

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

IN THE PROCEEDING BETWEEN

**SIEMENS A.G.
(CLAIMANT)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

(ICSID Case No. ARB/02/8)

DECISION ON JURISDICTION

Members of the Tribunal
Dr. Andrés Rigo Sureda, President
Judge Charles N. Brower, Arbitrator
Professor Domingo Bello Janeiro, Arbitrator

Secretary of the Tribunal
Ms. Claudia Frutos-Peterson

Washington D.C., August 3, 2004

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I. PROCEDURE

1. On May 23, 2002, the International Centre for Settlement of Investment Disputes (hereinafter “ICSID” or “the Centre”) received from Siemens A.G. (hereinafter “Siemens” or “the Claimant”) a request for arbitration against the Argentine Republic (hereinafter “the Respondent” or “Argentina”). On June 7, 2002, the Centre acknowledged receipt of the request in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter the “Institution Rules”) and informed the Claimant that it would not take further action until it has received the prescribed lodging fee as provided by Institution Rule 5(1)(b). On June 13, 2002, the Centre acknowledged receipt of the prescribed lodging fee by the Claimant and transmitted a copy of the request to Argentina and to the Argentine Embassy in Washington, D.C. in accordance with Institution Rule 5(2).

2. According to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (“the ICSID Convention”), the Secretary-General of the Centre registered the request for arbitration on July 17, 2002. In accordance with Institution Rule 7, the Secretary-General notified the parties on the same date of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

3. On August 7, 2002, the parties agreed that the Arbitral Tribunal would consist of three arbitrators, one arbitrator to be appointed by each party and the third, who shall serve as the President of the Tribunal, to be appointed by agreement of the parties. The Claimant appointed Judge Charles N. Brower, a U.S. national, and the Respondent appointed Professor Domingo Bello Janeiro, a Spanish national. However, the parties failed to agree on the appointment of the third, presiding arbitrator. On October 21, 2002, the Claimant requested that the third, presiding arbitrator be appointed by the Chairman of the ICSID Administrative Council in accordance with

Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (hereinafter “the Arbitration Rules”).

4. After consulting the parties, Dr. Andrés Rigo Sureda, a national of Spain, was appointed by the Centre as the third, presiding arbitrator. In accordance with Rule 6(1) of the Arbitration Rules, on December 19, 2002, the Secretary-General notified the parties that all three arbitrators accepted their appointment and that the Arbitral Tribunal was deemed to be constituted and the proceedings deemed to began on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal. The Tribunal held its first session in Washington, D.C. on February 13, 2003.

5. Mr. Guido Santiago Tawil of M. & M. Bomchil and Dr. Peter Gnam of Siemens, A.G. represent the Claimant. Messrs. Tawil and Gnam represented the Claimant at the first session. Dr. Horacio Daniel Rosatti, Procurador del Tesoro de la Nación Argentina, represents the Respondent. Messrs. Ignacio Suárez Anzorena and Carlos Lo Turco, acting on instructions from the Procurador del Tesoro de la Nación Argentina, and Mr. Osvaldo Siseles, from the Ministerio de Economía de la República Argentina, represented the Respondent at the first session.

6. During the first session, the parties agreed that the Tribunal had been properly constituted in accordance with the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections to any members of the Tribunal. It was also noted that the proceedings would be conducted under the ICSID Arbitration Rules in force since September 26, 1984.

7. During the first session, the parties also agreed on several other procedural matters, which were later reproduced in the written minutes signed by the President and the Secretary of the Tribunal. Regarding the written submissions, the Tribunal, after consulting with the parties in this respect, fixed the following time limits for the presentation of the parties' pleadings: The Claimant would file a memorial within 90 (ninety) days from the date of the first session; the Respondent would file a counter-memorial within 90 (ninety) days from its receipt of the Claimant's memorial; the Claimant would file a reply within 60 (sixty) days from its receipt of the Respondent's counter-memorial, and the Respondent would file a rejoinder within 60 (sixty) days from its receipt of the Claimant's reply.

8. The Tribunal further noted that, according to the ICSID Arbitration Rules, the Respondent has the right to raise any objections to jurisdiction no later than the expiration of the time limit fixed for the filing of its counter-memorial, but that in the event that the Respondent raises objections to jurisdiction, the following schedule would apply: The Claimant would file a counter-memorial on jurisdiction within the same number of days used by Argentina to file its objections to jurisdiction, but in any event, the Claimant would have a minimum of 60 (sixty) days to file its counter-memorial on jurisdiction; the Respondent would file a reply on jurisdiction within 30 (thirty) days from its receipt of the Claimant's counter-memorial on jurisdiction; the Claimant would file a rejoinder on jurisdiction within 30 (thirty) days from its receipt of the Respondent's reply on jurisdiction. It was also agreed that, if the Respondent would raise any objections to jurisdiction and proceedings would be resumed following the filing of such objections (because the Tribunal dismisses the objections or because it decides to join them to the merits of the dispute), the calendar agreed for the merits would recommence, and the

Respondent would have the remaining number of days at the date of the filing of its objections to jurisdiction, for the filing of its counter-memorial on the merits.

9. On March 13, 2003, the Claimant filed its memorial on the merits and accompanying documentation.

10. On March 24, 2003, Ms. Claudia Frutos-Peterson, ICSID, Counsel, assumed her position as Secretary of the Tribunal.

11. On April 8, 2003, the parties agreed that the hearing on jurisdiction would take place on January 20-22, 2004, in Washington, D.C.

12. By letter of June 10, 2003, the Argentine Republic requested an extension of time due to the institutional succession in the Argentine Government to file its counter-memorial on the merits and/or to raise any objections to the jurisdiction of the Centre until August 4, 2003. By letter of June 18, 2003, the Claimant objected to the extension requested by the Respondent.

13. On June 23, 2003, due to the particular circumstances, the Tribunal granted the extension sought by Argentina and informed the parties that if the Argentine Republic filed its counter-memorial without objecting to jurisdiction, the Claimant, if requested, would be granted a similar extension of time to file its reply on the merits. The Tribunal further noted that if the Argentine Republic filed any objections to jurisdiction, the Claimant would have the same number of days used by the Argentine Republic to file such objections for the filing of its counter-memorial on jurisdiction.

14. On July 1, 2003, Dr. Horacio Daniel Rosatti informed the Tribunal that he had been appointed Procurador del Tesoro de la Nación Argentina.

15. In accordance with ICSID Arbitration Rule 41(1), on August 4, 2003, the Respondent filed a memorial raising objections to the jurisdiction of the Centre and the competence of the Tribunal. In its memorial on jurisdiction, Argentina requested the Tribunal for a 45 (forty-five) day extension of the time limit to file its counter-memorial on the merits in the event that the Tribunal would declare that it has competence over this matter.

16. Pursuant to ICSID Arbitration Rule 41(3), on August 7, 2003, the Tribunal suspended the proceedings on the merits.

17. On August 8, 2003, the Tribunal invited the Claimant to provide its observations regarding the Respondent's request concerning the extension of the time limit to file its counter-memorial on the merits. The Claimant presented its observations on August 11, 2003. On August 21, 2003, the Tribunal informed the parties that they considered it premature to decide this issue at this stage of the proceedings.

18. On October 16, 2003, the Claimant filed its counter-memorial on jurisdiction. Thereafter, on November 17, 2003, the Respondent filed its reply on jurisdiction.

19. On December 10, 2004, the Respondent requested to postpone the hearing on jurisdiction scheduled for January 20-22, 2004, until February 15, 2004. On December 11, 2004, the Tribunal invited the Claimant to present any observations to the Respondent's request. On the same date, the Claimant presented its observations, asking the Tribunal to reject the Respondent's request and to maintain the previous agreed schedule for the hearing on jurisdiction.

20. By letter of December 19, 2003, the Tribunal informed the parties of its decision to schedule the hearing on jurisdiction on February 3 and 4, 2004.

21. On December 24, 2003, the Claimant filed its rejoinder on jurisdiction.

22. As previously decided by the Tribunal, the hearing on jurisdiction took place in Washington, D.C. on February 3 and 4, 2004. At the hearing, the Claimant was represented by Mr. Guido Santiago Tawil, Dr. Peter Gnam and Mr. Stephan Signer and Ms. María Inés Corrá. Mr. Tawil and Dr. Gnam addressed the Tribunal on behalf of the Claimant. The Respondent was represented by Ms. Andrea Gualde, Ms. Ana Badillos, and Mr. Jorge Barraguirre from the Procuración del Tesoro de la Nación Argentina, as well as by Messrs. Osvaldo Siseles, from the Ministerio de Economía de la República Argentina, and Roberto Hermida, from the Embassy of Argentina in Washington, D.C. Ms. Gualde and Mr. Barraguirre addressed the Tribunal on behalf of the Respondent. During the hearing, the Tribunal also put questions to the parties in accordance with ICSID Arbitration Rule 32(3).

II. THE FACTS

23. In August 1996, the Respondent invited bids for a contract to establish a system of migration control and personal identification (“the System”). The bidding terms required that a local company be established by bidders in order to participate in the bidding process. The Claimant established, through its wholly-owned affiliate Siemens Nixdorf Informationssysteme AG (“SNI”), a local corporation, Siemens IT Services S.A. (“SITS”).

24. As required by the bidding terms, SITS took part as a bidder and its offer showed evidence – as requested by the Respondent - that SNI was wholly integrated into Siemens, the sole owner of its shares, that SNI was managed by Siemens and “by virtue of law is jointly liable for the obligations that SNI assumes before third parties.”¹

¹ Request for Arbitration, para. 13

25. SITS' bid won the contract, which was signed on October 6, 1998 and approved by Decree No. 1342/98 ("the Contract"). The Contract had a term of six years with the possibility of two extensions of three years each. Siemens proceeded to make the required investments through capital contributions to SITS and funds provided to SITS to enable it to carry out its obligations under the Contract.

26. On December 10, 1999, a new Government came to power in Argentina and in February 2000 it suspended the contract allegedly because of technical problems. In March 2000, a commission was established to review the Contract. SITS agreed to a proposal (*propuesta de reformulación contractual*) made by this commission in November 2000 within the scope of Emergency Law 25.344. A new and different proposal was received by SITS on May 3, 2001. On May 18, 2001, the Respondent terminated the Contract by Decree No. 669, issued under Emergency Law 25.344. SITS filed three administrative appeals against Decree No. 669 on June 5, June 19, and July 5, 2001. The appeals were rejected by Decree No. 1205/01, dated September 24, 2001.

27. On July 23, 2001, Siemens had notified the Respondent of a breach of the Treaty between the Federal Republic of Germany and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investments, signed on April 9, 1991 ("the Treaty"), triggering a six-month negotiation period under the Treaty. Representatives of the parties met on several occasions but could not resolve the dispute. On March 18, 2002, Siemens confirmed its agreement to ICSID arbitration under Article 10 of the Treaty.

III. OBJECTIONS TO JURISDICTION

The Respondent filed eight objections to jurisdiction:

- (1) Siemens has breached factual and temporal requirements of the Treaty.
- (2) The dispute was submitted to the local jurisdiction.
- (3) Siemens lacks *ius standi*: the Treaty requires a direct relationship between the company of the other Contracting Party and the investment.
- (4) Siemens lacks *ius standi*: the Treaty allows indirect claims only in the context of Article 4.
- (5) The dispute does not arise directly out of an investment.
- (6) The dispute is hypothetical.
- (7) Siemens has included new claims which had not been notified to the Respondent under the terms of the Treaty.
- (8) The Contract includes a specific and exclusive jurisdictional clause.

28. In addition, the Respondent made “Some Preliminary Considerations” regarding the concept of “Investment and Investor”, “Breaches of the Treaty”, “Development of the Investment Dispute”, “Some Preliminary Aspects of the Context and Legal Basis of Siemens’ Claims” and “Applicable Law”. The Tribunal will consider first applicable law, and to the extent that other preliminary considerations have a bearing on the jurisdiction of the Centre or the competence of the Tribunal, they will be considered as part of the objections to jurisdiction. The Tribunal will consider the objections to jurisdiction in the sequence presented in the Respondent’s Memorial on Jurisdiction.

1. Applicable Law

(a) Position of the Respondent

29. The Respondent refers to the Treaty clause on applicable law which provides that the dispute shall be decided “on the basis of the present treaty, and if applicable, on the basis of other treaties in force between the Parties, the local law of the Contracting Party in which territory the investment was made, including its rules on conflict of laws and on the general principles of international law.”² Based on this provision, the Respondent argues that “the dispute is governed mainly by Argentine law, which in turn is the law applicable to contractual issues and those issues concerning the status of investor in an Argentine corporation underlying Siemens’ claim.”³

(b) Position of the Claimant

30. The Claimant argues that “It is a well established principle that jurisdictional questions should be decided on the basis of the Treaty and international law only. Decisions on jurisdiction are governed solely by Article 25 of the ICSID Convention and the pertinent provisions of the Treaty, as *lex specialis*”⁴. None of these provisions is affected by any provision of Argentine law to the contrary. Furthermore, the Treaty is an international law instrument and international law applies alongside the Treaty.⁵ The Claimant also notes that the law applicable to the dispute is a matter to be considered in the merits phase of the proceedings.⁶

² Memorial on Jurisdiction, para. 93.

³ Ibid. para. 94.

⁴ Counter-Memorial on Jurisdiction, para. 40.

⁵ Ibid. para. 48.

⁶ Ibid. para. 44.

(c) Considerations of the Tribunal

31. Argentina in its allegations has not distinguished between the law applicable to the merits of the dispute and the law applicable to determine the Tribunal's jurisdiction. This being an ICSID Tribunal, its jurisdiction is governed by Article 25 of the ICSID Convention and the terms of the instrument expressing the parties' consent to ICSID arbitration, namely, Article 10 of the Treaty. Therefore, the Tribunal needs to assess whether the Request for Arbitration meets the requirements of Article 25 of the ICSID Convention and of Article 10 of the Treaty.

2. First Objection: Siemens Has Breached Factual and Temporal Requirements of the Treaty

(a) Position of the Respondent

32. The Claimant has invoked the most-favored-nation ("MFN") clause of the Treaty to avoid, as is permitted under the Treaty between Argentina and Chile concerning the Reciprocal Encouragement and Protection of Investments of October 2, 1991 ("the Chile BIT"), a prior submission of the dispute to the local courts. Alternatively, Siemens submits that the 18-month period provided by the Treaty to allow a decision of the local courts to the satisfaction of the parties is a mere rule of procedure and not an obstacle to the jurisdiction of the Tribunal, and that it would be futile to pursue this dispute in the local courts because it is impossible to obtain a decision of the courts within the 18-month period.

33. Argentina considers that the scope of the MFN clause can be determined only through interpretation of the specific treaty in which it appears: "[I]t cannot be said that there is only one way to interpret the extent of the MFN clause, as this could change according to the provisions in which it is included."⁷ In support of this argument, the Respondent refers to *Rights*

⁷ Memorial on Jurisdiction, para. 112.

of *Nationals of the United States of America in Morocco*, *Anglo-Iranian Oil*, *AAPL*, and *Maffezini* and concludes that it is not possible “to determine *a priori* whether a certain clause of an international treaty is subject or not to the application of the MFNC of another convention of equal nature. That shall depend on what the Parties had agreed upon in each case.”⁸

34. Argentina argues that the Claimant has based its case in particular on *Maffezini*, ignoring that the MFN clause included in the Treaty between Argentina and Spain concerning the Reciprocal Encouragement and Protection of Investments of October 3, 1991 (“the Spain BIT”) is “substantially different from that included in the Treaty and must be object of a specific analysis of this Tribunal.”⁹ Argentina affirms that MFN clauses “constitute a sort of legal anomaly”¹⁰ since they create a framework that “extraordinarily conditions a basic principle of international law regarding bilateral obligations: the principle of *res inter alios acta*.”¹¹ Then Argentina refers to the application of the principle of *ejusdem generis* and quotes from the Draft Articles of the International Law Commission (“ILC”) on the MFN Clauses: “The beneficiary State acquires the rights...only in respect of persons or things which are specified in the clause or implied from its subject-matter.”¹²

35. Argentina argues that the MFN clause in the Treaty precludes an investor from invoking the Chile BIT. This argument is based on a textual and contextual interpretation “including arguments relative to the international law applicable to the relationship between the

⁸ Ibid. paras. 114-118.

⁹ Ibid. para. 119.

¹⁰ Ibid. para. 120.

¹¹ Ibid.

¹² Ibid. para. 121, Article 2(2).

parties at the moment when the Treaty was celebrated, and to the general and particular practice regarding investment treaties.”¹³

36. It is the contention of Argentina that the text of Article 3(1) of the Treaty refers only to investments and the treatment of investments. It does not cover treatment to be accorded to holders of investments. The lack of the “subjective” element is in contrast to the text of Article 10 of the Treaty that refers to the possibility for the parties (State/investor) to submit their differences to the competent courts and arbitration. There is no basis in Article 3(1) to construe the term investments in such manner as to include “the modalities established for a dispute settlement system”. In any case, a dispute settlement procedure cannot be deemed an asset –an investment- in plain English.¹⁴

37. Argentina equally maintains that the text of Article 3(2) of the Treaty does not allow one to infer that the parties thereto intended to include the dispute settlement system within the scope of the application of the MFN clause because it is not an activity in connection with an investment. This is confirmed by the definition of “activities” in Ad Article 3 of the Protocol. This definition relates to transactions of a commercial and economic nature in relation to exploitation and management of investments. There is no expression in the definition that would allow the reader tacitly to include dispute settlement in the definition used. According to Argentina, “the *ratio legis* of the Protocol is precisely that of limiting that concept to the management of assets in a commercial sense.”¹⁵

¹³ Ibid. para. 125.

¹⁴ Ibid. paras. 129-132.

¹⁵ Ibid. para. 137.

38. Argentina considers that the plain meaning of the word “activities” within the context of an investment treaty does not support an interpretation compatible with the Claimant’s position. The Respondent considers that, in this context, “*Activity* refers to the group of actions related to operation and management, and could be understood to mean enterprise, as expressed by modern commercial scholars.”¹⁶ This meaning is confirmed by the definition of “company” in Article 1(4) of the Treaty: “any juridical person [...] irrespective of whether or not its activities are directed at profit.”

39. Argentina further supports its position by analyzing provisions of the laws of Italy, Germany and Argentina and concludes that “both [S]tates Parties to this Treaty give to the term activity an equivalent scope, confirming that the Parties were referring to technical and economic operations linked to the exploitation of investments and not to the dispute settlement system.”¹⁷

40. According to the Respondent, this conclusion is reinforced by Article 10 of the Treaty. This Article allows “both investors and the [S]tate alike to resort to dispute settlement mechanisms. However, only investors engage in the activities referred to by the Protocol, since only they carry investment-related activities. Had the Convention [Treaty] wanted also to refer to the latter, the article should have been worded in more general terms.”¹⁸ Furthermore, dispute settlement cannot be considered an activity of nationals or companies because they do not carry it out.¹⁹

¹⁶ Ibid. para. 140.

¹⁷ Ibid. paras. 142-145.

¹⁸ Ibid. para. 147.

¹⁹ Ibid. para. 148.

41. Another argument put forward by the Respondent is that the matters covered by Article 3(1) and (2) of the Treaty are based on treatment that is national treatment. The Treaty ensures the same treatment to foreign and national investors and, therefore, “the matters regulated by said provisions must be those enabling said identical treatment.”²⁰ The rules regarding dispute settlement are exceptional and exclusive to foreign investors, “Consequently, it cannot be argued – at least, logically – that the dispute settlement system is comprised within the treatment obligations contained in Article 3(1) and (2)”.²¹

42. According to the Respondent, a harmonious interpretation of these Treaty provisions inevitably leads to exclusion of the dispute settlement provisions from the MFN clause. The exceptions in Article 3(3) and (4) and in the Protocol concerning tax advantages also show that these provisions refer to competitiveness of the investment as it is specifically mentioned in the Protocol Ad to Article 3(2).²²

43. The Respondent affirms that the Treaty structure also shows that, when the parties wanted to give the MFN clause a broader effect, they did so. In this respect, Argentina refers to the fact that there is an MFN clause in Article 4 but it does not refer to national treatment. Argentina explains that it would not make sense to include such treatment because the provisions of Article 4 are not in line with the rights enjoyed by national investors. On the other hand, the provisions of the Treaty on capital transfers (Article 5) or dispute settlement (Article 10) do not include either national treatment or MFN clauses. Neither of these provisions would apply to nationals, as is the case of Article 4, but this notwithstanding, there is no MFN clause in either of these articles.

²⁰ Ibid. para. 153.

44. According to Argentina, the interpretation of the Treaty presented by the Claimant violates the principle of effective interpretation, namely, *ut res magis valeat quam pereat*, against Article 31(1) of the Vienna Convention on the Law of the Treaties (“the Vienna Convention”). Article 4(4) would be superfluous, since it would be covered by Article 3(1) and (2) of the Treaty.

45. The Respondent affirms that the rights conferred by Article 3 are different from those conferred under Article 10 and recalls that both parties to a dispute may, under Article 10, submit it to the local courts six months after its notification. In this context, Siemens confers on the MFN clause in Article 3 “an exorbitant effect contrary to the most fundamental general principles of law: the effect of an implied and implicit waiver of a right expressly conferred by the Treaty.”²³ Argentina then states that “at all events, the Argentine Republic requests that pursuant to the powers granted by article 10(2) of the Treaty, the dispute be submitted to competent federal courts.”²⁴

46. Argentina then turns to a contextual interpretation of the MFN clause in Article 3. The Respondent first points out that conceptually the agreement to arbitrate is separable from the substantive provisions, and Article 3 deals with substantive provisions. Second, Argentina finds a similarity between the MFN clause and assignment and manifests that it is unquestionable that if the object of the assignment is the arbitration agreement per se, the party’s consent is indispensable. Third, it argues that the principle *ejusdem generis* is even more restrictive regarding procedural and jurisdictional matters. Based on French case law, the Respondent

²¹ Ibid. para. 154.

²² Ibid. paras. 155-160.

²³ Ibid. para. 172.

²⁴ Ibid. para. 174.

concludes that, unless expressly provided for, the MFN clause does not implicitly extend to procedural matters.²⁵

47. Argentina then examines the understanding of the MFN clause under international law at the time the Treaty was executed. Argentina argues that in the two cases in which the ICJ has dealt with an MFN clause (*Anglo-Iranian Oil* and *U.S. Nationals in Morocco*), the ICJ “opposed the application of the clause to extend the benefit of most-favored-nation to the jurisdictional scope.”²⁶ The Respondent also refers to the decision of the arbitration commission in *Ambatielos* and affirms that this commission decided on substantive standards of treatment and not jurisdictional commitments. Based on these three cases, the Respondent concludes that “in light of the evolution of the international law at the time the Treaty was executed, not only can it be said that there were no elements to presume that the jurisdictional commitments under the Treaty belonged to the operating scope of the MFNC but that there were concrete elements to reach in the opposite direction.”²⁷

48. Argentina maintains that the practice of the parties as regards investment treaties shows that, if the parties intended to include the dispute settlement system within the scope of application of the MFN clause, they expressly did so. This was the case of the Treaty between Argentina and Korea concerning the Mutual Encouragement and Protection of Investments, dated May 17, 1994. The United Kingdom has included a specific reference to dispute settlement in the MFN clause in some of its treaties but not in the Treaty for the Promotion and Protection of Investments entered into with Argentina on December 11, 1990. The Respondent also refers to

²⁵ Ibid. paras. 175-187.

²⁶ Ibid. para. 188. Underlined in the original.

²⁷ Ibid. para. 202.

the broad language of “the Spain BIT” but limits its importance because Spain does not accept that that agreement includes jurisdictional clauses in its MFN clause and therefore neither does Argentina.²⁸

49. Argentina emphasizes that the Treaty provision on settlement of disputes diverges from the alternatives provided by the German model investment treaty. From this fact, the Respondent draws two conclusions: “The first is that the parties expressly adopted said dispute settlement mechanism. The second is that the parties considered said mechanism specially important and, albeit contrary to the policy favored in the German model treaty, they did not agree on a MFNC that may allow [to] surmount said situation in the future, in the event the Argentine Republic modifies its policy on the issue.”²⁹

50. Argentina expounds further on its BIT practice to show that not all the MFN clauses and dispute settlement clauses are the same and that they are specifically negotiated case by case, and “in no case shall it be presumed that the issues concerning the way the Argentine Republic submit to international jurisdictions are not a part of its main public policies.”³⁰ According to the Respondent, the matters specifically considered by the contracting parties, and as decided in *TECMED v. Mexico*, cannot be included in the sphere of the MFN clause.³¹

51. Argentina maintains that Article 10 of the Treaty reflects a “moderation” of the exhaustion of local remedies rule, and that the Treaty requires Siemens to use these remedies “diligently- for at least 18 months, as a previous requisite before attempting to compromise the

²⁸ Ibid. paras. 206-208.

²⁹ Ibid. para. 211.

³⁰ Ibid. para. 217.

³¹ Ibid. para. 212.

responsibility of the Argentine Republic under the Treaty before an international court.”³² Siemens’ interpretation arrives at “the absurd situation whereby a supposed application of the rule that internal remedies are to be exhausted first would be tacitly waived. That, of course, is in contradiction with legal literature, case law and generally accepted international practice.”³³ Argentina refers to *ELSI*, in which the ICJ held that it finds itself “unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”³⁴ Argentina also points out that limitations to a State’s sovereignty should be treated restrictively and that it had warned Siemens on two occasions that the Chile BIT was not a valid basis for bringing this claim to ICSID without first pursuing it in the local courts.³⁵

52. Argentina then turns to *Maffezini*, and points out that notwithstanding the generality of the MFN clause, Spain considered that it did not cover matters of procedure. The tribunal recognized that it was necessary “to determine whether the omission stems from the parties’ intention, or whether the extension of the clause can be reasonably inferred from the parties’ practice in their treatment of foreign investors and of their own investors.”³⁶ Argentina finds questionable the reasoning leading to the conclusion that the MFN clause in the Spain BIT covers the settlement of controversies, and that the Tribunal should bear in mind “the specific framework of the tribunal’s analysis, the non-binding nature of the case law precedents on third parties, and, if applicable, the distinction between the points meriting the tribunal’s attention in

³² Ibid. para. 218.

³³ Ibid. para. 219.

³⁴ *Case concerning Elettronica Sicula S.p.A.* 1989 ICJ Reports, p. 50.

³⁵ Ibid. paras. 221-227.

³⁶ *Maffezini*, para. 53.

order to arrive at the decision which of them were to be held and which of them were overabundant.”³⁷

53. Argentina finds incorrect the analysis of *Ambatielos* by the tribunal in *Maffezini*. Argentina considers that the decision in *Ambatielos* regarding administration of justice had a substantive content because what was disputed was whether, on the basis of the MFN clause, “Mr. Ambatielos was entitled to receive a *just treatment*, an *equitable treatment*, and a *treatment according to law* from the English courts.”³⁸ Argentina also considers that that tribunal “did not take adequate note of the significant differences between the substantive issues raised in that case and the issues of a jurisdictional nature that had to be decided in the *Maffezini v. Spain* case.”³⁹ Furthermore, the tribunal in *Maffezini* ignores *Anglo-Iranian Oil*, in which the ICJ “conclusively affirmed the inapplicability of a MFNC to jurisdictional matters.”⁴⁰

54. Argentina affirms that the conclusion reached by the tribunal in *Maffezini* is based on the description of situations such as the convenience of traders and investors and the relationship of substantive rights and dispute settlement mechanisms. It is not based, as it should be, on the source of relevant law: the intention of the parties. There is no specific analysis of the *ejusdem generis* principle. The only relevant reference is to the generality of the MFN clause. If this is the basis of the tribunal’s conclusion, then the other statements regarding convenience of investors and the relationship of substantive and jurisdictional rights are in the nature of *obiter dicta*.⁴¹

³⁷ Memorial on Jurisdiction, para. 232.

³⁸ Ibid. para. 235. Emphasis in the original.

³⁹ Ibid. para. 237.

⁴⁰ Ibid. para. 241.

⁴¹ Ibid. paras. 242-249.

55. Argentina is concerned that with its reasoning the tribunal in Maffezini “inverted the order in the analysis and, by transforming the exception into a rule and vice versa, it grants priority to the access to mechanisms for the settlement of disputes which are special over essential international law principles”⁴².

56. Argentina maintains that Siemens cannot refuse to comply with the provisions of the Treaty because they are of a procedural nature or because resort to local courts is useless or expensive. Argentina points out that Siemens switches from one treaty to another, which is not consistent with the prohibition of contradiction to the prejudice of a third party, a fact that the Respondent requests the Tribunal to take into account.⁴³ In any case, the treaties referred to by Siemens in support of its argument are not applicable since they have dispute settlement mechanisms that do not require “a previous, effective and diligent use of national jurisdiction”. They all require simply a waiting period related to negotiations.⁴⁴

57. Argentina recalls that its consent to international arbitration is subject to the requirement of bringing the dispute to the local courts in a first stage. This “not only implies aspects related to the legal source of the consent to arbitration jurisdiction, but it is also related to sensitive economic policy and foreign policy issues. In short, such term constitutes an essential element of the exceptional jurisdictional offer made in investment treaties.”⁴⁵

58. It cannot be argued, maintains Argentina, that the situation has changed regarding legal costs in Argentina or that the judiciary in Argentina is more inefficient than it was when the Treaty was signed. On both counts the situation remains the same. The Tribunal cannot redefine

⁴² Ibid. para. 249.

⁴³ Ibid. para. 260.

⁴⁴ Ibid. para. 262. Emphasis in the original.

⁴⁵ Ibid. para. 263.

the Treaty without incurring in “a serious and clear excess of powers which would not only invalidate the whole proceeding, but would seriously cause the new system for international protection of investment to lose prestige.”⁴⁶

59. As a final point, Argentina finds that the Tribunal should not consider as purely temporal the requisite that investors bring an investment dispute before a local court. In this respect, Argentina recalls that the tribunal in *Maffezini* held “the courts of the Contracting Parties are given an opportunity to vindicate the international obligations guaranteed in the BIT. Given the language of the treaty, this is a role which the Contracting Parties can be presumed to have wished to retain for their courts, albeit within a prescribed time limit. Second, Claimant’s interpretation of Article X(2) would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of the Treaties.”⁴⁷

(b) Position of the Claimant

60. Siemens contests the restrictive interpretation of the Treaty on which Argentina bases its case. The Vienna Convention requires that the provisions of a treaty be interpreted in good faith. Applying this principle to a reading of the Treaty and the MFN clause leads Siemens to the conclusion that this clause comprises all matters covered by the Treaty, except those expressly excluded in Article 3(3) and (4) and Ad Article 3(b) of the Protocol and the Reversal Note dated April 9, 1991. Siemens considers that “The mechanisms for the settlement of disputes are part of the guarantees for the promotion and protection of foreign investments

⁴⁶ Ibid. para. 268.

⁴⁷ Ibid. para. 270. Emphasis in the original.

granted to the investors, being international arbitration for the settlement of investment disputes before ICSID one of the most relevant of them.”⁴⁸

61. Siemens argues that it has a right to invoke relevant case law in support of its claim without it being a violation of Article 53 of the Convention. Argentina misconceives Siemens’ reliance on the legal authority arising from *Mafezzini*. It is clear to Siemens that the principle of *res inter alios acta* has no relevance in the operation of an MFN clause.⁴⁹

62. According to Siemens, Article 3 of the Treaty relates to the *treatment* granted to investments and investors. It is not logical to protect the investment and deny this protection to its owner. The treatment under the Treaty is not restricted to any particular substantive standards of treatment: “The MFN treatment is contained in a separate clause without any distinction concerning a specific matter which could limit the scope of application of the clause.”⁵⁰

63. Siemens finds that Article 3(2) extends rather than limits the application of the MFN clause. The term “activity” is broad and inclusive and the list of activities enumerated in the Protocol is preceded by the words “especially but not exclusively”. According to Siemens, “The settlement of an investment dispute falls within this term; particularly, the exercise by an investor of its right of action to solve an investment claim under the Treaty is a clear example of an activity in connection with investments pursuant to this Article.”⁵¹ Even if it would be possible to interpret the term “activity” restrictively under the Treaty, “the management, maintenance, use and enjoyment of an investment” described in the Protocol are terms that encompass activities in the context of dispute settlement. It is a normal feature of the

⁴⁸ Counter-Memorial on Jurisdiction, para. 69.

⁴⁹ Ibid. paras. 72-73.

⁵⁰ Ibid. paras. 77 and 79.

⁵¹ Ibid. paras. 83 and 85.

management and operation of an enterprise to participate in litigation. The power to bring legal action is a classical part of management.”⁵²

64. Siemens argues that it is irrelevant to the jurisdiction of the Tribunal whether the State may also resort to the dispute settlement provided for in the Treaty. This should not be a reason “to deny an investor’s right to institute arbitration under conditions not-less favourable than the third State’s investors.” Siemens’ right is independent of the State’s right .⁵³

65. The Claimant rebuts the link established by Argentina between national treatment and MFN treatment. The Claimant finds that there is no basis in the Treaty for such reading. In fact, the Treaty provides MFN treatment and national treatment as alternative standards of protection; they are independent and can be invoked by the foreign investor independently of each other. This understanding of Article 3 of the Treaty is confirmed by the ILC’s Commentary to draft Article 19(1):

“[I]n the presence of the most-favored-nation treatment, national treatment and any other treatment accorded by the granting State with respect to the same subject-matter, the beneficiary State not only ha[s] an ‘either/or’ choice, but might also be in a position to opt for the cumulative enjoyment of all, some, or parts of the various treatments concerned. [...] [W]henver the beneficiary State is accorded different types of treatment with respect to the same subject-matter, it shall be entitled to whichever treatment or combination of treatments it prefers in any particular case.”⁵⁴

66. Siemens reaches the opposite conclusion as the Respondent regarding the exceptions included in Article 3 and the inclusion of an additional MFN clause in Article 4. The MFN clause in Article 3 applies “to the ‘agreed sphere of relations’ covered by the Treaty as a

⁵² Ibid. para. 87.

⁵³ Ibid. paras. 91-92.

⁵⁴ Ibid. para. 103, citation.

whole, except where the contracting parties negotiated its exclusion, which is not the case with dispute settlement.”⁵⁵

67. As regards Article 4, the existence of a specialized provision does not negate the effect of an MFN clause not attached to a particular provision; if it would, it would negate the meaning of Article 3 altogether. The MFN clause in that article can be read differently from the clause in Article 3: “while the general MFNC is subject to the exceptions contained in Article 3(3) and (4), these exceptions do not apply in the case of Article 4.”⁵⁶ There are also differences between the two clauses as regards national treatment. National treatment in Article 4 is limited to the case covered by Article 4(3).⁵⁷

68. Siemens considers irrelevant the arguments made by Argentina regarding severability, Kompetenz-Kompetenz and assignment. The Claimant maintains that the considerations that apply to severability bear no relationship to the status of the MFN clause. The authority of the Tribunal to decide its own competence has also no relationship to the issue of the MFN clause, except that the Tribunal has the power to decide on the effect of the MFN clause on its competence. As regards assignment, there is “neither an assignor nor an assignee in the application of an MFN clause.”⁵⁸

69. Siemens argues that the principle of *ejusdem generis* does not preclude the application of the MFN clause as intended by Siemens. According to Siemens, Argentina misconstrues this principle and its effects. Siemens disputes that the Report of the ILC on MFN clauses or the ILC’s commentary provide any basis for a restrictive interpretation with respect to

⁵⁵ Ibid. para. 108.

⁵⁶ Ibid. para. 114.

⁵⁷ Ibid. footnote 102.

⁵⁸ Ibid. paras. 116-119.

the *ejusdem generis* principle or for the requirement of an express reference for an MFN clause to cover procedural or jurisdictional matters. The same can be said of the cases cited by the Respondent. The Treaty does refer to jurisdictional and procedural issues. The principle *ejusdem generis* requires only that the MFN clause and the clause relied on in the third-party treaty both relate to jurisdiction. The subject matters of the Treaty and the Chile BIT are identical.⁵⁹

70. Siemens also finds mistaken the interpretation made by Argentina of *Anglo-Iranian Oil Co.*, *Rights of Nationals of the United States of America in Morocco* and *Ambatielos*. *Anglo-Iranian Co.*, was decided mainly on considerations of inter-temporal law. The treaties in question had no relation to jurisdictional matters and therefore the claimant was, on the basis of the MFN clause, unable to rely on other treaties for purposes of jurisdiction.⁶⁰ In *Rights of Nationals* the ICJ found that “a broadly worded MFN clause in a treaty that dealt with a number of diverse matters, including jurisdiction, entitled the beneficiary to claim jurisdictional privileges contained in treaties with third parties. The only reason why the jurisdictional privileges were ultimately denied was that they had expired since the rights arising from the third party treaties had come to an end.”⁶¹ As regards *Ambatielos*, Siemens contests that the matter at issue was related to substantive standards of treatment and not to procedural jurisdictional agreements.⁶² Siemens finds that, when the Commission referred to “the administration of justice”, it did not make any distinction between substantive and procedural rights relating to it. The important finding of the Commission was that “Protection of the rights of traders naturally

⁵⁹ Ibid. paras. 123-127.

⁶⁰ Ibid. para. 131.

⁶¹ Ibid. para. 133.

⁶² Ibid. para. 139.

finds a place among the matters dealt with by treaties of commerce and navigation.”⁶³ Siemens considers this finding particularly relevant for purposes of “activities in connection with investments” (Article 3(2) of the Treaty).⁶⁴

71. Siemens then turns to BIT state practice in general and of Argentina in particular and concludes that MFN clauses conceived in broad terms are the rule rather than the exception. The practice of Argentina also shows that there is no consistency regarding access to international arbitration in terms of waiting period and prior recourse to the local courts. This inconsistency is such that it cannot be argued, as Argentina does, that recourse first to the local courts is part of Argentina’s public policy. On the contrary, “the situation described by Argentina with respect to provisions on dispute settlement in its recent BITs is a typical case for the application of an MFNC. The diverse regulations on access to international arbitration in different BITs, create a situation that discriminates against investors of certain nationalities.”⁶⁵ The effect of the MFN clause is to harmonize the conditions applicable to investors irrespective of their nationality. Siemens considers that “the existence of treaties with diverse provisions is not an argument against the application of an MFNC but a necessary precondition for its application.”⁶⁶

72. As regards the fact that the terms of Article 10 of the Treaty are at variance with those of the German model bilateral investment treaty and therefore show that they were specifically negotiated, Siemens argues that this cannot be considered a reason for excluding

⁶³ Ibid. para. 140.

⁶⁴ Ibid. para. 142.

⁶⁵ Ibid. para. 170.

⁶⁶ Ibid.

Article 10 provisions from the application of the MFN clause: “There is no evidence that MFNCs are applicable only to treaty provisions that were not subject to negotiations.”⁶⁷

73. Siemens also disputes the consequences attributed by Argentina to *TECMED*. In that case, the arbitral tribunal found that “*TECMED* should be distinguished from the *Maffezini* case because of the substantial rather than procedural or jurisdictional nature of the matter in question [as in *Maffezini*]. Since the matter at issue in the present case is almost identical to the one in *Maffezini*, the decision in *TECMED* can only confirm Siemens’ claim rather than oppose it.”⁶⁸

74. Siemens rebuts the arguments of Argentina on the findings of *Maffezini* and their application to this case. First, the different wording of the two MFN clauses was not significant to the decision in *Maffezini*. The tribunal based its conclusion on the inextricable linkage of the protection of foreign investors with dispute settlement arrangements and not on the words “all matters” of the MFN clause in the Chile BIT. Second, it is not necessary to have the express will of the parties to consider dispute settlement to be included in the MFN clause. The will of the parties can be “reasonably inferred”, and it can be inferred in the Treaty.⁶⁹

75. Siemens maintains that the main considerations of the tribunal in *Maffezini* apply in this case: Both treaties are in the same category and contain provisions almost identical on dispute settlement; the wording of the two MFN clauses does not reveal significant difference in its scope of application; in the Treaty this clause is self-standing, while in the Chile BIT it is in an article that deals with a particular aspect of treatment, hence the need to emphasize that it applies to all matters. Argentina’s BIT practice shows that “it has sought to obtain a dispute

⁶⁷ Ibid. para. 168.

settlement method for its investors abroad more favorable than that granted under the Treaty to foreign investors in its territory.” None of the limitations mentioned in *Maffezini* apply to this case: the procedural requirement is exactly the same in both cases and it does not reflect a question of fundamental public policy. Siemens concludes that Argentina has failed to distinguish this case from *Maffezini*.⁷⁰

76. Siemens finds that the criticisms of *Maffezini* regarding the interpretation of *Ambatielos* are not justified. The MFN clause in *Ambatielos* did not have a wider range than in *Maffezini*. The clause in *Ambatielos* covers administration of justice as much as *Maffezini* covers dispute settlement. There is no basis in *Ambatielos* to distinguish between substantive rights related to the administration of justice and jurisdictional agreements. Provisions concerning both the administration of justice and dispute settlement refer to mechanisms for the protection of rights. Siemens finds equally unjustified the criticisms of *Maffezini* for failing to give legal reasons to support the application of the *ejusdem generis* principle in that case, for failure to apply logic, for confusing facts and law, for not giving priority to customary international rules over the BIT and the Convention, and for not taking into account that the 18-month period was a moderate conventional form of the exhaustion of remedies rule.⁷¹

77. Siemens rebuts Argentina’s arguments related to the requirement of Article 10 to have recourse first to the local courts. According to Argentina, this requirement is “nothing but a moderated form of the exhaustion of local remedies rule,”⁷² and the exhaustion of local remedies cannot be tacitly waived by operation of the the MFN clause. Siemens recalls that Article 26 of

⁶⁸ Ibid. para. 162.

⁶⁹ Ibid. paras. 180-183.

⁷⁰ Ibid. para. 184.

⁷¹ Ibid. para. 194.

the Convention reverses the order and unless there is an explicit condition to exhaust local remedies, the rule does not apply. The State Parties did not limit their consent to arbitration to the exhaustion of local remedies when they signed the Convention or the Treaty. In any case, there is a difference between the requirement to exhaust local remedies and one compelling resort to domestic courts for a limited period of time. The second requirement is merely a rule of procedure, the parties may pursue arbitration after the time has lapsed.⁷³

78. Siemens considers that resort to the local courts would be a futile exercise since it is well known, and Siemens submitted an expert opinion in this respect, that it is impossible for the local courts to decide a case of this nature within the 18 months provided for in the Treaty. Siemens refers to the practice of the ICJ and other tribunals to show that “[they] have generally refused to regard non-compliance with clauses providing for waiting periods as an obstacle to their jurisdiction. In rejecting objections to their jurisdiction based on such clauses, they have emphasized the evident futility of resorting to the alternative means for dispute settlement presented by these clauses.”⁷⁴ Argentina’s insistence on Siemens resorting to the local courts serves only the purpose of obstructing these arbitration proceedings with meaningless delays and disproportionate expenses. According to Siemens, to insist upon a procedure that is incapable of achieving its intended result is contrary to the requirement of performing treaty obligations in good faith.⁷⁵

(c) Considerations of the Tribunal

79. The following issues emerge from the arguments exchanged by the parties:

⁷² Ibid. para. 197.

⁷³ Ibid. paras. 197-203.

⁷⁴ Ibid. para. 205.

⁷⁵ Ibid. paras. 229-230.

- (i) Interpretation of the Treaty.
- (ii) General or specific character of the MFN clauses in Article 3.
- (iii) If the MFN clauses in Article 3 are considered general clauses, rationale of the MFN clause in Article 4.
- (iv) Protection of investments or investors.
- (v) Effect of reference to national treatment on the scope of the MFN clause.
- (vi) Treatment of investors and dispute settlement.
- (vii) Exhaustion of local remedies.
- (viii) Significance of negotiated changes in the model form of German BIT.
- (ix) Effect on the scope of the MFN clause of the right of the State to bring the dispute to its courts.
- (x) Claim of a benefit under a treaty by the operation of an MFN clause as triggering application of all the provisions of that treaty.

(i) *Interpretation of the Treaty*

80. Both parties have based their arguments on the interpretation of the Treaty in accordance with Article 31(1) of the Vienna Convention. This Article provides that a treaty be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The Tribunal will adhere to these rules of interpretation in considering the disputed provisions of the Treaty. The first question posed by the Respondent’s allegations is whether the Treaty should be interpreted restrictively or broadly.

81. The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty “to protect” and “to promote” investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries.⁷⁶ The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.

(ii) General or Specific Character of the MFN Clauses in Article 3

82. There are three clauses in the Treaty that refer to MFN treatment: Article 3(1), Article 3(2) and Article 4(4). The Tribunal will consider first the MFN clauses in Article 3, which for ease of reference are reproduced here:

Article 3(1): None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States.

Article 3(2): None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.⁷⁷

⁷⁶ Translation of the Tribunal.

⁷⁷ Translation of the Tribunal.

83. The exceptions in Article 3 to no less favorable treatment refer to privileges agreed in the context of customs or economic unions and of free trade areas (Article 3(3)), and to advantages granted in taxation-related agreements (Article 3(4)). The Protocol complements these exceptions by excluding measures dictated by internal or external security or public order concerns, and the fiscal advantages, exemptions or reductions granted to each Contracting Party's nationals or companies (Ad Article 3 (a) and (b)). In addition, the Protocol states that "activities" refers "specially but not exclusively to the administration, use and benefit of an investment", and that measures that affect the purchase of raw materials and other inputs and means of production in or outside each Contracting Party will be, "specially but not exclusively", considered measures of less than favorable treatment (Ad Article 3 (a)).

84. Based on the exceptions and the provisions of the Protocol, the Respondent has alleged that the treatment envisaged in Article 3 is limited to Article 3 itself and refers to treatment of transactions of a commercial and economic nature in relation to exploitation and management of investments. According to the Respondent, the treatment intended by the parties is related to the competitiveness of the investments.

85. The first two clauses of Article 3 refer simply to a "not less favorable treatment" – "trato no menos favorable" in the Spanish version. "Treatment" in its ordinary meaning refers to behavior in respect of an entity or a person. The term "treatment" is neither qualified nor described except by the expression "not less favorable". The term "activities" is equally general. The need for exceptions confirms the generality of the meaning of treatment or activities rather than setting limits beyond what is said in the exceptions. In clarifying in the Protocol the term "activities" used in Article 3(2), the drafters were careful to qualify twice that the clarification is special but not exclusive. This is a clear indication that the clarifications do not limit the

meaning of the term “activities”. They simply emphasize matters of particular concern to the parties. When the parties meant to provide an outright limitation by way of an exception they have done so in paragraphs (3) and (4) of Article 3 and in the Protocol in relation to security measures or taxation privileges of nationals or national companies. If it were the intention to limit the content of Article 3 beyond the limits of those exceptions, then the terms “treatment” or “activities” would have been qualified. The fact that this is not the case is an indication of their intended wide scope. Treatment in Article 3 refers to treatment under the Treaty in general and not only under that article.

86. For these reasons, the Tribunal finds that a plain and contextual reading of Article 3(1) and (2) does not limit the treatment to transactions of a commercial and economic nature in relation to exploitation and management of investments as alleged by Argentina. This understanding of Article 3(1) and (2) is reinforced by the consideration that the term “companies”, as defined in the Treaty, includes “companies or associations [...] independently from whether or not the purpose of their activity is the pursuit of profit”.⁷⁸ The competitiveness argument advanced by Argentina would effectively exclude non-profit organizations from protection under the Treaty.

(iii) Rationale of the MFN Clause in Article 4

87. The Tribunal needs to address now the question of the relationship of Articles 3 and 4, since the Respondent has argued that, if the MFN clause in Article 3 would cover more than Article 3 itself, then Article 4 would be superfluous. This result would be against treaty interpretation rules that require that a meaning be attributed to each clause.

⁷⁸ Translation of the Tribunal.

88. Article 4 provides that:

“(1) The investments of nationals or companies of each Contracting Party shall enjoy full protection and legal security in the territory of the other Contracting Party.

(2) [This paragraph deals with expropriation and compensation and is not necessary to reproduce for the present discussion]

(3) The nationals or companies of one of the Contracting Parties that suffer losses in their investments because of war or other armed conflict, revolution, national state of emergency or insurrection in the territory of the other Contracting Party, shall not be treated by such party less favorably than its own nationals or companies as to restitution, compensation, indemnities or other. These payments will be freely transferable.

(4) The nationals or companies of each Contracting Party shall enjoy in the territory of the other Contracting Party the treatment of the most favored nation in all matters covered in this Article.”⁷⁹

89. For purposes of considering the Respondent’s interpretation, the Tribunal needs to consider in detail the provisions of Article 4 in comparison with Article 3. The Tribunal notes first that Article 4(4) is restricted to “matters covered in this Article”. No such limitation exists in Article 3. The Article 4 MFN clause further refers to nationals or national companies, a subjective element which is lacking in Article 3(1). Whether this is significant the Tribunal will discuss later in considering the differentiation between investments and investors argued by Argentina. There is no reference to national treatment except in Article 4(3) in relation to losses caused by war or disturbances. Only Article 3 refers to investments jointly owned by the foreign investor with nationals or national companies of the Contracting Party where the investment has been made.

⁷⁹ Translation of the Tribunal.

90. The Tribunal concludes from this textual comparison that references to MFN treatment or to national treatment in Article 4 do not detract from the generality of Article 3 nor make Article 4 superfluous. To the extent that there is an overlap, it needs to be understood as covering areas of special interest to the parties. Compensation on account of expropriation or of civil war or other violent disturbances is a key issue in the treatment of foreign investment and foreign nationals and a specific reference to it would seem congruent with its importance. The Tribunal considers that the parties to a treaty are not precluded from placing emphasis on certain matters *ex abundante cautela*. The repeated provision in a particular context stresses the concern of the parties in respect of that particular matter rather than limiting the scope of clauses of general character.

(iv) *Protection of Investments or Investors*

91. Argentina has drawn a difference between the protection of investors and of investments and reached conclusions which affect the applicability of the MFN clause under the Treaty. Investment is referred to in the context of fair and equal treatment, full protection under the Treaty and protection against discriminatory or arbitrary measures (Article 2), MFN treatment (Article 3(1)), full protection and legal security, expropriation, (Article 4(1) and (2)), and more favorable treatment resulting from future developments in international law or general agreements (Article 7). The expression “in relation to investments” is found in the context of activities under the MFN clause (Article 3(2)), free transfer of payments (Article 5), applicability of the Treaty retroactively (Article 8), and dispute settlement (Article 10). Foreign investors appear in the provisions on privileges granted under customs or economic unions or free trade areas (Article 3(3)), advantages granted under taxation agreements (Article 3(4)), national treatment in case of war or civil disturbance (Article 4(3)), general treatment under Article 4,

free transfer of payments (Article 5), payments under guarantees (Article 6), and dispute settlement (Article 10).

92. The Tribunal notes that Article 3 refers to treatment of investments in paragraph (1), while the exceptions refer to investors. On the other hand, there is a double reference to investments and investors in Article 4, paragraphs 1 and 4, respectively. It could be argued based on this use of the terms “investments” and “investors” that the exceptions in Article 3 do not apply to investments and that unless in each case both terms are used, as it is the case in Article 4, then the provision concerned applies only to one or the other as the case may be. The Tribunal has difficulty with such argument. The Treaty is a treaty to promote and protect investments, investors do not figure in the title. Fair and equitable treatment would be reserved to investments, and denial of justice to an investor would be excluded. While these considerations may follow a strict logical reasoning based on the terms of the Treaty, their result does not seem to accord with its purpose. More consistent with it is to consider that, in Article 3, treatment of the investments includes treatment of the investors and hence the need to provide for exceptions that refer to them. In the same vein, the reference to investors and investments in Article 4 is a matter of emphasis, not of exclusion. In other instances, the subjective element is just a matter of plain common sense, e.g., in clauses dealing with the transfer of payments, dispute settlement, and activities in relation to investments: these actions need to be taken by a person, physical or legal. The Tribunal finds that, for purposes of applying the MFN clause, there is no special significance to the differential use of the terms investor or investments in the Treaty.

(v) *Effect of Reference to National Treatment on the Scope of the MFN Clause*

93. The reference to national treatment in Article 3(1) and (2) is provided as one alternative, the other being treatment not less favorable than the treatment granted to nationals or

to nationals or companies of a third State. The obligation is dual. The State has undertaken not to give treatment less favorable in *either* situation. It may happen that advantages granted to nationals of a third State result in more favorable treatment than that enjoyed by the nationals of the grantor State. In that situation, reference to national treatment does not limit the advantages that investors may have by operation of the MFN clause. The obligations of the State under Article 3 (1) and (2) refer to a minimum level of treatment, not a ceiling. If advantages granted to nationals of a third State would not be granted under the MFN clause simply because they exceed national treatment, then the State would breach the obligation to grant not less favorable treatment under that clause. The simple ordinary meaning of this clause is that investors should not be discriminated against for being foreigners and at the same time should be given the best treatment afforded any other foreign investor. This treatment is irrespective of whether the investment has been made solely by foreign investors or jointly or in association with local investors.

(vi) *Treatment of Investors and Dispute Settlement*

94. There has been extensive discussion by the parties as to whether settlement of disputes is or is not part of the protection given to investors. The parties have based their allegations on conflicting interpretations of *Anglo Iranian Oil*, *Rights of U.S. Nationals in Morocco*, and *Ambatielos*.

95. In *Anglo-Iranian Oil* the United Kingdom had argued that, upon the coming into force of the Iranian-Danish Treaty on March 6th 1935, Iran became bound, by the operation of the MFN clause in the treaties of 1857 and 1903 between Iran and the United Kingdom, to treat British nationals in its territory in accordance with the principles and practice of international law. The ICJ stated that:

Without considering the meaning and the scope of the most-favored-nation clause, the Court confines itself to stating that this clause is contained in the Treaties of 1857 and 1903 between Iran and the United Kingdom, which are not subsequent to the ratification of the Iranian Declaration [accepting the Court's jurisdiction]. While Iran is bound by her obligations under these Treaties as long as they are in force, the United Kingdom is not entitled to rely upon them for the purpose of establishing the jurisdiction of the Court, since they are excluded by the terms of the Declaration.⁸⁰

96. As stated by the ICJ itself, it is clear that the ICJ did not consider the “meaning or scope of the MFN clause”, including whether the clause would extend to settlement of disputes. The finding that the United Kingdom could not base its case on the MFN clauses included in the treaties of 1857 and 1903 was not related to these clauses as such but to the declaration of Iran accepting the jurisdiction of the ICJ, which excluded treaties executed prior to the date of the declaration.

97. As regards the *Rights of US Nationals in Morocco*, the ICJ considered the scope of the MFN clause in a treaty between the United States and Morocco of 1836, specifically, Articles 14 and 24. Article 14 provides:

The commerce with the United States shall be on the same footing as is the commerce with Spain, or as that with the most favored nation for the time being; and their citizens shall be respected and esteemed, and have full liberty to pass and repass our country and sea-ports whenever they please, without interruption.

Article 24 in part provides:

[A]nd it is further declared, that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian powers, the citizens of the United States shall be equally entitled to them.

⁸⁰ ICJ *Reports*, p. 109. Emphasis added by the Tribunal.

98. According to the ICJ, “These articles entitle the United States to invoke the provisions of other treaties relating to the capitulatory regime.”⁸¹ As described by the ICJ, “The most extensive privileges in the matter of consular jurisdiction granted by Morocco were those which were contained in the General Treaty with Great Britain of 1856 and in the Treaty of Commerce and Navigation with Spain of 1861. Under the provisions of Article IX of the British Treaty, there was a grant of consular jurisdiction in all cases, civil and criminal, when British nationals were defendants.” Similar protection was granted to Spanish defendants.⁸² The ICJ stated: “Accordingly, the United States acquired by virtue of the most-favoured nation clauses, civil and criminal consular jurisdiction in all cases in which United States nationals were defendants.”⁸³

99. It is evident that the ICJ accepted that MFN clauses may extend to provisions related to jurisdictional matters, but this was not really the issue between the parties. The issue in that case was different. Spain and the United Kingdom had renounced their capitulatory rights and privileges and the US contended that its rights through the MFN clause persisted beyond that renunciation. The ICJ found otherwise. Benefits available due to an MFN clause last as long as the treaty that grants them is in effect, but they do not become incorporated into the treaty containing the MFN clause. If Spain and the United Kingdom would not have renounced their capitulatory rights, the United States would have been entitled to identical rights under the MFN clause of the 1836 treaty.

100. In *Ambatielos*, the question was whether the MFN clause - Article X of the 1886 treaty between the United Kingdom and Greece - extended to the administration of justice.

⁸¹ ICJ *Reports* 1952, p. 190.

⁸² *Ibid.*

Article X, provided in part: “it being their [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 favoured nation.”⁸⁴

101. The United Kingdom had contended that the MFN clause could attract only matters belonging to the same category of subject as the case itself. The arbitral Commission agreed but found that in that case the rule led to conclusions different from the United Kingdom’s submissions. According to the Commission:

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

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes “all matters relating to commerce and navigation.”⁸⁵

102. The Respondent has argued that, in *Ambatielos*, administration of justice refers to substantive procedural rights like just and equitable treatment and not to purely jurisdictional matters. The Tribunal does not find any basis in the reasoning of the Commission to justify such distinction. On the other hand, the Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.

⁸³ Ibid.

⁸⁴ United Nations: *Reports of International Arbitral Awards*, Vol. XII, p. 106.

103. This conclusion concurs with the findings of the arbitral tribunal in *Maffezini*. In that case, the investor claimed advantages under the Treaty between Spain and Chile for the Protection and Encouragement of Investments, dated October 2, 1991. The Respondent has emphatically stated that the MFN clause in the basic treaty in *Maffezini* – the Spain BIT - is different from the MFN clause in the Treaty and that *Maffezini* has to be considered in its own context. The Tribunal notes that the MFN clause in the Spain BIT refers to “all matters subject to this Agreement”⁸⁶, while the MFN clause in the Treaty refers only to “treatment”. The arbitral tribunal in *Maffezini* noted that Spain had used the expression “all matters subject to this Agreement” only in the case of its BIT with Argentina and “this treatment” in all other cases. The said tribunal commented that the latter was “of course a narrower formulation”.⁸⁷ The Tribunal concurs that the formulation is narrower but, as concluded above, it considers that the term “treatment” and the phrase “activities related to the investments” are sufficiently wide to include settlement of disputes.

(vii) *Exhaustion of Local Remedies*

104. The Respondent has argued that Article 10(2) is a “moderate” version of the exhaustion of local remedies rule and that that rule may not be tacitly waived. It is an essential element of its consent to arbitration and is related to sensitive economic and foreign policy issues. The Tribunal concurs with the Respondent in that the Contracting Parties had intended through 10(2) to give the local tribunals an opportunity to decide a dispute first before it would be submitted to international arbitration. However, this does not mean that this provision requires the exhaustion of local remedies as this rule has been understood under international

⁸⁵ Ibid. p. 107.

⁸⁶ *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction of January 25, 2000, para. 60.

law.⁸⁸ Article 10(2) does not require a prior final decision of the courts of the Respondent. It does not even require a prior decision of a court at any level. It simply requires the passing of time or the persistence of the dispute after a decision by a court. Then, even if this decision is one subject to appeal, the requirement of Article 10(2) would have been fulfilled. For these reasons, the Tribunal considers that Article 10(2) is not comparable to the local remedies rule and the issue of a tacit waiver of a rule of international law does not arise.

105. As to the claim that Article 10(2) reflects the policy of Argentina, the Respondent has not presented any evidence beyond its affirmations to this effect in the written pleadings. The Tribunal would consider an indication of the existence of a policy of the Respondent if a certain requirement has been consistently included in similar treaties executed by the Respondent. The Chile BIT was signed on August 2, 1991, only a few months before the Treaty. The Spain BIT was entered into on October 3, 1991. The US-Argentina BIT, which does not require institution of judicial proceedings prior to arbitration, was executed on November 14, 1991. This lack of consistency among the BITs entered into by the Respondent during the same year as the Treaty was signed does not support the argument that the institution of proceedings before the local courts is a “sensitive” issue of economic or foreign policy or that it is an essential part of the consent of the Respondent to arbitration. The Respondent has sought for its own nationals as investors in Chile or the United States similar treatment to that sought by the Claimant in these proceedings.

(viii) Significance of Negotiated Changes in the Model Form of German BIT

⁸⁷ Ibid.

⁸⁸ Ibid. para. 28.

106. The Respondent has stressed the fact that the dispute settlement clause departs from the standard bilateral investment treaty of Germany in order to support its argument that this was a clause specially negotiated and hence which should be differentiated from the rest. The acceptance of a clause from a model text does not invest this clause with either more or less legal force than other clauses which may have had been more difficult to negotiate. The end result of the negotiations is an agreed text and the legal significance of each clause is not affected by how arduous was the negotiating path to arrive there. The Tribunal feels bound, in its interpretation of the Treaty, by the expressed intention of the parties to promote investments and create conditions favorable to them. The Tribunal finds that when the intention of the parties has been clearly expressed, it is not in its power to second-guess their intentions by attributing special meaning to phrases based on whether they were or were not part of a model draft. As already noted, the term “treatment” is so general that the Tribunal cannot limit its application except as specifically agreed by the parties. In fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted. It complements the undertaking of each State Party to the Treaty not to apply measures discriminatory to investments under Article 2.

(ix) Effect on the Scope of the MFN Clause of the Right of the State to Bring the Dispute Before its Courts

107. The parties have argued whether the right of the State to submit the dispute to its own courts under Article 10 of the Treaty affects the MFN clause since such provision is not included in the Chile BIT. In terms of the facts of the case, this issue seems to be of a theoretical nature since the Respondent could have submitted this dispute to the local tribunals and did not before an ICSID arbitral tribunal was seized of it. Whether in the abstract such right of the State

precludes the application of the MFN clause to dispute settlement under the Treaty, the Tribunal considers it not to be such an obstacle here, for the simple reason that the State could have brought a dispute with the Claimant to its own courts at any time before this Tribunal became seized of it. The BITs do not restrict the rights of investors or the State to pursue a dispute before the local courts. They provide an additional venue normally not open to investors.⁸⁹

(x) *Claim of a Benefit under a Treaty by the Operation of an MFN Clause as Triggering the Application of All the Provisions of that Treaty*

108. As regards the issue of whether the claim of a benefit under an MFN clause triggers application of the whole treaty, it depends on the terms of the clause, but only to the extent that it is advantageous to the beneficiary of the clause. The MFN clause would be of limited use otherwise. This understanding does not mean that the investor in Argentina will enjoy a more favorable treatment than the investor in Chile. The MFN clause works both ways. The investor in Chile will be able to claim similar benefits under the Chile BIT.

109. To conclude, the Tribunal considers that, as a general matter, claiming a benefit by the operation of an MFN clause does not carry with it the acceptance of all the terms of the treaty which provides for such benefit whether or not they are considered beneficial to the party making the claim; neither does it entail that the claiming party has access to all benefits under such treaty. This will depend on the terms of the MFN clause and other terms of the treaties involved. The Tribunal concurs with *Maffezini* that the beneficiary of the MFN clause may not override public policy considerations judged by the parties to a treaty essential to their

⁸⁹ The Spain BIT provides for a similar right. This matter does not seem to have been discussed in *Maffezini*.

agreement.⁹⁰ As already indicated, the Tribunal considers that the public policy considerations adduced by the Respondent are not applicable.⁹¹

110. For the above reasons, the Tribunal rejects the first objection to its jurisdiction.

3. Second Objection: The Dispute Was Submitted to the Local Jurisdiction

(a) Position of the Respondent

111. Argentina argues that if Siemens may rely on the Chile BIT, then the bifurcation clause in that treaty applies. SITS has appealed before the administrative authorities of Argentina and stated that SITS reserved the right to pursue arbitration in due time. Furthermore, if the Tribunal would find that the MFN clause does not apply, then, Argentina argues, the Tribunal could not find that it has jurisdiction under the Treaty because Article 10(2) requires that 18 months have elapsed since the initiation of the judicial process. According to Argentina, the Treaty refers here to the ordinary judicial process. This expression does not include the administrative courts. Under said Article 10(2), Argentina argues, the claim has to be pursued in a diligent and effective manner in the “competent judicial courts”.⁹²

112. A different situation prevails under the Chile BIT. There the expression “local jurisdiction” includes both administrative and judicial jurisdiction. Had the parties to that treaty intended to mean judicial jurisdiction, then the expression “ordinary judicial procedure” would have been used. The term jurisdiction needs to be interpreted to give full meaning to the different provisions of the Chile BIT where it occurs. This would not be the case if the expression “local jurisdiction” is restricted to mean “ordinary judicial procedure”.⁹³

⁹⁰ Decision on Jurisdiction, paras. 62-63.

⁹¹ Supra, para. 105.

⁹² Ibid. para. 275.

⁹³ Ibid. paras. 276-281.

Furthermore, under international law, jurisdiction denotes the legislative, judicial and administrative competence of the State. It is in the customary language of international law to include the administrative and judicial jurisdictions under the expression “local jurisdiction”.⁹⁴

113. This interpretation is also confirmed by the text of Article 10(2) of the Chile BIT. This article offers the option of international arbitration as opposed to the local jurisdiction. The investor may pursue either option. In this context, the reference to local jurisdiction necessarily includes the administrative courts. Argentina recalls that “the protection of the private rights of individuals is formally dealt with by means of administrative and judicial procedural techniques, and that in certain circumstances, the administrative claim is an essential requirement in order for the judicial appeal to proceed.”⁹⁵

114. Argentina refers also to the preparatory work for the Chile BIT. Argentina recalls a communication from the Chilean Foreign Office to the Argentine counterpart saying that if the discussions between investor and State do not succeed, then “the dispute may be submitted to the competent administrative or judicial jurisdiction”. The final text included a generic term, local jurisdiction, but the intention of the parties is clear. This understanding is confirmed when the structure of both documents is compared. Argentina maintains that, since one treaty is based on the other, “it can be presupposed that the consequence of using a broad wording (such as *local jurisdiction*) or a specific wording (such as *competent courts or judicial procedure*) was clear to the subscribing parties.”⁹⁶

115. Argentina concludes the reasoning of this objection by affirming that “Siemens refers to SITS as an *alter ego* and as a simple vehicle of its will in order to subscribe and perform

⁹⁴ Ibid. para. 276.

the Contract. Thus, either the proceedings prosecuted by SITS are imputable to Siemens, or Siemens is not entitled to bring claims on behalf of SITS, that does not qualify either as an investor or as an investment pursuant to the Treaty.”⁹⁷

(b) Position of the Claimant

116. Siemens denies that the MFN clause requires it to choose between two alternative treaties and that once an advantage under a treaty is chosen then all the provisions of that treaty apply. Each treaty may carry advantages and disadvantages, and the MFN clause “implies the right to select those aspects of provisions in different treaties that favor the MFNC’s beneficiary most.”⁹⁸ Siemens refers in this respect to the Commentary of the ILC on the Draft Articles, which states that “whenever the beneficiary State is accorded different types of treatment with respect to the same subject-matter, it shall be entitled to whichever treatment or combination of treatments it prefers in any particular case.”⁹⁹

117. Siemens argues that, even if the position of Argentina were correct as to the effect of applying the MFN clause, Siemens has not triggered the fork-in-the-road provision of the Chile BIT. Siemens asserts that, for this provision to apply, there must be a submission to a national jurisdiction, the dispute so submitted must be identical to that submitted to arbitration, and the parties to both proceedings must also be identical. This is not the case here. First, no submission has been made before a “national jurisdiction”. This term, according to Siemens, makes “reference to bodies that are both independent and impartial, as far as the parties to the dispute are concerned, and which – pursuant to the host State legal system – are empowered to

⁹⁵ Ibid. para. 286.

⁹⁶ Ibid. paras. 288-290.

⁹⁷ Ibid. para. 292.

⁹⁸ Counter-Memorial on Jurisdiction, para. 242.

⁹⁹ Ibid. para. 245. Quoted by the Claimant with emphasis added by the Claimant.

settle investment disputes between the State and foreign investors.”¹⁰⁰ This term does not include administrative proceedings before the Executive Branch, but only proceedings before “the internal bodies of the host state exercising judicial type functions (funciones jurisdiccionales), as opposed to those performing administrative or law-making ones.”¹⁰¹ SITS’ submissions were made to the Argentine President. He was asked to reconsider a decision he had adopted. SITS’ filings before the Argentine President were not part of a judicial proceeding. The President exercised an administrative, not a judicial, function. In deciding the administrative appeal filed by SITS, he was just exercising his administrative function.¹⁰²

(c) Considerations of the Tribunal

118. The allegations of the parties raise two issues: (i) whether by claiming a benefit through the MFN clause all provisions of the treaty providing for that benefit then apply; and (ii) whether there is a difference between the terms “local jurisdiction” and “ordinary jurisdiction” used in the Chile BIT and the Treaty, respectively, for purposes of applying the fork-in-the-road clause under the Chile BIT or the requirement to submit a dispute first to the local courts under the Treaty.

119. On the first issue, the argument of Argentina is prompted by the wide scope given by Siemens in its allegations to the MFN clause in the Treaty. If the MFN clause is interpreted to have such coverage, then it should cover the Chile BIT as a whole and not only the provisions convenient to the Claimant. The party claiming a benefit under the clause would choose between one treaty as a whole and the other, including the application of clauses that may be considered less beneficial.

¹⁰⁰ Ibid. para. 251.

¹⁰¹ Ibid. para. 254.

120. This understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonize benefits agreed with a party with those considered more favorable granted to another party. It would oblige the party claiming a benefit under a treaty to consider the advantages and disadvantages of that treaty as a whole rather than just the benefits. The Tribunal recognizes that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subject to its disadvantages. The disadvantages may have been a trade-off for the claimed advantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favorable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. Even if the MFN clause is of a general nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such. As already noted, there may be public policy considerations that limit the benefits that may be claimed by the operation of an MFN clause, but those pleaded by the Respondent have not been considered by the Tribunal to be applicable in this case.

121. On the first issue, the Tribunal concludes that the Claimant may limit the application of the Chile BIT to direct access to international arbitration. Therefore, there is no further need to consider the allegations of the parties on the fork-in-the-road provision of the Chile BIT or the nature of the jurisdictions referred to in the Treaty and the Chile BIT.

4. Third and Fourth Objections: Siemens Lacks *ius standi*

122. The parties' allegations on *ius standi* have extended in part to the issue of whether the dispute arises directly out of an investment under the Fifth Objection. To avoid repetition,

¹⁰² Counter-Memorial on Jurisdiction, para. 267.

the Tribunal will consider all issues related to *ius standi* under this section irrespective of the heading under which they have been raised.

(a) Position of the Respondent

123. According to Argentina, the Treaty requires a direct relationship between the investor and the investment. In the instant case, this direct relationship does not exist because SNI and not Siemens is the holder of the shares in SITS. It follows that only SNI could raise claims in relation to its investment and SNI is not party to these proceedings.¹⁰³ According to Argentina, this understanding is reaffirmed by “the application of a criterion so strong as the *effective seat* when assigning nationality to legal persons.”¹⁰⁴

124. The Respondent recognizes that there is the possibility of indirect claims under Article 4 of the Treaty and the related Ad Article 4 of the Protocol.¹⁰⁵ This specific possibility under Article 4 shows the exceptional nature of indirect claims. It confirms that they cannot be implied but require an express provision in the agreement and the Chile BIT does not permit indirect claims. Therefore, if the Tribunal should find the Chile BIT applicable, Siemens could not bring an indirect claim at all by the operation of the MFN clause: “[I]f Siemens expects to make use of the treatment accorded to Chilean investments and Chilean investors for considering it most favorable, then Siemens should be placed in the same position as a Chilean investment or a Chilean investor. Otherwise, Siemens and its investment would be accorded a most favorable treatment than [sic] that accorded to Chilean investors and investments, which is contrary to the

¹⁰³ Memorial on Jurisdiction, paras. 294-295.

¹⁰⁴ Ibid. para. 293.

¹⁰⁵ Ad Article 4 of the Protocol reads as follows: “A claim to compensation shall also exist when any of the measures defined in Article 4 is taken in respect of the company in which the investment is made and as a result the investment is severely impaired.” (Translation of the Tribunal).

operation of the MNFC.”¹⁰⁶ Argentina argues that investors cannot pick and choose provisions of each treaty and cut a new treaty to the measure of their interests. MFN clauses “do not serve to create a super investment treaty that includes the main benefits of each different treaty.”¹⁰⁷

125. The Respondent recognizes that “It is clear that an investor in shares has standing to activate dispute settlement mechanisms under bilateral investment treaties in cases of acts by the host state that affect it directly.” The situation is different when shareholders bring a claim for damages suffered by the company in which they have shares (indirect claims). The shareholders and the company have distinct legal personality. In these cases, the possibility for the shareholders to file indirect claims is always based on an express authorization. These principles are reflected in the judgments of the ICJ in *Barcelona Traction* and *ELSI*. ICSID decisions have not modified this rule since the claims were brought personally and directly (*Maffezini v. Kingdom of Spain*), the local corporation qualified as an investment (*AMT v. Zaire*), or the applicable treaty permitted an indirect claim (*AAPL v. Sri Lanka*).¹⁰⁸

126. The Respondent contests the notion of direct claim under the Treaty advanced by the Claimant: “[A] claim is direct if it originates at [sic] an injury caused directly to a right of whoever files a claim. A claim is indirect if it relates to a measure affecting the assets or rights of a third party (in this case SITS) and indirectly affects the expectations of whoever claims (shareholder), who is not the holder of such assets or rights.”¹⁰⁹

127. The Respondent criticizes the Claimant’s allegations as a “gathering of opinions and decisions which does not distinguish, *inter alia*, whether a treaty existed expressly allowing

¹⁰⁶ Memorial on Jurisdiction, para. 306.

¹⁰⁷ Ibid. para. 308.

¹⁰⁸ Ibid. paras. 297-299.

¹⁰⁹ Reply on Jurisdiction, para. 142.

a claim by the shareholder, or whether such company qualified as investment or investor in the light of the applicable treaty, or whether it was a question of direct or indirect claims.”¹¹⁰

(b) Position of the Claimant

128. Siemens refutes the notion that such a direct relationship is required by the Treaty. There is no reference in the Treaty to a direct relationship between the investor and the investment as a requirement to entitle it to protection. The broad formula used in Article 1 (1) to define investment “could only be limited by express exceptions or limitations set out in the Treaty itself [...] had the parties intended to exclude certain assets from the Treaty’s scope of application, they would have done so.”¹¹¹ Siemens refers to three approaches to the definition of investment. The Treaty uses the most general definition, the asset-based approach, as opposed to the enterprise-based or transaction-based approaches. The Contracting Parties in adopting this approach “did not intend to require direct ownership of the assets covered by the definition; this conclusion is supported by the absence of any exclusion expressly set forth in the Treaty in order to limit the typical broad reference involved in the asset-based definition.”¹¹²

129. Siemens also contests the validity of Argentina’s assertion that the use of the effective seat of the investor to determine nationality is evidence of the requirement of a direct relationship between the investor and the investment. Nationality by corporate seat is one of the accepted criteria for determining corporate nationality. Such criterion has no effect on the status of Siemens as an investor. Siemens finds that “in the light of the broad definition of the terms [sic] ‘investment’ set out in the Treaty as well as the ICSID Convention and its interpretation as reflected in the ICSID practice and the opinion of distinguished legal authors, the only

¹¹⁰ Ibid. para. 154.

¹¹¹ Counter-Memorial on Jurisdiction, paras. 308-309.

interpretation sustainable is that the Treaty does cover indirect investment as the one made by Siemens in this case.”¹¹³

130. Siemens maintains that it has standing irrespective of SNI’s right to enjoy the protection of the Treaty. Siemens is not precluded from pursuing its claim under the Treaty due to the fact that the shares in SITS are held through SNI. Siemens has submitted its claim in its own right.¹¹⁴

131. As regards the standing of Siemens from an international law point of view, Siemens alleges that *Barcelona Traction* has been misconstrued by the Respondent. In that case, the issue was not whether international law provided an independent source of rights and protections for shareholders; rather the question was whether a State could protect its shareholders in a foreign corporation affected by measures of a third State. This distinction, according to Siemens, is “fundamental because the international law question addressed by the ICJ was not whether shareholders had a cause of action under international law.”¹¹⁵ In the present case, the Treaty grants standing to the shareholders and the ICJ held that foreign shareholders are protected by international law if the company is a national of the respondent state. In fact, this is the case of SITS. Furthermore, the ICJ in *Barcelona Traction* referred to treaty developments in foreign investment protection by which “Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.”¹¹⁶ In *ELSI* “the ICJ did not even address the question of whether the substantive provisions of the treaty

¹¹² Rejoinder on Jurisdiction, para.186.

¹¹³ Counter-Memorial, para. 322.

¹¹⁴ Ibid. paras. 323-331.

¹¹⁵ Ibid. para. 352.

[...] granted protection to the U.S. shareholders in relation to acts of the Italian authorities aimed at the company. By examining the merits of the claims, the ICJ clearly considered that the treaty protected the shareholders.”¹¹⁷

132. Siemens reviews the practice of arbitral tribunals established under BITs and concludes that “[they] have consistently granted standing to foreign investors holding shares in locally incorporated companies. In all these cases, adverse measures by the host State that have affected the local company, were found as giving foreign shareholders in these companies a direct right of action.”¹¹⁸ Siemens considers also that the practice of the Iran-United States Claims Tribunal does not support the position of Argentina, contrary to what has been alleged by Argentina. Article VII(2) of the Claims Settlement Declaration provides the criteria for determining whether a particular investment belongs to a protected investor and it does not “preclude a shareholder in a local company, injured by host-state measures, from bringing a claim in relation to its shareholding. Article VII(2) merely determines whether that shareholding may be said to belong to a protected investor.”¹¹⁹ According to Siemens, the case law of the Iran-United States Claims Tribunal confirms this understanding as evidenced in *American International Group, Inc. (AIG) v. Iran* and *Ebrahimi v. Iran*.¹²⁰

133. Siemens also argues that the wording of the Treaty does not support the position of Argentina. The Preamble is clear in that the purpose of the Treaty is to create favorable conditions for investments and the definition of this term is very broad and covers every kind of assets. The Ad Article 4 of the Protocol by referring to “shall also exist” indicates that it is not

¹¹⁶ Ibid. para. 358, quoted by Claimant.

¹¹⁷ Ibid. para. 359.

¹¹⁸ Ibid. para. 381.

¹¹⁹ Ibid. para. 382.

exclusive and that “this provision cannot be construed to mean that rights protected by other Articles of the Treaty enjoyed by the investor by virtue of its investment in the local company are excluded.”¹²¹ Siemens concludes that “Argentina’s attempt to deny the advantages of the Treaty to foreign investors in local companies by relying on the corporate personality of those companies is at odds with the Treaty.”¹²²

134. Siemens also contests the effect attributed by the Respondent to the claim of a benefit under the MFN clause in respect of Ad Article 4 of the Protocol. The fact that indirect claims are mentioned in that Article and not in the Chile BIT does not mean that Siemens has to abide by all the provisions of the Chile BIT. Siemens is not bound by a less favorable provision of the Chile BIT. To argue otherwise, contradicts the intent of the MFN clause.¹²³

(c) Considerations of the Tribunal

135. The Tribunal has already found that the claim of favorable treatment under a provision of the Chile BIT does not necessarily entail being subject to all provisions of the Chile BIT, including those that the Claimant may consider less advantageous. Therefore, for purposes of consideration of this objection, the question of whether the Chile BIT only covers direct investments is of no relevance.

136. The arguments of the Respondent against protection of indirect investments are based on the extraordinary nature of such protection requiring specific coverage in the Treaty, on the fact that there is such specific reference only in Article 4 and on the criterion defining the nationality of a company by its seat. The arguments on indirect investments revolve around two

¹²⁰ Legal Authority No. 85 submitted with Counter-Memorial on Jurisdiction.

¹²¹ Counter-Memorial on Jurisdiction, para. 391.

¹²² Ibid. para. 392.

¹²³ Ibid. para. 400.

different meanings of indirect: indirect meaning that the shareholder of the local company controls it through another company, and indirect meaning that a shareholder may claim damage suffered by a company in which it holds shares. These two distinct situations appear intertwined in the parties' arguments. The Tribunal will consider first the arguments related to indirect investment understood as an investment by an investor through interposed companies.

137. The Tribunal has conducted a detailed analysis of the references in the Treaty to "investment" and "investor". The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty. The definition of "investment" is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words "not exclusively" before listing the categories of "particularly" included investments. One of the categories consists of "shares, rights of participation in companies and other types of participation in companies".¹²⁴ The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.

138. The arguments related to Ad Article 4 of the Protocol refer to indirect claims by a shareholder based on damage to the company in which it holds shares. It will be useful to reproduce this provision here. It reads as follows: "The right to be compensated also exists when measures defined in Article 4 are adopted in respect of a company where the investment

has been made and as a result of such measures the investment is severely prejudiced.” The term “measures” in Article 4 of the Treaty is used only in the context of expropriation or measures tantamount to expropriation. This Article and the addition in the Protocol read together indicate that the right to be compensated is based on damage suffered by the investment directly, or indirectly through “measures” taken against the company. It is not sufficient for the company in which the investment has been made to suffer damage. This damage has to have a detrimental effect on the investment. This effect is the cause of the State’s responsibility under the Treaty.

139. Argentina considers this provision to be indicative of the special nature of indirect claims and that, for them to be possible, they have to be specifically authorized. Siemens reads the use of “also” in connection with the right of compensation to mean that this is yet another indication that this right is not limited to this situation. The Tribunal considers that this clause focuses on damage to the investment directly, or indirectly through measures taken against the company in which the investment has been made, rather than on who may base a claim on it. The provision speaks of a right to compensation, without specifying who may claim such a right, whether directly or indirectly. The use of “also” should be read in the same light. It is established in the Treaty that the right to be compensated exists in case of expropriation and measures having the equivalent effect, and “also” in the case of measures directed against the company in which the investment has been made. Therefore, in the opinion of the Tribunal, the arguments related to indirect claims based on these provisions are misplaced.

140. It follows from this conclusion that there is no merit in the allegation that the provision for indirect claims in Article 4 and the corresponding provision of the Protocol are an indication that such claims are not permitted under other provisions of the Treaty. In this

¹²⁴ Article 1(1) b).

respect, the Tribunal also notes that Article 4 is the only article in the Treaty that deals with compensation in case of expropriation and of war or civil unrest. If the Treaty should be interpreted as alleged by Argentina - by excluding from its application every specific situation that has not been included -, we would be bound to reach the conclusion that, in cases of discrimination, arbitrary measures, or treatment short of the just and equitable standard, there would not be a right to compensation under the Treaty - an unlikely intended result by the Contracting Parties given the Treaty's purpose. If a matter is dealt with in a provision of the Treaty and not specifically mentioned under other provisions, it does not necessarily follow that the other provisions should be considered to exclude the matter especially covered.

141. The parties have also referred to the case law of the ICJ and ICSID tribunals related to indirect claims and the extent to which they are permissible. The parties have widely different interpretations of the significance of *Barcelona Traction* and *ELSI* regarding the extent of the right of a State under public international law to grant diplomatic protection to nationals who are shareholders in foreign companies. The Tribunal considers it unnecessary to discuss the relevance of these cases to the current proceedings. The issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by the Treaty.

142. As regards ICSID case law dealing with the issue of the right of shareholders to bring a claim before an arbitral tribunal, the decisions of arbitral tribunals have been consistent in deciding in favor of such right of shareholders. The Tribunal does not agree with the arguments advanced by Argentina to the effect that these cases do not support the Claimant's contentions because the claims were brought personally and directly (*Maffezini v. Kingdom of Spain*), the local corporation qualified as an investment (*AMT v. Zaire*), or the applicable treaty permitted an

indirect claim (*AAPL v. Sri Lanka*). In all these cases, whether involving individual shareholders or corporate shareholders, the arbitral tribunals recognized their *ius standi*. The fact that the shareholders were individuals does not make them qualitatively different from Siemens. The arguments of Argentina are also based on the issue of indirect investment which the Tribunal has already rejected.

143. The Tribunal considers further that the Respondent has failed to establish that the effective seat criterion for determining nationality of a company limits the possibility of advancing indirect claims under the Treaty. In the opinion of the Tribunal, the two matters are unrelated. If indirect claims are permitted, those would be permitted irrespective of the criterion chosen in the Treaty to determine the nationality of investors.

144. For the above reasons, the Tribunal considers that Siemens has *ius standi* in these proceedings as an investor in SITS through SNI.

5. Fifth Objection: The Dispute Does Not Arise Directly Out of an Investment

(a) Position of the Respondent

145. Argentina argues that, as evidenced by the preparatory works of the Convention, it was the intention to interpret restrictively the disputes that could be brought under the Convention and the term “directly” was included instead of others that would have been less restrictive, such as “in relation to” or “arising out of” an investment. Siemens’ investment consists of shares in SNI or, if identity of SNI and Siemens is assumed, of shares in SITS, an Argentine company. The dispute is related to acts of the Federal Government in respect of the

Contract, it arises out of SITS's contractual rights and obligations, and SITS is not an investor nor an investment under the terms of the Treaty.¹²⁵

146. According to the Respondent, "it can be simultaneously and concordantly stated that: i) the dispute brought by Siemens arises directly out of assets which do not constitute an investment of Siemens and ii) the dispute brought by Siemens does not arise directly out of an investment in shares of stock in SITS."¹²⁶ The Respondent develops this argument further in its Reply on Jurisdiction. The Respondent recognizes as a possible investment only the shares held in SITS by SNI who, inexplicably, is not part in this proceeding. SITS itself and the Contract are not investments and the dispute concerns issues related to the Contract, not the shares of SITS. Argentina has not expropriated these shares. According to Argentina, the legal dispute does not arise directly from an investment in shares by Siemens since it concerns the effects of measures taken by the Respondent in relation to an asset that is not an investment: the legal dispute arises indirectly from an alleged investment in shares.¹²⁷

(b) Position of the Claimant

147. Siemens recalls that SNI became fully integrated into Siemens in 1992. The consequence of integration under German Law is close to a merger in which the integrated company preserves its legal personality but loses its independence: SNI's Managing Board has the obligation to implement the directives of Siemens, Siemens has access to SNI's assets, and Siemens is jointly and severally liable for SNI's liabilities incurred prior to and during the integration. In fact, SNI is just a business unit of Siemens.¹²⁸

¹²⁵ Memorial on Jurisdiction, paras. 309-313.

¹²⁶ Ibid. para. 315.

¹²⁷ Reply on Jurisdiction, paras. 160-172.

¹²⁸ Counter-Memorial on Jurisdiction, para. 334-335.

148. Siemens argues that it is not claiming SITS' rights, but rather Siemens' rights, under the Treaty. Siemens' claim is not indirect but a direct action under the Treaty "based on Argentina's multiple breaches of the guarantees and protection granted to German investors in the Treaty."¹²⁹ Siemens' direct right of action is "independent of and distinct from any contractual right of action that SITS may have under the Contract or Argentine law."¹³⁰ Argentine civil and company law are irrelevant for purposes of Siemens' rights under the Treaty.

149. Siemens points out that the objection of Argentina has nothing to do with the requirement of Article 25(1) that the dispute should arise directly out of an investment. Since Argentina denies that Siemens has made an investment in that country for purposes of the Treaty, then clearly there can be no dispute arising out of the investment. In fact, Argentina confuses the direct requirement of Article 25(1) with the issue of direct/indirect claims and persists in identifying Siemens' rights and claims arising directly from the Treaty with SITS' rights and possible claims under the Contract and Argentina law.¹³¹

(c) Considerations of the Tribunal

150. As described by Siemens, its investment consists of: "shares, rights of participation in companies and other types of participation", "claims to money that has been used to create economic value or claims to any performance under a contract having an economic value", "intellectual property rights", and "business concessions conferred by public law." There is no doubt that the dispute with Argentina under the Treaty is a dispute which arises directly from the investment as defined by Siemens. The quality of a direct dispute is not affected by Siemens not being the direct shareholder of the local company. This is a separate question. For

¹²⁹ Ibid. para. 340.

¹³⁰ Ibid. para. 241.

purposes of Article 25(1), a dispute may arise directly out of an investment made directly or indirectly by an investor. Whether in that situation the investor qualifies as such will depend on the definition of investor in the treaty or the terms of the investment contract. The direct requirement under the ICSID Convention is related to the investment dispute, not to whether the investor is direct or indirect.

6. Sixth Objection: The Dispute is Hypothetical

(a) Position of the Respondent

151. According to Argentina, the Treaty requires that a dispute exist at the time of notification to it for purposes of arbitration. There must be continuity between the dispute brought by the investor and the dispute that was subject to negotiations during the amicable phase and afterwards brought before the local courts. In this case, Argentina argues Siemens notified the dispute while SITS filed appeals against the measures taken by the State. This is disconcerting for the Respondent because if SITS succeeded in its administrative appeal, “the expropriation claim made no sense”¹³². Hence, the hypothetical character of the dispute: it may have happened that the expropriation measure had been revoked based on SITS’ own jurisdictional activity.

152. Furthermore, Argentina recalls that it has always acknowledged that SITS has a right to compensation due to the termination of the Contract. Therefore, it was impossible that the dispute had arisen when the Claimant filed its notification, July 23, 2001. The existence of the dispute depended on facts that might or might not occur and did not depend solely on the Respondent’s will: Argentina required the collaboration of the Claimant for purposes of the

¹³¹ Rejoinder on Jurisdiction, paras. 231-235.

¹³² Memorial on Jurisdiction, para. 324.

valuation. Siemens never filed a real dispute founded on a violation of Article 4 of the Treaty on grounds of “an unjustified delay by the Federal State to determine the compensation owed to SITS, or in its case, because the compensation amount offered *severely impaired the investment*”.¹³³

153. Argentina also argues that an expropriation cannot be consolidated during the arbitration proceedings: “[T]here has to be a fundamental dispossession of the use and enjoyment of a definite investment without compensation at the moment the claim is placed.”¹³⁴ Argentina warns of a proliferation of “just in case” claims should claims based on immature controversies be allowed to proceed.¹³⁵

(b) Position of Claimant

154. Siemens argues that the dispute is concrete in the light of Siemens’ own rights under the Treaty and its violation by Argentina. Argentina took a series of measures over a period of two years that amounted to creeping expropriation and failure to meet the obligations under the Treaty to accord Siemens’ investment fair and equitable treatment and guarantee its full protection and legal security, to avoid any arbitrary and discriminatory treatment, and to comply with the obligations specifically undertaken towards the investment. Siemens’ claims go beyond a claim of expropriation for termination of the Contract without compensation.¹³⁶ Furthermore, for purposes of jurisdiction, the relevant date is the date of institution of the

¹³³ Ibid. para. 329. Emphasis in the original.

¹³⁴ Reply on Jurisdiction, para. 175.

¹³⁵ Ibid. para. 176.

¹³⁶ Counter-Memorial on Jurisdiction, paras. 429-430 and Rejoinder on Jurisdiction, para. 240.

proceedings, in this case July 17, 2002, when the dispute was registered, and not July 23, 2001 as maintained by Argentina.¹³⁷ On that date, July 17, 2002, the dispute was “real and in force”.¹³⁸

155. The Claimant maintains that the real nature of the dispute under the Treaty was recognized by the Respondent when the parties considered the possibility of submitting the dispute jointly to ICSID and limiting it to the amount of damages. The conduct of Argentina towards Siemens confirms that a concrete and relevant dispute exists. Siemens also affirms that the administrative appeal of SITS did not request a declaration that the Contract was still in force and effect but “to establish that its termination was due to Argentina’s fault and, accordingly, that SITS’ compensation should be full rather than limited, as suggested by the Government.”¹³⁹ The denial by Argentina that Siemens has a right to compensation under the Treaty is another instance that evidences the existence of a concrete dispute.¹⁴⁰

156. Another flaw in Argentina’s objection is the timing regarding the issue of compensation. This is premature and not valid as an exception to jurisdiction. It should be raised in the proceedings on the merits. The Treaty requires that compensation be paid without delay and Argentina does not claim to have taken any steps in this regard. Furthermore, Siemens’ claims cannot be reduced to compensation and the recognition of an obligation of compensation is not sufficient to terminate the dispute as recognized in *AGIP v. Congo*.¹⁴¹

157. Siemens concludes its rebuttal of this objection by stating that “The present dispute –which comprises an expropriation claim, and other violations of the Treaty, has existed from the moment Argentina deprived Siemens of the economic benefits of its investments and

¹³⁷ Counter-Memorial on Jurisdiction, para. 433.

¹³⁸ Rejoinder on Jurisdiction, para. 240 (i).

¹³⁹ Counter-Memorial on Jurisdiction, para. 443.

¹⁴⁰ *Ibid.* para. 445.

violated the guarantees and protections granted to Siemens and its investment under the Treaty. Those effects took place before notice of the dispute was delivered by Siemens to Argentina through its letter dated July 23, 2001.”¹⁴² Siemens re-affirms that its claims arise directly from its rights under the Treaty and that “Argentina’s assertions concerning SITS’ compensation and the internal proceedings in relation to it are misplaced and irrelevant to jurisdiction in this case.”¹⁴³

(c) Considerations of the Tribunal

158. The Tribunal needs to consider whether a real, as opposed to a hypothetical, dispute exists and, for purposes of jurisdiction, which is the critical date for determining its existence. The exchanges between the parties in this connection also have raised issues about the nature of the dispute, compensation, and the lack of continuity between the dispute as described in the notification of the dispute and the claims made in these proceedings. The first two of these issues are related to the merits of the dispute and the Tribunal does not need to address them for purposes of determining whether it has jurisdiction in this case. The third issue is the subject of the seventh objection to jurisdiction and will be dealt with later by the Tribunal.

159. For a dispute to exist, according to the ICJ, there must be “a disagreement on a point of law or fact, a conflict of legal views or interests between the parties.”¹⁴⁴ In *AAPL v. Sri Lanka*, the arbitral tribunal considered it sufficient for a dispute to exist that there be a lack of response to a specific demand after a reasonable period of time.¹⁴⁵ In the instant case, the supposed hypothetical nature of the dispute is related to the fact that SITS filed administrative

¹⁴¹ Ibid. paras. 446-448.

¹⁴² Ibid. para. 454.

¹⁴³ Ibid. para. 455.

¹⁴⁴ *Case concerning East Timor*, 1995 ICJ Reports, p. 89.

¹⁴⁵ Award, June 27, 1990, 4 ICSID Reports 251.

appeals against Decree 669/01 and Siemens notified Argentina of the dispute under the Treaty on July 23, 2001 before the appeals had been decided. According to Argentina, if SITS would have been compensated for the cancellation of the Contract, then there would have been no grounds for a claim before ICSID. At the time, it was premature to know what would be the result of the administrative proceedings.

160. The Tribunal considers that this issue is of a historical nature. The administrative appeals were rejected shortly after the notification of the dispute by Decree 1205/01, which confirmed Decree 669/01 on September 24, 2001. As Siemens has framed its claim, the claim goes beyond expropriation measures and it is a claim under the Treaty by a party different from the party that instituted the proceedings in Argentina. There are certainly conflicting interests between the parties, and opposed legal views on the significance of certain facts and on whether the dispute is a dispute of a contractual nature or a dispute under the Treaty. The Tribunal is satisfied that a real dispute exists.

161. Concerning the critical date to determine whether a dispute exists, the Tribunal considers that for purposes of the Treaty the dispute must exist at the time of the notice of arbitration. It has to exist also at the time the dispute is filed with the ICSID Secretariat and at the time of registration. The Tribunal has examined the correspondence between the Claimant and the Respondent between July 12, 2001, date of the communication of the Claimant to the Respondent to start amicable consultations for purposes of Article 10(1) of the Treaty, and March 18, 2002, date of the notice of the Claimant to the Respondent concerning its consent to arbitration. It is evident from this correspondence that a dispute existed at the time and that the parties even considered to submit it jointly to arbitration. Although this period of time overlaps

in part with the appeals made by SITS to the President, this fact was never alleged by the Respondent as an obstacle to the consultations under Article 10(1) of the Treaty.

162. For these reasons the Tribunal rejects the sixth objection to its jurisdiction.

7. Seventh Objection: Dispute Has Never Been Notified

(a) Position of the Respondent

163. According to Argentina, Siemens has included in its Memorial claims going beyond those included in the notification to Argentina about the existence of a dispute or in the arbitration request. The Respondent argues that “Siemens tries to allege the existence of a *creeping expropriation* and to include additional claims as part of a supposed *expropriatory process*. In order to increase, in this way, the calculation basis of the compensation it claims.”¹⁴⁶ The only admissible claim is the claim based on the rescission of the Contract.

164. Argentina considers that “there was neither a controversy in connection with clearly identified problems, nor a precise claim – as required in *re Maffezini v. Spain* -, until Siemens filed its Memorial, at least, in relation to all those matters that are beyond the allegation stating that the termination of the Contract by the Federal State amounts to an expropriation without just compensation, in violation of section 4 of the Treaty.”¹⁴⁷ It follows that the six-month term requirement to settle the dispute amicably before filing an arbitration request has not been met.

165. Argentina also points out that there was no additional arbitration request regarding these claims and no registration of the additional issues as required by Article 36 of the

¹⁴⁶ Memorial on Jurisdiction, para. 335.

¹⁴⁷ *Ibid.* para. 339.

Convention, thus depriving the ICSID Secretary-General of the opportunity to consider these claims for registration purposes.¹⁴⁸

(b) Position of the Claimant

166. Siemens argues that there is no inconsistency between the dispute notified to Argentina and the subject matter of the Request for Arbitration and the Claimant's Memorial. The Treaty does not contain any formal notification requirement: "Under Article 10 of the Treaty, what matters [...] is whether the communications before the institution of proceedings concerned 'the dispute' that was subsequently submitted to arbitration."¹⁴⁹ Siemens described the main aspects of the dispute in the note filed on July 23, 2001 and, in the Request for Arbitration, listed the measures that constituted multiple breaches of the Treaty. Siemens manifests that in both documents it is expressly stated that the claim was not exclusively limited to the factual or legal arguments set out in them.¹⁵⁰

167. The six-month period, even if certain matters had not been negotiated, is a procedural and not a jurisdictional matter: "Arbitration practice demonstrates that waiting periods are procedural rather than jurisdictional and need not to be observed if negotiations are obviously futile."¹⁵¹ Argentina never evidenced a serious effort to negotiate a settlement and the invitation to negotiate was always there. Siemens considers that "the fact that in its Memorial on Jurisdiction Argentina rejects in advance Siemens' claims involved in this dispute evidences once more its lack of interest to settle the dispute. Thus, insistence on a separate waiting period for events allegedly not included in Siemens' prior submissions could only lead to the illogical

¹⁴⁸ Ibid. para. 340.

¹⁴⁹ Counter-Memorial on Jurisdiction, para. 461.

¹⁵⁰ Ibid. para. 463.

¹⁵¹ Ibid. para. 466.

result of forcing the Claimant to go through a futile procedure and ultimately to re-submit to arbitration exactly the same claim.”¹⁵²

168. Siemens argues that all measures are part of a chain of events that ended in the unilateral termination of the Contract by Argentina and the expropriation of Siemens’ investment. They form a single dispute: “There can be no doubt that all issues submitted by Siemens in its Memorial relate to the same dispute notified to Argentina and that was the object of the Request for Arbitration, and are thus properly before the Tribunal.”¹⁵³ All these issues relate to “the same subject matter, the same factual background and the same causes of action.”¹⁵⁴ Furthermore, Siemens affirms its right to elaborate in its Memorial on the issues in dispute and even to submit “additional claims” until the Reply was due to be filed, as permitted by Article 46 of the Convention and Rule 40 of the Arbitration Rules.¹⁵⁵

169. According to Siemens, the facts described in the Memorial are “part of a one and the same story: the continuing spectrum of Argentina’s interference with the DNI Project and the investment environment originally created to secure the development of said project.”¹⁵⁶ The legal claims are also the same: “The nature of the dispute is determined not by the facts leading to it but by the legal claims they trigger.”¹⁵⁷

(c) Considerations of the Tribunal

170. As characterized by the Claimant in its letter of July 12, 2001 (filed on July 23, 2001) to the President of the Argentine Republic, the dispute concerns the breach by Argentina

¹⁵² Ibid. para. 469.

¹⁵³ Ibid. para. 472.

¹⁵⁴ Ibid. para. 479.

¹⁵⁵ Ibid. paras. 480-486.

¹⁵⁶ Rejoinder on Jurisdiction, para. 255.

¹⁵⁷ Ibid. para. 256, the quote by the Claimant is from C. Schreuer, *The ICSID Convention*.

of its obligation under the Treaty to grant Siemens' investment just and equitable treatment, and full protection and legal security in Argentina, not to take arbitrary or discriminatory measures that affect Siemens' administration, use and benefit of its investment, and not to expropriate or nationalize Siemens' investment or take equivalent measures against it without prompt payment of the required compensation. These claims, according to the same letter, are based on the actions taken by the Argentine Government after the change of Government in December 1999 that led to the cancellation of the contract on May 18, 2001. Specifically, the Claimant avers that, after the change of Government, it received indications that the new Government wished to modify the Contract and that in February 2000 the authorities stopped the preparation, printing and distribution of the new DNI, alleging without reason problems of a technical nature. Under pressure, Siemens had to initiate negotiations with the Argentine authorities. The negotiations failed because the Argentine authorities did not follow up on their commitments and because the incremental sacrifices requested from the contractor altered significantly the economic-financial equation of the Contract.¹⁵⁸

171. The Request for Arbitration sets forth in more detail identical claims. The Request lists as acts or omissions of the Respondent the following: (i) measures to press SITS to renegotiate the Contract, (ii) the indefinite suspension of the preparation, printing and distribution of the new DNIs and the implementation of the DNM's Immigration System, (iii) failure to extend the production of the new DNIs to the whole territory of Argentina, (iv) lack of good faith during the re-negotiation process, (v) unilateral termination of the Contract, (vi) non-payment of compensation, (vii) lack of reception of the remaining assets and of collaboration by

¹⁵⁸ Exhibit 16 to the Request for Arbitration, pp. 2-3.

the Government in order to solve the economic, logistic and technical problems arising out of the suspension and unilateral termination of the Contract.¹⁵⁹

172. The Respondent has also alleged that “particularly” the Claimant’s Memorial brings issues that have never been pursued in compliance with the Treaty.¹⁶⁰ Then it proceeds to list a “series of facts”¹⁶¹ that substantially coincide with those listed in the Request for Arbitration and reproduced above.

173. Comparing the description of facts and legal claims in the letter to the President of the Argentine Republic, the description of facts and legal claims in the Request for Arbitration, and the “series of facts” referred to by the Respondent in the Memorial on Jurisdiction, the Tribunal fails to perceive any new facts or claims presented by the Respondent that would not have been encompassed by the notice of the existence of a dispute for purposes of the Treaty. The documents concerned are, in this respect, substantially the same, and therefore the Tribunal finds that there is no merit to the seventh objection.

8. Eighth Objection: The Contract Contains a Specific Jurisdictional Clause

(a) Position of the Respondent

174. The Respondent argues that the Contract provides for the submission to the Federal Administrative and Contentious Courts of Buenos Aires any legal dispute in connection with the Contract. Siemens is submitting to the Tribunal a dispute related to contractual rights of a third party that does not qualify as an investor or as an investment. Siemens is not entitled to bring claims in connection with the Contract to a court other than agreed upon by SITS.¹⁶² In

¹⁵⁹ Request for Arbitration, para. 46.

¹⁶⁰ Memorial on Jurisdiction, para. 333.

¹⁶¹ Ibid. para. 334.

¹⁶² Memorial on Jurisdiction, paras. 343-344.

addition, the Respondent affirms that the acts of Argentina related to SITS are acts that are based on its contractual rights to rescind a contract rather than on its prerogatives as a sovereign. Breaching the obligations under a contract, or rescinding it, are not the same as expropriating a contract. A State contract may be expropriated only through measures unrelated to the performance of its provisions.¹⁶³

175. Argentina maintains that even if, for the sake of the argument, such jurisdictional clause would have no effect in a case related to a breach of a BIT, Siemens could not hold Argentina liable under the Treaty because the liability of the host State could only arise out of a denial of justice. The Claimant has not alleged that “SITS had no access to justice, or that it has been denied to it when attempting to make use of the remedies expressly agreed upon such purposes.”¹⁶⁴

176. Argentina has further argued that the Treaty does not impede the investors from agreeing to different dispute settlement mechanisms, including the renunciation of the remedies offered by the Treaty. These special agreements should take priority over those available under the Treaty. It should be noted that Article 26 of the Convention permits the parties to contract otherwise in relation to the exclusive character of ICSID jurisdiction.¹⁶⁵

(b) Position of the Claimant

177. Siemens argues that the claim brought before this Tribunal is a claim under the Treaty and not under the Contract: “[T]he characterization of the dispute as arising from a contract or from the BIT, for purposes of jurisdiction, depends on how the claims are put forward by the Claimant. Whether this characterization is correct will ultimately be determined by the

¹⁶³ Reply on Jurisdiction, para. 190.

¹⁶⁴ Memorial on Jurisdiction, para. 345.

tribunal when it decides in its award on the merits whether or not guarantees under the BIT have been violated.”¹⁶⁶

178. Siemens recalls the numerous decisions in which this matter has been decided by ICSID arbitral tribunals in the sense that “claims alleging a cause of action under a BIT are not precluded by the exclusive jurisdiction of the local courts pursuant to an underlying contract, regardless of whether the claims relate to a greater or lesser extent to contractual issues.”¹⁶⁷ In all cases, tribunals have upheld ICSID’s jurisdiction, and “irrespective of whether Siemens’ claims raise questions related to the Contract, Siemens is clearly asserting a cause of action under the Treaty. The jurisdiction of the Tribunal is not affected by the forum selection clause of the Contract.”¹⁶⁸

179. As regards the issue of the exclusivity of remedies under Article 26 of the Convention, Siemens maintains that “if the parties agree on a method of dispute settlement in addition to ICSID, they create an exception to ICSID’s exclusivity but they do not oust ICSID’s jurisdiction in terms of Article 26.”¹⁶⁹

(c) Considerations of the Tribunal

180. The Tribunal has already found that Siemens qualifies as an investor and that the dispute arises directly from an investment for purposes of the jurisdiction of the Tribunal under the Treaty and the Convention. The Tribunal concurs with decisions of previous ICSID arbitral tribunals on this matter and in particular recalls the statement made by the *Ad hoc* Annulment Committee in *Vivendi* to the effect that “A treaty cause of action is not the same as a contractual

¹⁶⁵ Reply on Jurisdiction, para. 189.

¹⁶⁶ Counter-Memorial on Jurisdiction, para. 492.

¹⁶⁷ *Ibid.* para. 508.

¹⁶⁸ *Ibid.* para. 510.

cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the treaty standard. The availability of local courts ready and able to resolve specific issues [...] is not dispositive, and it does not preclude an international tribunal from considering the merits of the dispute.”¹⁷⁰ Arbitral tribunals have found that a dispute arising out of a contract may give rise to a claim under a bilateral investment treaty. The dispute as formulated by the Claimant is a dispute under the Treaty. At this stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty made by Siemens are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if the Claimant’s allegations would be proven correct, then the Tribunal has jurisdiction to consider them.

181. As regards Article 26 of the Convention, the first sentence reads as follows: “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.” This provision presumes exclusivity of the remedies under the Convention unless the parties had agreed otherwise. Article 26 does not provide that what may be agreed otherwise excludes the remedies under Convention. In that case, the remedies under the Convention are not exclusive but neither are those otherwise agreed. This understanding of Article 26 is confirmed by the decision on jurisdiction in *Southern Pacific Properties (Middle East) Limited (SPP) v. The Arab Republic of Egypt*: “Article 26 says that consent to ICSID jurisdiction, unless otherwise stated, shall be deemed to exclude other remedies. Thus failure to waive other remedies does not impair consent to ICSID jurisdiction.”¹⁷¹

¹⁶⁹ Rejoinder on Jurisdiction, para. 293.

¹⁷⁰ Legal Authorities No. 69, submitted with the Counter-Memorial on Jurisdiction, para. 513.

¹⁷¹ 3 *ICSID Reports*, p. 112.

182. The Tribunal concurs with the Claimant that the issue whether the breach of the Contract may or may not be an act of expropriation is a matter related to the merits of the dispute.

183. For the stated reasons, the Tribunal rejects the eighth objection to jurisdiction.

IV. DECISION

184. The Tribunal has considered the parties' arguments in their written and oral pleadings and for the reasons above stated the Tribunal finds that:

1. The Tribunal has jurisdiction of Siemens' claims as set forth in its Request for Arbitration and its Memorial on the Merits.
2. Siemens has *ius standi* to present the claims referred in 1. above.

The Tribunal has, accordingly, made the necessary Order under Arbitration Rule 41(4) for the continuation of the procedure.

185. 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 this matter as part of the merits.

Done in English and Spanish, both versions being equally authoritative.

Dr. Andrés Rigo Sureda
President of the Tribunal

Judge Charles N. Brower
Arbitrator

Professor Domingo Bello Janeiro
Arbitrator