International Centre for Settlement of Investment Disputes
Washington, D.C.

In the proceedings between

Telefónica S.A.
(Claimant)

and

The Argentine Republic
(Respondent)

Case No. ARB/03/20

DECISION OF THE TRIBUNAL ON OBJECTIONS TO JURISDICTION

Members of the Tribunal

Prof. Giorgio Sacerdoti, President
Judge Charles N Brower, Arbitrator
Lic. Eduardo Siqueiros, Arbitrator

Secretary of the Tribunal

Mr. Gonzalo Flores

Representing the Claimant	***Representing the Respondent***
Dr. Guido S. Tawil	Procurador del Tesoro de la Nación Argentina
M & M Bomchil	Dr. Osvaldo César Guglielmino
Suipacha 268, piso 12	Procuración del Tesoro de la Nación Argentina
Buenos Aires	Buenos Aires
República Argentina	República Argentina

Date of Decision: May 25, 2006

A Procedure

1. On May 12, 2003, Telefónica S.A. (hereinafter "Telefónica" or "the Claimant") filed with the International Centre for Settlement of Investment Disputes (ICSID) a "Request for Arbitration" against the Argentine Republic (hereinafter "Argentina" or "the Respondent") pursuant to the ICSID Convention and the Treaty between the Kingdom of Spain and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (hereinafter "BIT") of October 3, 1991.

2. On May 14, 2003, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt and transmitted a copy of the request to the Argentine Republic and to the Argentine Embassy in Washington D.C.

3. On July 21, 2003, the Acting Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention. On the same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed, as soon as possible, to constitute an arbitral tribunal.

4. Following a request from the Claimant, and in accordance with Art. 37(2)(b) of the ICSID Convention, the Centre informed the parties that the arbitral tribunal in this case would consist of three arbitrators. By letter of October 22, 2003 the Claimant appointed as an arbitrator Judge Charles N. Brower, a U.S. national. By letter of December 12, 2003, the Argentine Republic appointed Licenciado Eduardo Siqueiros, a Mexican national, as an arbitrator.

5. As the parties failed to agree on the president of the tribunal, the Claimant requested that the Chairman of ICSID Administrative Council appoint the President pursuant to Art. 38 of the ICSID Convention. Accordingly the Acting Chairman of ICSID's Administrative Council appointed Professor Giorgio Sacerdoti, a national of Italy, as the President of the Tribunal on March 17, 2004. All members of the Tribunal duly accepted their appointment in writing.

6. The first session of the Arbitral Tribunal was held at the seat of the Centre in Washington, D.C. on July 6, 2004. The parties appeared and were duly represented. The parties confirmed that the Tribunal had been properly constituted on April 12, 2004 in accordance with the ICSID Convention and the ICSID Arbitration Rules and that they did not have objections in this respect.

7. During the course of the first session the parties agreed on a number of procedural matters reflected in the written minutes signed by the President and the Secretary of the Tribunal. Among the various procedural decisions taken at that hearing, it was agreed that, in accordance with ICSID Arbitration Rule 22, the languages of the proceedings would be English and Spanish. The Claimant would file its pleadings in English and Argentina would file its pleadings in Spanish, with subsequent courtesy translation of the written pleadings into the other party's chosen procedural language. Following a joint request from the parties and deliberation by the Tribunal, the President announced that the proceedings were to be suspended until October 5, 2004. It was further decided that the Claimant would file its Memorial on the merits within 60 days, if the Claimant would file a "reduced" Memorial (excluding questions of compensation, remedies and damages), or within 90 days, if

the Claimant would file a "complete" Memorial (including questions of compensation, remedies and damages), from October 5, 2004 or from the end of any other suspension period agreed upon by the parties, and that the Respondent would file its objections to jurisdiction within 60 days from its receipt of the Claimant's Memorial on the merits. Thereafter the proceedings on the merits would be suspended in accordance with Arbitration Rule 41(3) and the Claimant would file its Counter-Memorial on Jurisdiction within 60 days from its receipt of the Respondent's objections to jurisdiction.

8. The Claimant filed its Reduced Memorial on December 5, 2004; Argentina filed its "Brief on defenses alleging the lack of jurisdiction of the Centre and the competence of the Tribunal" on February 23, 2005. In accordance with Arbitration Rule 41(3) the proceedings on the merits were thereby suspended. In conformity with the above procedural decisions, the Claimant then submitted its Counter-Memorial on Jurisdiction on May 9, 2005.

9. The hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. on June 20, 2005. Messrs. Gabriel Bottini, Florencio Travieso and Ariel Martins addressed the Tribunal on behalf of Argentina. Mr. Guido S. Tawil addressed the Tribunal on behalf of the Claimant. The Tribunal posed questions to the parties, as provided for in Arbitration Rule 32(3). The Tribunal granted to each party 15 days from the date of the hearing to file certain documents referred to at the hearing.

B. The Subject Matter of the Dispute

10. Before examining the issue of jurisdiction submitted to the Tribunal, it appears useful to highlight briefly the subject-matter of the dispute, in fact and in law, as presented by the Claimant in its "Request for Arbitration", and thereafter expanded upon in its Reduced Memorial of December 2004, taking also into account the statements made up to now by Argentina. Such presentation is made for the sole purpose of comprehension of the factual circumstances and the legal claims made by Claimant in respect of which Argentina has raised objections to jurisdiction. No legal evaluation is hereby implied or made by the Tribunal, nor should any such significance be attached to it for purposes of the present case.

11. As indicated by Telefónica in its written submissions, the Claimant is a corporation constituted under the laws of the Kingdom of Spain. Telefónica indirectly owns a 97,91 % shareholding of Telefónica de Argentina S.A. (hereinafter "TASA"), a corporation legally constituted under the laws of the Republic of Argentina, thus qualifying as an "investment" according to Art. I(2) (second paragraph) of the BIT, which refers to "shares and any other kind of participation in companies." Moreover, the Claimant has invested more than US$ 5,500 million in equity in TASA and disbursed other amounts of money which are, in the Claimant's view, covered by the BIT provision of Art. I(2) (third paragraph), according to which investments protected by the Treaty include: "rights arising from any kind of contributions made for the purpose of creating economic value, including loans directly related to a specific investment, whether or not capitalized." The investment made by Telefónica would also come under the scope of the BIT in accordance with

Art.I(2) (sixth paragraph), by way of the rights granted by Argentina in respect of the tariff regime, the compensation mechanism in case of price control, the tax stability provision, the ownership of the Licensee's assets and to the right to hold a perpetual telecom license.

12. Following the 1989 State Reform Law, the State-owned telephone company, *Empresa Nacional de Telecomunicaciones* ("ENTel"), was privatized and its assets were transferred to four corporations created by Argentina through two Decrees of January 5, 1990. A consortium formed by *Telefónica International Holding BV* (a subsidiary of *Telefónica S.A.*), *Citicorp Venture Capital S.A.* and *Inversora Catalinas S.A*. was awarded a 60% shareholding in *Sociedad Licenciataria Sur Sociedad Anónima ("Consortium")*(Exhibit 11 R.A.). The Transfer Agreement was approved by Decree 2332/90 of November 8, 1990 providing for the transfer of this shareholding to the Consortium (Exhibit 12 R.A.). Pursuant to Art. 4.3(a) of the Transfer Agreement, the corporate name of *Sociedad Licenciataria Sur Sociedad Anónima* was changed to *Telefónica de Argentina S.A.* ("TASA"). Since the privatization was to be final, a license – and not a concession – was granted to the new operators in order to provide basic telephone services. Licenses could only be amended by the State when the license itself so provided or when the consent of the licensee was obtained. In addition, licenses could only be terminated by breach of their conditions by the licensees. Termination by the State for reasons of public convenience was expressly excluded. According to the Tariff Regime included in TASA's License, a system was created to provide compensation in the event that the authorities ordered a price or tariff freezing not in line with the Tariff Regime. On November 28, 1991, as a result of the enactment of the Convertibility Law in March

1991, the License Tariff Regime was modified converting domestic telephone tariffs into U.S. dollars and subjecting them to an automatic semi-annual adjustment based on CPI changes (the local cost-of-living index, the so called Consumer Price Index (*Índice de Precios al Consumidor*). The Tariff Agreement did not affect international long-distance tariffs method of calculation, which remained fixed in Gold Francs.

13. According to the Claimant, Telefónica made its investment in TASA on the basis of the specific legal, financial and economic guarantees provided for by Argentina in the Decrees enacted since the State Reform Law and in the Agreements entered into with the Claimant prior to the enactment of the Public Emergency and Foreign Exchange System Reform Act (hereinafter "The Emergency Law), which became effective on January 6, 2002. Pursuant to the Emergency Law, the system established in the Convertibility Law whereby the Argentine currency was made freely convertible into U.S. dollars at a 1:1 exchange rate has been eliminated; moreover, as regards all agreements executed under public law by Argentina, U.S. dollar adjustment clauses and indexation clauses based on foreign price indexes have become invalid. (In particular, Art.8 of the Emergency Law extinguished the right of regulated public utilities – including TASA – and public works contractors to adjust their tariffs according to the variance to the CPI, the U.S. dollar, or any other foreign currency or indices). In the meantime, however, contractors or public service providers have been asked not to suspend the fulfillment of their obligations.

14. The Claimant complaints that the measures adopted pursuant to the Emergency Law by Argentina amounted to breaches of the BIT in several ways: first of all, the obligation to protect and not to impair by unjustified or discriminatory

measures the investments of the other Contracting Party, enshrined in Art. III(1) of the BIT; secondly, the obligation to accord fair and equitable treatment to the investments of the other Contracting Party, as prescribed by Art. IV(1) of the BIT; thirdly, the obligation not to expropriate the investments of the other Contracting Party through measures tantamount to expropriation, in breach of Art. V of the BIT. The Claimant seeks compensation for the damages caused to its investment as a result of the abovementioned breaches by Argentina of the BIT.

15. As far as the governing law is concerned, the Claimant asks the Tribunal to apply, according to Art. 42(1) of the ICSID Convention, the provisions of the BIT as *lex specialis* between the parties at dispute, and the rules of general international law as a residual source of law.

16. Argentina has not replied yet to the Claimant's arguments as to the facts since Argentina has raised preliminary objections to jurisdiction. Still, Argentina has not basically challenged the facts referred to by the Claimant, nor Claimant's references to the various Argentine laws relevant for the making of the investment and the changes in 2001/02 to the legal regime applicable to it. Argentina does not deny either that Telefónica is a Spanish corporation that has made indirectly an investment in Argentina – specifically as shareholder of TASA to which the Argentina-Spain BIT applies.

C. The objections of Argentina to jurisdiction

17. In its "Brief on defenses alleging the lack of jurisdiction of the Centre and the competence of the Tribunal," Argentina raises six grounds for challenging the

jurisdiction of ICSID and the competence of the Arbitral Tribunal to hear the present dispute. The objections to jurisdiction are being listed hereunder and thereafter specifically described and addressed together with the counter-arguments of the Claimant:

a. The dispute submitted to the Tribunal fails to meet the requirements set forth by Art.25(1) of the ICSID Convention;
b. Pursuant to the terms of the BIT, there is no investment dispute;
c. The Tribunal lacks competence since the parties agreed on the exclusive jurisdiction of the Federal Courts in and for the Capital City of the Argentine Republic;
d. Telefónica lacks *ius standi* to sue since under international law and Argentine applicable law, corporate claims of derivative nature (such as allegedly those made here) are inadmissible;
e. Telefónica did not comply with the 18-month period prescribed by Article X of the BIT;
f. The claim is inadmissible due to lack of damage.

<u>First and Second jurisdictional objections of Argentina:</u>

a. The dispute submitted to the Tribunal fails to meet the requirements set forth by Art. 25(1) of the ICSID Convention.

b. *Pursuant to the terms of the BIT, there is no investment dispute.*

Since the first two objections to jurisdiction both deal with the requirements laid down in Art.25 of the ICSID Convention and are closely interrelated, the Tribunal considers it appropriate to examine them jointly.

Argentina's arguments

18. The first objection presented by Argentina concerns the requirement that "the dispute arise directly out of an investment." In order to meet such a requirement, in Argentina's view, "the measure or measures invoked in violation of the pertinent BITs have to be **specifically** concerned with the investments." In other words, "the Centre has only jurisdiction over the measures aimed against the investment of the investor" bringing a claim to the ICSID. Universal measures addressed to everyone cannot be considered by ICSID Tribunals. "This would imply the judgment of a political policy and not a legal conflict."

19. Argentina considers accordingly that the measures complained of by the Claimant are of a general nature, being "linked to the termination of the exchange policy in force in the Argentine Republic." In order to prove that there is a dispute arising directly out of an investment, the Claimant, in the Respondent's view, should have shown that the measures it complained of were "addressed against specific compromises entered into, negotiated with Claimant, and particularly, specifically and exclusively promised to Clamant," that is between the investor and the host State. As a support to its approach, Argentina relies on the recent NAFTA arbitration award on jurisdiction in the case *Methanex v. USA* to the effect that it is not enough that the measure "affects" the investor or its investment. The theory of legal causation construed by the *Methanex* tribunal interpreting the phrase "relating to" contained in Art.1101 of the NAFTA is, in Argentina's view, "*a fortiori* applicable to a case like the present one, which is governed by the ICSID rules, where jurisdiction is limited by the much more restricted phrase: '…arising directly out of an investment.'" Argentina concludes that Telefónica should have proved, "a direct, next and

immediate connection between the measure and its alleged investment," that is, legal causation, whereas Telefónica only presented mere causation of a factual nature. Moreover, the Respondent asserts that the Claimant also failed to prove that its claim is of a legal nature, as required by Art.25 of the ICSID Convention.

20. As far as the <u>second objection</u> to jurisdiction is concerned, Argentina questions the very nature of the investment of Telefónica. According to Argentina, the Claimant defines its investment in an "imprecise manner," that "does not permit to draw the individualization of the investments made by the Claimant from those made by TASA." Argentina concludes that "the investment alleged by Telefónica refers exclusively and distinctly to the shareholding in TASA."

21. Under the same objection to jurisdiction, Argentina denies that the dispute at issue is an "investment dispute." Argentina considers that since "the only investment made by Telefónica has been the acquisition of the shareholding of TASA, there is no relation of any kind between such investment and the claim filed by Telefónica." According to the Respondent, the dispute brought by the Claimant to ICSID is not about rights but about commercial transactions. Argentina suggests that "Telefónica's claim is of contractual nature" since the disagreement "refers to provisions contained in licenses granted for the exploitation of the basic telephone service, in contracts transferring shares and in the tariff agreement." Accordingly, the Respondent maintains that any legal dispute that may arise from such contracts and agreements "shall be submitted to the jurisdiction of national courts", the only ones capable of ruling on an alleged non-compliance with a contractual relation under the Argentine law.

22. Finally, with regard to this heading, Argentina challenges the competence of the Tribunal on the ground that the dispute concerns a contractual claim. To support its position, the Respondent reports three decisions rendered under the ICSID Convention: *SGS v. Pakistan*;[1] *Generation Ukraine*[2] and *Waste Management II,*[3] to the effect that "an expropriation dispute requires more than eventual contractual non-compliance." Argentina asks the Tribunal to address at this jurisdictional stage the issue of the nature of the dispute. As a result, according to Argentina, the Tribunal should deny its jurisdiction, since the dispute is contractual.

Claimant's counter-arguments:

23. In its Counter-Memorial on Jurisdiction, the Claimant addresses the first and the second objections raised by Argentina in reverse order: firstly, it responds to the argument that the dispute is not of a legal nature; secondly, it contests the argument that the dispute is not an investment dispute; thirdly, it opposes the argument that the dispute does not arise directly out of Telefónica's investment.

24. To begin with, the Claimant argues that the dispute is a "legal dispute" because "Telefónica claims for the violation of its Treaty rights." According to the Claimant, the measures complained of taken by Argentina constituted "breaches of the obligations undertaken towards the investor and its investment under the BIT."

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[1] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13)

[2] Generation Ukraine Inc. v. Ukraine (ICSID Case No. ARB/00/9)

[3] Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3)

25. Concerning the Respondent's argument that the dispute is not an investment dispute because of the very nature of the investment of Telefónica, the Claimant stresses first of all the broad coverage of the BIT article defining investments protected by the Treaty. It then recalls, as already explained in its Reduced Memorial that its investment derives from (i) its shareholding in TASA, which is covered by Art. I(2), (second paragraph) of the BIT; (ii) from the disbursement of US$6,000 million in equity in TASA and other amounts financing at no cost TASA's activities, a case also covered by the BIT at Art. I(2), (third paragraph); and (iii) from Telefónica's rights to the Tariff Regime, the compensation mechanism in case of price control, the tax stability provision, the ownership of the Licensee's assets transferred to Telefónica by Argentina and covered under the terms of Art. I(2) (sixth paragraph). In addition, the Claimant argues that "activities **channeled** through a locally incorporated company are covered by Article I(2) (second paragraph) of the Treaty and effectively constitute Telefónica's investments as a 98,03% indirect shareholder of TASA."

26. Since the dispute concerns measures against the investment as defined above by the Claimant, it necessarily arises "directly out" of that investment. To support its position, the Claimant refers to five recent cases in which Argentina - as a Respondent - filed an identical objection to ICSID jurisdiction and in which the arbitral tribunals constantly and identically rejected the objection. The cases are: *CMS v. Argentina*;[4] *Azurix v. Argentina*;[5] *Enron v. Argentina*;[6] *LG&E v. Argentina*[7] and *Siemens v. Argentina*.[8]

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[4] CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8).

[5] Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12).

27. Finally, the Claimant addresses Argentina's argument that the measures complained of by the Claimant are not specifically against Telefónica, but are of a general nature. According to the Claimant, characterizing those measures as general measure taken in light of the financial crisis which touched Argentina is misleading. The Claimant "does neither claim for the peso devaluation nor challenges Argentina's power to rule its own currency and to fix its value." The Claimant complains rather of specific measures which affected Telefónica's investment and which were taken in violation of commitments arising from the BIT.

28. To clarify its assertions that the measures taken by Argentina are specifically aimed at Telefónica's investment, thus constituting breaches of the BIT, the Claimant sets forth a list of the commitments undertaken by Argentina towards Telefónica.

Third jurisdictional objection of Argentina:

> *c. The Tribunal lacks competence since the parties agreed on the exclusive jurisdiction of the Federal Courts in and for the Capital City of the Argentine Republic.*

29. Argentina maintains that the Transfer Agreement entered into between the State and the former *Empresa Nacional de Telecomunicaciones* (ENTel) on the one hand, and *Compañía de Inversiones en Telecomunicaciones S.A.*, *Telefónica International Holding BV*, *Citicorp Venture Capital S.A.*, *Inversora Catalinas S.A.*

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[6] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3).

[7] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1).

[8] Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8).

and the Claimant on the other hand, provided - in Art.18.6 on Applicable Law - that "Any question related to the interpretation, the execution or the termination of the Transfer Agreement shall be resolved in the City of Buenos Aires and the Federal Courts hearing administrative claims shall have jurisdiction." To support its argument, Argentina reports as relevant precedents the *Woodruff*[9] case decided by the Claims Commission between the U.S. and Venezuela; the *North American Dredging Company* (*NADC*)[10] case decided by the Mexican-American Claims Commission in 1926 and the *SGS v. Philippines* case.[11] In the Respondent's view, such jurisprudence points out a fundamental criterion according to which a "specific designation contained in contract" has the "priority" "over the general agreement that serves as the foundation for the jurisdiction of the international tribunal."

Claimant's counter-arguments:

30. The Claimant rejects Argentina's arguments that the Tribunal cannot hear the claim because it is basically a contractual claim and because the contract at issue – the Transfer Agreement – provides for the resolution of disputes arising out of it by domestic courts. The Claimant maintains that its claims "are founded in the Treaty" (*i.e.* the BIT) and that "it is for violations of the Treaty" and not for "a mere breach of contract" that Telefónica brought its case before this Tribunal. To support its counter-argument, the Claimant refers to some recent decisions on jurisdiction taken by arbitral tribunals (*Lanco v. Argentina*;[12] *Salini v. Morocco*;[13] *Vivendi v. Argentina*;[14]

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[9] *Woodruff* Case (1974), IX Reports of International Arbitral Awards, p. 213 ff.

[10] *North America Dredging Co*. (1926), IV Reports of International Arbitral Awards, p. 26 ff.

[11] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No.ARB/02/6).

[12] Lanco International, Inc. v. Argentine Republic (ICSID Case No. ARB/97/6)

CMS v. Argentina). According to this case-law, a "contractual dispute resolution clause providing for the jurisdiction of the local courts of the host State" cannot have a "preclusive effect" on the jurisdiction of an arbitral tribunal constituted under the terms of the applicable BIT. The Claimant refers, moreover, to some cases where ICSID Tribunals have upheld their jurisdiction both when the subject-matter of the proceedings before the domestic courts under the contract and the dispute submitted to the arbitral tribunal were different (*Azurix v. Argentina; Siemens v. Argentina*), and when the international claim concerned at the same time violations of contracts and breaches of the pertinent BIT (*Enron v. Argentina*). Accordingly, the Claimant considers the cases referred to by Argentina to support its argument as "blurred old cases" and "highly criticized decisions" and questions their pertinence to the question at issue.

Fourth jurisdictional objection of Argentina

d. Telefónica lacks ius standi to sue since under international law and Argentine applicable law, corporate claims of a derivative nature (such as those allegedly made here) are inadmissible.

Argentina's arguments

31. Argentina submits that Telefónica lacks *ius standi* to sue because recognizing such a right only as regards some of the shareholders of a corporation would lead to "the definite destruction of the company." In other words, "if the Tribunal admitted the action brought by (some) shareholders, in the event of deciding in their favor, it

[13] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4)

[14] Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3)

could not ensure that the resources would compensate the corporate property allegedly damaged, which would lead to the anticipatory liquidation of the company."

32. To defend its argument, Argentina relies on the well-known *Barcelona Traction* decision by the ICJ.[15] In the Respondent's view, the pronouncement by the ICJ in that case supports its argument that shareholders' damages caused by State measures directed at a company itself cannot give rise to shareholders' entitlement to compensation. This is no more than the general principle according to which "no one can sue in the name of another". To succeed therefore, indirect or derivative actions, "have to be expressly authorized."

33. Moreover, Argentina maintains that even according to Argentine Companies Law (ACL)[16] "only the corporation can defend its own interests. There is no provision in the ACL that allows a shareholder to make a complaint on behalf of the corporation." Since "Telefónica does not assert, in this case, the violation of any of the rights that, in its capacity as shareholder, it has" - Argentina concludes – "it cannot bring a derivative action, that is an action "to enforce rights of another legal person."

The Claimant's counter-arguments

34. The Claimant addresses the second part of the second jurisdictional objection and the fourth objection raised by Argentina together. According to the Claimant,

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[15] Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Judgment of February 5, 1970, 1970 I.C.J. 3.

[16] In support of its arguments based on Argentine law, Argentina has submitted with its memorial on jurisdiction a legal opinion on Argentine corporate law by Prof. Ricardo Augusto Nissen, Chief Inspector of the Argentine Regulatory Agency of Corporations.

Telefónica's claim is not a contractual one, but it is based on the BIT. In fact, Telefónica - as a Spanish "investor" in Argentina - as defined by the BIT - complains of the violation of the BIT by Argentina. The Claimant, therefore, brings a claim under the Treaty in its own capacity. Its claim is therefore a direct claim, that is a claim which "arises directly from its rights under the Treaty." Telefónica invokes the commitments taken by Argentina under the License, the Transfer Agreement and the *Pliego* (containing the Bidding Terms and Conditions as approved by the President, see Annex 1 to Decree 62/90, Exhibit 9 R.A.) not in order to advance any contractual claim under Argentine law, but rather "to set out the relevant framework within which the Tribunal must evaluate whether the conduct of Argentina amounts to a violation of the Treaty's protection". It does not matter whether an action arising under a BIT may also raise local issues or causes of actions, and amount also to a breach of the License or a violation of Argentine municipal law.

35. Therefore the Claimant is of the view that, in order to recognize its *ius standi* before this Tribunal, it is enough to take into account the BIT's provisions. Telefónica makes reference to the definition of "investments" in the BIT, which is broad, and to the Preamble, which enunciates the object and purpose of the Treaty. To deny to foreign investors in a local company the protections provided by the BIT would mean to ignore the Contracting Parties' commitments under the BIT. In fact, investing in shares of local companies is often the only choice left to foreign investors by the host State legislation. To explain how this happened in Argentina, the Claimant recalls the process and the rules leading to the privatization of the telecom sector through an international public bid.

36. Moreover, Argentina has completely overlooked the possibility of applying the umbrella clause found in the U.S.-Argentina BIT by virtue of the MFN clause contained in the Argentina-Spain BIT applicable to the present dispute. Such umbrella clause, in the Claimant's view, "provides further basis for jurisdiction … in the unlikely case that the Tribunal were to find that there is no Treaty claim." Contrary to the narrow and restrictive construction of the umbrella clause argued by Argentina, Telefónica maintains, and seeks to demonstrate by confuting the case-law mentioned by Argentina, that the "effect of umbrella clauses … is to extend to any violation of these (contractual) obligations the status of BIT's breach."

37. Finally, under this heading, the Claimant maintains that claims by shareholders are well recognized by ICSID practice and international law. To support such position, the Claimant refers to various decisions in cases in which arbitral tribunals have "consistently granted standing to foreign investors holding shares in locally incorporated companies."

38. The reference made by the Respondent to Argentine Companies Law, which does not admit derivative claims, is irrelevant to these proceedings since Telefónica's claim is a claim based on the BIT. Accordingly, and as already explained in its Reduced Memorial, the Claimant recalls that the applicable law is the BIT itself and additionally international law.

39. Telefónica challenges the reliance by Argentina on the *Barcelona Traction* case. First of all, the Claimant recalls that the question at issue in that case was not the shareholders' right of action under international law, but the right of the State of

nationality of the shareholders to bring a claim on behalf of its nationals (diplomatic protection) for damages that their company, established in a different State, had suffered in a third State. By denying such a right to the national State of the shareholders (Belgium), and, conversely, recognizing it in the national State of the company (in that case Canada, where *Barcelona Traction* had been incorporated), the ICJ explicitly distinguished the case where a treaty would provide for the direct protection of shareholders. The Claimant refers in this respect to the ICJ decision in a later case, which it considers more relevant to the question at issue here, namely the *ELSI* case,[17] brought before the ICJ by the U.S. against Italy under the Treaty of Friendship, Commerce and Navigation between the two countries. Finally, the Claimant refers to some cases which, in its opinion, would lead one to reassess the question dealt with by the ICJ in the *Barcelona Traction* case, that is, "whether international law affords independent protection to shareholders."

Fifth jurisdictional objection of Argentina

e. Telefónica did not comply with the 18-month period prescribed by the Article X of the BIT.

40. Argentina maintains that Telefónica, by bringing its claim before an ICSID tribunal without submitting it in the first place (at least for 18 months) to the competent Argentine tribunals violated Art. X of the BIT, which includes such a requirement. The reliance by the Claimant on the MFN clause found at Art. IV.2 of the BIT with reference to the provisions on dispute settlement of the BIT between Argentina and Chile that contain no such a requirement, does not help the Claimant

[17] Case concerning Elettronica Sicula S.p.A. 1989 ICJ Reports, p. 50.

since, in Argentina's view, the MFN obligation is not applicable to jurisdictional matters. This conclusion is supported, first of all, by the application of the *ejusdem generis* rule and, secondly, by a correct interpretation of the provision of the BIT containing the MFN clause. According to the *ejusdem generis* rule, the MFN clause must refer to the same subject matter of the provision which grants advantages or benefits to the most-favored nation. Argentina submits that an MFN clause contained in a BIT cannot be used to extend to one contracting Party the advantages or the benefits that the other contracting Party accords to another country in respect of a different matter than that covered by the MFN clause. Secondly, an appropriate interpretation of Art. X of the BIT must be based first of all on the principle of useful effect, according to which a treaty provision cannot be interpreted in a way that would render its words meaningless or superfluous. Moreover, the very text of the MFN clause in the Treaty, that is Art.IV.2, supports, in Argentina's view, its position that settlement of disputes is not included in the clause itself.

41. Argentina contends also that the *Maffezini* case, referred to by the Claimant in its briefs, does not support the Claimant's interpretation of the MFN clause. Argentina draws the Tribunal's attention to the fact that in *Maffezini* the position taken by Spain as a respondent was the same as the one taken by Argentina as a respondent in these proceedings. The arbitral Tribunal in *Maffezini*, in fact, not finding the text clear in itself, resorted to the intention of the contracting parties of the BIT. According to Argentina, the recent arbitral award in the ICSID case "*Salini Costruttori v. Jordan*"[18] confirms this position.

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[18] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/13); available online at www.worldbank.org/icsid.

42. Moreover, Argentina points out that the 18-month period provided for by Art. X of the BIT cannot be considered "a delaying regulation of international jurisdiction. On the contrary, it is a concrete opportunity for the courts in Argentina to apply and defend international laws, granting an appropriate remedy – if applicable – before the international liability of the Argentine State is established." Argentina asserts, *as a distinct and additional argument*, that its position on the issue, which it has set forth also in the *Siemens* dispute, and the identical position taken by Spain in *Maffezini*, are to be considered as *subsequent practice*, in conformity with Art. 31(3)(b) of the Vienna Convention on the Law of the Treaties, which must therefore be taken into consideration for an appropriate interpretation of the MFN clause contained in the BIT.

The Claimant's counter-arguments

43. In response to the Respondent's argument on the MFN clause the Claimant puts forward what, in its view, should be the correct interpretation of the clause itself. Such an interpretation should start by reading the text of the clause itself according to the general rule on the interpretation of treaties, as set out in Art. 31 of the Vienna Convention. The "broad and comprehensive wording" of the BIT's MFN clause (which applies to "[…] *all* matters governed by this Agreement") supports the Claimant's argument that dispute settlement is covered by the clause. Moreover, the object and purpose of the BIT confirm this interpretation since its aim is to promote and encourage foreign investment and "an effective system of dispute settlement" serves this same purpose. As far as the relevant case-law on the matter is concerned, the decision on jurisdiction in *Maffezini* has a great relevance to the present proceedings because the claim was based on the same BIT as is at issue here.

According to the Claimant, irrespective of the position taken by Spain in that case (which is the same as taken by Argentina in the present proceedings), the Tribunal's decision in that case supports Telefónica's interpretation of the MFN clause as applicable also to the dispute settlement procedures. The position taken by Spain in *Maffezini* and by Argentina in *Siemens* cannot, in the Claimant's view, be resorted to by the Tribunal to interpret a treaty provision unless the plain meaning of that provision does not make sense. Moreover, being mere arguments made in the context of adversarial proceedings, those positions cannot be considered as the expression of the real intention of the contracting Parties of a treaty. On the contrary, the relevant case-law on the subject (which Telefónica cites) can be seen to support Telefónica's construction of the MFN clause.

44. Telefónica challenges also the reference to the *ejusdem generis* rule made by Argentina to support its argument that the MFN clause contained in the BIT applies only to substantive and not to jurisdictional matters. Telefónica also rejects the relevance of the case-law cited by Argentina in support of its position.

45. Finally, Telefónica raises the so-called "futility exception" under international law, according to which "when alternative means of dispute settlement are obviously futile, they need not be complied with." In this respect, Telefónica argues that in 18 months no decision, not even at first instance, could be rendered by Argentina's courts. Telefónica points out moreover that bringing this large case to Argentina's courts of justice would require the payment of a fee of a considerable amount. This useless requirement makes evident, in the Claimant's view, the "abuse of right", as

defined in international law, inherent in Argentina's insistence that those domestic remedies be pursued for 18 months.

Sixth jurisdictional objection of Argentina

f. *The claim is inadmissible due to lack of damage*.

46. Argentina asserts the non-existence of a controversy and the related non-existence of any real damage suffered by Telefónica. "The increase in the company's quotation in the Stock Exchange" shows that the company is, in fact, "financially solid and active." Moreover, "the remaining tariff-related issues are being dealt with within the frame of a negotiation process taking place in Argentina."

The Claimant's counter-arguments

47. According to the Claimant, the above-mentioned ground for challenging the jurisdiction of the Tribunal is, in fact, a merits-related one and must be dealt with accordingly during the merits phase of the proceedings. In order to assert its jurisdiction, the Tribunal must be satisfied, according to Art. 25 of the ICSID Convention, of the existence of a legal dispute concerning real facts and these requirements are met in this case, as shown by Telefónica in its Counter-Memorial on Jurisdiction.

48. The fact that TASA is involved in a renegotiation process taking place in Argentina (in which, by the way, the Claimant asserts that TASA has been forced to take part and to which it did not voluntarily agree) is without effect on the position of

Telefónica, which is a different legal person and whose claims before this ICSID Tribunal "are based on its right of action under" a BIT "and do not involve the exercise of TASA's rights under Argentine law."

D. Consideration by the Tribunal of the objections to jurisdiction

In general

50. As announced by the President of the Tribunal at the end of the hearing on jurisdiction and in conformity with Art. 41 of the ICSID Convention and ICSID Arbitration Rule 41, the Tribunal is called upon to decide as a preliminary question the objections raised by the Respondent to the effect that the dispute is not within the jurisdiction of the Centre nor within the competence of the Tribunal. While the parties have advanced many arguments, some of them touching upon the merits, the Tribunal will consider hereafter only those that are relevant to its decision regarding the objections of the Respondent to jurisdiction.

51. The Tribunal must therefore ascertain, for the sole purpose of determining its competence under the ICSID Convention and the Argentina – Spain BIT, whether the criteria that define disputes for the purpose of ICSID jurisdiction under those two instruments are met. These criteria are:

a) that the dispute is between Argentina (as a Contracting Party to the ICSID Convention and the BIT) and a national of Spain (as defined in the BIT and in the ICSID Convention),
b) that the dispute is a "legal" dispute (Art. 25(1) ICSID Convention),

c) that said legal dispute arises "directly" out of an investment (Art. 25(1) ICSID Convention),

d) that said dispute is one of "Las controversias que surgieren entre una de las Partes y un inversor de la otra Parte *en relación con las inversiones en el sentido del presente Acuerdo*" that is one of "the disputes that arise between one of the Parties and an investor of the other Party *in respect of investments as defined in the present Agreement*" as stated in Art. X.1 of the BIT,

e) that such investment is of the type defined and listed in Art. I.2 of the BIT.

<u>The proper methodology for resolving the jurisdictional issues</u>

52. Before starting the above examination on the basis of the parties' documentation and arguments, but not necessarily in the same order as the parties have raised them, the Tribunal finds it appropriate to elucidate the type of analysis that it is called upon to make in order to determine its jurisdiction in this case.

53. In order to determine its jurisdiction, the Tribunal must consider whether the dispute, as presented by the Claimant, is *prima facie,* that is on a summary examination, a dispute that falls generally within the jurisdiction of ICSID and specifically within that of an ICSID tribunal established to decide a dispute between a Spanish investor and Argentina under the BIT. The requirements of a *prima facie* examination for this purpose have been elucidated by a series of international cases.[19] The object of the investigation is to ascertain whether the claim, as presented by the Claimant, meets the jurisdictional requirements, as to the *factual subject matter* at

[19] A detailed examination of international cases can be found in the recent Decision on Jurisdiction by the ICSID Tribunal in *Impregilo v. Pakistan*, ICSID Case No.ARB/03/3, Decision on Jurisdiction of April 22, 2005, paras. 237-253, available at: http://www.worldbank.org/icsid.

issue, as to the *legal norms* referred to as applicable and alleged to have been breached, and as to the *relief* sought.[20] For this purpose the presentation of the claim as set forth by the Claimant is decisive. The investigation must not be aimed at determining whether the claim is well founded, but whether the Tribunal is competent to pass judgment upon it.

54. As to the *facts of the case*, the presentation of the Claimant is fundamental: it must be assumed that the Claimant would be able to prove to the Tribunal's satisfaction in the merits phase the facts that it invokes in support of its claim, that is the existence and impact of Argentina's measures and actions it considers have affected its investments in breach of the BIT. This does not rule out the possibility that a respondent may submit, already at the jurisdictional stage, such "prima facie" evidence as to show that the claim, or some claims, are "manifestly without merit" at a preliminary examination (as currently envisaged under the ICSID Arbitration Rules as amended on April 10, 2006).

55. In the present dispute, however, there does not seem to be any basic disagreement between the parties as to the factual elements of the case, as far as this may be relevant to identify the ambit of the Tribunal's jurisdiction in relation to the dispute. Argentina does not basically dispute that its measures, referred to by the Claimant (specifically the Emergency Law of 2002 and its Art. 8), have eliminated the free convertibility of the peso into U.S. dollars at the rate of 1:1 and have extinguished the right of regulated public utilities - including TASA – to adjust their tariffs according to the CPI, the U.S. dollar or other foreign currencies and indexes.

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[20] This corresponds to the traditional Roman law description of the elements of a claim: *factum*, *causa petendi* and *petitum.*

Argentina does not dispute either, insofar as it might have addressed this issue in the jurisdictional phase, that those measures generally have had the factual impact described by the Claimant, namely that the measures adopted in Article 8 of the Emergency Law have adversely affected TASA's business.

56. As to the *legal foundation* of the case, in accordance with accepted judicial practice, the Tribunal must evaluate whether those facts, when established, namely the unilateral changes of the legal regime just mentioned and their alleged negative impact on Telefónica's investment, could possibly give rise to the Treaty breaches that the Claimant alleges, and which the Tribunal is competent to pass judgment upon[21]. In other words, those facts, if proved to be true, must be "capable" of falling within the provision of the BIT and of having caused or constituting treaty breaches as alleged by the Claimant.[22] It is of course a question of the merits as to whether the alleged facts do constitute breaches of the BIT for which the Respondent must be held liable.

57. As to the *relief* sought, there is no doubt as to the admissibility of the claim for relief that the Claimant has sought against and from Argentina, notably a declaratory judgment that Argentina has committed various breaches of the BIT's provisions and an order that Argentina compensate it for the damages stemming therefrom. With these considerations in mind the Tribunal will turn to examine the jurisdictional basis of the claim challenged by Argentina.

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[21] See ICJ, *Oil Platforms* case, ICJ Reports 1996, p. 806, para. 16; see also the separate Opinion of Judge Higgins, at para. 32 of her separate Opinion; *SGS v Philippines,* cit., Decision on Jurisdiction of January 29, 2004, in ICSID Reports (2005), p. 518, para. 157.

[22] ICJ, *Legality of the Use of Force* (Serbia and Montenegro v. Italy), ICJ Reports 1999-1, para. 25.

58. The Tribunal wishes immediately to dispose of the first requirement listed above, namely that concerning the parties. Argentina does not dispute that the Claimant, Telefónica S.A., is a juridical person having the nationality of another Contracting State in conformity with Art. 25(1)(a) of the ICSID Convention. More specifically, Argentina does not dispute that the Claimant meets moreover the requirements of being a Spanish company under the BIT.

The first and second objections to jurisdiction by Argentina

The requirement that the dispute be of a "legal" nature

59. Both parties acknowledge that, pursuant to Art. 25(1) of the ICSID Convention, the dispute must have a "legal" character. Indeed judicial organs can by their very nature only pass judgment upon disputes which involve the recognition as between the parties of rights and obligations, stemming from binding norms and instruments. Such disputes must be resolved by the proper interpretation and application of those norms and other relevant rules to the facts of the case.[23] This is confirmed within the ICSID system by Art. 42 listing the various "rules of law" in accordance with which the tribunal "shall decide" a dispute.

60. In this case, the Claimant refers to specific legal acts and provisions as the basis of its claim: it indicates that certain measures by Argentina have affected its legal rights protected by the BIT. The Claimant further lists specific provisions of the

[23] A possible exception is when the parties expressly confer on a Tribunal the power to decide "*ex aequo et bono*".

BIT granting various types of legal protection to its investments in Argentina that in its view have been breached by those measures.

61. In the Tribunal's view, these indications set forth in detail by the Claimant allow the Tribunal to conclude that the Claimant has made legal claims against Argentina, so that the Tribunal is presented with a legal dispute which as such is within its jurisdiction. The Tribunal does not find support for the contrary argument that "challenges related to questions such as a price control system" and against "the general suspension of adjustments by foreign indexes and the fixing of the tariff of the public utilities in Argentine pesos are measures that, under the correct construction of the terms of the ICSID Convention, do not constitute questions of 'legal nature.'" The Claimant has indicated, as clearly appears from its arguments, that it does not complain about general economic measures, but of the violation of express legally binding commitments (neither political nor commercial) of Argentina as regards Telefónica's investments under the BIT.

The requirement that the dispute arises "directly" out of an investment.

62. We turn now to Argentina's objection that its measures are not "specifically" addressed to Telefónica's investments. Argentina bases this objection on the premise that by referring to "any legal dispute arising directly out of an investment" Art.25(1) of the ICSID Convention requires that the measures impugned by the Claimant as being contrary to the BIT must be "specifically" addressed to an investment. In the present case, according to Argentina, the claims at issue are linked to, and are the consequence of the termination of Argentina's exchange policy, over which ICSID

has no jurisdiction. The Tribunal does not share the argument of Argentina nor its conclusions for the following reasons. First of all, the Tribunal does not consider that from a textual point of view the term “specific” can be considered as a synonym for “directly”. A measure of the host State can affect an investment directly, so that the dispute as to the international legality of that measure arises directly out of that investment, even if the measure is not specifically aimed at that investment.

63. International practice indeed shows that many, if not most, disputes based on an alleged breach of international standards concerning the treatment of the property of aliens, settled either through diplomatic protection or by direct arbitration, have arisen from general measures taken by host States, that affected those investments directly, without necessarily being specifically aimed at them. Were this not the case, nationalization measures, either aimed at the property of both nationals and foreigners, or just at foreign property, which have been the subject matter of a substantial portion of those disputes, would have escaped any international litigation and dispute settlement mechanisms.

64. In the present case it appears that Telefónica claims and has given *prima facie* evidence, as is sufficient for purposes of establishing jurisdiction, that certain measures, namely Emergency Law N° 25.561, and more particularly its Art.8, specifically affected its investment since the legal regime applicable to the telecommunication service performed by TASA was thereby changed in a way detrimental to it.

65. The requirement of Art. 25(1) of the ICSID Convention that the dispute arise directly out of an investment is met when, as is here the case, the Claimant challenges certain measures of the host State that affect directly the investment in a negative way, in that these measures are applicable to such an investment as a matter of law[24] and that they were in fact implemented in respect of such an investment.

66. Moreover, in the present case one could consider that the more restrictive criterion advocated by Argentina is also met. This is because some of the measures referred to by Telefónica as having affected its investment adversely, both legally and economically, such as Decree N°1090/02,[25] were directed and applied specifically to public services (*servicios públicos)* and their providers under license (*los concesionarios)*, among which TASA and its operations were included. In this respect the Tribunal does not consider that for a measure to be found "specifically" directed to a certain entity or to its assets it is necessary that said entity be singled out by name as an addressee of such measure.

67. It is important to clarify that the subject matter of the dispute is not the termination of the exchange policy of Argentina *per se*, nor can the Tribunal pass judgment on whether such a decision and the measures through which it was carried out were right or wrong from an economic or domestic legal point of view. The Tribunal is called upon, in exercising objectively its competence under the ICSID

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[24] This element makes reliance on the *Methanex* case irrelevant, since in that case (moreover brought under the partly different requirements of NAFTA Art. 1101(1)) the measure at issue was found to affect the claimant only indirectly. The reason was that the measure restricted the use of a product made by a different company, to which *Methanex* supplied an additive, *Methanex Corp. v. USA*, Decision on Jurisdiction of August 7, 2002, available online at: www.naftaclaims.com.

[25] Exh. 17 to the Claimant's Request for Arbitration.

Convention and the BIT, to determine whether specific measures, or possibly also measures of a more general nature affecting directly such an investment, have been adopted in violation of legally binding commitments contained in the BIT. "What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments."[26]

The requirement that the dispute concern "an investment"

68. The previous discussion leads the Tribunal to examine the second objection of Argentina, namely that the investment made by Telefónica and protected by the BIT consists of the acquisition and possession of the shares of TASA. The consequence that Argentina draws is that the dispute is not about Telefónica's investment, since those shares are not affected by the various measures challenged by the Claimant as being in breach of the BIT. Indeed, having found above that Argentina's measures are within the jurisdiction of the Tribunal insofar as they allegedly directly affected, both legally and economically, TASA's operations, it must be ascertained whether assets and/or rights that represent Telefónica investments according to the BIT's definitions were thereby legally and economically affected.

69. Telefónica maintains, in contrast with Argentina's position, that the dispute involves such investments under the BIT, namely the investment it made to acquire its current shareholding in TASA, additional financing thereof, as well as "Telefónica's rights in the Tariff Regime, the compensation mechanism in case of price control, the

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[26] *CMS v. Argentina* cit., Decision on Jurisdiction of July 17, 2003, para. 27, referred to in part by Argentina in its Memorial on Jurisdiction. This holding has been relied upon in *Enron v. Argentina*, cit., Decision on Jurisdiction (Ancillary Claim) of August 2, 2004, para. 12; both available at: http://www.worldbank.org/icsid.

tax stability provision, the ownership of the Licensee's assets and the right to hold a perpetual telecom license that can only be amended by the mutual agreement of the parties."

70. In order to resolve the issue the first step is to ascertain whether the rights that Telefónica invokes fall within the definition of investment under the BIT. A second step is to determine whether those rights pertain to Telefónica, and not just to its local subsidiary TASA.

71. As to the definition, the BIT contains in Art.II.1 an all-inclusive definition of "Investments", namely "*every kind of assets, such as goods and rights of any nature, acquired or made in accordance with the legislation of the host country, and particularly, but not exclusively*…." There is no question moreover that the shares that Telefónica owns in TASA, controlling it through a 97.91% shareholding, fall within the first illustrative definition of Art. II.1, namely "*shares and other forms of participation in corporations.*" Financing and loans that Telefónica claims have been affected by Argentina's action in breach of the BIT clearly fall within the next definition: "*Rights arising from any sort of contribution made for the purpose of creating economic value, including loans directly related to a specific investment, whether or not capitalized.*"

72. The other rights that Telefónica invokes and claims to have been breached by Argentina in violation of various BIT's provisions (notably the licenses and the various guarantees concerning the service) also fall within the BIT's illustrative

listing of various types of investments, specifically within "*Rights conferred by law or contract for conducting economic and commercial activities*….".

73. Finding that the rights that Telefónica claims are protected by the BIT (a claim that Argentina does not challenge as far as the shareholding is concerned) does not by itself resolve the objection to jurisdiction raised by Argentina. In order to dismiss the objection it is necessary to find that:

a) the present case is one of a "dispute arising directly out of an investment", in accordance with Art. 25 of the ICSID Convention , and falls within the definition of Art. I.2 and X.1 of the BIT, notwithstanding that the title to the shareholding in itself has not been legally affected by Argentina's measures claimed to be in breach of the BIT; and

b) the licenses and guarantees pertaining thereto can be properly considered to be investments of Telefónica, notwithstanding the fact that they appear to belong to, and/or represent an entitlement of TASA under Argentina's law.

74. We start our examination with question (b), since the answer to it is relevant also for answering question (a), as will appear from our reasoning. The broad definition of "investment" in BITs generally, and their purpose of promoting and protecting investments by nationals of one Contracting Party in the territory of the other, have prompted arbitral tribunals to take somehow as granted that rights of the type listed under (b) are protected by a BIT, also when they are owned by or granted

to the local subsidiary, and irrespective of the fact that in some instances such subsidiary was not controlled by the foreign claimant. While this broad view appears to be appropriate when dealing with jurisdiction, the separate legal personalities of the foreign investor, on the one hand, and of the local company in which such investor has invested, on the other hand, should not be ignored without an adequate consideration of the facts of each case.

75. In the present instance, considering the general definition of investment in Art. II.1 of the BIT and the fact that Telefónica fully controls TASA due to its shareholding, one can consider TASA, as a company, as a protected investment. Therefore Telefónica may claim, *i.a.*, a right under Art. III.1 of the BIT that Argentina "does not hinder by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or, as the case may be, liquidation of such investment".

76. Those provisions warrant an interpretation of the BIT according to which, in case of an acquisition by an investor of one Contracting Party of the entire capital of a company of the other Party, treaty protection is not limited to the free enjoyment of the shares, that is the exercise of the rights inherent in the position of a shareholder. It also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that constitutes the investment.[27] It is of course a question of the merits to ascertain whether breaches of the investor's treaty rights have been committed by the host State in that respect.

[27] By so holding the Tribunal does not express its views on the possibility that non-controlling shareholders, including minority shareholders, may be found to enjoy the same rights, as held by various arbitral tribunals in investment disputes.

77. This interpretation is supported by the object and purpose of the BIT, which is a Treaty "concerning the Reciprocal Promotion and Protection of Investment." In the Preamble, the Parties declare that they "intend to establish favorable conditions for the investments carried out by investors of each party in the territory of the other one". Disregard of the actual treatment of the company representing the investment, by removing it from the BIT's coverage, would therefore require a restrictive interpretation of the BIT's terms contrary to its object and purpose. Such an interpretation might moreover render several of its provisions ineffective and useless for investors, especially for those that have made a "direct investment" (as Telefónica did in this case) through a local company that they have established or acquired, in order to carry out, through it, a specific economic activity, *in casu* the provision of telecommunication services.[28]

78. There are additional decisive circumstances, specific to the facts of this case, that lead the Tribunal to answer the question (b) in para. 73 in the affirmative. Due attention must be given in this respect to the real scope of Telefónica's investments as it results from its participation in the privatization, in 1989-91, of the State-owned company that provided telecommunications services in Argentina (ENTel). The terms of the bidding and of the various related documents make it clear that Argentina launched a public international bidding for that purpose, which was opened to foreign investors (which were indeed sought by Argentina), on the condition that they included as necessary participants "private companies dedicated to the

[28] The carrying out of the investment through a local company is sometimes required by the law of the host State, as was the case here.

telecommunication activities as Operator."[29] These companies had to be endowed with specific technical competences and qualifications, besides having available adequate financial resources.[30] The Operator had to accept the rights and obligations as "Manager" under a contract to be entered with the licensee (*"Contrato de Gerenciamiento."*) The conditions specified that the successful bidders would be awarded the shares in the specific licensees, *i.e.* the local companies which resulted from the division of ENTel assets (among which *Sociedad Licenciataria Sur S.A.*). The conditions also specified the basic conditions and warranties under which those licensees would operate.

79. As a successful bidder, the consortium in which Telefónica participated through a fully owned subsidiary was awarded 60% of *Licenciataria Sur* for the price of US$ 2,834,000,000, a percentage that was later increased up to almost 100%, while *Licenciataria Sur* changed its name into TASA. The Transfer Agreement approved by Decree 2332/90[31] explicitly mentioned and recognized Telefónica as *"Operador Principal,"* independently from its being also a member of the Consortium.

80. In view of the above, it is clear that the legal regime applicable to TASA's operations was the object of an undertaking by Argentina with Telefónica as a participant in the privatization and as "Operator." Telefónica claims that by the

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[29] The fact that the foreign investor had responded to an international privatization bid addressed by Argentina to qualified foreign companies has been noted in various decisions upholding the jurisdiction of ICSID tribunals, see f.i. *Enron v. Argentina*, cit., Decision on Jurisdiction, 14 January 2004, paras. 54-56, available at: http://www.worldbank.org/icsid.

[30] See Decree 62/90 and annexed "*Pliego de Bases y Condiciones para el Concurso Público Internacional para la Privatización de la Prestación del Servicio de Telecomunicaciones"* (Exh. 9 and C 34 of Claimant), specifically Art. 3. Also Telefónica, as "Operador principal" was a party to the Transfer Agreement (see Exhibit 12 R.A.).

[31] Claimant's Exh. 12.

changes of the legal and contractual regime laid down and agreed in the privatization process its rights under the BIT have been breached and its claim is therefore not barred by the fact that TASA may be the legal holder of certain of those rights and connected obligations under the laws of Argentina.

81. As a consequence, question (a) in para. 73, whether the Tribunal is presented with a dispute arising directly out of an investment, as prescribed by Art. 25 of the ICSID Convention and meeting the requirements of the BIT, must also be answered in the affirmative. In view of the circumstances given here, Telefónica's rights are not limited to the mere title to the shareholding in TASA. Telefónica made the investment through TASA and not just in TASA. The Tribunal is thus competent to entertain claims that measures affecting the legal regime of TASA's operations have breached Telefónica's rights under the BIT. The Tribunal is faced accordingly with "an investment dispute" under Art. 25(1) of the ICSID Convention, corresponding to "a dispute relating to an investment" under Art. X.1 of the BIT, irrespective of the fact that TASA may have contractual claims against the competent Argentina authorities for breach of the Transfer Agreement. It is of course for the merits to determine whether or what treaty breaches have been effected by Argentina through the various measures challenged by Telefónica.

82. The above specific factual and legal situation and the scope of BIT provisions lead the Tribunal to conclude that the treaty rights that Telefónica invokes, complaining that Argentina has breached them, indeed, pertain to Telefónica.

83. Therefore, Argentina's reliance on the decision rendered in 1970 by the International Court of Justice in the *Barcelona Traction* case is misplaced when it seeks to deny the possibility that action taken by the host country against the activities and assets of a local company fully owned or controlled by foreign investors may constitute a breach of the BIT. The factual and legal context was different there and only the protection of foreign shareholders under customary international law was at issue in that dispute. Without entering into the specifics of that case, the ICJ itself recognized in its decision that the protection of shareholders required that recourse be had to treaty stipulations. The Court recalled that "indeed, whether in the form of multilateral or bilateral treaties between States, or in agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments."[32] The impressive development of BITs has been a response to the uncertainty of customary international law relating to foreign investment.

Third objection to jurisdiction of Argentina

<u>The alleged exclusive jurisdiction of the Federal Courts of Buenos Aires</u>

84. The reasons elaborated above in deciding the second objection by Argentina resolve also the third objection. Telefónica claims that Argentina has breached its undertakings in the privatization instruments, aimed at attracting qualified foreign

[32] ICJ Reports (1970), paras. 88-89. In the subsequent *ELSI* case the Court upheld the applicability of Art. III.2 of the bilateral treaty of Friendship, Commerce and Navigation of 1948 between the US and Italy (granting to nationals and corporations of either party the right to "organize, control and manage" corporations controlled by them and created under the law of the other party), in a case where Italian authorities had requisitioned property of an Italian company owned by two US corporations, ICJ Reports (1989), paras. 68 ff. The relevance of this decision for the interpretation of BITs has been highlighted by the late Dr. F.A. MANN in his comment *Foreign Investment in the International Court of Justice,* in *American J. Int. Law*, 1986, p. 92-102.

investors intending to participate in such process and meant thereafter to govern the regime of the operations which successful bidders such as Telefónica were to carry out. Telefónica claims that Argentina thereby has breached its BIT obligation and does not rely on a breach of contract under Argentine law as a party to the Transfer Agreement. As regards Telefónica, the Transfer Agreement, on which Argentina relies, appears rather the instrument for implementing the undertakings and commitments stemming from the bidding process, *i.e.* the acquisition of the shares of *Licenciataria Sur*, entailing the responsibility to carry on its services and the rights and duties connected therewith.

85. Telefónica's investments qualify for investment protection under the BIT, so that recourse to its dispute settlement mechanism provided in Art. X is possible as a matter of right. The claim that the host State has breached the BIT in respect of a given investment can be entertained by this Tribunal irrespective of the existence of contractual remedies available to TASA or to Telefónica as provided in the Transfer Agreement. The exclusive choice of forum clause contained in such contract operates therefore in respect of such contractual claim and cannot prevent the discharge by this Tribunal of its obligations in accordance with the BIT.

86. The Claimant has referred in support of its position to various cases where ICSID tribunals have held that claims based on alleged breaches of the BIT with respect to an investment by a foreign investor cannot be equated with contractual claims under a license agreement.[33] Argentina on the other hand relies on various cases to the effect that a contractual choice of local forum should be given effect over

[33] See f.i. *LG&E v. Argentina*, cit., Decision on Jurisdiction of April 30, 2004, para. 66, available at: http://www.worldbank.org/icsid.

the international agreement that serves as the foundation of the jurisdiction of the international tribunal.[34]

87. Based on its examination of the claims made by Telefónica and the respective arguments of the parties, the Tribunal considers that the subject matter of the claims of Telefónica to be decided here, and as to which Argentina challenges our jurisdiction, is not the breach of a contract containing a choice of domestic forum clause. It is not Telefónica's position that it has submitted such a contractual claim to this ICSID Tribunal and this position appears *prima facie* warranted for jurisdictional purposes. The choice-of-forum clause of the Transfer Agreement is therefore immaterial and cannot be a bar to our jurisdiction. This means further that there is no need for us to examine or rely on Telefónica's additional argument based on the applicability of the umbrella clauses present in various BITs of Argentina by virtue of the MFN clause of Art.IV.2 of the Argentina-Spain BIT in order to find that we are competent to pass judgment on Telefónica's claims (notwithstanding, *arguendo,* the choice-of-forum clause that would be applicable to the contractual claim).[35] The subject-matter of this dispute is not a contractual claim that would be cognizable by this ICSID Tribunal established under the BIT only by virtue of an umbrella clause under which a purely contractual claim would have been converted into a Treaty claim. The Tribunal is rather presented here with a claim based on the alleged breach by Argentina, through its legislative and other measures of 2001 and 2002, of the legal regime applicable to Telefónica's investment in the telecommunication sector in

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[34] *Woodruff* Case, cit.; *North America Dredging Co*., cit.; *SGS v. Philippines*, cit., para. 154.

[35] We do not find it necessary therefore to dwell on the interpretation and effects of such umbrella clauses, an issue which the Claimant has raised with reference to the most recent ICSID case law on this matter.

Argentina in violation of various terms of the BIT. The jurisdiction of this Tribunal on such claims must be upheld for the above-mentioned reasons.[36]

Fourth objection to jurisdiction of Argentina

The alleged lack of ius standi by Telefónica since under international law and applicable Argentine law corporate claims of a derivative nature (such as those allegedly made here) are inadmissible

88. As mentioned above, this defense by Argentina is based on the position that since the assets and rights affected by the measures of Argentina challenged by the Claimant belong exclusively to the local company in which the foreign party has bought shares representing the investment, the action brought here cannot but be defined as a derivative suit. Argentina describes as a derivative suit one by which the shareholder attempts to make good in its own name rights that belong instead to its subsidiary in the host State. Such "derivative" suit being inadmissible under the domestic law of the subsidiary, namely the law of Argentina, the Claimant cannot present such a claim to an international arbitral tribunal.

89. Having found, however, that the assets and rights that Telefónica claims have been injured in breach of the BIT fall under the definition of investments under the BIT, it is immaterial that title to some of them is in TASA in accordance with the law of Argentina. Telefónica asserts its own treaty rights for their protection, regardless of any right, contractual or non-contractual, that TASA might assert in respect of such

[36] This would not prevent the Tribunal, when dealing with the merits, from examining *incidenter tantum* whether there have been breaches of the Transfer Agreement, should this be relevant in order to ascertain whether Argentina has committed the BIT breaches that Telefónica alleges. See also the *Vivendi* Annulment decision, *Comp. de Aguas del Aconquija (Annulment),*41 ILM 1135 (2002) at para. 112.

assets and rights under local law before the courts of competent jurisdiction of Argentina for damages suffered as a consequence of actions taken by those authorities in breach of applicable provisions of such law.

90. Telefónica, on the other hand, invokes here treaty rights concerning its investment in Argentina protected by the BIT. The claims of Telefónica cannot therefore be defined as indirect claims (or "derivative" claims), as if Telefónica were claiming on behalf or *in lieu* of TASA in respect of rights granted to the latter by the laws of Argentina. It is therefore irrelevant that such claims would be inadmissible under the laws of Argentina and that they would not be amenable in any case to the jurisdiction of an ICSID arbitral tribunal. This objection of Argentina appears therefore to be without merit.

Fifth objection to jurisdiction of Argentina

Telefónica did not comply with the 18-month period prescribed by the Article X of the BIT

91. Argentina submits that this Tribunal lacks jurisdiction because Telefónica initiated the present arbitration without complying with Art. X.3(a) of the BIT, which allows an investor to submit an investment dispute under the BIT to international arbitration provided that the tribunal of the host State, competent to hear the dispute under para. 2 of the same article, has not rendered "a decision on the merits of the claim after the expiration of a period of eighteen months from the date on which the

proceedings referred to in par. 2 of this article have been initiated."[37] This provision requires, according to Argentina, that an aggrieved investor, before resorting to ICSID arbitration, must submit its claims to domestic courts and pursue its case there for at least 18 months if no decision on the merits has been rendered within this time period.[38]

92. As stated above, Telefónica relies instead on the most-favored-nation clause found in Art. IV.2 of the BIT in order to claim that the requirement of Art. X.3 (a) is not applicable in view of the fact that other BITs entered into by Argentina, in particular the Argentina – Chile BIT of 1991 (in force since January 1, 1995),[39] does not subject the submission of an investment dispute to ICSID arbitration under that BIT to such a condition precedent.

93. In this respect, the Tribunal notes that this requirement, or precondition, is best qualified as a temporary bar to the initiation of arbitration. The objection is therefore technically an exception of inadmissibility raised by Argentina against the Claimant for not having complied with the requirement.[40] The Tribunal notes that the

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[37] The original text of Art.X.3(a) is as follows: *"La controversia podrá ser sometida a un tribunal arbitral internacional en cualquiera de las circunstancias siguientes: (a) a petición de una de las partes en la controversia, cuando no exista una decisión sobre el fondo después de transcurridos dieciocho meses contados a partir de la iniciación del proceso previsto por el apartado 2 de este articulo."*

[38] The next subparagraph of Art. X.3(a) allows the introduction of an international claim notwithstanding the timely issuance of such domestic decision on the merits (no requirement that such decision be final is mentioned) "if the dispute between the parties continue."

[39] Exh. 27 and 28 of Telefónica.

[40] The I.L.C. uses the terms "Admissibility of claims" as title of Art. 44 of its Draft Articles on States Responsibility. According to this article: "The responsibility of a State may not be invoked if: (*b*) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."

As to the various types of relations that can exist between inadmissibility and lack of jurisdiction see ICJ, *Case concerning Armed Activities on the Territory of Congo* (Democratic

inadmissibility of the claim would result in the Tribunal's temporary lack of jurisdiction, that is until the condition of the Claimant having submitted its claims to the courts of Argentina as the host State and not having obtained a decision on the merits within eighteen months would not had been satisfied.

94. The objection requires interpreting the scope of the MFN clause of Art. IV.2 of the BIT in order to ascertain whether it is applicable to the above-mentioned procedural requirement and with what effect. Art. IV of the BIT, whose heading is "Treatment", provides as follows :

> "1. *Cada Parte garantizará en su territorio un tratamiento justo y equitativo a las inversiones realizadas por inversores de la otra Parte*." ("Each Party shall grant in its territory a fair and equitable treatment to investments made by investors of the other Party.")
>
> "2. *En todas las materias regidas por el presente Acuerdo, este tratamiento no será menos favorable que el otorgado por cada Parte a las inversiones realizadas en su territorio por inversores de un tercer país.*" ("In all matters regulated by the present Agreement, this treatment shall not be less favorable than the one granted by each Party to the investments made in its territory by investors of a third country").

Republic of Congo v. Rwanda), Decision on Jurisdiction of the Court and Admissibility of the Application, February 3, 2006, especially paras. 18, 88 and 100. In *SGS v Philippines*, cit., the Tribunal held that it had jurisdiction of the claim thanks to the relevant umbrella clause but that the claim was not admissible in view of the choice-of-local jurisdiction clause; see paras. 127 f. and 155.

Paragraph 3 and 4 contemplate some exceptions to the MFN obligation (concerning, respectively, regional integration agreements and similar schemes, and double taxation treaties), while paragraph 5 of the same article deals with national treatment.

95. Argentina claims that this MFN obligation "is not applicable to jurisdictional matters" since the application of the MFN clause is governed by the principle "*ejusdem generis.*" This principle would restrict the application of the MFN treatment "to the people or things specified in the clause, or implied in the matter governed by such clause."[41] According to Argentina subjecting the 18-month period prescribed by Art. X to the MFN clause would imply a violation of a basic principle of treaty interpretation contemplated in Art. 31(1) of the Vienna Convention on the Law of Treaties of 1969 because the Parties must have given to Art. X an intended meaning, which is submitting the case to local bodies before making any international claim.

96. The exact meaning of the MFN clause in the BIT must indeed be analyzed in accordance with the principles of Art. 31 of the Vienna Convention (which codifies the customary principles of international law on the matter). First of all, a treaty must 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" (Art. 31.1).

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[41] Citation by Argentina from the ILC Final Draft Articles on the Most-Favored-Nation Clauses, Art. 9, *Yearbook of the ILC,* 1978-II, reprinted in ILM 1978, p. 1518.

97. As to the MFN clause, one should specifically consider that it is a "standard clause", although the specific language varies from treaty to treaty.[42] It has been used for centuries in order to ensure that a certain treatment, or any treatment that the parties have agreed in a bilateral treaty to grant to their merchants, traders and investors, as the case may be, in respect of their persons, activities, goods and assets, depending upon the sectors regulated by said treaty, not be undercut by a better treatment that either contracting State might in the future grant to the same categories of persons, activities, goods and assets of a third State.[43] By virtue of the MFN clause the result sought is achieved by extending to the beneficiaries of the other contracting State such better treatment. In accordance with the most frequent "automatic" type of MFN clause, this better treatment is to be extended automatically as a matter of right. Moreover, the better treatment to be extended to the beneficiary contracting State is not limited to the one granted under subsequent treaties made by the other signatory with a third State. Its source may be found also elsewhere; thus the better treatment to be extended may have been granted by law or even *de facto* by such other contracting State.

98. An MFN clause is aimed at ensuring equality of treatment to the beneficiaries in respect of its subject matter at the most advantageous level.[44] In respect of trade in goods, establishment, services and investments, the purpose of an MFN clause has

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[42] See Lord McNAIR, *The Law of Treaties*, 1938, p. 285: "Speaking strictly, there is no such thing as *the* most-favoured nation clause: every treaty requires independent examination."

[43] M. GIULIANO, *Quelques aspects juridiques de la coopération intergouvernementale en matière d'échanges et de paiements internationaux,* Recueil des Cours, 1968-II, p. 557 ff, at p. 581.

[44] More generally "the intention of the most-favored-nation clauses [is] to establish and maintain at all times fundamental equality without discrimination as between the countries concerned", ICJ, *Case concerning rights of nationals of the USA in Morocco* (France v. USA), ICJ Reports (1952), p. 192.

been described as that of guaranteeing equal competitive conditions to businessmen of the countries concerned in the contracting States' territories. Specifically as to foreign investors, it appears correct to state that "the basic purpose of MFN is to guarantee equality of competitive opportunities for foreign investors in the host state.".[45]

99. The original scope of the MFN clause has been enlarged by making it applicable not only to *future* better treatments, but also to any treatment, however provided, by either State to the same categories of persons, things or activities referred to in the clause, pertaining to a third State.[46] In any case, "The beneficiary State can only claim rights which belong to the subject-matter of the clause, which are within the time-limits and other conditions and restrictions set by the agreement, and which are in respect of persons or things specified in the clause or implied from its subject-matter."[47] This relationship is what is generally called the "*ejusdem generis*" restriction in the application of the MFN clause.

100. With these general concepts in mind the Tribunal turns now to the specific issue raised under the MFN clause of Art. IV.2 of the BIT at issue in respect of the dispute settlement provision of Art. X of the same BIT. Argentina claims that dispute settlement provisions or mechanisms, such as the one found in Art. X, would not be encompassed by their very nature by the scope of the MFN clause of Art. IV. The

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[45] J. KURTZ, *The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: Maffezini v. Kingdom of Spain,* in T. WEILER (Ed.*) International Investment Law and Arbitration*, Cameron May, London, 2005, p. 523.

[46] It is well known that the clause has been widely employed in multilateral treaties, notably in the GATT as to trade matters, thus guaranteeing equality of treatment among all participants.

[47] E. USTOR, *Most-Favoured-Nation Clause,* Encyclopaedia of Public International Law, North Holland, Amsterdam 1985, vol.8, p. 411, at p. 415.

text of neither articles, however, support this limitation. On the contrary, Art. IV.2 explicitly states: "In all matters regulated by the present agreement this treatment shall not be less favorable than..." The contrary argument by Argentina that dispute settlement mechanisms are not covered appears to be unwarranted.[48] The protection of the rights of foreigners, including investors, through the granting of an explicit right to have access to courts and to avail themselves of specific remedies such as recourse to direct arbitration is a typical matter where the MFN treatment is relevant, traditional and recognized as applicable.[49] In the *Ambatielos*[50] international arbitration case, referred to by both the disputing parties in support of their opposing views, the Greek claimant invoked the MFN clause of the Treaty of Commerce and Navigation of 1886 between Greece and the UK dealing with "all matters relating to commerce and navigation" precisely in order to claim a right of access to British justice based on the better treatment so provided in that respect in treaties of the UK with other countries.[51]

101. That case and other instances and examples often quoted refer in any case to domestic justice.[52] In the present case, Art. X provides, as far as it is relevant here,

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[48] The Tribunal notes that notwithstanding, or maybe in view of the use of the term "all matters", the Parties have taken care to exclude specifically certain matters from the coverage of the MFN clause: see Art. IV.3 and 4, as well as par. 1 of the Protocol to the BIT.

[49] See E.USTOR, cit., at p. 411.

[50] ICJ Reports (1953) p. 10.

[51] Award of 6 March 1956, UNRIAA, XII, p.87, at p. 107.

[52] See the extensive discussion of the *ejusdem generic* rule (or limitation) in Commentaries by the I.L.C. to Art. 9 and 10 of its Final Draft Articles on Most-Favoured-Nation Clause, cit. *supra*. The fact that the U.N. General Assembly was unable to recommend the Draft Articles to Member States with a view to the conclusion of a convention on the subject, due to disagreement on specific points and a decline of interest in the subject, does not affect the value of the I.L.C. contribution to the matter under customary international law, see Sir A. WATTS, *The International Law Commission*, Oxford 1999, vol. III, p. 1795.

for recourse by the aggrieved investor to ICSID international arbitration under the Washington Convention of 1965. Access to such a system of international justice would not be automatically available to an investor of a country which is not party to the Washington Convention, nor when the host State has not given its consent to such arbitration in a BIT or otherwise. The fundamental role that direct arbitration in favor of investors may have under BITs would not overcome the obstacle represented by the lack of participation by either State in the international organizational context within which such direct arbitration is possible in case of dispute.[53]

102. The issue here is not, however, the extension of ICSID arbitration beyond what is provided for in the Argentina – Spain BIT by virtue of the reference to another BIT under the MFN clause.[54] The issue is whether submission of the dispute to ICSID under the BIT may be exempted from the precondition of submitting the claim to the domestic courts of the host State, thanks to the application of the MFN clause. In the light of what has been said above, the Tribunal considers that this requirement pertains to the "treatment" that Argentina applies, "within its territory" to Spanish investors wishing to complain before an ICSID arbitral tribunal about a breach of some substantive provision of the BIT in respect of their investment in Argentina. Therefore, such a requirement falls within the purview of the MFN clause of Art. IV.2. It follows that if such a requirement is not applied to Chilean (and other foreign)

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[53] See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of January 25, 2000, para. 63, in ICSID Review - Foreign Investment Law Journal (2001) also available online at www.worldbank.org/icsid.

[54] Referring to the role and function of the dispute settlement provisions within BITs in general does not appear to be an adequate interpretative tool to resolve the question at issue. See paras. 106 to 108 hereunder for a discussion of this approach as relied upon in part, but leading to different conclusions, in the *Maffezini* Decision on Jurisdiction, cit., (at para. 54), on the one hand, and in *Plama Consortium Ltd v. Bulgaria,* on the other hand, ICSID Case No. ARB/03/24, Decision on Jurisdiction of February 8, 2005, para. 223, in ICSID Review—Foreign Investment Law Journal (2005); also available online at www.worldbank.org/icsid.

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investors by Argentina under the respective BITs, then this requirement properly is inapplicable to Spanish investors.

103. It is undisputable that it is preferable for an investor not to be obliged to submit, and pursue for 18 months, its claim before the courts of the host State before being allowed to submit it to the specific investment arbitration at ICSID. Being exempted from such a requirement (also considering the unlikelihood that a decision on the merits be rendered within this time limit)[55] represents a "better treatment" in respect of which, therefore, the MFN clause operates.

104. This conclusion fully respects the requirement of the *ejusdem generis* rule, invoked by Argentina, for the reasons indicated above. As indicated above, the Tribunal considers that excluding the 18-month requirement from the application of the MFN clause would not be justified in view of the explicit applicability of the clause to "all matters" regulated by the BIT, as stated in Art. IV.2 of the same. Other BITs concluded by Argentina, which are the basis of disputes brought by foreign investors against Argentina and currently pending at ICSID, do use a different language. Thus the Argentina-U.S. BIT of 1991, at Art. II.1 provides: "Each Party

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[55] The Tribunal does not find it necessary to address the argument of Telefónica that the 18-month requirement is inapplicable because it should be considered "futile" under a certain doctrine of international law in relation to the exhaustion of local remedies. Telefónica makes this argument because it considers (and has given evidence in that respect) that it would be impossible for a court of Argentina to render a decision on the merits in such a period of time. While this observation appears to be reasonable, the Tribunal notes that such a requirement is present in various BITs of Argentina and of other Latin American countries. It has been considered as a mitigated form of the exhaustion of local remedies requirement, to which these countries have traditionally adhered in accordance with the Calvo doctrine. It cannot be excluded from the outset that the host State might be able, if it so wishes, to speed up proceedings and the issuance of a decision by its own courts. See generally H. A. GRIGERA NAÓN, *Arbitration and Latin America: Progress and Setbacks,* in *Arbitration International,* 2005, p. 127, at p. 137 ff. We note however that the *Siemens* Tribunal considered that since Art. 10(2) of the Argentina-Germany BIT (substantially identical to Art. X.3 (a) of the BIT at issue here) "does not require a prior final decision of the courts of the Respondent…Art. X(2) is not comparable to the local remedies rule", *Siemens A.G. v. Argentina*, cit., Decision on Jurisdiction of August 3, 2004, para. 42, available online at www.worldbank.org/icsid.

shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals and companies of any third country, whichever is the most favorable." The BIT between Argentina and France of 1991 at Art. 4 specifies: "Each Contracting Party shall accord in its territory and maritime zone to investors of the other Party, in respect of their investments and activities in connection with such investments, treatment that is no less favorable than that accorded to its own investors or the treatment accorded to investors of the most-favored-nation, if the latter is more advantageous." The Argentina-Germany BIT, also of 1991, states at Art. 3(1): "None of the Contracting Parties shall accord in its territories to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States."[56]

105. The Tribunal is comforted in reaching its conclusion by previous decisions on the issue, especially those that have interpreted to the same effect the very same provision of the Argentina–Spain BIT. These decisions have reached the same conclusion though through partially different reasoning.[57]

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[56] The *Maffezini* Tribunal has pointed out that the Argentina-Spain BIT was the only one, among many BITs concluded by Spain, that included the terms "all matters", Decision cit., at para. 60.

[57] See *Maffezini* cit.; *Siemens A.G. v. Argentina*, cit.; *Gas Natural SDG, S.A. v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of June 17, 2005. Both the *Maffezini* and *Gas Natural* decisions involved the Argentina-Spain BIT at issue here; in the *Siemens* case the Argentina-Germany BIT of 1991 was the relevant treaty.

106. The tribunal in *Maffezini* was faced with a claim against Spain by an Argentine investor that had not complied with the "18-month domestic litigation previous obligation" (as we call it here for sake of brevity) relying on the MFN clause as Telefónica does here. The Tribunal considered that, although the Argentina-Spain BIT does not refer expressly to dispute settlement as covered by the MFN clause, "there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors… and are also closely linked to the material aspects of the treatment accorded."[58] The Tribunal further noted that international arbitration has replaced other remedies resorted to in the past, such as certain forms of extraterritorial jurisdiction which had been frequently abused, and that "traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts."[59] The Tribunal concluded therefore that "if 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 MFN clause as they are fully compatible with the *ejusdem generis* principle."[60]

107. The decision affirming jurisdiction in the *Siemens v. Argentina* dispute discusses in detail the manifold aspects of the same question in accepting the plea of *Siemens* that it did not have to comply with the "18-month domestic litigation previous obligation" found in the Argentina-Germany BIT. That Tribunal concluded

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[58] *Maffezini* Decision cit., at paras. 54 and 55.

[59] *Ibid*., at para. 55.

[60] *Ibid*., at para. 56.

that "the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause."[61]

108. We are not called upon to comment upon these other decisions that have concluded before that BIT provisions containing the "18-month domestic litigation previous obligation" are inapplicable by virtue of a MFN clause. We note that those tribunals have reached the same conclusion, namely the inapplicability of the requirement, although their reasoning in part differs from ours.[62] Other ICSID tribunals have recently considered pleas based on the MFN clause contained in various BITs both in relation to jurisdiction and as to questions of merits.[63] The issues discussed there are however not directly relevant for our decision here.

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[61] *Siemens A.G. v. Argentina*, Decision cit., at para. 102.

[62] The argument relied upon in *Maffezini,* namely that the international direct arbitration mechanisms of BITs are inextricably linked to the substantive protection of investors' rights and thus are part of the treatment to which they are entitled and to which the MFN obligation applies, has been referred to also in other decisions. We note however that not all BITs make direct international arbitration mechanisms available to investors for the protection of all their rights spelled out in the treaty. In fact various limitations as to access to such a mechanism were present in the 1987 BIT between Cyprus and Bulgaria at issue in the *Plama v. Bulgaria* case cit. Moreover, although such international arbitration pertains to the treatment which investors benefit of under a BIT (and have even been considered as "perhaps the most important element in investors protection", as mentioned in the *Gas Natural* Decision), we do not consider for the reasons explained in the text that it is in itself part of the "fair and equitable treatment" that "Each Party shall grant *in its territory...* to investments made by investors of the other Party" as provided for by Art.IV.1 of the Argentina-Spain BIT (emphasis added).

[63] The MFN clause has been relied upon and discussed by various ICSID Tribunals recently, both on request of the claimants and of the respondents. As to the merits see *CMS v. Argentina*, cit., Award on the merits of May 12, 2005, in 44 *ILM* 2005, p. 1205, also available online at www.worldbank.org/icsid. As to jurisdiction, the ICSID Tribunals in both *Salini Costruttori & Italstrade v. Jordan*, cit., Decision on Jurisdiction of November 29, 2004, in *ICSID Review – Foreign Investment Law Journal* (2005), p. 148; and in *Plama v. Bulgaria*, cit., rejected reliance on a MFN clause as the sole basis for jurisdiction. In *Plama* the Tribunal was called upon to find jurisdiction on a claim solely on the basis of incorporation by reference (through a MFN clause) of the ICSID dispute settlement mechanism in its entirety, since such a mechanism was not provided for in the applicable BIT. Reliance on the MFN clause as the basis for jurisdiction in these instances would have been

Argentina's argument based on "subsequent practice by Spain and Argentina

109. Argentina has raised an additional argument to support its argument that the MFN clause of Art. IV.2 should not apply to the "18-month domestic litigation previous obligation." Argentina claims that the opposition to such application expressed by Spain as a respondent in the *Maffezini* case, and by Argentina in the *Siemens* and *Gas Natural* litigations, leads to this conclusion. Argentina claims that the parallel positions taken by the two Contracting States in those proceedings, based on similar arguments as to the interpretation and application of the relevant articles of the Argentina-Spain BIT amount to "subsequent acts carried out by the parties" which indicate "their agreement as regards the interpretation of a given provision" which would be binding on this Tribunal.

110. It is not clear from the outset whether Argentina bases its reasoning and conclusion on Art. 31.3(a) or 31.3(b) of the Vienna Convention on the Law of Treaties. According to Art. 31.3, in order to interpret a treaty provision "*There shall be taken into account, together with the context, (a) <u>any subsequent agreement between the parties</u> regarding the interpretation of the treaty or the application of its provisions"; (b) <u>any subsequent practice</u> in the application of the treaty <u>which establishes the agreement</u> of the parties regarding its interpretation"* (emphasis added).

considerably more far reaching that in the present and the other cases mentioned, where only the "18-month domestic litigation previous obligation" is or was at issue. The Tribunal in *Plama* concluded that the principle should be different than the one stated in *Maffezini*: "an MFN clause provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them" (at para. 223).

111. The Tribunal considers that the case of letter (a) is not present here. The distinct, independent positions taken by the two Contracting States as respondents in different arbitral proceedings, moreover not involving the other Contracting State, does not amount to an "agreement", in any one of the manifold forms admitted by international law,[64] between the two parties concerning such an interpretation.[65]

112. From the arguments developed by Argentina it appears rather that Argentina relies on subpara. (b) of Art. 31.3 "Subsequent practice" as referred to in that provision is important because it "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[66] In this respect, the Tribunal is not convinced that positions on interpretation of a treaty provision, expressed by a Contracting State in its defensive brief filed in an international direct arbitration initiated against it by an investor of the other Contracting State, amounts to "practice" of that State, as this requirement is understood in public international law, nor does it appear relevant in order to ascertain "how the treaty has been interpreted in practice" by the parties thereto.[67]

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64 Even a press communiqué of a meeting between representatives of the parties may suffice, see ICJ, *Aegean Sea Continental Shelf case* (Greece v. Turkey), ICJ *Reports* (1978), para. 96.

65 In respect of investment agreements, contracting States have sometimes provided that mixed commissions made of their representatives may issue authentic, binding interpretations of the relevant treaty provisions, that amount to subsequent agreements by the parties; see f.i. Art. 1131(2) of the NAFTA. Even when a BIT does not establish such a commission or does not provide for consultations between the parties in respect of matters arising under the BIT, as is the case of the Argentina–Spain BIT, contracting States would of course be free to enter into consultations and conclude an interpretative agreement.

66 I.L.C., *Yearbook,* 1966-II, p. 219, para. 6.

67 To use the often quoted expression by Sir G. FITZMAURICE, *The Law and Procedure of the ICJ 1951-4: Treaty Interpretation and Other Treaty Points,* (1957) BYIL, p. 203, at p. 211.

113. First of all, these positions do not seem to amount to "practice", *i.e.* to "conduct of the parties in their application of the…Agreement"[68] or "performance" by the States concerned,[69] in that they do not evidence the "factual element" required by Art. 31.3(b). These positions, expressed separately by Spain and Argentina in those distinct disputes, indicate their views set forth in those litigations for purposes of arguing as respondents therein. Moreover, these statements, individually and separately made by the Contracting States within such litigation, are not directed towards each other: they do not evidence therefore an "agreement", a meeting of their minds or intent ("concours de volonté")[70] as required by the same Art. 31.3(b). In this respect, the present case may be distinguished from a case decided by the Iran-United States Claims Tribunal in 2004. There that Tribunal had to deal with the admissibility of counterclaims filed after a deadline set in a provision of the relevant agreement barring the filing of claims, in view of the practice of both countries to the contrary in litigation before that Tribunal. The Iran – United States Claims Tribunal found that it could consider "as action taken in the application of the treaty … the filing of counterclaims and assertions and admissions made in the course of the proceedings before a tribunal." The Tribunal found that "the Parties have engaged in a concordant, common and consistent practice in filing counterclaims to official claims, and this practice reflects an agreement as to the interpretation of Article II, paragraph 2 of the Claims Settlement Declaration."[71] These factual elements, and especially the

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[68] *Italy-USA Air Transport Arbitration,* 17 July 1965, 4 ILM (1965) p. 974, at p. 983.

[69] PCIJ, *Brazilian Loans* (France v. Brazil), PCIJ Series A, 1929, N° 21, at p. 119.

[70] P.DAILLER & A. PELLET, *Droit International Public* (7° ed. 2002), para. 62, p. 118.

[71] *The Islamic Republic of Iran* and T*he United States of America*, Interlocutory Award No. ITL 83-B1-FT of September 9, 2004, paras. 115-116, (reprinted in Iran-U.S. C.T.R.), referring *i.a.* to the Decision of the Eritrea-Ethiopia Boundary Commission of April 13, 2002, para. 3.30.

fact that both parties, Iran and the United States, had followed that practice in litigation between themselves before that Tribunal are not present in this dispute.

114. The Tribunal finds therefore that those positions, though concordant at least in appearance,[72] do not entail a *"concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation"* (emphasis added)[73] as would be required under Art.31.3(b) of the Vienna Convention. The Tribunal rejects therefore the argument of Argentina that the MFN clause does not in any case relieve the Claimant from the duty to comply with the 18-month requirement of Art. X.3(a) of the BIT because of an interpretative agreement to the contrary of Argentina and Spain established by their subsequent practice.

Sixth objection to jurisdiction of Argentina

The claim is inadmissible due to lack of damage

115. Telefónica has claimed that the measures enacted by Argentina that affected its investments have inflicted on it substantial damages, notably the transformation of the tariffs from U.S. dollars (to which the peso was pegged at the rate of 1:1) to devalued pesos and the elimination of the adjustment mechanism. In order to establish jurisdiction based on a *prima facie* examination of the claims raised by the

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[72] We note that the arguments made by Spain to object to the application of the MFN clause in the *Maffezini* case are not identical to those made by Argentina before us, as far as can be concluded from the summary of those arguments found in paras. 41-42 of the *Maffezini* Decision.

[73] WTO Appellate Body, *Japan – Alcoholic Beverages-II*, WT/DS 8-10-11/AB/R, p. 13, adopted on November 1, 1996, available at: www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes. The Appellate Body quoted I.SINCLAIR, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984), p. 137, where the author states: "An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."

Claimant this statement and the documents submitted to this effect appear to be adequate. The possible uncertainty as to the final amount of the damages does not represent a bar to jurisdiction, but rather an issue to be decided in the merits phase. The Tribunal observes moreover that the Claimant has petitioned *i.a.* for a declaratory judgment that Argentina has breached the BIT. In this respect the issue of damages is immaterial.[74]

116. Nor does the existence of ongoing negotiations with local companies or the foreign shareholders (which are however disputed by the Claimant) represent a bar to the introduction or pursuit of an international claim such as the one at issue. Negotiations in view of a settlement are often carried on by the parties to a dispute, domestically and internationally, between private parties, between governments, and between governments and foreign investors, while the dispute is pending before a court of law or an international or arbitral tribunal. This situation does not undermine the jurisdiction of those judicial or arbitral bodies, except if the parties jointly decide to suspend proceedings or to intervene otherwise in the course of the pending dispute. Since this is clearly not the current situation in this dispute[75], the Tribunal has no other choice than to reject this objection as being without foundation.

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[74] A basic issue in the present litigation is whether Argentina has committed an internationally wrongful act, that is whether it has breached the international obligations contained in the BIT by conduct attributable to it. As held by the I.L.C. these two conditions are sufficient to establish such a wrongful act giving rise to international responsibility. Having caused a damage thereby is not an additional requirement, except if the content of the primary obligation breached has an object or implies an obligation not to cause damages, see I.L.C., *Draft Articles on State Responsibility* cit., commentary to Art. 2, para. 9.

[75] See para. 7 above as to the suspension of these proceedings that the parties had agreed for a few months in 2004.

Decision

For the reasons stated above the Tribunal concludes that all jurisdictional requirements laid down in the ICSID Convention and in the BIT are met in the present dispute. The Tribunal rejects accordingly Argentina's objections to jurisdiction and decides that the present dispute is within the jurisdiction of ICSID and the competence of the Tribunal.

So decided

Giorgio Sacerdoti
President of the Tribunal

Charles N. Brower
Arbitrator

Eduardo Siqueiros
Arbitrator