

(English Translation from Spanish Original)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

EMILIO AGUSTÍN MAFFEZINI
(CLAIMANT)

and

THE KINGDOM OF SPAIN
(RESPONDENT)

CASE NO. ARB/97/7

**DECISION OF THE TRIBUNAL ON OBJECTIONS
TO JURISDICTION**

Members of the Tribunal

Professor Francisco Orrego Vicuña, President
Judge Thomas Buergenthal, Arbitrator
Mr. Maurice Wolf, Arbitrator

Secretary of the Tribunal

Mr. Gonzalo Flores

Representing the Claimant

Dr. Raúl Emilio Vinuesa
Dra. María Cristina Brea
Dra. Silvina González Napolitano
Dra. Gisela Makowski
Estudio Vinuesa y Asociados
Buenos Aires
Argentina

Representing the Respondent

Mr. Rafael Andrés León Cavero
Abogado del Estado
Subdirección General de los
Servicios Contenciosos del
Ministerio de Justicia
Madrid
Spain

Date of decision: January 25, 2000

A. Procedure

1. On July 18, 1997, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from Mr. Emilio Agustín Maffezini, a national of the Argentine Republic (Argentina), a Request for Arbitration against the Kingdom of Spain (Spain). The request concerns a dispute arising from treatment allegedly received by Mr. Maffezini from Spanish entities, in connection with his investment in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia. In his request the Claimant invokes the provisions of the 1991 “Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic” (the Argentine-Spain Bilateral Investment Treaty or BIT).¹ The request also invokes, by way of a most-favored-nation (MFN) clause in the Argentine-Spain BIT, the provisions of a 1991 bilateral investment treaty between the Republic of Chile (Chile) and Spain.²

2. On August 8, 1997, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt of the request and on the same day transmitted a copy to the Kingdom of Spain and to the Spanish Embassy in Washington, D.C. At the same time, the Centre asked Mr. Maffezini to provide (i) specific information concerning the issues in dispute and the character of the underlying investment; (ii) information as to the complete terms of Spain’s consent to submit the dispute to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention); (iii) information as to the basis of his claim that the MFN clause in the Argentine-Spain BIT would allow him to invoke Spain’s consent contained in the Chile-Spain BIT; and (iv) documentation concerning the entry into force of the bilateral investment treaties invoked in the request. Mr. Maffezini provided this information in two letters of September 10 and September 29, 1997.

¹ Agreement between Argentina and Spain of October 3, 1991. Hereinafter cited as the Argentine-Spain BIT.

² Agreement between Chile and Spain of October 2, 1991. Hereinafter cited as the Chile-Spain BIT.

3. On October 30, 1997, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention. On this same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.
4. On December 22, 1997, the Claimant proposed to the Respondent that the Arbitral Tribunal consist of a sole arbitrator, to be appointed by agreement of the parties. The Claimant further proposed that, if the parties fail to agree in the name of the sole arbitrator by January 31, 1998, the sole arbitrator shall be appointed by ICSID's Secretary-General.
5. On March 5, 1998, Spain having failed to respond to the Claimant's proposal and more that 60 days having elapsed since the registration of the request, the Claimant informed the Secretary-General that he was choosing the formula set forth in Article 37(2)(b) of the ICSID Convention. The Tribunal, therefore, would consist of three arbitrators, one appointed by Mr. Maffezini, one appointed by Spain, and the third, presiding arbitrator, appointed by agreement of the parties.
6. On March 18, 1998, the Centre received a communication from the Spanish Ministry of Economy and Finance, whereby Spain anticipated having objections to the jurisdiction of the Centre and to the competence of the Tribunal, providing the Centre with a summary of the grounds on which such objections were based. The Centre promptly informed the Respondent that a copy of this communication, as well as copies of the request for arbitration and its accompanying documentation, of the notice of registration and of the correspondence exchanged between the parties and the Centre would be transmitted, in due course, to each of the Members of the Tribunal, noting that the question of jurisdiction was one for the Tribunal to decide.
7. On April 24, 1998, Mr. Maffezini appointed Professor Thomas Buergenthal, a national of the United States of America, as an arbitrator. On May 4, 1998, Spain appointed Mr. Maurice Wolf, also a national of the United States of America, as an arbitrator. The parties, however, failed to agree on the appointment of the third, presiding, arbitrator. In these circumstances, by means of a further communication of May 14, 1998, the Claimant requested that the third, presiding, arbitrator in the proceeding

be appointed by the Chairman of ICSID's Administrative Council in accordance with Article 38 of the ICSID Convention.³

8. Having consulted with the parties, the Chairman of ICSID's Administrative Council appointed Professor Francisco Orrego Vicuña, a Chilean national, as the President of the Arbitral Tribunal. On June 24, 1998, ICSID's Legal Adviser, on behalf of the Centre's Secretary-General, and in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

9. On July 3, 1998, the Respondent filed an application for provisional measures, requiring the Claimant to post a guaranty in the amount of the costs expected to be incurred by Spain in defending against this action. By further filing of August 7, 1998, the Claimant requested the Tribunal to dismiss such application.

10. After consulting with the parties, the Tribunal scheduled a first session for August 21, 1998. On August 20, 1998, counsel for the Respondent hand-delivered a document containing Spain's objections to the jurisdiction of the Centre. A copy of Spain's filing was distributed by the Centre to the Members of the Tribunal on that same date. A copy of Spain's filing was later handed by the Secretary of the Tribunal to the Claimant's representative in the course of the Tribunal's first session with the parties.

11. The first session of the Tribunal with the parties was held, as scheduled, on August 21, 1998, at the seat of ICSID in Washington, D.C. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the

³ Under Article 38 of the ICSID Convention, if the Tribunal is not yet constituted within 90 days after the notice of registration of the request has been dispatched, the Chairman of ICSID's Administrative Council shall, at the request of either party, and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal.

ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect.

12. During the course of the first session the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. The Respondent, represented at the session by Mr. Rafael Andrés León Cavero, drew the Tribunal's attention to its objections to the jurisdiction of the Centre. The Tribunal, after briefly ascertaining the views of the parties on this matter, fixed the following time limits for the written phase of the proceedings: the Claimant would file a memorial, with all of his arguments on the question of jurisdiction and on the merits within 90 days from the date of the first session; the Respondent would then file a counter-memorial, with all of its arguments on the question of jurisdiction and on the merits within 90 days from its reception of the Claimant's memorial. The Tribunal left open the possibility of requiring the submission of a reply and a rejoinder to the parties. The Tribunal also left open the possibility of holding a hearing on the issue of jurisdiction.

13. In accordance with the above-described schedule, the Claimant submitted to the Centre his memorial on the merits and on the question of jurisdiction on November 19, 1998. On April 9, 1999, after a request for an extension of the time limit for the filing of its counter-memorial was granted by the Tribunal, the Respondent submitted its written pleadings on the merits and on the question of jurisdiction.

14. On May 14, 1999, the Tribunal invited the parties to submit any further observations they may had on the question of jurisdiction, calling for a hearing on jurisdiction to be held on July 7, 1999, at the seat of the Centre in Washington, D.C. The parties filed their final observations on the question of jurisdiction on June 3, 1999 (the Claimant) and June 18, 1999 (the Respondent). Due to consecutive requests filed first by counsel for the Respondent, and later by counsel for the Claimant, the hearing on jurisdiction was postponed until August 9, 1999.

15. At the August 9, 1999 hearing, Dr. Raúl Emilio Vinuesa addressed the Tribunal on behalf of the Claimant, referring to the arguments put forward in his written pleadings. Mr. Rafael Andrés León Cavero addressed the Tribunal on behalf of the Kingdom of Spain. The Tribunal then posed questions to the representatives of the parties, as provided in Rule 32(3) of the Arbitration Rules.

16. Having heard the views of the parties, the Tribunal rendered, on August 26, 1999, Procedural Order No 1, deciding that, in accordance with Article 41(2) of the ICSID Convention and Rule 41(3) of the Arbitration Rules, it would deal with the question of jurisdiction as a preliminary matter, therefore suspending the proceedings on the merits.

17. On October 28, 1999, the Tribunal issued Procedural Order No. 2, addressing Spain's request for provisional measures. The Tribunal, pointing out that the recommendation of provisional measures seeking to protect mere expectations of success on the side of the Respondent would amount to a pre-judgement of the Claimant's case, unanimously dismissed Spain's request.

18. The Tribunal has considered thoroughly the parties' written submissions on the question of jurisdiction and the oral arguments delivered in the course of the August 9, 1999 hearing on jurisdiction. As mentioned above, the consideration of the merits has been postponed until the issue of the Centre's jurisdiction and Tribunal's competence is decided by the Tribunal. Having considered the basic facts of the dispute, the ICSID Convention and the 1991 Argentine-Spain BIT, as well as the written and oral arguments of the parties' representatives, the Tribunal has reached the following decision on the question of jurisdiction.

B. Considerations

Exhaustion of Domestic Remedies

19. The Kingdom of Spain first challenges the jurisdiction of the Centre and the competence of the Tribunal on the ground that the Claimant failed to comply with the requirements of Article X of the Bilateral Investment Treaty between Argentina and Spain. Article X of this Treaty reads as follows:

“Article X

Settlement of Disputes Between a Contracting Party and an Investor of the other Contracting Party

1. Disputes which arise within the terms of this Agreement concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably by the parties to the dispute.

2. If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made.

3. The dispute may be submitted to international arbitration in any of the following circumstances:

- a) at the request of one of the parties to the dispute, if no decision has been rendered 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 paragraph 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues;
- b) if both parties to the dispute agree thereto.

4. In the cases foreseen in paragraph 3, the disputes between the parties shall be submitted, unless the parties otherwise agree, either to international arbitration under the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States or to an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

If after a period of three months following the submission of the dispute to arbitration by either party, there is no agreement to one of the above alternative procedures, the dispute shall be submitted to arbitration under the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, provided that both Contracting Parties have become parties to the said Convention. Otherwise, the dispute shall be submitted to the above mentioned ad hoc tribunal.

5. The Arbitral Tribunal shall decide the dispute in accordance with the provisions of this Agreement, the terms of other Agreements concluded between the parties, the law of the Contracting Party in whose territory the investment was made, including its rules on conflict of laws, and general principles of international law.

6. The Arbitral Award shall be binding on both parties to the dispute and each Contracting Party shall execute them in accordance with its laws.”

20. Respondent makes two interrelated arguments based on Article X. The first is that Article X(3)(a) requires the exhaustion of certain domestic remedies in Spain and that Claimant failed to comply with this requirement. The second contention is that Claimant did not submit the case to Spanish courts before referring it to international arbitration as required by Article X(2) of the BIT.

21. The Tribunal will first address the contention that Article X(3)(a) requires the exhaustion of domestic remedies. The starting point for its analysis of Respondent’s submission is Article 26 of the ICSID Convention. It permits the Contracting States to condition their consent to ICSID arbitration on the prior exhaustion of domestic remedies. Article 26 reads as follows:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

22. The language of Article 26 makes clear that unless a Contracting State has conditioned its consent to ICSID arbitration on the prior exhaustion of domestic remedies, no such requirement will be applicable. Article 26 thus reverses the traditional international law rule, which implies the exhaustion requirement unless it is expressly or implicitly waived.

23. In determining whether Spain conditioned its acceptance of the Centre’s jurisdiction and the Tribunal’s competence on the prior exhaustion of domestic remedies, the Tribunal notes that in ratifying the ICSID Convention, Spain did not attach any such condition to its acceptance of Article 26. But since Spain was free to do so in the BIT, the Tribunal must now examine whether Article X of that treaty requires the prior exhaustion of domestic remedies. Although Article X does not condition the reference to ICSID arbitration *expressis verbis* on the prior exhaustion of domestic remedies, it does speak of proceedings in domestic courts. It must be deter-

mined, therefore, whether that language can be interpreted to require the exhaustion of domestic remedies and, if so, what the scope of that requirement is.

24. Paragraph 2 of Article X provides that, if a dispute arises between an investor and one of the Contracting Parties to the BIT, and if that dispute cannot be resolved amicably within a period of six months, it shall be submitted to the competent tribunals of the Contracting Party in whose territory the investment was made. Paragraph 3 of Article X then stipulates that the dispute may be submitted to an international arbitral tribunal in any of the following circumstances:

- a) at the request of one of the parties to the dispute, if no decision has been rendered 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 paragraph 2 of this Article have been initiated, or, if such decision has been rendered, but the dispute between the parties continues;
- b) if both parties to the dispute agree thereto.

25. The Respondent reads Article X(3)(a) to mean that, if a domestic court has rendered a decision on the merits on the issues in dispute within the prescribed period of eighteen months, the case can no longer be referred to international arbitration, irrespective of the holding of the court. This conclusion follows, in Respondent's view, because once the decision has been rendered, the dispute cannot be said to continue. Hence, if Claimant had referred the case to the Spanish courts and if those courts had passed on the merits of the case within the eighteen-month period, the dispute could no longer be submitted to the Centre under Article X. It follows, in Respondent's view, that Claimant's failure to give Spanish courts the opportunity to resolve the issues in dispute requires the Tribunal to rule that it is not competent to hear the instant case.

26. Claimant admits that the dispute was not referred to a Spanish court prior to its submission to the Centre. He contends, however, that an analysis of the here relevant provisions of Article X indicates that a dispute does not have to be referred to a domestic court before it is submitted to international arbitration as long as the dispute continues and the eighteen-

month period has expired. In Claimant's view this conclusion follows from the fact that Article X(3)(a) permits the reference of a case to international arbitration whether or not a domestic court decision has been rendered and regardless of its outcome.

27. Like all other provisions of the BIT and in the absence of other specified applicable rules of interpretation, Article X must be interpreted in the manner prescribed by Article 31 of the Vienna Convention on the Law of Treaties. It provides that a treaty is to 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." Applying this principle, it is to be noted that Article X(3)(a) does not say that a case may not be referred to arbitration if a domestic court has rendered a decision on the merits of the dispute within a period of eighteen months. It provides merely that if such a decision has been rendered and if the dispute continues, the case may be referred to arbitration.

28. The Tribunal notes, in this connection, that Article X(3)(a) does not require the exhaustion of domestic remedies as that concept is understood under international law.⁴ It speaks merely of a decision on the merits, which Respondent admits does not even have to be a final or non-appealable decision under Spanish law, and thus fails to require the exhaustion of all available domestic remedies.

29. But even if Article X(3)(a) were to be characterized as a provision requiring the exhaustion of domestic remedies, that requirement would not have the effect, contrary to Respondent's arguments, of preventing the subsequent reference of the case to international arbitration under the BIT. This is so because, where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding. They retain that remedy because the international tribunal rather than the domestic court has the final say on the meaning

⁴ C. Schreuer, "Commentary on the ICSID Convention. Article 25", *Foreign Investment Law Journal, ICSID Review*, Vol. 12, 1997, 59, at 201.

and scope of the international obligations—in this case the BIT—that are in dispute.⁵

30. Here it is to be noted that the requirements of the exhaustion of domestic remedies differs depending on whether the appeal to an international tribunal contends that the domestic tribunal was guilty of a denial of justice, or whether the claim seeks the vindication of rights guaranteed in a treaty, for example, which empowers the tribunal to interpret and apply the treaty. In the former case, the right to appeal to an international tribunal, if it exists at all, can only be based on a denial of justice by the domestic courts. In such a case, if there was no denial of justice, the case will have to be rejected, whether or not the domestic court committed errors of law or fact in rendering its judgement. This is not true in a case where, as here, the parties have a treaty right to obtain a final determination from the international tribunal on the scope of their rights under the treaty, provided they have first exhausted all available domestic remedies.

31. The foregoing analysis is relevant in determining the soundness of Respondent's interpretation of Article X(3)(a) and its contention that pursuant to this provision a dispute cannot be deemed to continue if the domestic court has rendered a decision on the merits which addressed all issues raised by the parties. Leaving aside for a moment the wording of paragraph 3(a), Respondent's argument is based on the assumption that a case may be referred to international arbitration under the BIT only if there was a denial of justice by the domestic court. This proposition, if accepted, would have the effect of denying the party to a dispute the right to challenge the domestic court's interpretation of the BIT. Respondent's interpretation can be reconciled neither with the language nor object and purpose of the dispute resolution provisions of BITs in general and the instant BIT in particular. This is so because these clauses are designed to give foreign investors the right to have their disputes under a BIT decided either exclusively or ultimately by international arbitration.⁶

⁵ See International Law Commission, Draft Articles on State Responsibility, Art. 22 and related Commentary, *1977 Yearbook of the International Law Commission*, Vol. II, Part 2, 1978, at 30 et seq. For the 1996 Draft and its referral to the 1977 Draft on this point, see *International Legal Materials*, Vol. 37, 1998, 444. See also C. F. Amerasinghe: *Local remedies in international law*, 1990, at 45-51.

⁶ Schreuer, loc. cit., supra note 4, at 199-202.

32. Moreover, the wording of paragraph 3(a) does not support Respondent's submission on this subject. It contains no guidelines for deciding whether or under what circumstances a dispute may be deemed to continue. In the Tribunal's view, the absence of such objective criteria leaves each party free to decide for itself whether the dispute continues, that is, whether its claim has been vindicated by the domestic court, and to refer the case to international arbitration if it is not satisfied with the domestic court judgment. Had the Contracting Parties to the BIT wished to establish a different procedure, they would have done so.

33. The Tribunal considers that Article X(3)(a) serves two important functions, which are not affected by the above interpretation. First, it permits either party to a dispute to seek redress from the appropriate domestic court. Second, it ensures that a party accessing the domestic court will not be prevented and will not be able to prevent the case from going to international arbitration after the expiration of the eighteen-month period. This is so whether or not the domestic court has rendered a decision and regardless of the decision it may have rendered.

34. Turning to the second part of Respondent's argument, it must now be asked whether a party to a dispute, which has not referred the case to a domestic court, as required by Article X(2), must be deemed to have waived or forfeited the right to submit the matter to international arbitration. Here it is to be noted that paragraph 2 provides that the dispute "shall be submitted" (*será sometida*) to the competent tribunals of the State Party where the investment was made, and that paragraph 3(a) then declares that the dispute "may be submitted" (*podrá ser sometida*) to an international arbitral tribunal at the request of a party to the dispute in the following circumstances: if the domestic court has not rendered a decision on the merits of the case within a period of eighteen months or if, notwithstanding the existence of such a decision, the dispute continues.

35. This language suggests that the Contracting Parties to the BIT—Argentina and Spain—wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration. Claimant contends, however, that this could not have been the intended meaning of Article X(2), if only because at the end of that period either party would still be free to take the case to international arbitration, regardless of the outcome of the domestic court proceedings.

36. Had this been the Claimant's sole argument on the issue, the Tribunal would have had to conclude that because the Claimant failed to submit the instant case to Spanish courts as required by Article X(2) of the BIT, the Centre lacked jurisdiction and the Tribunal lacked competence to hear the case. This is so because Claimant's submission on this point overlooks two important considerations. First, while it is true that the parties would be free to seek international arbitration after the expiration of the eighteen-month period, regardless of the outcome of the domestic court proceeding, they are likely to do so only if they were dissatisfied with the domestic court decision. Moreover, they would certainly not do so if they were convinced that the international tribunal would reach the same decision. In that sense the courts of the Contracting Parties are given an opportunity to vindicate the international obligations guaranteed in the BIT. Given the language of the treaty, this is a role which the Contracting Parties can be presumed to have wished to retain for their courts, albeit within a prescribed time limit. Second, Claimant's interpretation of Article X(2) would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of Treaties.

37. As noted above, had the Claimant's contention regarding Article X(2) stood alone, the Tribunal would have had to reject it. However, in view of the fact that Claimant argues in the alternative that he has the right to rely on the most favored nation clause contained in the BIT, dismissal of the application to the Tribunal without due consideration of this other argument would be premature. The Tribunal will accordingly now address the Claimant's alternative argument.

Most Favored Nation Clause

38. The argument based on the most favored nation clause raises a number of legal issues with which international tribunals are confronted from time to time. As is true of many treaties of this kind, Article IV of the BIT between Argentina and Spain, after guaranteeing a fair and equitable treatment for investors, provides the following in paragraph 2:

“In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.”

39. As noted above, the Argentine-Spain BIT provides domestic courts with the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration. However, Article 10(2) of the Chile-Spain Bilateral Investment Treaty, imposes no such condition. It provides merely that the investor can opt for arbitration after the six-month period allowed for negotiations has expired.

40. Claimant contends, consequently, that Chilean investors in Spain are treated more favorably than Argentine investors in Spain. He argues, accordingly, that the most favored nation clause in the Argentine-Spain BIT gives him the option to submit the dispute to arbitration without prior referral to domestic courts. Claimant submits, in this connection, that although the Argentine-Spain BIT provides for exceptions to the most favored nation treatment, none of these apply to the dispute settlement provisions at issue in the instant case.

41. The Kingdom of Spain rejects these contentions. In its view, the treaties made by Spain with third countries are in respect of Argentina *res inter alios acta* and, consequently, cannot be invoked by the Claimant. Respondent further argues that under the principle *ejusdem generis* the most favored nation clause can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty. In Spain's view, this means that the reference in the most favored nation clause of the Argentine-Spain BIT to "matters" can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions.

42. In this respect, Spain has also argued that since it is the purpose of the most favored nation clause to avoid discrimination, such discrimination can only take place in connection with material economic treatment and not with regard to procedural matters. Only if it could be established that resort to domestic tribunals would produce objective disadvantages for the investor would it be possible to argue material effects on the treatment owed. It follows, in the same line of argument, that it would have to be proved that the submission of the dispute to Spanish jurisdiction is less advantageous to the investor than its submission to ICSID arbitration.

43. The arguments outlined above are familiar to international lawyers and scholars. Indeed, many of the issues mentioned have been addressed in

the *Anglo-Iranian Oil Company Case (Jurisdiction)*,⁷ in the *Case concerning the rights of nationals of the United States of America in Morocco*⁸ and in the *Ambatielos Case (merits: obligation to arbitrate)*,⁹ as well as in the proceedings of the *Ambatielos case* before a Commission of Arbitration.¹⁰

44. In addressing these issues, it must first be determined which is the basic treaty that governs the rights of the beneficiary of the most favored nation clause. This question was extensively discussed in the *Anglo-Iranian Oil Company Case*, where the International Court of Justice determined that the basic treaty upon which the Claimant could rely was that “containing the most-favored-nation clause”.¹¹ The Court then held that:

“It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*”.¹²

45. This discussion has practical consequences for the application of the most favored nation clause. For if, as the Tribunal believes, the right approach is to consider that the subject matter to which the clause applies is indeed established by the basic treaty, it follows that if these matters are more favorably treated in a third-party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty.

⁷ International Court of Justice, *Reports*, 1952, p. 93. See also Sir Gerald Fitzmaurice: *The Law and Procedure of the International Court of Justice, 1951-1954: Points of Substantive Law. Part II*, p. 84.

⁸ International Court of Justice, *Reports*, 1952, p. 176.

⁹ International Court of Justice, *Reports*, 1953, p. 10. See also generally, *International Law Reports*, 1953, p. 547.

¹⁰ Award of the Commission of Arbitration established for the *Ambatielos* claim between Greece and the United Kingdom, dated March 6, 1956, United Nations: *Reports of International Arbitral Awards*, Vol. XII, 1963, p. 91.

¹¹ International Court of Justice, *Reports*, 1952, at 109.

¹² *Ibid.*, at 109. For a discussion of this and other decisions relating to the most favored nation clause, the writings of authors and the work of the International Law Commission on the subject, see *Yearbook of the International Law Commission*, Vol. II, 1970, p. 199; Vol. II, 1973, p. 97; Vol. II, Part One, 1978, p. 1; Vol. II, Part Two, 1978, p. 7.

If the third-party treaty refers to a matter not dealt with in the basic treaty, that matter is *res inter alios acta* in respect of the beneficiary of the clause.¹³

46. The second major issue concerns the question whether the provisions on dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies under basic treaties on commerce, navigation or investments and, hence, whether they can be regarded as a subject matter covered by the clause. This is the issue directly related to the *ejusdem generis* rule.

47. The question was indirectly but not conclusively touched upon in the *Case concerning the rights of nationals of the United States of America in Morocco*. Here, the International Court of Justice was confronted with the question of whether the clause contained in a treaty of commerce could be understood to cover consular jurisdiction as expressed in a third-party treaty. However, the Court did not need to answer the question posed because its main finding was that the treaties from which the United States purported to derive such jurisdictional rights had ceased to operate between Morocco and the third states involved.¹⁴

48. The issue came into sharp focus in the *Ambatielos case*. Greece contended before the International Court of Justice that her subject—Ambatielos—had not been treated in the English courts according to the standards applied to British subjects and foreigners who enjoyed a most favored nation treatment under treaties in force. Such most favored nation treatment was relied upon as the basis of the claim and the request that the dispute be submitted to arbitration. The Court did not deal with the matter of the most favored nation clause, but this task would be undertaken by the Commission of Arbitration.

49. The Commission of Arbitration, to which the dispute was eventually submitted, subsequently confirmed the relevance of the *ejusdem generis* rule. It affirmed that “the most-favored-nation clause can only attract

¹³ It was on this basis that the International Court of Justice ruled against the extension of principles of international law envisaged in treaties between Iran and third parties to the United Kingdom, as these principles were unrelated to the basic treaty containing the clause, Judgment *cit.*, *supra* note 11.

¹⁴ International Court of Justice, *Reports*, 1952, p. 191.

matters belonging to the same category of subject as that to which the clause itself relates”.¹⁵ However, the scope of the rule was defined in broad terms:

“It is true that the ‘administration of justice’, when viewed in isolation, is a subject-matter other than ‘commerce and navigation’, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favored-nation clause, when the latter includes ‘all matters relating to commerce and navigation’. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty”.¹⁶

50. The Commission accepted the extension of the clause to questions concerning the administration of justice and found it to be compatible with the *ejusdem generis* rule. It concluded that the protection of the rights of persons engaged in commerce and navigation by means of dispute settlement provisions embraces the overall treatment of traders covered by the clause. On the merits of the question, the Commission determined, however, that the third-party treaties relied upon by Greece did not provide for any “privileges, favours or immunities” more extensive than those resulting from the basic treaty and that “accordingly the most-favored-nation clause contained in Article X has no bearing on the present dispute...”.¹⁷

51. It is in the light of this background that the operation of the most favored nation clause in bilateral investment treaties must now be considered by this Tribunal. In the case *Asian Agricultural Products Limited v. Republic of Sri Lanka*,¹⁸ an ICSID Tribunal had the occasion to examine

¹⁵ United Nations, *Reports of International Arbitral Awards*, 1963, p. 107.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, at 109, 110.

the operation of the most favored nation treatment agreed to between Sri Lanka and the United Kingdom in light of the argument that a Sri Lanka-Switzerland treaty contained more favorable provisions on which the investor sought to rely. The provisions discussed, however, were not related to dispute settlement but only to the liability standards under the treaties in question. As in the *Ambatielos* decision rendered by the Commission of Arbitration, the ICSID Tribunal held that "...it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favourable than those provided for under the Sri Lanka/UK Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case".¹⁹

52. A number of bilateral investment treaties have provided expressly that the most favored nation treatment extends to the provisions on settlement of disputes. This is particularly the case of investment treaties concluded by the United Kingdom. Thus, Article 3(3) of the Agreement between the United Kingdom and Albania, stipulates: "For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement".²⁰ Among the enumerated provisions are the clauses on dispute settlement and the consent to submit to conciliation or arbitration under ICSID. Here it is beyond doubt that the parties intended the most favored nation clause to include dispute settlement in its scope, thereby meeting the test proposed by the *Ambatielos* Commission of Arbitration. Furthermore, the parties included this model clause in the Agreement with the express purpose of "the avoidance of doubt".

53. In other treaties the most favored nation clause speaks of "all rights contained in the present Agreement"²¹ or, as the basic Argentine-Spain BIT does, "all matters subject to this Agreement". These treaties do not provide expressly that dispute settlement as such is covered by the clause. Hence, like in the *Ambatielos* Commission of Arbitration it must be estab-

¹⁸ *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case NoARB/87/3, Award of June 27, 1990, *ICSID Reports*, Vol. 4, p. 246.

¹⁹ *Ibid.*, at 272.

²⁰ Agreement between the United Kingdom and Albania, March 30, 1994. Twelve other agreements made by the United Kingdom, which the Tribunal has examined, contain the same model clause.

²¹ Agreement between Chile and the Belgian-Luxembourg Economic Union, July 15, 1992, Article 3 (3).

lished whether the omission was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors.

54. Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad.²² It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.

55. International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. 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, while the host governments have traditionally felt that the protection of domestic courts is to be preferred. The drafting history of the ICSID Convention provides ample

²² See, for example, *Magno Santovincenzo v. James F. Egan*, United States Supreme Court, Decision of November 23, 1931, *U.S. Reports*, Vol. 284, p. 30, where it was held that "...the provisions of Article V of the Treaty were of special importance, as they provided for extraterritorial jurisdiction of the United States in relation to the adjudication of disputes. It would thwart the major purpose of the Treaty to exclude from the important protection of these provisions citizens of the United States who might be domiciled in Persia". For this and other domestic decisions concerning the most favored nation clause see International Law Commission, Decisions of national courts relating to the most-favoured-nation clause, Digest prepared by the Secretariat, Doc. A/CN.4/269, *Yearbook of the International Law Commission*, Vol. II, 1973, p. 117.

evidence of the conflicting views of those favoring arbitration and those supporting policies akin to different versions of the Calvo Clause.²³

56. From the above considerations it can be concluded 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 most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle. This operation of the most favored nation clause does, however, have some important limits arising from public policy considerations that will be discussed further below.

57. The negotiations leading to the Argentine-Spain BIT evidence similar policy conflicts between the capital exporting country and the host country, that is, Spain and Argentina respectively, except that in the present case the roles were later reversed, with Argentina becoming the capital exporter and Spain the host country. The Claimant has convincingly explained that at the time of the negotiations of the Agreement, Argentina still sought to require some form of prior exhaustion of local remedies, while Spain supported the policy of a direct right of submission to arbitration, which was reflected in the numerous agreements it negotiated with other countries at that time. The eventual role the treaty envisaged for domestic courts, involving the submission of the dispute to these courts for a period of time, not amounting to the traditional exhaustion of local remedies requirement as explained above, coupled with ICSID arbitration, was an obvious compromise reached by the parties. Argentina later abandoned its prior policy, and like Spain and Chile, accepted treaty clauses providing for the direct submission of disputes to arbitration following a period of negotiations.

58. The Tribunal has also examined in detail the practice followed by Spain in respect of bilateral investment treaties with other countries. These treaties indicate that Spain's preferred practice is to allow for arbitration,

²³ See generally ICSID: *Analysis of Documents Concerning the Origin and the Formulation of the Convention*, 1970.

following a six-months effort to reach a friendly settlement, which is what the Chile-Spain BIT provides. In most cases there is a choice of arbitration under ICSID, but other options are available as well. This is the situation, for example, with regard to the treaties concluded by Spain with Algeria,²⁴ Chile,²⁵ Colombia,²⁶ Cuba,²⁷ Czechoslovakia,²⁸ Dominican Republic,²⁹ Egypt,³⁰ El Salvador,³¹ Honduras,³² Hungary,³³ Indonesia (twelve-month direct settlement effort),³⁴ Kazajstan,³⁵ Republic of Korea,³⁶ Lithuania,³⁷ Malaysia,³⁸ Nicaragua,³⁹ Pakistan,⁴⁰ Peru,⁴¹ Philippines,⁴² Poland⁴³ and Tunisia.⁴⁴

59. Spain's treaty practice also shows that in a few cases a six-month or nine-month effort at a direct settlement is followed by arbitration between the Contracting Parties, but not involving the choice of the investor. This is, for example, the case of the treaties with Bolivia,⁴⁵ Morocco⁴⁶ and the USSR.⁴⁷ Only one other treaty, namely that with Uruguay,⁴⁸ follows the

²⁴ Agreement of December 23, 1994.

²⁵ Agreement of October 2, 1991.

²⁶ Agreement of July 9, 1995.

²⁷ Agreement of May 27, 1994.

²⁸ Agreement of December 12, 1990.

²⁹ Agreement of March 16, 1995.

³⁰ Agreement of November 3, 1992.

³¹ Agreement of February 14, 1995.

³² Agreement of March 18, 1994.

³³ Agreement of November 9, 1989.

³⁴ Agreement of May 30, 1995.

³⁵ Agreement of March 23, 1994.

³⁶ Agreement of January 17, 1994.

³⁷ Agreement of July 6, 1994.

³⁸ Agreement of April 4, 1995.

³⁹ Agreement of March 16, 1994.

⁴⁰ Agreement of September 15, 1994.

⁴¹ Agreement of November 17, 1994.

⁴² Agreement of October 19, 1993.

⁴³ Agreement of July 30, 1992.

⁴⁴ Agreement of May 28, 1991.

⁴⁵ Agreement of April 24, 1990.

⁴⁶ Agreement of January 15, 1992.

⁴⁷ Agreement of November 28, 1991.

⁴⁸ Agreement of April 7, 1992.

model of the Argentine-Spain BIT, probably because of the similarity of policies pursued by the two River Plate nations.

60. The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of “all matters subject to this Agreement” in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that “this treatment” shall be subject to the clause, which is of course a narrower formulation.

61. The Spanish treaty practice is also relevant in connection with another aspect of the clause. Most treaties concluded by Spain have a model clause to the effect that “...Each Party shall guarantee in its territory fair and equitable treatment for the investments made by investors of the other Party...This treatment shall not be less favourable than that extended by each Party to the investments made in its territory by its own investors...”.⁴⁹ While this clause applies to national treatment of foreign investors, it may also be understood to embrace the treatment required by a Government for its investors abroad, as evidenced by the treaties made to ensure their protection. Hence, if a Government seeks to obtain a dispute settlement method for its investors abroad, which is more favorable than that granted under the basic treaty to foreign investors in its territory, the clause may be construed so as to require a similar treatment of the latter.

62. Notwithstanding the fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements, there are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.

63. Here it is possible to envisage a number of situations not present in the instant case. First, if one contracting party has conditioned its consent

⁴⁹ See, for example, the Algeria-Spain Agreement of December 23, 1994, Article 4.

to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law.⁵⁰ Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible,⁵¹ this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.

64. In light of the above considerations, the Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favorable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts. In the

⁵⁰ *The Mavrommatis Palestine Concessions* (Greece v. U.K.), Permanent Court of International Justice, 1924, Series A. No. 2, 12; *Interhandel Case* (Switzerland v. United States of America), International Court of Justice, *Reports 1959*, 27.

⁵¹ See, for example, the Chile-Spain BIT of October 2, 1991, Article 10(2).

Tribunal's view, the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case in respect of this aspect of the challenge made by the Kingdom of Spain.

The Claimant's Standing

65. The Respondent has also challenged the jurisdiction of the Centre and the Tribunal's competence on a different ground, namely, that the Claimant lacks standing to file this request for arbitration because he is not an investor within the meaning of Article 25(1) of the ICSID Convention. Respondent points out that under Article 25(1), the Centre has jurisdiction only over disputes arising directly out of an investment "between a Contracting State and a national of another Contracting State." Although Claimant is an Argentine national, his claim against the Kingdom of Spain is based, in Respondent's view, on injuries allegedly suffered by EAMSA, a Spanish juridical entity established and largely owned by Claimant. As a Spanish company, EAMSA has a juridical personality separate and distinct from its shareholders. Respondent argues that as long as the company continues to exist *qua* company, a shareholder in Claimant's position has no standing to seek to lift the corporate veil and sue in his personal capacity for damages sustained by the company. According to this view, the Claimant would have only very limited grounds upon which to sue for eventual wrongdoings that might affect him personally, but in any event such acts could not be attributed to the Kingdom of Spain.

66. Claimant emphasizes that he is not bringing this case on behalf of EAMSA. He contends, instead, that he has filed this action in his personal capacity as a foreign (Argentine) investor in the Spanish company (EAMSA) to protect his investment in that company. In support of his arguments, Claimant points, *inter alia*, to Articles I(2) and II(2) of the BIT and argues that these provisions define "investments" broadly in the sense that they cover all types of property and rights to property, including investments made or acquired in the host country.

67. The Tribunal notes that Article 25 of the Convention must be read together with two provisions of the BIT, which are of particular relevance

in analyzing the above contentions of the parties. The first of these is Article I(2) of the BIT, which reads, in part, as follows:

“The term ‘investment’ means every kind of asset, such as goods and rights of whatever nature, acquired or made in accordance with the laws of the Contracting Party in whose territory the investment is made, and shall include, in particular though not exclusively, the following: shares in stock or any other form of participation in a company.”

The other provision is Article II(2), which stipulates:

“The present Agreement shall apply to capital investments in the territory of one Contracting Party, made in accordance with its legislation prior to the entry into force of the Agreement. However this Agreement shall not apply to disputes or claims originating before its entry into force.”

68. These provisions indicate that capital investments are covered by the BIT. They also provide that individuals having the nationality of one of the Contracting Parties, who invest in corporations or similar legal entities created in the territory of the other Contracting Party, are as a general proposition entitled to claim the protection of that treaty. These provisions complement and are consistent with the requirements of Article 25 of the Convention. Claimants’ assertions as to his standing to file this case are fully compatible with these stipulations.

69. The foregoing conclusion does not mean that Claimant has in fact proved that he has made out a valid claim for damages sustained by him in his personal capacity. He will have to do that in the proceedings on the merits in order to win his case. At this stage of the proceedings, however, it is enough for him to demonstrate that, if true, his allegations would give him standing to bring this case in his personal capacity.

70. In the Tribunal’s view, Claimant has sustained that burden. He is an Argentine investor in a Spanish company, who brings this action ostensibly to protect his investment in that company and for losses incurred by him due to injurious acts he attributes to Respondent. If proved, these facts would entitle Claimant to invoke the protection of the BIT in his personal capacity. (Convention, Art. 25; BIT, Arts. I(2) and II(2)). Accordingly,

Claimant can be said to have made out a *prima facie* case that he has standing to file this case.

SODIGA's Status in the Kingdom of Spain

71. The Tribunal now turns to the Respondent's contention that the instant dispute is not between the Kingdom of Spain and the Claimant, as alleged by the Claimant, but between the Claimant and the private corporation "Sociedad para el Desarrollo Industrial de Galicia" (SODIGA), with which the Claimant made various contractual dealings.

72. The issue here can be summarized as follows. The Claimant argues that the actions and omissions affecting his investment are attributable to an entity owned and operated by the Kingdom of Spain. SODIGA, the Claimant argues, is not only owned by several State entities, but it is also under the control of the State and operated as an arm of the State for the purposes of the economic development of the region of Galicia. Accordingly, as a State entity, its wrongful acts or omission may be attributed to the State.

73. The Respondent maintains, however, that SODIGA is a private commercial corporation established under the commercial laws of Spain and that, consequently, its activities are those of a private entity. Ownership of part of the shares of SODIGA by State entities, the Respondent argues, does not alter the private commercial character of the corporation nor does it transform SODIGA into a State agency. Its acts or omissions cannot, therefore, be attributed to the State.

74. Under the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State.⁵² Just as the Centre has no jurisdiction to arbitrate disputes between two States, it also lacks jurisdiction to arbitrate disputes between two private entities. Its main jurisdictional feature is to decide disputes between a private investor and a State.⁵³ However, neither the term "national of another Contracting State" nor the term "Contracting State" are defined in the Convention.

⁵² ICSID Convention, Article 25(1).

⁵³ Aron Broches: "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", *Columbia Journal of International Law*, Vol. 5, 1966, 263, at 265.

Some elements outlined in the Convention in respect of the standing of a constituent subdivision or agency of a Contracting State or the modalities of consent in their respect,⁵⁴ neither help in this case.⁵⁵ The Convention contains no criteria dealing with the attribution to the State of acts or omissions undertaken by such State entities, subdivisions or agencies. The Argentine-Spanish BIT does not assist either in this determination. While it speaks of actions of State authorities (“*autoridades de una Parte*”), it does not define the phrase.⁵⁶

75. Accordingly, the Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal, and second, whether the actions and omissions complained of by the Claimant are imputable to the State. While the first issue is one that can be decided at the jurisdictional stage of these proceedings, the second issue bears on the merits of the dispute and can be finally resolved only at that stage.

76. Since neither the Convention nor the Argentine-Spanish BIT establish guiding principles for deciding the here relevant issues, the Tribunal may look to the applicable rules of international law in deciding whether a particular entity is a state body. These standards have evolved and been applied in the context of the law of State responsibility. Here, the test that has been developed looks to various factors, such as ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken.⁵⁷

77. The question whether or not SODIGA is a State entity must be examined first from a formal or structural point of view. Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly. A similar

⁵⁴ ICSID Convention, Article 25(1) and 25(3). See C. Schreuer: “Commentary on the ICSID Convention. Article 25”, *Foreign Investment Law Journal—ICSID Review*, Vol. 11, 1996, 318, at 380-391; Schreuer, loc. cit., supra note 4, at 140-150.

⁵⁵ SODIGA is not a party to this case and no designation has been made or consent has been given by Spain to this effect.

⁵⁶ Argentine-Spain BIT, Article V.

⁵⁷ Ian Brownlie: *System of the Law of Nations. State Responsibility. Part I*, 1983, 132 et seq.

presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.

78. The relevance of these standards is clearer when there is a direct State operation and control, such as by a section or division of a Ministry, but less so when the State chooses to act through a private sector mechanism, such as a corporation (*sociedad anonima*) or some other corporate structure. In any event, a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil.⁵⁸ Paragraph 2 of Article 7 of the International Law Commission's *Draft Articles on State Responsibility*, supports this position:

“2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall be considered as an act of the State under international law, provided the organ was acting in such capacity in the case in question.”⁵⁹

79. Because of the many forms that State enterprises may take and thus shape the manners of State action, the structural test by itself may not always be a conclusive determination whether an entity is an organ of the State or whether its acts may be attributed to the State. An additional test has been developed, a functional test, which looks to the functions of or role to be performed by the entity.⁶⁰ Although, as noted above, neither the ICSID Convention nor the Argentine-Spain BIT define a Contracting State, the drafting history of the Convention does cover an analogous situation: whether mixed economy companies or government-owned corporations may be considered under the definition of a “national of a Contracting State”. While recognizing, of course, that definitions of different terms are not usually interchangeable and that, in this case, a “Contracting State” is different from a “national of a Contracting State”,

⁵⁸ See generally Brownlie, *op. cit.*, supra note 57, at 135-137.

⁵⁹ International Law Commission: “Draft Articles on State Responsibility”, 1996, *International Legal Materials*, Vol. 37, 1998, 444.

⁶⁰ Brownlie, *op. cit.*, supra note 57, at 136.

there are sufficient similarities which would allow us to utilize jurisprudence developed for one definition in the context of the other. Thus, a determination as to the character of state-owned enterprises in the context of whether it is a “national of a Contracting State”, may also be relevant in determining whether a state enterprise may be subsumed within the definition of the term “Contracting Party”. In this connection, it is relevant to note, as explained by a leading authority on the Convention, that it would seem that “a mixed economy company or government-owned corporation should not be disqualified as a ‘national of another Contracting State’ unless it is acting as an agent for the government or is discharging an essentially governmental function”.⁶¹

80. This functional test has been applied, in respect of the definition of a national of a Contracting State, in the recent decision of an ICSID Tribunal on objections to jurisdiction in the case of *Ceskoslovenska Obchodni Banka, A. S. v. the Slovak Republic*.⁶² Here it was held that the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were “essentially commercial rather than governmental in nature”.⁶³ By the same token, a private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under the functional test, be considered as an organ of the State and thus engage the State’s international responsibility for wrongful acts.

81. It is difficult to determine, *a priori*, whether these various tests and standards need necessarily be cumulative. It is likely that there are circumstances when they need not be. Of course, when all or most of the tests result in a finding of State action, the result, while still merely a presumption, comes closer to being conclusive.

⁶¹ Aron Broches: “The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States”, *Recueil des Cours de l’Academie de Droit International*, 1972, at 355.

⁶² *Ceskoslovenska Obchodni Banka, A. S. v. the Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999, *ICSID Review—Foreign Investment Law Journal*, Vol. 14, 1999, at 250.

⁶³ *Ibid.*, par. 20.

82. The Tribunal is also of the view that a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental, while it is to be given considerable weight, is not necessarily binding on an international arbitral tribunal. Whether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law.⁶⁴

83. In the light of these considerations, the Tribunal notes, first, that SODIGA was created by a decree issued by the Ministry of Industry (*Ministerio de Industria*) which authorized the National Institute for Industry (*Instituto Nacional de Industria*), a national State agency, to establish SODIGA. The characterization of the Ministry and the Institute as State entities is not disputed in this case. Furthermore, in spite of the fact that the government chose to create SODIGA in the form of a private commercial corporation, it did so by providing that the Instituto Nacional de Industria would own no less than 51% of the capital. In fact, as of December 31, 1990, the percentage of governmentally owned capital of SODIGA had increased to over 88%, including the stock holdings of the Xunta de Galicia, also a state entity in charge of the executive power in the Autonomous Community of Galicia,⁶⁵ several savings and loans associations (*cajas de ahorros*), other regional development agencies and the Banco Exterior de España.

84. However, the intent of the State to create still another a corporate entity, particularly one which is intended to operate in the private sector, even if State owned, is not sufficient to raise the presumption of an entity being an organ of the State. More is required in terms of the functional test discussed above.

85. In this instance, however, it is clear from the background leading to the establishment of SODIGA that the intent of the Government of Spain was to create an entity to carry out governmental functions. In fact, the proposal to create SODIGA originated in the *Ministerio de Industria*; its

⁶⁴ Brownlie, op. cit., supra note 57, at 136. See also International Law Commission, Draft Articles cit., supra note 59, Article 4.

⁶⁵ The Xunta is defined as the collegiate body of the Government of Galicia. See <http://galicia97.vieiros.com>

creation was vetted and approved by the Ministry of Finance (*Ministerio de Hacienda*); and its creation was discussed and approved at a meeting of the Council of Ministers (*Consejo de Ministros*), one of the highest policy organs of the Government of Spain.⁶⁶ The participation of these government bodies in the creation of SODIGA points to the fact that it was established to carry out governmental functions in the field of regional development.

86. This intention is evidenced, for example, in the preamble to the decree. It declares that one of the purposes for SODIGA's creation is the promotion of regional industrial development of the Autonomous Region of Galicia. (“ . . . [S]e considera urgente la constitucion de una Sociedad que, con la finalidad especifica de impulsar el desarrollo industrial de Galicia, . . .”). Furthermore, it can be seen that it was the intent of the Government of Spain to utilize SODIGA as an instrument of State action. Among its functions was the undertaking of studies for the introduction of new industries into Galicia, seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance. Moreover, either through the *Instituto Nacional de Industria* or directly, SODIGA was charged with providing subsidies and offering other inducements for the development of industries. Many of these objectives and functions are by their very nature typically governmental tasks, not usually carried out by private entities, and, therefore, cannot normally be considered to have a commercial nature.

87. While it is possible that the Spanish State could have out-sourced such development activities to a private, non-governmental, corporate entity, this was not the case here. But, as explained above, even if it had been the case, under the functional test this would not have necessarily delinked the Spanish State from the entity as its functions would have been delegated by the State and they could still be government functions in the light of international law.

88. Many countries besides Spain have created regional development agencies. These agencies have been created around the world and operate as governmental entities, whether in the form of direct State agencies, terri-

⁶⁶ Decreto 2182/1972, *Boletín Oficial del Estado*, No. 197, August 17, 1972, p. 1536.

torial or regional agencies or, as in the case of SODIGA, as corporations. It is relevant to note, in this connection, that the World Bank has established an office, the Foreign Investment Advisory Service (FIAS), one of whose functions is to provide technical assistance and consulting services to governments to assist with the creation and operation of industrial and other development organizations.

89. In view of the fact that SODIGA meets both the structural test of State creation and capital ownership and the functional test of performing activities of a public nature, the Tribunal concludes that the Claimant has made out a *prima facie* case that SODIGA is a State entity acting on behalf of the Kingdom of Spain. Whether SODIGA is responsible for the specific acts and omissions complained of, whether they are wrongful, whether all these acts or omissions always were governmental rather than commercial in character, and, hence, whether they can be attributed to the Spanish State, are questions to be decided during the proceedings on the merits of the case.

Time of the Dispute

90. A last challenge of the Respondent to the jurisdiction of the Centre and the competence of the Tribunal rests on the argument that the alleged dispute originates in its view before the entry into force of the BIT between Argentina and Spain. This argument is in turn connected with the issue of the existence of a dispute and whether it qualifies as a legal dispute, but these other aspects belong also to the merits of the claim.

91. Article II(2) of the Argentine-Spain BIT provides in part: “However, this agreement shall not apply to disputes or claims originating before its entry into force.”

92. The Argentine-Spain BIT entered into force on September 28, 1992, and because of the Claimant’s argument about the relevance of the most-favored-nation clause in respect of the Chile-Spain BIT, the Kingdom of Spain also argues that the latter treaty only entered into force on March 29, 1994. Accordingly, Spain submits that for the Centre to have jurisdiction the dispute should originate after this last date or, in any event, after the date of entry into force of the Argentine-Spain BIT. Considering that the Claimant relies on facts and events that took place as early as 1989 and

throughout 1990, 1991, and the first part of 1992, Spain contends that the BIT does not apply to the dispute.

93. The Claimant rejects this view on the ground that a “dispute” arises when it is formally presented as such, and this happened only after both the Argentine-Spain and the Chile-Spain BIT had entered into force. He contends, moreover, that before the dispute can be deemed to have arisen, there may have been disagreements and differences of opinion between the parties, but these events do not amount to a dispute as this concept is understood in international and domestic law.

94. These differing views of the parties as to the meaning of a dispute and when it becomes identified or recognized as such, are quite common in ICSID and other arbitral or judicial proceedings.⁶⁷ The International Court of Justice has defined a dispute on various occasions by declaring that it is “a disagreement on a point of law or fact, a conflict of legal views or interests between parties.”⁶⁸ It has been rightly commented in this respect that the “dispute must relate to clearly identified issues between the parties and must not be merely academic...The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim”.⁶⁹

95. In the present case it is quite clear, as the Kingdom of Spain has argued, that the events on which the parties disagreed began as early as 1989. Issues such as budget estimates, requirements of environmental impact assessment, disinvestment, and other, were indeed discussed during the period 1989-1992. But this does not mean that a legal dispute as defined by the International Court of Justice can be said to have existed at the time.

96. The Tribunal notes in this respect that there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these

⁶⁷ *AGIP v. Congo*, ICSID Case ARB/77/1, Award of November 30, 1979, *ICSID Reports*, Vol. 1, 306.

⁶⁸ International Court of Justice: *Case concerning East Timor*, *ICJ Reports 1995*, 90, para. 22, with reference to earlier decisions of both the Permanent Court of International Justice and the International Court of Justice.

⁶⁹ C. Schreuer, *loc. cit.*, (1996), *supra* note 54, at 337.

events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.⁷⁰ This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.

97. It should also be noted that the Kingdom of Spain has correctly argued that there is a difference between a dispute and a claim in terms of Article II(2) of the Argentine-Spain BIT. While a dispute may have emerged, it does not necessarily have to coincide with the presentation of a formal claim. The critical date will in fact separate, not the dispute from the claim, but the dispute from prior events that do not entail a conflict of legal views and interests. It follows that if the dispute arises after the critical date it will qualify for its transformation into a claim, while if the dispute has arisen before such date it will be excluded by the terms of the BIT.

98. The Tribunal is satisfied that in this case the dispute in its technical and legal sense began to take shape in 1994, particularly in the context of the disinvestment proposals discussed between the parties. At that point, the conflict of legal views and interests came to be clearly established, leading not long thereafter to the presentation of various claims that eventually came to this Tribunal. That is to say, this dispute came into being after both the Argentine-Spain and the Chile-Spain BITs had entered into force, although the critical date here is the date of entry into force of the former, since this is the basic treaty relevant in this case. It is on this basis that the Tribunal comes to the conclusion that the Centre has jurisdiction and that the Tribunal is competent to consider the dispute between the parties in accordance with the provisions of Article II(2) of the Argentine-Spain BIT.

⁷⁰ Ibid., at 337, with particular reference to *AALP v. Sri Lanka*, ICSID Case NoARB/87/3, Award of June 27, 1990, *ICSID Reports*, Vol. 4, 251.

C. Decision

99. For the foregoing reasons, the Tribunal unanimously decides that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has, accordingly, made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

[signature]

Francisco Orrego Vicuña
President of the Tribunal

[signature]

Thomas Buergenthal
Arbitrator

[signature]

Maurice Wolf
Arbitrator