IN THE MATTER OF AN UNCITRAL ARBITRATION

between

NATIONAL GRID PLC
(Claimant)

and

THE ARGENTINE REPUBLIC
(Respondent)

_____

DECISION ON JURISDICTION

_____

Members of the Tribunal
Dr. Andrés Rigo Sureda, President
E. Whitney Debevoise, Esq., Arbitrator
Professor Alejandro Garro, Arbitrator

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

Representing the Claimant
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Mr. Lluís Paradell
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Paris, France

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Buenos Aires, Argentina

Representing the Respondent
Dr. Osvaldo Cesár Guglielmino
Procurador del Tesoro de la Nación
Argentina

Washington, D.C., June 20, 2006

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National Grid plc v. Argentine Republic

Decision on Jurisdiction

I. PROCEDURAL HISTORY

1. By notice dated April 25, 2003, National Grid Transco plc[1] (hereinafter "National Grid" or the "Claimant") requested the institution of an arbitration proceeding against the Argentine Republic (hereinafter "Argentina" or the "Respondent") under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter the "UNCITRAL Rules") pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments, which was signed on December 11, 1990, and entered into force on February 19, 1993 (the "Treaty").

2. The Claimant and the Respondent appointed as arbitrators Mr. Eli Whitney Debevoise and Professor Alejandro Garro, respectively. In accordance with Article 7(1) of the UNCITRAL Rules, the party-appointed arbitrators selected Mr. Andrés Rigo Sureda as the third arbitrator and president of the Tribunal.

3. On March 29, 2004, the Arbitral Tribunal issued its Procedural Order No. 1 recording that it had been constituted in accordance with the UNCITRAL Rules and proposing a date for a preparatory meeting with the parties.

4. Messrs. Nigel Blackaby, Lluís Paradell and Uriel O'Farrell, and Ms. Andrea Saldarriaga represent the Claimant. Dr. Osvaldo César Guglielmino, Procurador del Tesoro de la Nación Argentina, represents the Respondent. Dr. Juan José Galeano and Professor Beatriz Pallarés, acting on instruction from the Procurador del Tesoro de la Nación Argentina, represented the Respondent at

[1] By its letter of August 19, 2005, the Claimant informed the Tribunal of its change of name from National Grid Transco plc to National Grid plc.

the preparatory meeting.

5. During the preparatory meeting of June 25, 2004, in Washington, D.C., U.S.A., the parties confirmed that the Tribunal had been properly constituted in accordance with the UNCITRAL Rules without raising any objections to the appointment of any member of the Tribunal.

6. The parties also agreed on several other procedural matters which were later recorded in the written minutes signed by the President of the Tribunal. In the course of the meeting, Washington, D.C. was agreed as the seat of the arbitration. It was also agreed that the parties would request the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") to provide administrative services for the arbitration proceedings.

7. By letters of June 28 and July 1, 2004, the parties requested such services of the ICSID Secretariat. By letter of July 9, 2004, the Acting Secretary-General of ICSID informed the parties and the members of the Tribunal that the Centre would provide administrative services for the arbitration proceedings, as requested. On August 11, 2004, Mr. Francisco Ceballos, ICSID Counsel, was appointed as Secretary of the Tribunal.

8. On July 12, 2004, the Tribunal issued its Procedural Order No. 2 concerning the presentation of the parties' pleadings. The Tribunal requested the Claimant to file the statement of claim within four months of its receipt of Procedural Order No. 2. In the event that no jurisdictional plea was entered, the Respondent was directed to file its statement of defense within four months from its receipt of the statement of claim; the Claimant, its reply two months from its receipt of the statement of defense; and the Respondent, its rejoinder two months from its receipt of the reply. In the event that the Respondent entered a plea on jurisdiction, it should do so within two months from its receipt of the statement of claim; the Claimant would then have two months to present its counter-memorial on jurisdiction; and the Tribunal would decide on the need for a

further exchange of submissions or hearings concerning its jurisdiction. The Tribunal further decided that in case it upheld its jurisdiction, the Respondent should file a statement of defense within four months of its receipt of the decision of the Tribunal less the time elapsed between the date of submission of the statement of claim and the date of submission of the plea on jurisdiction.

9. On November 16, 2004, the Claimant filed its Statement of Claim in English, and on December 1, 2004, filed the respective Spanish translation.

10. On December 14, 2004, the Tribunal informed the parties that in accordance with its Procedural Order No. 2, in the event that a plea on jurisdiction was entered by the Respondent, such plea was to be filed no later than February 10, 2005. In the event no plea was raised, the Respondent was to file its statement of defense no later than April 11, 2005.

11. On December 15, 2004, the Respondent challenged the President of the Tribunal.

12. On December 23, 2004, the Claimant expressed its opposition to the challenge and reserved its right to present further arguments.

13. On January 7, 2005, the Tribunal issued Procedural Order No. 3 establishing a schedule for submissions by the parties and the President in observance of the challenge procedures of the UNCITRAL Rules. The Tribunal also reaffirmed the deadlines established in Procedural Order No. 2. In accordance with the agreement of the parties, reflected in the minutes of the preparatory meeting of June 25, 2004, that a majority of the members of the Tribunal will constitute the quorum necessary to make decisions, Procedural Order No. 3 was subscribed by the two arbitrators not subject to the Respondent's challenge.

14. Following exchanges of submissions by the parties on the Respondent's challenge, on February 28, 2005, the President confirmed his intention not to resign.

15. On March 11, 2005, the Tribunal issued Procedural Order No. 4 granting the parties a term of 10 days to agree on an appointing authority for purposes of the procedure provided for in Article 12(1)(c) of the UNCITRAL Rules. Absent agreement, Procedural Order No. 4 authorized either Party to proceed, pursuant to Article 6 of the UNCITRAL Rules, to request the Secretary-General of the Permanent Court of Arbitration in The Hague ("PCA Secretary-General") to designate the appointing authority. The Tribunal also reserved for the award the fixing of fees and expenses of the appointing authority and of the PCA Secretary-General, as provided for in Article 38(f) of the UNCITRAL Rules.

16. In early September 2005, the Respondent completed the formalities necessary to request the PCA Secretary-General to designate the appointing authority.

17. On September 8, 2005, the PCA Secretary-General designated the International Court of Arbitration of the International Chamber of Commerce in Paris as appointing authority.

18. Following submissions by the Parties, on December 16, 2005, the International Court of Arbitration rejected the Respondent's challenge of the President of the Tribunal.

19. On February 10, 2005, the Respondent filed its plea on jurisdiction in Spanish. The English translation followed on February 25, 2005.

20. On March 11, 2005, the Tribunal issued its Procedural Order No. 4 confirming the deadlines established in its Procedural Order No. 2, as ratified in its Procedural Order No. 3.

21. On March 18, 2005, Mr. Francisco Ceballos was replaced by Mrs. Claudia Frutos-Peterson as Secretary of the Tribunal. In turn, on May 10, 2005, Mrs. Frutos-Peterson was replaced by Mr. José Antonio Rivas as Secretary of the Tribunal.

22. On April 29, 2005, the Claimant filed its response to the plea on jurisdiction. The Spanish translation followed on May 10, 2005.

23. On May 3, 2005, the Claimant sent the Tribunal a letter proposing that the jurisdictional debate proceed to oral hearing without need for further written submissions.

24. On May 27, 2005, the Tribunal issued its Procedural Order No. 5 deciding that no further exchange of pleadings on jurisdiction was required. The Tribunal further decided to hold a jurisdictional hearing on a date to be established in consultation with the parties.

25. On June 17, 2005, the Tribunal issued its Procedural Order No. 6 related to the Respondent's disqualification request.

26. On August 5, 2005, after consultations with the parties on their availability, the Tribunal confirmed that the hearing on jurisdiction would take place on November 7, 2005.

27. On August 10, 2005, the Tribunal issued its Procedural Order No. 7 related to the Respondent's disqualification request and confirming the deadlines set forth in its Procedural Order No. 2, as ratified in its Procedural Order No. 3.

28. On August 30 and September 27, 2005, the Tribunal issued Procedural Order No. 8 and Procedural Order No. 9, respectively, related to the Respondent's disqualification request and ratifying that the hearing on jurisdiction would take place on November 7, 2005.

29. The hearing on jurisdiction took place on November 7, 2005 in Washington, D.C. The Claimant was represented at the hearing by Messrs. Nigel Blackaby, Lluís Paradell and Uriel O'Farrell, and Ms. Andrea Saldarriaga. Messrs. Blackaby, Paradell and O'Farrell addressed the Tribunal on behalf of the Claimant. The Respondent was represented by Messrs. Martín Moncayo von Hase, Ariel Martins Mogo and Florencio Travieso from the Procuración del

Tesoro de la Nación Argentina, who addressed the Tribunal on behalf of the Respondent.

30. By letter of November 9, 2005, the Tribunal reaffirmed the invitation made to the Respondent during the course of the hearing on jurisdiction to furnish information to the Tribunal on the status of the renegotiations of certain foreign investment contracts in Argentina. By letter of November 24, 2005, the Respondent informed the Tribunal. By letter of December 15, 2005, the Claimant provided its comments on the information furnished by the Respondent.

31. On December 23, 2005, the Acting Director of ICSID informed the Tribunal that Mrs. Mercedes Kurowski had been appointed to replace Mr. José Antonio Rivas as Secretary of the Tribunal.

II. FACTS

A. The Investment Project

32. The dispute arises in the context of the privatization program carried out by the Respondent in the early 1990s, the guarantees offered to investors who bought assets in the electricity sector, and the measures taken by the Respondent to stem the Argentine economic crisis in 2001-2002.

33. Before privatization, the electricity assets of the Respondent were operated by *Agua y Energía Sociedad del Estado* ("A y E"), *Servicios Eléctricos del Gran Buenos Aires S.A.* ("SEGBA") and *Hidroeléctrica Nordpatagónica S.A*. ("Hidronor").

34. These three companies were restructured for purposes of privatization pursuant to Decree 634/91 of April 12, 1991,[2] and Law 24,065 of January 16, 1992[3] (the "Electricity Law"). According to this legal framework, the electricity generation, transmission and distribution assets belonging to those

[2] Claimant's Exhibit 11. Claimant's exhibits are referred to hereafter with the letter "C" followed by the exhibit number.

[3] Exhibit C-13.

three state companies were divided into individual business units. Thus, the electricity transmission assets held by A y E, SEGBA and Hidronor were transferred to one national high-voltage electricity transmission company – *Compañía de Transporte de Energía Eléctrica en Alta Tensión S.A.* ("Transener") – and six regional companies.

35. In December 1992, the Respondent offered, through an international bidding process, 65% of Transener's shares, in accordance with the terms and conditions set forth in the bidding rules.[4] In parallel, the Respondent approved the terms of a 95-year concession agreement granting Transener the right to provide high-voltage electricity transmission service in Argentina (the "Concession").[5]

36. In turn, the Argentine provinces privatized the electricity assets under their jurisdiction. Thus, in 1997, the Province of Buenos Aires (the "Province") launched an international public tender for the sale of 90% of the shares in *Empresa de Transporte de Energía Eléctrica por Distribución Troncal de la Provincia de Buenos Aires S.A.* ("Transba"), pursuant to the terms and conditions approved by Decree 107/97 of January 10, 1997 of the Province ("Transba Bidding Rules").[6] In July 1997, the Province approved the terms of a 95-year concession granting Transba the right to provide high-voltage electricity transmission service within the Province (the "Transba Concession").[7]

37. In 1993, National Grid Finance B.V., a wholly owned subsidiary of National Grid, together with two US companies – Duke Transener Inc. ("Duke") and Entergy Corp ("Entergy") – and two Argentine companies – *SADE Ingeniería y Construcciones S.A.* ("SADE"), a wholly-owned subsidiary of Perez Companc ("Perez Companc"), and *Eléctrica del Plata S.A.*, a subsidiary of *Sociedad*

[4] *See* "Pliego de Bases y Condiciones de Concurso Público Internacional para la Venta de 65% de las Acciones de la Compañía de Transporte de Energía Eléctrica en Alta Tensión Transener S.A." ("Transener Bidding Rules"), Exhibit C-20.

[5] Exhibit C-26.

[6] Exhibit C-40.

[7] Exhibit C-50.

Comercial del Plata S.A. ("SCP") – formed a consortium to participate in the international tender of shares in Transener (the "Consortium").[8] The Consortium incorporated an Argentine company – *Compañía Inversora en Transmisión Eléctrica Citelec S.A.* ("Citelec") – as a vehicle for its investment in Transener.[9] National Grid initially acquired a 15% share of Citelec for US$18.5 million.

38. Citelec successfully bid for the 65% stake in Transener for US$234.1 million, the assumption of US$54.2 million of debts transferred to Transener and a mandatory investment commitment of US$37 million. On June 30, 1993, Transener signed the Concession Contract with the Government of the Argentine Republic (the "Concession Contract").[10] Transener took over operation of the high voltage electricity system on July 17, 1993. Subsequently, National Grid purchased an additional 26.25% stake in Citelec for US$48.8 million, approved Transener's acquisition of a 90% stake in Transba for US$220.2 million and the assumption of a debt of US$10 million owed to the Government of the Province. Transener subsequently made investments in the upgrading of the electricity transmission system and in expansion projects. In 1997, 1999 and 2001, Transener was awarded three contracts to construct, operate and maintain transmission lines in return for periodic payments from the beneficiaries of the lines. These payments, or *cánones*, were to be calculated in US dollars and adjusted periodically in accordance with the US Consumer Price Index ("CPI") and the US Producer Price Index ("PPI").

39. In December 1999, National Grid acquired a further 1.243% interest in Citelec by way of a capitalization of contributions made by National Grid in October 1999 for an amount of US$32 million.

[8] Exhibit C-22.

[9] Exhibit C-24.

[10] The Concession Contract and the contract related to the Transba Concession are collectively referred to as the "Contracts". Transener and Transba are referred to collectively as the "Concessionaires." See Exhibit C-26 for the Concession Contract and Exhibit C-50 for the Transba Concession.

B. The Facts Giving Rise to the Dispute

40. On January 6, 2002, Law 25,561 – the Public Emergency and Exchange Rate Reform Law – (the "Reform Law")[11] abolished the currency board set up by the Convertibility Law in 1991.[12] Law 25,561 also terminated by operation of law the right to calculate public utility tariffs in US dollars and the right to adjust those tariffs on the basis of international price indices. Under the terms of Law 25,561, public service tariffs were converted into Argentine pesos ("pesos") at the rate of one peso to one dollar and were frozen at that rate (the so-called "pesification"). All other dollar-denominated payment obligations and their adjustment by international indices suffered the same fate. As of April 2003, the Argentine peso had fallen to 2.90 pesos to one US dollar.

41. The Reform Law forbade electricity transmission and public utility companies from suspending or modifying compliance with their obligations under their concessions and licenses. It also provided for the renegotiation of public utility contracts. At the time of filing the Statement of Claim, National Grid affirmed that the renegotiation process had achieved nothing. Respondent disputes such affirmation and objects to the jurisdiction of the Tribunal on the basis, *inter alia*, that there is an ongoing negotiation process touching upon the subject matter of this dispute.[13]

42. The Claimant alleges that the impact of the Reform Law and subsequent adverse regulations adopted by the Respondent (the "Measures") destroyed the value of its investment in Transener, and estimates that its losses range from US$100 million to US$130 million.[14]

43. In March 2004, National Grid agreed to sell its shares in Citelec to *Dolphin Management S.A.* ("Dolphin") for US$14 million. The Claimant alleges that this sale was undertaken to mitigate its losses and was made expressly

[11] Exhibit C-69.

[12] Law 23,928 of March 27, 1991, Exhibit C-10.

[13] Respondent's Plea on Jurisdiction, paras. 174-182; Respondent's Exhibit 6.

[14] Statement of Claim, paras. 23-24, Exhibit C-67.

without prejudice to its rights in this arbitration.[15]

C. Notification of the Dispute and Claim

44. Following adoption of the Measures, on April 10, 2002, the Claimant notified the Respondent of the existence of an investment dispute and sought the commencement of negotiations and consultations for its amicable settlement as provided in Article 8 of the Treaty.[16] The notification expressly invoked Article 3, the most-favored nation article of the Treaty, and claimed the benefit of Article 7(2) of the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (the "US-Argentina Treaty"),[17] which provides for international arbitration after a six-month period of negotiations without prior referral to the Argentine courts.

45. On August 28, 2002, the Claimant sent a follow-up letter to the Respondent reiterating the request for amicable settlement.[18]

46. On September 27, 2002, the Procurador del Tesoro de la Nación, Rubén Miguel Citara, responded and proposed to suspend by mutual agreement the negotiations period until such date as the process of renegotiation of public service contracts had taken place. The Claimant replied on October 17, 2002, distinguishing between the renegotiation of the concessions involving Transener and Transba and negotiations with the Claimant concerning its Treaty claims.[19] The Claimant declined the proposal to suspend or extend the time period for amicable negotiations, although it did express a willingness to meet with the authorities to conduct negotiations.

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[15] Statement of Claim, para. 24.

[16] Exhibit C-77.

[17] Treaty Between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, dated November 14, 1991, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf.

[18] Exhibit C-87.

[19] Exhibit C-94.

47. On February 20, 2003, the Claimant wrote to the Respondent again expressing a willingness to meet to explore ways to resolve the dispute, notwithstanding the expiration of the six-month negotiations period.[20]

48. On April 25, 2003, the Claimant submitted its Notice of Arbitration.

III. CONSENT TO ARBITRATION

49. Except as addressed below, the parties to the dispute have consented to arbitration and their consent is not in doubt or dispute. The Respondent consented to arbitration by offering under the terms of the Treaty the option to settle eventual disputes that may arise with investors who are nationals of the other State party. Claimant consented to arbitration by filing its Notice of Arbitration. Under Article 3.2 of the UNCITRAL Rules, the arbitration proceedings commenced on the date that the Notice of Arbitration was received by the Respondent.[21]

IV. APPLICABLE LAW

50. The applicable law for purposes of determining the jurisdiction of the Tribunal has not been a matter of contention between the parties, and it has only been indirectly addressed by them in their submissions.[22]

51. The jurisdiction of the Tribunal is governed by the terms of the instruments expressing the parties' intent to submit to arbitration the dispute identified in the Notice of Arbitration. Article 21.1 of the UNCITRAL Rules empowers the Tribunal to rule on objections that it has no jurisdiction. It follows that the primary task of the Tribunal is to assess whether the dispute submitted in

[20] Exhibit C-109.

[21] There is no requirement under the UNCITRAL Rules that consent must be given in the same instrument by both parties to the proceedings. In the case of arbitration under the terms of a bilateral investment treaty, arbitral tribunals have consistently held that consent to arbitration has been given by the State party through the treaty concerned and by the investor through the instrument initiating the arbitration proceedings. See *American Manufacturing & Trading, Inc. v. Republic of Zaire (Award)*, 36 *ILM.(*1997) p. 1531 at para. 5.23, and *Lanco International Inc. v. Argentine Republic* (Preliminary Decision on Jurisdiction), 40 *ILM* (2001) p. 454 at paras. 42-44.

[22] *See, e.g.*, Respondent's Memorial on Jurisdiction at para. 62.

the Notice of Arbitration falls within the terms of Article 8 of the Treaty and whether the Tribunal has the authority to decide on the objections raised by the Respondent. To the extent that this assessment requires the interpretation of the Treaty, the Tribunal shall apply the treaty interpretation rules enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('the Vienna Convention"),[23] which reflect customary international law. Furthermore, the Tribunal observes that the Vienna Convention is binding on both State parties to the Treaty.[24]

V. OBJECTIONS TO JURISDICTION

52. The Respondent has raised six objections to the jurisdiction of the Tribunal. The Tribunal will now address them in the order that they have been raised.

1. First Objection: The Most-Favored Nation ("MFN") Clause Does Not Apply to Provide the Investor with a More Favorable Dispute Resolution Mechanism

53. The Claimant has submitted its claim to arbitration without first submitting it to the Argentine courts as required by Article 8(1) and Article 8(2)(a) of the Treaty. Article 8(2)(a) permits a claimant to institute arbitration proceedings only if the Respondent's courts have not given a final decision within eighteen months after the dispute was submitted to them. The Claimant has considered it unnecessary to file a claim before Argentine courts on the basis that the dispute resolution clause in the US-Argentina Treaty[25] does not require such step. According to the Claimant, under Article 3(2) of the Treaty an investor who is a national of the United Kingdom is entitled to rely on the more favorable procedural regime contained in the US-Argentina Treaty. The Claimant has also

[23] Vienna Convention on the Law of Treaties (23 May 1969), 1155 *UN Treaty Series* 331.

[24] The Argentine Republic signed the Vienna Convention on May 23, 1969, and ratified it on December 5, 1972; the United Kingdom signed the Convention on April 20, 1970 and ratified it on June 25, 1971.

[25] US-Argentina Treaty, *supra* note 17.

argued that the requirement to submit its claim to the local courts first is a procedural step leading to inefficiency and inequity in the settlement of disputes, thus defeating the object and purpose of the Treaty. We will consider first the arguments advanced by the parties in connection with the application of the MFN clause, followed by the considerations and conclusion reached by the Tribunal.

(a) Positions of the Parties

(i) Position of the Respondent

54. The Respondent takes exception to the application of the MFN clause in this case. According to the Respondent, this clause is governed by the *ejusdem generis* principle expressed by the International Law Commission ("ILC") in the following terms: "The beneficiary State may not invoke, by reason of the most-favored nation clause, rights other than those relative to the object of the clause and those included within the scope of the same."[26] This principle was applied by the Arbitration Commission that decided the *Ambatielos* case: "the Commission holds that the most-favored nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates."[27]

55. The Respondent argues further that the interpretation given by the Claimant to the MFN clause in the Treaty would render superfluous the clause requiring that a dispute be brought first before the local courts. The United Kingdom so argued in the *Anglo-Iranian Oil Co.* case:

> "It [the UK] asserts that a legal text should be interpreted in such a way that a reason and meaning can be attributed to every word in the text. It may be said that this principle should in general be applied when

[26] Article 7 of the Draft International Law Commission Report on the Most-Favored-Nation Clause, contained in Volume II of the International Law Commission Annual Report for 1973, U.N. Doc. A/CN.4/266.

[27] *Ambatielos (Greece v. United Kingdom of Great Britain and Northern Ireland)*, Award (6 March 1956), XII R.I.A.A. 91, 107.

interpreting the text of a treaty…"[28]

56. As a third argument, the Respondent alleges that it is evident from the text of the Treaty itself that the parties had no intention to include the settlement of disputes within the scope of the MFN clause. Article 3(2) reads as follows:

> "Neither Contracting Party shall in its territory subject investors of the other Contracting Party, **as regards their management, maintenance, use, enjoyment or disposal** of their investments, to treatment less favorable than that which it accords to its own investors or to investors of a third State."[29]

57. The Respondent notes that the text of Article 3(2) of the Treaty is different from the MFN clause in the BIT concluded between Spain and Argentina, which the arbitral tribunal in *Maffezini* [30] interpreted to include matters related to dispute settlement and on which the Claimant bases its argument. Contrary to what is alleged by the Claimant, the Respondent affirms that the text of the MFN clause in the Treaty is not as clear as the terms of the MFN clauses that were subject to interpretation in *Ambatielos* and *Maffezini*. In these cases, the clause being interpreted referred to "all matters relating to commerce and navigation"[31] and *"todas las materias regidas por el presente Acuerdo*"[32], respectively. The Arbitration Commission in *Ambatielos* and the arbitral tribunal in *Maffezini* observed that the agreement concerned did not expressly refer to dispute settlement in the MFN clause and hence it was necessary to determine the intention of the parties. The Respondent further notes that, in *Maffezini*, the arbitral tribunal made sure that, if it accepted the investor's position, the

[28] *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection (22 July 1952), [1952] *ICJ Reports* 93, 105.

[29] Treaty, Art. 3(2) (as it appears in the Respondent's Plea on Jurisdiction at para. 39). (Emphasis added by the Tribunal.)

[30] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), 16 ICSID Rev.—FILJ 212 (2001).

[31] Respondent's Plea on Jurisdiction, para. 44 (citing *Ambatielos*, *supra* note 27).

[32] *Id.* (citing *Maffezini*, *supra* note 30).

interpretation of such MFN clause by the arbitral tribunal in that particular case would not necessarily open the floodgates to expansive interpretations of other MFN clauses in future arbitrations.

58. The Respondent finds its interpretation of the clause and analysis of *Maffezini* confirmed by the decision on jurisdiction in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* ("*Salini*")[33]. In that decision, the tribunal observed that:

> "…[T]he circumstances of this case are different. Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage 'all rights covered by the agreement'. Furthermore, the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement."[34]

59. The Respondent finds that the Tribunal in this case faces the same situation as the arbitral tribunal in *Salini*. If the text of the MFN clause in the Treaty is completely different from the text of the MFN clauses on which *Ambatielos* and *Maffezini* based their decisions, as well as different from other MFN clauses in other bilateral investment treaties signed by the United Kingdom (such as the bilateral treaty signed by the UK with Albania, where settlement of disputes is expressly included in the scope of the MFN clause), then the strategy of the Claimant is to confound the Tribunal. The Respondent has no doubt that matters related to the administration of justice are excluded from and cannot be imported into the Treaty via the MFN clause as proposed by the Claimant.

60. The Respondent concludes by drawing the attention of the Tribunal (A) to the real objectives of Article 8 of the Treaty, namely, to afford Argentine

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[33] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (29 November 2004), 20 ICSID Rev.—FILJ 148 (2005).

[34] *Id*., para. 118.

courts the opportunity to apply and vindicate international law, and (B) to its view that it would be an affront to international law for an international tribunal to apply a rule of interpretation to reach a result that differed from the intent of the parties to the Treaty.

61. During the hearings, Argentina placed special emphasis on the importance of the parties' intent in the interpretation of the MFN clause. According to the Respondent, the parties to the Treaty had no intention to apply the MFN clause to dispute resolution matters, as is evident if the text of the MFN clause in the Treaty is compared with the one included in the bilateral investment treaty between the United Kingdom and Albania.[35] The Respondent referred to two decisions on jurisdiction – *Salini*[36] and *Plama v. Bulgaria*[37]- this latter decision having been rendered since the Respondent had filed its plea on jurisdiction. The Respondent pointed out that, in *Salini*, the arbitral tribunal, after comparing the Spain-Argentina BIT with the Italy-Jordan BIT, concluded that the circumstances of that case were different:

> "Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage 'all rights or all matters covered by the agreement.' Furthermore, the claimants have submitted nothing from which it *might* be established that the common intention of the parties was to have the most-favored-nation clause applied to dispute settlement."[38]

62. The Respondent also drew the attention of the Tribunal to the holdings of the tribunal in *Plama* as regards the undue emphasis on the object and purpose of a treaty, the need for the parties to express the intention to

[35] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Albania for the Promotion and Protection of Investments, dated 30 March 1994, Exhibit C-157.

[36] *Salini*, *supra* note 33.

[37] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005), 20 ICSID Rev.—FILJ 262 (2005).

[38] Transcript from the Hearing on Jurisdiction, English version, pp. 18-19 (quoting *Salini*, *supra* note 33, para. 118). All references to the Transcript hereafter shall refer to the English version.

incorporate dispute settlement provisions clearly and unambiguously, the autonomy of dispute settlement clauses, and the difficulty in applying provisions of one bilateral investment treaty to another negotiated in a different context.[39] The Respondent reminded the Tribunal of the extensive criticism of *Maffezini* by the *Plama* tribunal, in particular in respect of the statement made in *Maffezini* on the harmonization of dispute resolution regimes through MFN clauses:

> "The present Tribunal fails to see how this harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the 'basket of treatment' and 'self-adaptation of the MFN provision' in relation to dispute settlement provisions (as alleged by the Claimant) has as effect that the investor has the option to pick and choose provisions from the various BITs. If that were true, a host State which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation – actually counterproductive to harmonization – cannot be presumed to be the intent of the contracting parties."[40]

63. The Respondent further noted the criticism of *Plama* in connection with the decision on jurisdiction in *Siemens*[41] as evidence of the dangers of *Maffezini*'s approach: "The principle is retained in the form of string citation of principle, and the exceptions are relegated to a brief examination prone to falling soon into oblivion."[42]

64. The Respondent concluded by requesting the Tribunal to respect the intent of the parties to the Treaty.

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[39] *Id.*, pp. 20-21.

[40] *Id*., pp. 23-24 (paraphrasing from *Plama*, *supra* note 37, para. 219).

[41] *Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/08, Decision on Jurisdiction (3 August 2004), *available at* http://www.worldbank.org/icsid/cases/awards.htm#award42.

[42] Transcript, English version, p. 25 (quoting *Plama*, *supra* note 37, para. 226, which refers to *Siemens*, *supra* note 41, paras. 105, 109 and 120).

(ii) Position of the Claimant

65. The Claimant argues that the text of a treaty is assumed to be the authentic expression of the parties' mutual intent. The MFN clause is very broad; it applies to "investments", "investors" and "management, maintenance, use, enjoyment or disposal" of investments. The Claimant observes that the term "maintenance" covers preservation, protection, safeguard and continuation of investments; and that recourse to dispute settlement is a normal feature of the management and enjoyment of an investment.

66. The Claimant points to the addition of the following paragraph to the regular MFN clause in BITs concluded by the UK after 1993[43]:

> "For the avoidance of doubt it is confirmed that[44] the treatment provided in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11[45] of this Agreement."[46]

67. According to the Claimant this addition, by using terms such as "for the avoidance of doubt" and "it is confirmed", demonstrates that the intention in paragraph 1 and 2 was to incorporate into the MFN clause all matters aimed at protecting an investment, including matters relating to the settlement of disputes. The resulting paragraph, by its terms, does not purport to extend the scope of paragraphs (1) and (2) but to confirm their existing scope.

68. The Claimant argues that when the parties to the Treaty wished to limit the scope of the Treaty, they did so expressly and unequivocally. Thus, Article 7 excludes expressly from the operation of the MFN clause the benefit of any treatment, preference or privilege resulting from customs unions, regional economic integration or similar agreements, specifically listing bilateral

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[43] Claimant's Counter-Memorial on Jurisdiction, para. 176 (referring to the UK-Honduras BIT, UK-Albania BIT and UK-Venezuela BIT). *See* Exhibits C-157 to C-159.

[44] Emphasis added by the Claimant.

[45] Articles 1 to 11 cover the entire Treaty except the final clauses and include the dispute resolution clauses.

[46] *Id.* (citing Art. 3(3) of the BITs listed *supra* in note 43).

agreements providing for concessional financing, and domestic legislation or international agreements or arrangements relating wholly or mainly to taxation. Claimant concludes that the MFN clause was intended to apply to the whole Treaty and, by the very application of the *ejusdem generis* principle, the MFN clause applies to matters related to the method for settling disputes arising under the Treaty.

69. The Claimant replies to an argument hinted at by Argentina in the sense that an MFN clause is a clause of an exceptional nature because it limits the application of the principle *res inter alios acta*. In response, Claimant points out that the MFN clause itself is not *res inter alios acta* and that there is no special rule of interpretation for MFN clauses. An MFN clause should be interpreted as any other clause in the Treaty, that is, "in the light of its object and purpose" as required by the Vienna Convention.[47] The object and purpose of the Treaty is to promote and protect investments. As clearly stated by the tribunal in *SGS v. Philippines*: "It is legitimate to resolve uncertainties in its [the BIT's] interpretation so as to favor the protection of covered investments."[48] According to the Claimant, the object of the Treaty would be defeated by an interpretation that excluded the application of the MFN clause to dispute resolution.

70. The Claimant relies on case law in support of its contention that dispute settlement provisions are related to the treatment afforded to a foreign investor. Thus, in *Ambatielos*, the commission of arbitration held that: "Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation."[49] Also in *Maffezini* the arbitral tribunal concluded that dispute resolution matters in BITs are "inextricably related to the protection of foreign investors, as they are also related to the protection of rights

[47] Vienna Convention, *supra* note 23, Art. 31(1).

[48] *Société Générale de Surveillance S.A. (SGS) v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), 8 ICSID Rep. 518 (2005), para. 116.

[49] *Ambatielos, supra* note 27.

of traders under treaties of commerce".[50] The same arbitral tribunal considered that international arbitration and other dispute settlement arrangements are "closely linked to the material aspects of the treatment accorded."[51] The arbitral tribunal in *Siemens* reached a similar conclusion, recalling that the International Court of Justice ("ICJ") had also held, in *Rights of US Nationals in Morocco,*[52] that MFN clauses may extend to provisions related to jurisdictional matters.

71. The Claimant contests the relevance of *Salini* to this case. First, the arbitral tribunal in *Salini* did not identify the concerns it claimed to share nor who had raised those concerns when it stated that "it shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case."[53] Second, the arbitral tribunal in *Salini* stated that the circumstances in that case were different from those in *Maffezini* and that its decision was based on the particular wording of the MFN clause of the Italy-Jordan BIT. Third, the tribunal in *Salini* was addressing the question whether the MFN clause could be used to create jurisdiction over contractual disputes when the applicable BIT expressly excluded those disputes from arbitration and did not consider their application to a general procedural requirement for the submission of disputes to arbitration. In fact, always according to the Claimant, in *Salini* "there was no need for the tribunal to interpret the scope of the MFN clause because there had been an express exclusion of the right sought by the claimant through most favored nation treatment."[54] The Claimant concludes that the decision in *Salini* "cannot be invoked as a general proposition that MFN clauses do not apply to dispute resolution matters."[55]

72. The Claimant then addresses the issue of whether the Argentine Republic's public policy requires submission of the dispute to local courts for a

[50] *Maffezini*, *supra* note 30, para. 54.

[51] *Id*., para. 55.

[52] *Rights of Nationals of the United States of America in Morocco*, Judgment (27 August 1952), (1952) *ICJ Reports,* 176, 192.

[53] *Salini*, *supra* note 33, para. 115.

[54] Claimant's Counter-Memorial on Jurisdiction, para. 207.

[55] *Id.*, para. 208.

period of time prior to submission to arbitration. According to the Claimant, out of 57 BITs signed by the Argentine Republic, only 10 include the requirement of prior submission to local courts; out of 41 BITs signed by the Argentine Republic since October 1992, only one has this requirement; and none of the 21 BITs signed by the Argentine Republic since September 1994 includes such a requirement. The Claimant concludes that, as noted in *Maffezini*, the Argentine Republic has abandoned its policy to require prior submission to local courts. The Claimant also recalls the observation of the arbitral tribunal in *Siemens,* which noted the lack of consistency among the BITs entered into by the Respondent leading to the conclusion that the requirement of instituting proceedings before the local courts could not be considered a sensitive issue of economic or foreign policy conditioning the Argentine Republic's consent to submit to arbitration.[56]

73. The Claimant concludes that the MFN clause in Article 3 of the Treaty extends to the dispute resolution provisions of the Treaty, allowing Claimant to rely on the more favorable procedural regime established in the US-Argentina Treaty. According to the Claimant: "The contrary result would give rise to a clear discrimination between UK claimants and other foreign claimants against Argentina in the Argentina arbitrations and would destroy the very purpose of MFN clauses which is to avoid such discrimination."[57]

74. The Claimant further argues that the eighteen-month requirement is merely a procedural matter which would lead to inefficiency and inequity, thus defeating the object and purpose of the Treaty. The Claimant points out that the submission to the Argentine Republic's courts would be futile in that the dispute would not be resolved in eighteen months, and costly for National Grid in terms of court taxes, scheduled counsel fees and the Argentine Republic's costs if National Grid withdrew its court case in order to pursue arbitration, which defeats the purpose of the Treaty to create favorable conditions for greater investment.

[56] *Id*., paras. 211-212.
[57] *Id*., para. 213.

The Claimant draws the attention of the Tribunal to arbitral practice that has found strict application of investment treaty procedural requirements unnecessary where to do so would be futile or formalistic and lead to inefficiency and inequity.[58] Claimant concludes that a different approach would lead "to inefficiency and inequity, as the Claimant would simply be entitled to resubmit the very same issues to an UNCITRAL tribunal after waiting in vain for the Argentine courts to rule on the issues in dispute for eighteen months."[59]

75. During the hearing, the Claimant pointed out that the Argentine Republic failed to refer to *Gas Natural v. Argentine Republic*, decided subsequently to *Plama*, in which the Tribunal held that:

> "Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute resolution."[60]

76. According to Claimant, the real change brought about by the BITs is not the protection of the substantive rights of the investor, which have been widely recognized under international law, but rather direct access to an independent tribunal at the behest of the individual investor. According to Claimant: "it is a critical part of what protection is granted, and to seek to divorce the protection of access to an independent Tribunal from the substantive rights that that Tribunal seeks to protect is […] a false distinction."[61]

77. Claimant takes issue with the relevance of *Salini* and *Plama* to this case. In *Salini*, the claimant attempted to submit a contractual claim by way of an umbrella clause in another bilateral treaty, when the treaty between Italy and

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[58] *Id*. paras. 220-222.

[59] *Id*., para. 223.

[60] Transcript, p. 132 (citing para. 49 of *Gas Natural SDG, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005), *available at* http://www.asil.org/pdfs/GasNat.v.Argentina.pdf).

[61] *Id*., p. 141.

Jordan specifically required that such claims be submitted to the procedure foreseen in the investment agreement. In *Plama,* the tribunal was dealing with an old BIT, under which the only matter that could be brought to arbitration under UNCITRAL Rules was the adequacy of compensation in case of expropriation. The claimant in that case tried through an umbrella clause 'to extend the material scope of what is submitted to arbitration to cover everything, and […] access ICSID arbitration into the bargain."[62] Furthermore, in *Plama* there had been negotiations between the State parties to the treaty concerning the possibility of amending it, and the negotiations were unsuccessful. The arbitral tribunal concluded that since the contracting parties had looked into the matter and rejected it, they had no intention to extend the relevant clauses.[63]

78. The Claimant concluded at oral argument that in the instant case there is *no question of seeking access to ICSID without a separate consent*; the consent to arbitration had already been given, and the dispute resolution clause already covers all disputes.[64]

(b) Considerations of the Tribunal

79. The arguments and counter-arguments of the parties raise the following issues: rules for interpretation of the MFN clause, interpretation of the clause to ascertain the will of the parties from the text of the clause, differences in the terms of the MFN clause in this case and the MFN clause in *Maffezini*, and the meaning of "treatment" of foreign investors referred to in the MFN clause in the Treaty. The Tribunal will now consider these issues in this sequence.

80. As already stated above, the Tribunal will interpret the Treaty as required by the Vienna Convention. Article 31 of the Convention requires an international treaty 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 light of its

[62] *Id*., p. 149.
[63] *Id*., p. 150.
[64] *Id*.

object and purpose."[65] As regards the intention of the parties, the approach of the Vienna Convention and of the ICJ is that "what matters is the intention of the parties as expressed in the text, which is the best guide to the more recent common intention of the parties."[66] The Convention does not establish a different rule of interpretation for different clauses. The same rule of interpretation applies to all provisions of a treaty, be they dispute resolution clauses or MFN clauses.

81. Article 3 of the Treaty reads thus:

"National Treatment and Most-favored Nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of investors or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject investors or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to its own investors or to investors of any third State."

82. The Tribunal observes that the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius.*[67]

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[65] Vienna Convention, *supra* note 23, Art. 31(1).

[66] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th ed. 2003), p. 602.

[67] This interpretation is confirmed by the following statement on the general rules of application of the MFN clause in the *Encyclopedia of Public International Law*: "*By its nature, the unconditional clause, unless otherwise agreed, attracts all favors extended on whatever grounds by the*

83. The Tribunal observes further that, as pointed out by the Respondent, the MFN clause in the Treaty does not refer to "*todas las materias regidas por el presente Acuerdo*" as is the case of the MFN clause in the investment treaty between Spain and the Argentine Republic. The review of the MFN clauses included in the investment treaties concluded by Spain, which was carried out by the tribunal in *Maffezini,* found that the MFN clauses in all the other treaties omit reference to "…all matters subject to this Agreement"[68] and merely provide that "this treatment" shall be subject to the clause. Without further elaboration, the arbitral tribunal held such formulation to be more restrictive. In *Ambatielos*, the commission had to ascertain whether administration of justice in the local courts was covered by the MFN clause. The commission found that it was, considering the Contracting Parties' "intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favored nation."[69]

84. The decision in *Salini* also considered relevant that the MFN clause in the investment treaty between Italy and Jordan did not include a reference to "all rights or matters covered in this agreement" to reach the conclusion that that clause did not apply to dispute settlement clauses.[70] The issue for the Tribunal is whether reference only to most-favorable "treatment," absent a reference to all matters covered by the Treaty, excludes a procedural prerequisite to dispute resolution from the scope of application of the MFN clause. To answer this question, the Tribunal will consider the subsequent practice of the parties to the Treaty and the substantive content of treatment in the context of the protection afforded to investors under the BITs.

85. Since 1991, the MFN clause in the UK model investment treaty has included a third paragraph stating that: "*For the avoidance of doubt*", the MFN

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granting State to the third State." R. Bernhardt (ed.), 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 411, 415 (1985).

[68] *Maffezini*, *supra* note 30, para. 60.

[69] *Ambatielos*, *supra* note 27. (Emphasis in the original.)

[70] *Salini*, *supra* note 33, paras. 117-119.

clause extends to Articles 1 to 11 of the treaty and, hence, to dispute resolution matters. The implication in the wording of this additional paragraph is that, all along, this was the UK's understanding of the meaning of the MFN clause in previously concluded investment treaties.[71] On the other hand, after the decision on jurisdiction in *Siemens*, the Argentine Republic and Panama exchanged diplomatic notes with an "interpretative declaration" of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.[72] The Tribunal has not been furnished with any evidence that at any point in time an interpretation of such nature was considered by either party to the Treaty. Neither has the Tribunal received any evidence that the Argentine Republic adopted similar interpretations of the MFN clause incorporated in the more than 50 bilateral investment treaties concluded with other States parties. While it is possible to conclude from the UK investment treaty practice contemporaneous with the conclusion of the Treaty that the UK understood the MFN clause to extend to dispute resolution, no definite conclusion can be reached regarding the Argentine Republic's position at that time. Therefore, the review of the treaty practice of the State parties to the Treaty with regard to their common intent is inconclusive. The Tribunal will now turn to whether "treatment" may be understood to extend to mechanisms of dispute resolution.

86. The Tribunal recalls that in considering whether the application of national laws concerning the administration of justice, namely local remedies, should be available to foreign traders, the arbitral commission in *Ambatielos* stated:

> "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

[71] The practice of the UK of including the expression "For the avoidance of doubt" in paragraph 3 of the MFN clause does not seem to have been consistent. The investment treaty with Honduras includes it, but the investment treaty with Venezuela does not. *See* Exhibits C-157 and C-159.

[72] Transcript, pp. 136-137.

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."[73]

87. When the ICJ considered the case of the *Rights of US Nationals in Morocco*, it concluded that under the MFN clause in the US-Morocco treaty of 1836, the US was entitled to invoke the provisions of other treaties relating to the capitulatory regime.[74]

88. In *Maffezini*, the tribunal also considered that the MFN clause in the Spain–Argentina BIT allowed the Argentine investor to benefit from the mechanisms for the settlement of disputes incorporated into other treaties concluded by Spain to the extent that those mechanisms were more favorable to the protection of the investor's rights. The Tribunal stated :

"…[T]here 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. (…)

International arbitration and other dispute settlement arrangements….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. (…)

[73] *Ambatielos*, *supra* note 27, p. 107.

[74] *Rights of Nationals*, *supra* note 52, p. 190.

> 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."[75]

89. The *Ambatielos* arbitration commission, the ICJ, and the arbitral tribunal in *Maffezini* all concurred that the element of dispute settlement at issue was part of the protection – treatment – of investors. The most recent decision concerning the same matter put it in these terms:

> "provision for international investor-state arbitration in bilateral investment treaties is a significant incentive and protection for foreign investors; further, that access to such arbitration only after resort to national courts and an eighteenth-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiating period."[76]

90. During the hearing, the parties discussed extensively the decisions in *Salini* and *Plama,* which came to light after the submission of Claimant's Statement of Claim and had reached different conclusions from *Maffezini* and *Siemens* on the application of the MFN clause to particular matters related to dispute settlement.

91. Both tribunals considered extensions of the MFN clause to situations widely different from the situation considered here or, for that matter, in *Maffezin*i, *Siemens,* and *Gas Natural*. The claimant in *Salini* sought to include an umbrella clause where the basic treaty had none. In *Plama,* there was no ICSID clause in the basic treaty. In the present case, the parties had agreed to arbitration under UNCITRAL Rules and the issue is the avoidance, by virtue of an

[75] *Maffezini*, *supra* note 30, paras. 54-56.
[76] *Gas Natural*, *supra* note 60, para. 31.

MFN clause, of a procedural requirement that the Argentine Republic has dispensed with in its investment treaties concluded since 1994.

92. The Tribunal concurs with *Maffezini*'s balanced considerations in its interpretation of the MFN clause and with its concern that MFN clauses not be extended inappropriately. It is evident that some claimants may have tried to extend an MFN clause beyond appropriate limits. For example, the situation in *Plama* involving an attempt to create consent to ICSID arbitration when none existed was foreseen in the possible exceptions to the operation of the MFN clause in *Maffezini.*[77] But cases like *Plama* do not justify depriving the MFN clause of its legitimate meaning or purpose in a particular case. The MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.

93. To conclude, the Tribunal considers that, in the context in which the Respondent has consented to arbitration for the resolution of the type of disputes raised by the Claimant, "treatment" under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts, as is permitted under the US-Argentina Treaty. Therefore, the Tribunal rejects this objection to its jurisdiction.

94. Having reached this conclusion, the Tribunal does not deem it relevant to consider the Claimant's contention that the requirement to submit the claim first to local courts is merely a procedural matter that would lead to inefficiency in the proceeding and inequity among the parties, thus defeating the object and purpose of the Treaty.

2. Second Objection: The Claimant Is Not an "Investor"

(a) Positions of the Parties

[77] *Maffezini*, *supra* note 30, para. 63.

(i) Position of the Respondent

95. The Respondent argues that the legal link between the Claimant and the investment protected by the Treaty ceased to exist once the shares of National Grid in Citelec were transferred to Dolphin on August 18, 2004. As of that date, according to the Respondent, National Grid ceased to have the quality of "investor" required to be party to this arbitration under Article 8 of the Treaty. It is the position of the Respondent that customary international law requires Claimant to maintain its status as an "investor" throughout the arbitral proceedings and not only at the time of submission of its claim.[78] The Respondent argues that the rationale of *Loewen* applies in this case. Loewen, the Canadian claimant, was found by the tribunal not to be a party in interest at the time its operations were reorganized in a U.S. company:

> "Raymond Loewen argues that his claim under NAFTA survived the reorganization. Respondent originally objected to Raymond Loewen's claim on the ground that he no longer had control over his stock at the commencement of the proceeding. The Tribunal allowed Raymond Loewen to continue in the proceeding to determine whether he in fact continued any stock holding in the company. No evidence was adduced to establish his interest and he certainly was not a party in interest at the time of the reorganization of TLGI."[79]

96. The Respondent points out that the Claimant justifies the sale of its shares in Citelec as a means to mitigate the losses caused by the Measures. The Argentine Republic disagrees with this position, arguing that the sale was a free business decision and that the Treaty does not protect an investor from the effects of its voluntary decision to sell its shares of a company undergoing a contract renegotiation. If National Grid did not obtain a better price for its shares, this can only be attributed to the moment chosen by the Claimant to sell them.

[78] Respondent's Plea on Jurisdiction, paras. 77-79.

[79] *Id*., para. 74 (quoting *The Loewen Group, Inc. and Raymond L. Loewen v. United States,* ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), 7 ICSID Rep. 442 (2005), para. 239).

According to Respondent, National Grid's decision to sell had no causal link to Respondent's actions, remaining a unilateral decision by National Grid.[80]

97. The Respondent takes issue with the arguments of the Claimant regarding the arbitrability of public policy decisions of States. According to the Respondent, such decisions are not subject to the jurisdiction of any international arbitral tribunal, because they are sovereign acts as was recognized by the arbitral tribunal in *CMS* in the following terms:

> "[…] questions of general economic policy not directly related to the investment, as opposed to measures specifically addressed to the operation of the business concerned, will normally fall outside the jurisdiction of the Centre. A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. 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."[81]

98. It is also the position of Respondent that if there had been an expropriation as argued by the Claimant, it would be the new investor and not National Grid that would be entitled to compensation under the general principle that rights are transferred as owned by the seller.[82]

99. Finally, the Respondent draws the attention of the Tribunal to the fact that the Concession and the Transba Concession are meant to last 95 years. Paying heed to Claimant's demands would amount to treating the investments protections under the Treaty as an insurance policy against all conceivable risks, making it impossible for governments to adapt long-term contracts to new

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[80] *Id.*, paras. 92-93.

[81] *Id.*, para. 88 (quoting para. 27 of *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003), 42 ILM 788 (2003)).

[82] *Id*., para. 89.

circumstances when the public interest so requires.[83]

100. At the hearing, the Respondent emphasized the following points:

(A) The voluntary disposition of the shares of National Grid in Citelec, questioning the relevance of the cases adduced by the Claimant in its Counter-Memorial: Mondev[84] was deprived of a permit for urban development by the municipality of Boston, Senegal rescinded a contract of SOABI[85] for the construction of housing complexes, and at no time did CSOB[86] let go of its assets voluntarily;[87]

(B) National Grid's opportunistic behavior of instituting arbitration proceedings while it had been considering and preparing the sale of its shares for months;

(C) Transener's shares doubled in value between 2002 and 2005; and

(D) The sale of shares by National Grid was conducted in an environment of uncertainty, and it is not the purpose of BITs to protect investors against uncertainty or to neutralize international corporate risk.[88]

(ii) Position of the Claimant

101. The Claimant argues that, under the Treaty, the critical date for determining the Claimant's standing with regard to ownership of the investment is the date on which the dispute arose, that under well established case law the jurisdiction of the Tribunal must be determined at the time proceedings are instituted, and that Claimant's standing to bring this claim finds support in

[83] *Id*., para. 97.

[84] *Mondev International Ltd. v. United States,* ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), 6 ICSID Rep. 192 (2004).

[85] *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal,* ICSID Case No. ARB/82/1, Award (25 February 1988), 6 ICSID Rev.—FILJ 125 (1991).

[86] *Ceskoslovenska obchodni banka, a.s. (CSOB) v. Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999), 14 ICSID Rev.-FILJ 251 (1999).

[87] Transcript, pp. 34-36.

[88] *Id*., pp. 39-45.

fundamental principles of equity and justice, as articulated by international case law.

102. The Claimant contends that the text of the Treaty is "the best guide to the more recent common intention of the parties", pointing to what Claimant perceives as a fair reading of Article 8(1):

> "…[T]he jurisdiction to arbitrate a claim under the Treaty depends on a dispute having arisen with regard to an investment within the terms of the Treaty between an investor of one Contracting Party and the other Contracting Party. The requirements are, therefore, that a treaty dispute arose with regard to an 'investment' at that time, and that it arose with regard to an 'investor' also at that time. The date on which the dispute arose is the same date on which the investor and the investment must have existed."[89]

103. The Claimant finds confirmation of this reasoning by a further analysis of paragraph 1 of Article 8. This paragraph refers to submission of disputes "at the request of *one of the Parties to the dispute*."[90] Similarly, Article 8(2) refers to submission to arbitration "if one of the Parties so requests" and if "the Parties are still in dispute."[91] Article 8(3) refers to "the investor and the Contracting Party concerned in the dispute" in the context of agreement on the modality of arbitration proceedings, Article 8(3) also refers twice to the "Parties to the dispute".[92] The Claimant concludes this textual analysis by affirming that "the dispute" is the key element of reference:

> "Standing to pursue dispute resolution proceedings is acquired by being a party to the dispute; the status of being a disputing party crystallizes at the

[89] Claimant's Counter-Memorial on Jurisdiction, para. 99.
[90] *Id.*, para. 100. (Emphasis added by the Claimant.)
[91] *Id.*
[92] *Id.*

moment the dispute arises."[93]

104. The Claimant further contends that the same result is reached from the perspective of the object and purpose of the Treaty. The Treaty's purpose is to provide protection to investors against detrimental action by the State. The protections stipulated in the Treaty may apply in cases where, because of the State's adverse measures, the investment does not subsist, has been destroyed or is in such precarious state that its maintenance is impossible or commercially unreasonable. According to the Claimant:

> "If a State were to expropriate title to an asset and the former owner of that asset were to claim for expropriation, it would be nonsense for the State to argue non-justiciability of the dispute because the claimant no longer owns the asset! Yet this is what Argentina's argument amounts to."[94]

105. The Claimant then relies on *Mondev*, which was decided under Chapter 11 of the NAFTA, where the US objected to the jurisdiction of the arbitral tribunal on the ground that the foreclosure on a mortgage related to the project extinguished the rights and interests of the claimant. The US had argued that before the arbitration proceeding was instituted, and even before some of the acts complained took place, no investment owned or controlled by the claimant subsisted. The tribunal dismissed this jurisdictional objection in the following terms:

> "the Tribunal would […] observe that [NAFTA] Article 1105, and even more so Article 1110, will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the Claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is

[93] *Id.*

[94] *Id*., para. 102.

commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its 'sale or other disposition' […] On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of."[95]

106. As regards the argument made by the Respondent based on *Loewen*, the Claimant observes that in *Loewen* the Canadian claimant had ceased to exist and its operations were reorganized in a US company. The issue there was one of the continuous foreign nationality of the claimant and not the continuity of ownership or control of the investment. In this respect, the decision in *Loewen* upholds the finding of the tribunal in *Mondev* to the effect that:

"…the Tribunal [in Mondev] appropriately found that the loss of the investment through foreclosure of the mortgage could not be the basis for denying Mondev's right to pursue its remedies under NAFTA. It pointed out that such set of events could occur quite often to indenters and that the whole purpose of NAFTA's protection would be frustrated if such disputes could not be pursued."[96]

107. The Claimant points out that, under international law, jurisdiction is determined, at the latest, on the date of a submission of a dispute to an international judicial forum. According to the Claimant, this is confirmed by cases arbitrated under the ICSID Convention in relation to issues of ownership of the investment. Thus, in *CSOB*, the claimant assigned all its rights in the subject matter of the dispute to its majority owner, the Czech Republic. In support of the

[95] *Id*., para. 103 (quoting para. 91 of *Mondev*, *supra* note 84).
[96] *Id*., para. 105 (quoting para. 227 of *Loewen*, *supra* note 79).

standing of the transferee, the arbitral tribunal upheld its jurisdiction with the following reasoning:

> "…[I]t is generally recognized that the determination whether a party has standing in an international judicial forum for the purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments may have had on Claimant's standing had they preceded the filing of the case."[97]

108. According to the Claimant, the date of institution of a proceeding has been held by ICSID tribunals to be the critical date to determine foreign control[98] and the juridical status of a person.[99] Similarly, the ICJ has held that:

> "The Court recalls that according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events.
>
> […]
>
> Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed."[100]

109. The Claimant argues further that equity and justice prevent a party from taking advantage of its own wrong:

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[97] *Id*., para. 109 (quoting para. 31 of *CSOB*, *supra* note 86).

[98] *Amco Asia Corporation and Others v. The Republic of Indonesia,* ICSID Case No. ARB/81/1, Award on Jurisdiction (25 September 1983), 1 ICSID Rep. 389 (1993), para. 14, and *Liberian Eastern Timber Corp. (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award (31 March 1986), 2 ICSID Rep. 346 (1994), p. 351.

[99] *SOABI*, *supra* note 85, paras. 29 and 41.

[100] Claimant's Counter-Memorial on Jurisdiction, para. 114 (quoting paras. 24, 26 and 40 of the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment (14 February 2002), [2002] *ICJ Reports* 3).

> "If a State cannot allege lack of jurisdiction where it has directly expropriated an asset on the basis that the investor had no qualifying investment, it should not be able to do so in the event of indirect expropriation when its acts have emptied the asset of substantially its entire value."[101]

110. The Claimant alleges that it disposed of its investment as a result of Respondent's dismantlement of the regulatory framework that had attracted the investment. The alternative for the Claimant was to continue pumping money into a ruinous enterprise, a reckless approach that no one could be reasonably expected to adopt. Claimant sought to mitigate the losses caused by the Measures relinquishing 90% of the value of the investment. Under those circumstances, this sale could hardly be described as a free or voluntary transaction.[102]

111. During the hearing, the Claimant pointed out that the concept of the voluntary nature of the disposition of assets, considered a key point by the Respondent, finds no mention in the relevant case law.[103] According to the Claimant, Transener was a failed investment which had defaulted on its debts and "…It only managed to keep going because of other laws in Argentina which required it to keep going."[104] In this regard, Claimant underlined the holding in *Mondev*,

> "To require the claimant to maintain a continuing status as an investor under the law of the host state at the time of the arbitration is commenced, would tend to frustrate the very purpose of Chapter XI, which is to provide protection to investors against wrongful conduct, including uncompensated expropriation of their investment and to do so throughout

[101] *Id*., para. 116.
[102] *Id*., paras. 117, *et seq.*
[103] Transcript, p. 107.
[104] *Id*., p. 109.

the lifetime of that investment up to the moment of its sale or disposition."[105]

112. The Claimant denied that National Grid had acted in bad faith when it sold its shares in Citelec. According to the Claimant, it was clear under the terms of the documentation that the seller did not transfer any of its rights vis-a-vis Argentina. Moreover, Claimant recalled that "Argentina did not require in any sense that this claim be abandoned or suspended or any other such condition when its various regulatory consents were granted to that transfer.[106]

113. The Claimant reaffirmed at the hearing that:

(A) in all cases discussed and in *Soabi v. Senegal*[107] and *LETCO v. Liberia*,[108] the critical date adopted consistently by arbitral tribunals has been the date of consent, and the ICJ in the *Arrest Warrant* case considered settled jurisprudence that, for jurisdictional purposes, its jurisdiction must be determined at the time that the act instituting the proceeding was filed;[109] and

(B) National Grid gave up hope that any satisfactory solution could be achieved after two-and-a-half years of a process of renegotiation, which was initially meant to last 120 days and, as a commercial company, had an obligation to its shareholders to limit its losses.[110]

(b) Considerations of the Tribunal

114. For the purpose of ascertaining the limits to the jurisdiction of the Tribunal, the key issue to decide is whether the sale of Claimant's shares in Citelec, subsequent to the initiation of this proceeding, has deprived the Claimant of its standing as an "investor" under the terms of the Treaty.

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[105] *Id*., p. 112 (quoting *Mondev*, *supra* note 84, para. 91).
[106] *Id*., p. 118.
[107] *SOABI*, *supra* note 85.
[108] *LETCO*, *supra* note 98.
[109] Transcript, pp. 118-120.
[110] *Id*., pp. 120-125.

115. The textual analysis of Article 8 of the Treaty developed by the Claimant is helpful but does not fully dispose of the issue. The Tribunal agrees that the meaning of Article 8 is that the dispute must exist at the time the arbitration proceeding is instituted and it is at that point in time when the parties to the proceeding must be parties to the dispute. From this it may be implied, as does the Claimant, that events beyond the date of instituting the proceeding are irrelevant for purposes of the jurisdiction of the Tribunal. However, it suffices to review the views expressed by the Respondent to realize that Article 8 is not as clear and self-evident as Claimant suggests. Indeed, in order to dispose of the issue of standing, it is necessary to reach beyond the Treaty and, as the parties have already done, to examine the practice of the ICJ and other tribunals.

116. Before doing so, the Tribunal recalls that in the instant case the issue of standing does not concern a change in the Claimant's nationality - National Grid continues to be a British company - but rather the investor's continuity in the ownership of the investment. The quotation on continuity of ownership from Professor Brownlie's *Principles of Public International Law*, which the Respondent brought to the attention of this Tribunal,[111] refers to continuity of nationality for purposes of diplomatic protection; it does not concern the continuity of ownership by a claimant who has not changed its nationality. Even with regard to continuity of nationality to retain standing, Professor's Brownlie himself noted that "there is a respectable body of opinion which would reject the principle altogether."[112] To this respectable body of opinion one may add the conclusion reached by the Rapporteur on Diplomatic Protection of the ILC, Professor Dugard, to the effect that there is no established rule at all on that matter.[113]

117. As pointed out by the Claimant, the ICJ held in the *Arrest Warrant*

[111] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed. 1998), p. 483, cited in Respondent's Plea on Jurisdiction, para. 79.
[112] *Id*.
[113] Referred to by J. Paulsson, "Continuous Nationality in Loewen," 20 Arbitration International (2004), 213-215.

case that it was its settled jurisprudence that: "its jurisdiction must be determined at the time the act instituting the proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do regardless of subsequent events."[114] However, the Court went on to say: "Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction."[115]

118. As a general matter, all the arbitral tribunals in the cases discussed by the parties - *Amco*, *SOABI, CSOB*, *LETCO*, and *Mondev* - held that the critical date to meet the jurisdiction requirements is the date when the proceedings are instituted. *Loewen* also supports this position, as pointed out by the Claimant and as becomes evident when reviewing the previously quoted statement relied on by the Respondent.[116]

119. The Argentine Republic has contended that in none of these cases were assets transferred voluntarily. However, the voluntary or involuntary nature of the transfer does not seem to have been part of the considerations of the tribunals in reaching their respective decisions. In CSOB the tribunal held:

> "Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of this case."[117]

120. *In Mondev*, the tribunal went further and dissociated the investment

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[114] Claimant's Counter-Memorial on Jurisdiction, para. 114 (citing *Arrest Warrant, supra* note 100, para. 26).

[115] *Arrest Warrant*, *supra* note 100, para. 26. This sentence follows after the quotation adduced by the Claimant in its argument.

[116] "Raymond Loewen argues that his claim under NAFTA survived the reorganization. Respondent originally objected to Raymond Loewen's claim on the ground that he no longer had control over his stock *at the commencement of the proceeding* […]" (Emphasis added by the Tribunal). *Loewen, supra* note 79, para. 239.

[117] *CSOB*, *supra* note 86, para. 31.

and the arbitration proceeding, dispensing with the requirement that an investor maintain its ownership interest in the investment at the time the arbitration was commenced:

> "To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its 'sale or other disposition' (Article 1102(2))."[118]

According to Mondev, the key factor is to have been an investor and to have suffered a wrong before the sale or disposition of its assets, without the need to remain an investor for purposes of the arbitration proceedings.

121. The Respondent has also argued that, if a right to pursue the claims under the dispute would be recognized, then such right would have been transferred to the purchaser of the shares. The Tribunal observes that such right was retained by the Claimant as part of the terms of the sale of shares and that such terms were approved by the competent authorities of the Argentine Republic.[119]

122. For the above stated reasons, the Tribunal finds this objection without merit.

3. Third Objection: The Dispute Is Not a "Dispute with Regard to an Investment"

(a) Positions of the Parties

[118] *Mondev, supra* note 84, para. 91.
[119] Exhibit C-132.

(i) Position of the Respondent

123. The Respondent repeats here in part the argument made previously that, for an investor to request the protection provided for in the Treaty, the allegedly prejudicial measures taken by the Argentine Republic should have been specifically directed to the investment. According to the Respondent, general measures taken by a government destined to have an impact on the economic life of the nation are not matters for the consideration of this Tribunal. The Tribunal does not have jurisdiction to decide on matters of public policy, but rather to settle legal issues arising under or connected with the investment dispute submitted to its consideration. It does not suffice for the investor to be affected by a measure in order for the Tribunal to assume jurisdiction; it is necessary to show a legal link between the measure and the investment. In this respect, the Respondent refers to the already quoted statement of the tribunal in *CMS*, to the effect that matters of general economic policy are not in principle within the jurisdiction of ICSID and ICSID tribunals; it is necessary to establish a breach of specific contractual commitments made to the investor.[120]

124. The Respondent argues that it is not sufficient that the Argentine Republic had assumed general commitments in "treaties, laws or contracts", but rather that the Claimant must show which specific commitments assumed by the Argentine Republic were breached by the devaluation of the peso, the establishment of a new parity, the temporary "pesification" of tariffs and obligations, and the adoption of a fiscal policy in consonance with these Measures.[121]

125. The Respondent draws a parallel between the jurisdictional issue at stake in *Methanex* and the qualification of Claimant's dispute as an investment dispute under the Treaty. In *Methanex*, as explained by the Respondent, the NAFTA tribunal dealt with the question whether the measures taken by a State

[120] Respondent's Plea on Jurisdiction, paras. 100-101.

[121] *Id*., para. 102.

party to NAFTA were "relating to" the investment or the investor. Methanex had claimed that it was sufficient that a measure affected the investor or the investment to give rise to a claim under international law. The State parties to NAFTA disagreed with that interpretation. The Tribunal found that a textual interpretation of "relating to" was of scant help and considered the context, object and purpose of the Article 1101(1) of NAFTA, concluding thus:

> "If the threshold provided by Article 1101(1) were merely one 'affecting', as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to Methanex who suffered as a result of Methanex's alleged losses, suppliers to those suppliers and so on, towards infinity. As such, Article 1101(1) would provide no significant threshold to NAFTA arbitration. A threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all; and the attractive simplicity of Methanex's interpretation derives from the fact that it imposes no practical limit. It may be true, to adapt Pascal's statement, that the history of the world would have been much affected if Cleopatra's nose had been different, but by itself cannot mean that we are related to the royal nose. The chaos theory provides no guide to the interpretation of this important phrase; and a strong dose of practical common-sense is required."[122]

126. The Respondent finds in *Methanex* a correct statement about the causal link of a legal nature that is needed to connect the alleged facts to the investor:

> "In a legal instrument such as NAFTA, Methanex's interpretation would produce a surprising, if not an absurd, result. The possible consequences of human conduct are infinite, especially when comprising acts of

[122] *Id*., para. 107 (quoting para. 137 of *Methanex Corporation v. United States,* First Partial Award (7 August 2002), *available at* http://www.state.gov/documents/organization/12613.pdf).

> governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable […]"[123]

127. The Respondent has also argued that the facts underlying the link between the Measures and the Claimant must be proven in this phase of the proceedings and not together with the merits of the case. At least, the Claimant must show that it has a legitimate *prima facie* claim based on international law and not a mere contractual conflict or a mere conflict of interests with the Respondent.[124]

128. The Respondent concludes by affirming that the Claimant has not shown a direct, proximate and immediate connection between the Measures and its "alleged investment", and that it would be impossible for the Claimant to do so because the Measures were not addressed specifically against the investment nor were they related to the investment.[125]

(ii) Position of the Claimant

129. The Claimant affirms that its claim is not related to the Argentine Republic's general measures but to specific commitments made by the Respondent and upon which the Respondent reneged in violation of the Treaty. The direct connection between the Measures and the investment is based on the fact that the Measures directly affected the Claimant's rights associated with its investment and protected under international law.

130. The Claimant finds support for its position in *CMS*, quoting a passage cited by the Respondent and by the Tribunal at paragraph 97[126] above

[123] *Id*., para. 109 (quoting *Methanex*, *supra* note 122, para. 138).
[124] *Id*., para. 103.
[125] *Id*., para. 110.
[126] *See* para. 97, above.

and in the following additional language, which the Claimant quotes in full:

> "On the basis of the above considerations the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts."[127]

131. The Claimant observes that the question whether certain measures affected rights and caused injury to the Claimant is a matter linked to the merits of the dispute. According to the Claimant, the Tribunal must only be satisfied that there is *prima facie* a sufficiently direct connection between the Measures and the investment concerned. The Claimant again refers to *CMS*:

> "While conceptually the line between one and the other matter is clear, in practice whether a given claim falls under one or the other heading can only be established in light of the evidence which the parties will produce and address in connection with the merits of the case. (…) This means in fact that the issue of what falls within or outside the Tribunal's jurisdiction will be subsumed in the determination of whether a given claim is or is not directly connected with specific measures affecting the investment.
>
> For the time being, the fact that the Claimant has demonstrated prima facie that it has been adversely affected by measures adopted by the Republic of Argentina is sufficient for the Tribunal to consider that the claim, as far as this matter is concerned, is admissible and that it has

[127] *CMS*, *supra* note 81, para. 35 (quoted in the Claimant's Counter-Memorial on Jurisdiction, para. 45). (Emphasis added by the Claimant.)

jurisdiction to examine it on the merits."[128]

132. The Claimant notes that this position of the tribunal in *CMS* is consistent with "the traditional restraint that tribunals have exercised in reviewing the nature of the disputes submitted to ICSID arbitration."[129] The Claimant also observes that the threshold requirement is that of Article 8 of the Treaty and not Article 25(1) of the ICSID Convention: "disputes with regard to an investment" as opposed to "any legal dispute arising directly out of an investment."[130]

133. The Claimant restates the summary of claims included in the Statement of Claim, which reads as follows:

> "Argentina breached its obligations to National Grid under the Treaty by the Measures adopted since January 2002, described in Section III above, which run openly and directly against specific and critical provisions contained in the Regulatory Framework of the investment, and in particular by:
>
> (i) failing to respect the promise that Transener's and Transba's tariff-based remuneration would be 'fair and reasonable' and sufficient to cover reasonable operating costs, taxes, amortizations and provide a 'reasonable rate of return';
>
> (ii) abolishing Transener's and Transba's right to calculate all their remuneration in US dollars and express it in pesos at the exchange rate applicable at the time of billing;
>
> (iii) abolishing Transener's and Transba's right to adjust their remuneration every six months in accordance with US PPI and US CPI indices;
>
> (iv) converting all of Transener's and Transba's remuneration into

[128] *Id*. para. 34-35 (quoted in the Claimant's Counter-Memorial on Jurisdiction, para. 46).
[129] Claimant's Counter-Memorial on Jurisdiction, para. 47.
[130] *Id*., para. 48.

pesos at the artificial rate of one peso to one dollar, in spite of the fact that the dollar-peso parity established under the Convertibility Law was also abolished, allowing the peso to float freely, thus rapidly falling in value, and eventually stabilizing at about three pesos to one dollar;

(v) freezing Transener's and Transba's tariff-based remuneration for the electricity transmission service completely as of January 2002, at one third of its approved 2001 level in dollar terms;

(vi) failing to conduct the Five Year Review of Transener's (due 2003) and Transba's (due 2002) tariff-based remuneration in order to ensure the tariffs' continued compliance with the guarantees provided by the Regulatory Framework, particularly that of providing a 'fair and reasonable' tariff sufficient to satisfy reasonable operating costs, taxes, amortizations and a 'reasonable rate of return'; and

(vii) failing to adjust Transener's and Transba's tariff-based remuneration on the basis of 'objective and justified' circumstances, and/or on the basis that remuneration had become 'unjust, unreasonable, unduly discriminatory or preferential', as a result of the January 2002 Law.

Argentina's Measures, with their consequential losses to National Grid and its investment, constitute breaches of the Treaty, in particular:

(i) an expropriation of National Grid's investment without compensation, in violation of Article 5(1) of the Treaty […]

[…]

(ii) mistreatment of National Grid's investment in violation of the standards of treatment provided by Article 2(2) of the Treaty […]"[131]

[131] *Id*., para. 49.

The Claimant concludes that those claims refer to specific measures having a direct effect on the investment. The claims do not question general measures *per se*, such as the devaluation or the establishment of a different exchange rate parity, but rather "the very specific and concrete repudiation" by the Respondent of commitments in the Regulatory Framework.[132]

134. As regards *Methanex*, the Claimant observes that NAFTA establishes in Article 1101(1) a higher threshold than Article 8(1) of the Treaty. Article 1101(1) refers to measures "relating to" the investor or the investment, Article 8(1) refers to a dispute "with regard to an investment."[133] The Claimant argues that Article 8(1) does not require a direct connection between the measures giving rise to the dispute and the investment, as opposed to the *Methanex* tribunal's interpretation of Article 1101(1), calling for a "legally significant connection" between the measure and the investment or the investor.[134] The Claimant affirms that this understanding of Article 1101(1) must be read together with the holding in *Pope & Talbot* rejecting "Canada's submissions that a measure can only relate to an investment if it is primarily directed at that investment and that a measure aimed at trade in goods ipso facto cannot be addressed as well under Chapter 11."[135] Thus, there must be a "legally significant connection" between the measures in question and the claimant and its investments, but this connection does not need to be "primarily directed" at the investments.[136] The Claimant affirms that its claim meets the "legally significant connection," although such connection is not required under the Treaty.[137]

(b) Considerations of the Tribunal

135. This jurisdictional objection submitted by the Argentine Republic

[132] *Id*., para. 52.
[133] *Id.*, paras. 54-55.
[134] *Id*. (stating standard of "relating to" enunciated in *Methanex, supra* note 122, para. 147).
[135] *Id*., para. 55 (quoting Preliminary Motion by the Government of Canada to dismiss the claim because it falls outside the scope and coverage of NAFTA).
[136] *Id.*, para. 56
[137] *Id*.

raises the issue whether the Tribunal is competent to pass judgment on matters of public policy and whether the Measures were taken with regard to the "investment", as required by Article 8 of the Treaty.

136. The Tribunal has no difficulty in recognizing the Argentine Republic's sovereign prerogative to adopt the policies it sees fit. The Tribunal readily subscribes to the holding of *CMS* in this respect, namely:

> "On the basis of the above considerations the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong."[138]

137. However, the *CMS* tribunal did not stop here as submitted by the Respondent. It added:

> "The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts."[139]

138. Thus the issue is not passing judgment on policy measures of a State or considering measures that simply affect an investment, but whether the Measures had a direct bearing on the investment and violated binding obligations between Argentina and the Claimant.

139. The parties have discussed the meaning of "related to" and "with regard to" an investment. The Tribunal does not find the difference between these two expressions significant in the instant case; both refer to a connection, a

[138] *CMS*, *supra* note 81, para. 33.
[139] *Id*.

relation to the word that follows them.[140] There has to be a connection between the Measures and the investment. The connection does not need to be exclusive. There may be other investments to which the Measures are related. As stated in *CMS*, the measures adopted need to contravene "legally binding commitments made to the investor in treaties, legislation or contracts."[141]

140. The Argentine Republic has requested that the Claimant prove the connection between the Measures and the Argentine Republic's commitments at this stage of the proceedings. There is no doubt that National Grid made an investment in Argentina and, were it not for its sale of the shares in Citelec, the Argentine Republic would have accepted that the Claimant would be an investor under the Treaty. There is no doubt either that the Argentine Republic solicited the investment and that the execution of the Treaty had as its purpose to attract such investment. There is no denial that certain laws were passed by the Argentine Republic to ensure that such legislative framework would encourage investments. The dispute, as it has been framed and presented by the Claimant, is about the changes introduced to this legislative framework and the effect those changes had on the investment and the contractual obligations under related agreements. To the Tribunal, this is sufficient to establish the existence, *prima facie, of a* dispute with regard to the investment. The Tribunal does not need to be satisfied any further for purposes of deciding on its jurisdiction under the Treaty.

141. Therefore, the Tribunal rejects this objection to its jurisdiction.

4. Fourth Objection: The Dispute Is Not a "Legal Dispute"

(a) Position of the Parties

(i) Position of the Respondent

142. First, the Respondent argues that under the Treaty the dispute

[140] The UK has used both expressions indistinctly in its treaty practice. In fact, the two model investment agreements submitted during these proceedings use *"in relation to*."

[141] *CMS, supra* note 81, para. 33.

must be related to the violation of legal rights and not a mere conflict of interest and that the dispute must be susceptible of settlement by the application of the law. According to the Respondent, the disagreement between the parties on a point of fact or of law must be directed to the international obligations of the State, as stated by the tribunal in *Generation Ukraine v. Ukraine*.[142] However, the Respondent argues that, in the instant case, the alleged violations refer to specific contractual violations. Accordingly, Respondent claims that the tribunals competent to decide on the alleged violations are the Argentine courts, as "freely agreed between the parties to the dispute."[143]

143. The Respondent adds that:

(A) this Tribunal should not assume the role of the national administrative courts. The claim is clearly a claim for adjustment due to "increased costs" (*mayores costos)* for which there is a specific administrative procedure to restore the equilibrium of the contract;[144]

(B) simple affirmations of supposed violations of the Treaty by the Argentine Republic are not sufficient to turn allegations of a failed administrative mechanism of tariff adjustment based on criteria of public policy and equity into a "dispute about an investment" under the Treaty;[145] and

(C) "whether there exists an international dispute is a matter for objective determination", as stated by the ICJ in *Interpretation of Peace Treaties*.[146]

144. Second, the Respondent argues that if the claim were of a legal nature, then it would be a contractual claim. All the facts presented by the Claimant refer to violations of contractual obligations, while the remedies requested to solve the contractual problem are remedies directed at obtaining

[142] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003), 44 ILM 404 (2005), para. 18.4.

[143] Respondent's Plea on Jurisdiction, paras. 112-116.

[144] *Id*., para. 119.

[145] *Id*., para. 123.

[146] *Id*., para. 124 (citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1st Phase, Advisory Opinion (30 March 1950), [1950] *ICJ Reports,* 65, 74).

restitution of the investment. The Respondent refers to the principle of the "essential basis of a claim" introduced by the Annulment Committee in *Vivendi II.*[147] According to *Vivendi II*, when the essential basis of a claim submitted to an international tribunal is a breach of contract, the tribunal shall respect any valid clause of forum selection clause in the contract. In this case, the Respondent affirms that the basis of the claim is a nearly completed renegotiation of concession contracts and not the dismantling of an investment or a breach of international standards under the Treaty.[148]

145. Under this line of argument, the Respondent alleges that the Tribunal has the authority to determine the admissibility of the claim at this jurisdictional phase of the proceeding. For this purpose, the Tribunal requires only a careful reading of the Statement of Claim. The Respondent relies further on the authority of *SGS v. Philippines,*[149] where the tribunal remanded the case to the local courts in its decision on jurisdiction. Respondent also relies on the decision of the ICJ in the *Nuclear Tests* case, stating the advantage of tribunals limiting the scope of their specific jurisdiction, as well as the importance of doing so at the earliest available opportunity.[150]

146. Third, the Respondent argues that, this being a contractual claim, the Claimant has no *ius standi* to submit this claim to arbitration. The affected legal rights are those belonging to the concessionaire companies and not those of the Claimant.[151] Derivative claims are not admissible under Argentine law or international law. The Respondent conducts a comparative review of the treatment of derivative claims under NAFTA, the US-Chile Free Trade Agreement, and US law, for the purpose of showing the exceptional nature of

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[147] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002), 19 ICSID Rev.—FILJ 89 (2004).

[148] Respondent's Plea on Jurisdiction, paras. 128, 132 and 135.

[149] *SGS v. Philippines, supra* note 48.

[150] Respondent's Plea on Jurisdiction, paras. 137-139 (citing *Nuclear Tests (Australia v. France)*, Judgment (20 December 1974), [1974] *ICJ Reports* 253).

[151] *Id*., paras. 140-141.

those claims.[152]

147. The Respondent further argues that, in principle, there does not exist any right to a particular value of a share and that, under Argentine law, the only patrimonial right of a shareholder, *strictu sensu,* is the right to share in the liquidation value of the company. The Respondent then distinguishes between direct and derivative claims according to the different claims recognized by a shareholder who suffered a specific injury, as opposed to the injuries suffered by all shareholders. The Respondent also discusses the underlying policies or interests sought to be protected by both types of claims, namely, the integrity of the corporation on the one hand and the rights of creditors on the other. Failing to take this distinction into account, argues the Respondent, would amount to a preference for the interest of a shareholder who decides to file a claim over the needs of the company and of interested third parties taken as a whole.[153] The Respondent also points out that, in the case of a claim for special damages and injuries, the decision of the court is based on the facts presented in the claim and not in the allegation of the claimant or on how the claimant qualifies its claim.[154] For all these reasons, contends the Respondent, the Tribunal should not proceed to the merits. If the Tribunal were to do otherwise, and were to decide the case in favor of the shareholders, given the commitments made by Transener to the Respondent in the letter of understanding, the amount awarded by the Tribunal to the shareholders would not be paid into the corporate treasury and would lead to the liquidation of the company. Thus, the Tribunal would be destroying the capital needed for the company to recover from the alleged expropriation. In fact, the Tribunal would be expropriating a public services company to favor a few shareholders, thus assuming implicit powers to liquidate the company, which powers the Tribunal is not entitled to assume.[155]

[152] *Id*., paras. 151-158.
[153] *Id*., paras. 159-170.
[154] *Id*., para. 163.
[155] *Id*., para. 173.

(ii) Position of the Claimant

148. First, the Claimant observes that Respondent's arguments refer to principles of Argentine corporate law and domestic rules relating to the doctrine of legal personality of companies, which are not relevant to this arbitration. The Claimant reaffirms that its claims are based on the Treaty and not the domestic law of the Argentine Republic or any other domestic legal system. With respect to jurisdiction, the applicable law is found in the jurisdictional provisions of the Treaty as stated in *CMS* and *Siemens*.[156]

149. Second, the Claimant recalls that it has filed its Statement of Claim as a UK investor in Argentina; its claim arises directly from its rights under the Treaty and the breach by the Respondent of its obligations under the Treaty: "There is nothing indirect or derivative about these claims," states the Claimant.[157]

150. The Claimant notes that the Argentine Republic's argument ignores that the commitments made to the concessionaires in their respective contracts were made to the foreign investors as part of the efforts made by the Argentine Republic to attract bidders in the privatization of its public utilities. These commitments were "part of the entire Regulatory Framework for the privatization of the electricity industry, established by Argentina in laws, decrees, and resolutions as well as in the Contracts themselves."[158]

151. The Claimant refers to the considerations that led the tribunal in *Enron v. Argentina* to find that the Claimant had *ius standi*:

> "…[T]he Information Memorandum issued in 1992 and other instruments related to the privatization of the gas industry had specifically invited foreign investors to participate in this process. A road show followed in key

[156] Claimant's Counter-Memorial on Jurisdiction, paras. 135-138 (citing *CMS*, *supra* note 81, para. 42 and *Siemens*, *supra* note 41, para. 31).
[157] *Id*., para. 140.
[158] *Id*., para. 142.

cities around the world […]

> The conclusion that follows is that participation of the Claimant was specifically sought […] The Claimant cannot be considered to be only remotely connected to the legal arrangements governing the privatization, they are beyond any doubt the owners of the investment made and their rights are protected under the Treaty as clearly established treaty-rights and not merely contractual rights related to some intermediary. The fact that the investment was made through CIESA and related companies does not in any way alter this conclusion."[159]

152. The Claimant notes that the same considerations apply to the process of privatization of Transener described in the Statement of Claim.[160] There cannot be any doubt that the addressees of the commitments made by the Respondent were the investors, in particular the foreign investors. Transener and subsequently Transba were "simply the local entities through which the foreign investment was funneled."[161] The Claimant adds that BITs were part of these commitments. As noted in *Enron (Ancillary Claim)*: "That the Treaty was made with the specific purpose of guaranteeing the rights of the foreign investors and encouraging their participation in the privatization process, is beyond doubt."[162]

153. The Claimant concludes its second argument by affirming that it is a directly interested party and is independently entitled to submit its claim to the Tribunal, irrespective of whether the alleged breach of the Treaty may also involve a breach of the Contracts.[163]

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[159] *Id*., para. 143 (quoting paras. 55-56 of *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), *available at* http://ita.law.uvic.ca/documents/Enron-Jurisdiction.pdf).

[160] *Id.*, para. 144 (citing the Statement of Claim, paras. 78-83).

[161] *Id.*, para. 145.

[162] *Id*., para. 146 (quoting para. 32 of *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (2 August 2004), *available at* http://ita.law.uvic.ca/documents/Enron-DecisiononJurisdiction-FINAL-English.pdf).

[163] *Id*., paras. 147-149.

154. Third, the Claimant argues that the wording of the Treaty does not support Respondent's position. The Treaty defines broadly the term "investment" and includes "shares, […] and any other form of participation […] in a company."[164] This provision covers the Claimant's participation in Transener and Transba and the Claimant is entitled to bring a claim in respect of these investments. If they are damaged as a result of a breach of the Treaty, the Claimant is entitled to be compensated for it.[165]

155. Fourth, the Claimant refers to the numerous arbitration cases in which a similar *ius standi* objection has been rejected, i.e. *CMS*, *Enron*, *Azurix*, *Siemens* and *Maffezini*. The Tribunal will limit the reference to a few of the findings of these tribunals quoted by the Claimant.

156. Thus, in *CMS*, the tribunal found:

> "…no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders […] [this] can now be considered the general rule, certainly in respect of foreign investments and international claims and increasingly in respect of other matters."[166]

157. The tribunal in *Enron* held:

> "Whether the locally incorporated company may further claim for the violation of its rights under contracts, licenses or other instruments, does not affect the direct right of action of foreign shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying

[164] *Id.*, para. 150 (citing Treaty, Art. I(a)(ii)).
[165] *Id*., para. 150.
[166] *CMS*, *supra* note 81, para. 48.

investment."[167]

158. The Claimant also points out that shareholder claims were allowed in *Goetz*, *AAPL*, *Genin*, and *CME*, and concludes by saying that all these cases show that such claims are well recognized in international law.[168]

(b) Considerations of the Tribunal

159. The Respondent questions whether a legal dispute exits and, if it exists, then the Respondent contends that it is a contractual dispute that should be submitted to the federal courts of the City of Buenos Aires, as agreed in the Contracts. This objection and its reasoning overlap in part with the Sixth Objection. To avoid repetition, the Tribunal will address the second part of the issue of the forum selection in the Contracts when considering that objection.

160. In addressing Respondent's objections, the Tribunal finds useful the definition of "legal dispute" found in the Report of the Executive Directors of the International Bank for Reconstruction and Development to the Board of Governors accompanying the draft ICSID Convention: "The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[169] Although this Report does not apply to the interpretation of the Treaty, we find the foregoing language illustrative of the appropriate approach in this case. The arguments advanced by the parties and the facts alleged by them show that a

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[167] Claimant's Counter-Memorial on Jurisdiction, para. 154 (citing *Enron*, Decision on Jurisdiction, *supra* note 159, para. 49).

[168] *Id.*, paras. 161-162 (citing *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award (10 February 1999), 6 ICSID Rep. 5 (2004), paras. 6, 87 and 89; *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990), 6 ICSID Rev. —FILJ 526 (1991), para. 95; *Alex Genin, Eastern Credit Limited, Inc. and AS Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001), 17 ICSID Rev.—FILJ 395 (2002), paras. 323-325; and *CME Czech Republic BV v. The Czech Republic*, UNCITRAL Case, Partial Award (13 September 2001), para. 392, *available at* http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf).

[169] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965), adopted by Resolution No. 214 of the Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964, 1 ICSID Rep. 23, 28 (1993).

dispute exists between them as to whether the protection due to the investor under the Treaty has been violated and as to whether commitments were made to the investor under the laws of the Argentine Republic that would give rise to a claim under the Treaty. These claims extend beyond claims for breach of contract as contemplated in *Vivendi II*. Therefore, the Tribunal is satisfied that a dispute exists between the parties concerning an obligation of the Respondent with regard to an investment of the Claimant, as required under Article 8 of the Treaty, and rejects this objection to the extent that it concerns the absence of a legal dispute.

5. Fifth Objection: Letters of Understanding

(a) Positions of the Parties

(i) Position of the Respondent

161. The Respondent brings to the attention of the Tribunal letters of understanding signed by Transener and Transba on February 2, 2005 in the context of the renegotiation of the Contracts. In the case of Transener, Transener and its shareholders committed themselves to suspend, and desist from, any claim or recourse filed before any administrative, judicial or arbitral body in Argentina or elsewhere based on facts or measures taken in respect of the Concession Contract as a result of the emergency situation established by Law No. 25,561. Furthermore, in case the shareholders or former shareholders of Transener were to obtain an award or judgment in their favor, Transener would be responsible for payment of any compensation awarded, including fees and costs, and would hold Respondent harmless even in case of contract termination. It was also agreed that any such compensation, fees and costs, would not be recoverable through increased charges to the users of Transener's services. The parties to the letter of understanding confirm that the letter is the result of the renegotiation process provided for in Law No. 25,561 and ancillary statutes, and that the renegotiation's objective was to re-establish the conditions to provide the Public Service of Transport of High-Voltage Electric Power. A similar commitment

was made by Transba.[170]

162. It is the Respondent's position that, since it has reached a clear understanding with Transener and Transba, which are the Concessionaires entitled to the rights claimed in these arbitration proceedings, the Tribunal lacks jurisdiction to continue with the arbitration proceedings. Since neither Transener, nor Transba nor their shareholders could file claims against the Argentine Republic for measures taken since December 2001, neither could National Grid do so, having sold its shares at its own risk. National Grid suffered no harm and, as stated by the ICJ in *Nuclear Tests*, he who does not suffer any harm is not entitled under international law to request the protection of a tribunal.[171]

(ii) Position of the Claimant

163. The Claimant contends that the letters of understanding executed by Transener and Transba after National Grid's disposal of its investment are irrelevant for the purpose of determining the Tribunal's jurisdiction over this dispute. National Grid has never participated nor is it participating in the renegotiation and its Treaty claims are independent of the renegotiation. The Claimant draws the attention of the Tribunal to the statement made by the tribunal in *CMS*, responding to a similar jurisdictional objection:

> "It is not for the Tribunal to rule on the perspectives of the renegotiation process or on what TGN might do in respect of its shareholders, as these are matters between Argentina and TGN or between TGN and its shareholders."[172]

164. The Claimant observes that it was the Respondent that imposed the renegotiation process upon the Concessionaires and alleges that a process in which the Claimant plays and can play no part cannot block its Treaty

[170] Respondent's Plea on Jurisdiction, paras. 174, *et seq.*

[171] *Id*., paras. 181-182 (citing *Nuclear Tests*, *supra* note 150, para. 53).

[172] *CMS*, *supra* note 81, para. 86 (quoted in the Claimant's Counter-Memorial on Jurisdiction, para. 165).

claims.[173]

(b) Considerations of the Tribunal

165. The Respondent's argument is based on the contention that the shareholders hold no direct rights to claim protection under the Treaty and that, since the Measures are unassailable by Transener and Transba, those Measures are also unassailable by Transener's and Transba's shareholders. This argument advanced by the Respondent ignores the possibility of direct claims by National Grid based on obligations undertaken by the Argentine Republic in the Treaty. The Tribunal has already accepted *prima facie* the allegation that certain commitments were made by the Argentine Republic to the shareholders of Transener in order to attract their investment. The Tribunal has also upheld its jurisdiction to decide whether the Measures breached any treaty obligations. The Tribunal notes that neither Transener nor Transba had any rights to pursue claims under the Treaty and hence lacked legal capacity to negotiate them away with the Respondent. The fact that as part of this negotiation the Respondent obtained assurances of compensation by the Concessionaires in the event the Tribunal should award compensation to the Claimant, and the intimation by the Argentine Republic that such an eventual award might bankrupt a public utility should have no effect on the jurisdiction of this Tribunal to settle this dispute, for those are matters negotiated with third parties to these proceedings. The holding of the tribunal in *CMS* quoted above applies equally here.

166. For these reasons, the Tribunal rejects this objection to its jurisdiction.

6. Sixth Objection: Exclusive Jurisdiction of the Federal Courts of Buenos Aires

(a) Position of the Parties

[173] Claimant's Counter-Memorial on Jurisdiction, para. 166.

(i) Position of the Respondent

167. The Respondent observes that Article 38 in both Contracts provides for jurisdiction of the federal courts of Argentina's federal capital. The Respondent invites the Tribunal to read carefully the decisions in the *Woodruff Case*[174] and *North American Dredging Company*[175] recognizing the primacy of the specific jurisdiction agreed in a contract over the jurisdiction established under an international agreement. Respondent contends that this case is no different. If National Grid accepted the jurisdiction in the Contract when the remedies under the Treaty were already known, National Grid now is precluded by its own acts from resorting to such remedies.[176] The Respondent observes that this criterion has been confirmed by the tribunals in the *SGS* cases, quoting the following statement from *SGS v. Philippines*:

> "[…] the question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction."[177]

(ii) Position of the Claimant

168. The Claimant refers to a long line of cases - *CMS, Enron, Azurix, Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux, Vivendi II, Lanco, Salini,* and *CME* – to the effect that it is "well established in international case law that claims alleging a cause of action under a BIT are not

[174] *Woodruff*, United States-Venezuela Mixed Commission, IX R.I.A.A. 213.

[175] *North American Dredging Company of Texas*, United States-Mexico General Claims Commission, IV R.I.A.A. 26.

[176] Respondent's Plea on Jurisdiction, paras. 184-190.

[177] *Id*., para. 192 (quoting *SGS v. Philippines*, *supra* note 48, para. 154).

subject to the exclusive jurisdiction of the local courts pursuant to an underlying contract."[178]

(b) Considerations of the Tribunal

169. The Tribunal recalls the simple fact that National Grid is not a party to the Concession Contracts, in which the Concessionaires agreed to the exclusive jurisdiction of the federal courts in Argentina's federal capital. This should distinguish this case from some of the others adduced by the parties and facilitate the Tribunal's task. The Tribunal finds it somewhat contradictory that the Respondent would base its jurisdictional objection on preserving the integrity of the corporate personality of the Concessionaires while at the same time contending that the Claimant is bound by a commitment that it has not made. The Tribunal realizes that the Respondent's defense relies on rejecting the possibility that Claimant may bring claims under the treaty separately from claims arising under the Contracts. However, this is a matter to be proven by the Claimant at the time of discussing the merits of its claims. As characterized by the Claimant, the claims brought before this Tribunal fall *prima facie* under the Treaty. As held in *SGS v. Pakistan*: "…[I]f the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits."[179]

170. Therefore, the Tribunal rejects the sixth objection to its jurisdiction and the fourth objection to the extent that it relates to the same matter.

[178] Claimant's Counter-Memorial on Jurisdiction, paras. 79-87.

[179] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003), para. 145.

DECISION

1. Having considered the parties' arguments in their written and oral pleadings and for the reasons above stated, the Tribunal unanimously decides that:

1. The Tribunal has jurisdiction to consider the claims of National Grid set forth in its Notice of Arbitration and its Statement of Claim.

2. National Grid has *ius standi* to present such claims.

The Tribunal has, accordingly, made the necessary order, in accordance with Procedural Order No. 2, to establish the dates for the parties to submit their Counter-Memorial, Reply and Rejoinder on the merits.

Each party has requested that the costs of the jurisdictional phase of the proceedings, including its own costs, be borne by the other. The Tribunal further decides to consider and decide this matter together with the merits of the dispute.

Done in English and Spanish, both versions being equally authoritative, in Washington, D.C. on June 20, 2006.

Dr. Andrés Rigo Sureda
President

E. Whitney Debevoise, Esq.
Arbitrator

Professor Alejandro M. Garro
Arbitrator