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

In the proceedings between

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.

(Claimants)

and

The Argentine Republic
(Respondent)

ICSID Case No. ARB/03/17

DECISION ON JURISDICTION

Members of the Tribunal
Professor Jeswald W. Salacuse, President
Professor Gabrielle Kaufmann-Kohler, Arbitrator
Professor Pedro Nikken, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Representing the Claimants
Messrs. Nigel Blackaby and
Lluis Paradell and
Ms. Noiana Marigo
Freshfields Bruckhaus Deringer LLP

Representing the Respondent
Dr. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Dr. Jorge Barraguirre
Dr. Ignacio Torterola
Procuración del Tesoro de la Nación Argentina
Buenos Aires
República Argentina

Date of Decision: May 16, 2006

I. Procedure

1. On April 17, 2003, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received a Request for Arbitration ("the Request") against the Argentine Republic ("the Respondent" or "Argentina") from Aguas Provinciales de Santa Fe S.A. ("APSF"), Suez, Sociedad General de Aguas de Barcelona S.A. ("AGBAR") and InterAguas Servicios Integrales del Agua S.A. ("InterAguas" together, "the Claimants"). APSF is a company incorporated in Argentina. Suez, incorporated in France, and AGBAR and InterAguas, both incorporated in Spain, were major shareholders in APSF. The Request concerned the Claimants' investments in a concession for water distribution and waste water treatment in the Argentine Province of Santa Fe and a series of alleged acts and omissions by Argentina, including Argentina's alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.[1]

2. In the Request, the Claimants invoked Argentina's consent to dispute settlement through ICSID arbitration provided in the 1991 Bilateral Investment Treaty between France and the Argentine Republic (the "Argentina–France BIT")[2] and in the 1991 Bilateral Investment Treaty between the Argentine Republic and the Kingdom of Spain (the "Argentina-Spain BIT").[3]

3. On April 17, 2003, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt and transmitted a copy of the Request to the Argentine Republic and to the Argentine Embassy in Washington D.C.

4. On July 17, 2003, the Acting Secretary-General of the Centre registered the Request, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or "the Convention"). The case was registered as ICSID Case No. ARB/03/17 with the formal heading of Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic.[4]

On that same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

5. The parties could not reach an agreement on the number of arbitrators to comprise the arbitral tribunal nor on the method for their appointment. Accordingly, on 22 September 2003, the Claimants requested the Tribunal to be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; i.e. one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties. The Claimants appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national, as arbitrator. The Argentine Republic in turn appointed as arbitrator Professor Pedro Nikken, a national of Venezuela.

6. In the absence of an agreement between the parties on the name of the presiding arbitrator, on October 21, 2003 the Claimants, invoking Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), requested the Centre to make this appointment. With the agreement of both parties, the Centre appointed Professor Jeswald W. Salacuse, a national of the United States of America, as the President of the Tribunal.

7. On February 17, 2004, the Deputy Secretary-General of ICSID, in accordance with ICSID Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date.[5] 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.

8. Under ICSID Arbitration Rule 13, the Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The parties could not agree on a suitable date for the first session within the prescribed time limits.

The Tribunal accordingly held its first session without the parties via telephone conference on April 19, 2004.

9. On June 7, 2004, the Tribunal held a session with the parties at the seat of the Centre in Washington, D.C. During the session the parties confirmed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections in this respect.

10. During the session the parties also agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal.[6] The Tribunal, after consultation with the parties, fixed the following timetable for the written and oral pleadings in this case:

(1) ***Merits*** *(in the event Argentina raised no objections to jurisdiction):*

a. The Claimants would file a memorial on the merits within one hundred and five (105) days from the date of the session, i.e., no later than September 20, 2004;

b. The Respondent would file a counter-memorial on the merits within one hundred and twenty (120) days from its receipt of the Claimants' memorial;

c. The Claimants would file a reply on the merits within sixty (60) days from their receipt of the Respondent's counter-memorial;

d. The Respondent would file its rejoinder on the merits within sixty (60) days from its receipt of the Claimants' reply; and

e. The Tribunal would thereafter hold a hearing on the merits. The Tribunal envisaged holding this hearing on July 11-20, 2005, which dates the parties agreed to reserve for this purpose.

(2) ***Jurisdiction*** *(in the event Argentina raised objections to jurisdiction):*

a. If the Respondent decides to file objections to jurisdiction, it would do so within sixty (60) days from its receipt of the Claimants' memorial on the merits;

b. Thereafter the proceedings on the merits would be suspended in accordance with ICSID Arbitration Rule 41(3);

c. The Claimants would file their counter-memorial on jurisdiction within sixty (60) days from their receipt of the Respondent's objections to jurisdiction; and

d. The Tribunal would thereafter hold a hearing on jurisdiction. The Tribunal envisaged holding this hearing on May 9, 2005, which date the parties agreed to reserve for this purpose.

(3) If the Tribunal decides that it has jurisdiction or to join the question of jurisdiction to the merits of the dispute, the proceedings on the merits would be resumed and:

a. The Respondent would have for the filing of its counter-memorial on the merits the number of days equal to the original one hundred and twenty (120) less the number of days used for the filing of its objections to jurisdiction;

b. The Claimants would then file their reply on the merits within sixty (60) days from their receipt of the Respondent's counter-memorial;

c. The Respondent would file its rejoinder on the merits within sixty (60) days from its receipt of the Claimants' reply; and

d. The Tribunal would then, in consultation with the parties as far as possible, fix a date for a hearing.

11. In accordance with the agreed timetable, on September 20, 2004, the Claimants filed their Memorial on the Merits with accompanying documentation. On November 26, 2004 Argentina filed its Memorial with objections to jurisdiction.

12. By letter of December 3, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with ICSID Arbitration Rule 41(3). On February 1, 2005, the Claimants filed their Counter-Memorial on Jurisdiction.

13. As agreed upon during the June 7, 2004 session, a hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. on May 9, 2005. Messrs. Nigel Blackaby and Lluis Paradell and Ms. Noiana Marigo, from the law firm of Freshfields Bruckhaus Deringer LLP, Mr. Bernardo Iriberri, from the Buenos Aires-based law firm

of Estudio Cardenas Cassagne y Asociados, Messrs. Jean-Paul Minette and Patrice Herbert from Suez Environment and Mr. Miquel Griño, from AGBAR, attended the hearing on behalf of the Claimants. Messrs. Jorge Barraguirre and Ignacio Torterola from the Procuración del Tesoro de la Nación Argentina, attended the hearing on behalf of the Respondent. Also present on behalf of the Respondent were Ms. Liliana Campomanes from CEARINSA (Comisión de Estudio de Arbitrajes Internacionales de la Provincia de Santa Fe), Mr. Carlos Reyna from the Ente Regulador de Servicios Sanitarios de la Provincia de Santa Fe and Mr. Félix López Amaya, of the Fiscalía de Estado of the Province of Córdoba. During the hearing Messrs. Blackaby and Paradell addressed the Tribunal on behalf of the Claimants. Messrs. Barraguirre and Torterola addressed the Tribunal on behalf of the Argentine Republic. The Tribunal posed questions to the parties, as provided in Rule 32(3) of the Arbitration Rules.

14. On June 22, 2005, a *Petición de Participación como Amicus Curiae* (Petition for Participation as Amicus Curiae) was submitted to the Tribunal by *Fundación para el Desarrollo Sustentable*, a Santa Fe-based non-governmental organization, and three individuals. Following the filing of the *Petición*, the Tribunal invited the parties to file any observations they may have in this regard, and both parties submitted their views on this matter. On March 17, 2006, the Tribunal issued an Order in Response to a Petition for Participation as Amicus Curiae (available online at ICSID's web site at www.worldbank.org/icsid) setting out the conditions under which the Tribunal would consider amicus curiae submissions.[7]

15. Following the hearing on jurisdiction, the Respondent at various times filed unsolicited documents and arguments further contesting the Tribunal's jurisdiction. On each occasion, the Tribunal requested the Claimants views on these arguments and documents, and the Claimants totally rejected them each time. Finding that the Respondent had a full and complete opportunity to present their objections to jurisdiction in their memorial and oral arguments at the hearing on jurisdiction and finding further that the arguments presented in these unsolicited filing duplicated those that the Respondents had submitted in their oral arguments and memorial, the Tribunal by letter

of March 24, 2006 requested the parties to refrain from making any new unsolicited submissions.

16. By letter of January 11, 2006, counsel for the Claimants informed the Tribunal that APSF "in compliance with a condition imposed by the province of Santa Fe for its approval of the sale of Claimant Shareholders' interest in APSF to Alberdi Aguas S.A. … has decided to withdraw its claim in the above-referenced arbitration" but that such withdrawal was expressly without prejudice to the Claimant Shareholders' claims in this proceeding. Upon invitation of the Tribunal, the Respondent filed its observations to this withdrawal by letter of February 8, 2006. The Respondent did not object to the withdrawal of APSF but requested that APSF provide copies of the minutes of the shareholders' meeting *(Asamblea de Accionistas de APSF)* with respect to the decision authorizing such withdrawal. At the same time, Respondent advanced further arguments objecting to the Tribunal's jurisdiction and claiming that APSF's decision to withdraw extinguished the claims of the other claimants in this case. At the invitation of the Tribunal, counsel for APSF provided copies of the minutes of the APSF's shareholders' meeting of May 4, 2005 and of the APSF's board of directors' meeting of January 10, 2006, authorizing the discontinuance of its claim before this Tribunal. At the same time, counsel for the Claimants rejected each of the Respondent's arguments challenging the Tribunal's jurisdiction with respect to the other Claimants. The Tribunal provided copies of these documents to the Respondent and requested its observation concerning APSF's withdrawal. By letter of March 31, 2006, the Respondent informed the Tribunal that "… the Argentine Republic does not oppose the proposed cessation by the Concessionaire… APSF…" in ICSID arbitration ARB/03/17 ("… *la República Argentina no se opone al desistimiento planteado por la[s] Concesionaria[s] APSF*…"), (para. 9) but argued that such withdrawal had legal consequences with respect to the Tribunal's jurisdiction over the Shareholder Claimants and their claims.

17. In its deliberations on this request, the Tribunal found that neither the ICSID Convention nor the Rules specifically provide for the withdrawal of one party from an arbitration proceeding that is to continue thereafter. ICSID Arbitration Rule 44, the

provision of closest relevance to the action requested by the Claimant APSF, allows the discontinuation of an arbitration proceeding at the request of a party when the other party does not object. But Arbitration Rule 44 by a strict reading of its terms does not apply to the withdrawal of a single party. Nonetheless, the Tribunal, relying on Article 44 of the ICSID Convention, which grants ICSID tribunals the power to decide procedural questions not covered by the Convention or the Rules, concluded that it had the power to order the discontinuance of proceedings with respect to one party at its request when the other party did not object. The Tribunal found that permitting such discontinuance in the conditions presented by this case was in accordance with the basic objective of the ICSID Convention of facilitating the settlement of investment disputes, of which ICSID Arbitration Rule 44 is a specific manifestation. It also was of the view that the continued participation of APSF in this proceeding would serve no useful purpose in bringing about a fair and correct resolution of the present arbitration.

18. On April 14, 2006, the Tribunal therefore entered Procedural Order No. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Provinciales de Santa Fe S.A. (available online at www.worldbank.org/icsid), directing that: (i) the proceedings in ICSID Case No. ARB/03/17 with respect to the Claimant Aguas Provinciales de Santa Fe S.A. be discontinued and that the said Claimant Aguas Provinciales de Santa Fe cease to be a party with effect from April 14, 2006; and (ii) that the proceedings in ICSID Case No ARB/03/17 continue in all other respects. With respect to the Respondents arguments that the withdrawal of APSF from the case had implications for the Tribunal's jurisdiction over the Shareholder Claimants and their claims, the Tribunal concluded that these objections were more appropriately addressed in its decision on jurisdiction. They are in fact considered in subsequent sections of the present decision.

19. The Tribunal has deliberated on the parties' written submissions on the question of jurisdiction and on the oral arguments delivered in the course of the May 9, 2005 hearing. Having considered the relevant facts and evidence, the ICSID Convention, the Argentina–France BIT, the Argentina-Spain BIT, as well as the written and oral

submissions of the parties' representatives, the Tribunal has reached the following decision on the question of jurisdiction.

II. Factual Background

20. The Respondent is a federal republic consisting of the autonomous city of Buenos Aires and twenty-three provinces, one of which is the Province of Santa Fe, located in the north of the country. From 1980 until 1995, the Province of Santa Fe, through its *Dirección Provincial de Obras Sanitarios* (DIPOS), had the responsibility of providing water and waste water services to the principal urban areas in the Province.[8]

21. In 1989, Argentina enacted the State Reform Law[9] that launched a broad program of privatization by which the Argentine government proposed to transfer to private and primarily foreign investors the assets, operations, and functions of various designated State-owned companies and entities. The State Reform Law also invited the country's provinces to participate in the privatization process. Subsequently, Argentina took certain other measures to encourage private and foreign investment. Less than two years after the State Reform Law, Argentina adopted the Convertibility Law[10] by which it tied or "pegged" the value of the Argentine Peso to the United States Dollar and established a currency board requiring that the amount of Argentine currency in circulation be equivalent to the foreign currency reserves held by the State. Starting in 1990, it also began to conclude bilateral treaties "for the reciprocal promotion and protection of investments" with various countries. By the year 2000, it had concluded 57 such bilateral investment treaties, commonly known as BITs, including the July 1991 Argentine-France BIT and the October 1991 Argentina-Spain BIT.

22. Beginning in 1989, almost immediately after the federal government had launched its privatization program, the Province of Santa Fe took a series of measures to facilitate the privatization of certain provincial services and entities. Accordingly, Santa Fe adopted its own Emergency and State Reform Law[11] which designated the specific services and entities to be privatized and defined the rules by which the privatization would be conducted. The general approach was to enact specific laws for each entity to be privatized. The Santa Fe Emergency and State Reform Law listed DIPOS as one of the provincial entities to be privatized, and in 1994 Law No. 11,220 was enacted to govern the privatization of the water distribution and waste water services in the Province of Santa Fe. This law provided for an international bidding procedure to enable private investors to obtain a thirty-year concession for the operation and development of specified water and waste water systems in the province. A model contract, annexed to the bidding rules, specified certain provisions governing the financial aspects of the proposed concession, including investment commitments, tariff adjustments, and the equilibrium to be maintained between the costs of operation and the financial returns to the eventual successful concessionaire. The Province, in cooperation with the federal authorities, actively publicized its desire to privatize these systems, preparing and distributing a prospectus aimed at private investors, both foreign and national.[12]

23. In response to these measures, Suez (then known as Lyonnaise des Eaux) and AGBAR, together with Argentine companies Banco de Galicia y Buenos Aires S. A., Sociedad Comercial del Plata S. A., and Meller S. A., formed a consortium in January 1995 to participate in the bidding for the concession to operate specified water

distribution and waste water systems in the Province of Santa Fe. On August 30, 1995, this consortium was awarded the concession. Pursuant to the bidding rules, the consortium on November 8, 1995 formed an Argentine company, Aguas Provinciales de Santa Fe S.A, (APSF) to hold and operate the concession. On November 27, 1995, APSF formally concluded a thirty-year concession contract and on December 5, 1995 it assumed control and management of the water distribution and waste water systems in the fifteen most important urban areas in the Province of Santa Fe. According to the Claimants' Memorial on the Merits, by December 31, 2001 APSF had invested a total of US$ 257.7 million in the concession, consisting of US$60 million in APSF's initial capital, US$67.3 million of cash flows generated by APSF, and US$130.4 million primarily from the international financial market.[13]

24. In 1999, the Argentine Republic began to experience a severe economic and financial crisis that had serious consequences for the country, its people, and its investors, both foreign and national. In response to this continuing crisis, the government adopted a variety of measures to deal with its effects in the following years. In 2002, it enacted a law[14] that abolished the currency board that had linked the Argentine Peso to the U.S. dollar, resulting in a significant depreciation of the Argentine Peso. Claiming that these measures injured their investments in violation of the commitments made to them in securing the concession, the Claimants sought to obtain from the provincial government adjustments in the tariffs that APSF could charge for water distribution and waste water services, as well as modifications of other operating conditions.

25. After a fruitless period of negotiations, the Claimants in April 2003 submitted their dispute with the Argentine Republic for settlement by arbitration to ICSID under the ICSID Convention pursuant to the Argentina-France and the Argentina-Spain BITs. In their Memorial, the Claimants allege that the Argentine Republic is legally responsible under the above-mentioned BITs for the Province of Santa Fe's wrongful actions, which expropriated Claimants' investment in violation of Article 5(2) of the Argentina-France BIT and Article V of the Argentina-Spain BIT and which failed to treat Claimants' investment fairly and equitably in breach of Article 3 and 5(1) of the Argentina-France BIT and Article IV(1) of the Argentina-Spain BIT. As a result, pursuant to both BITs, Claimants seek compensation for their alleged loss. The Claimants at the initiation of this proceeding consisted of APFS (now withdrawn), the concession company, and three of its non-Argentine shareholders: Suez, a French company holding 51.69% of APSF shares; AGBAR, a Spanish Company holding 10.89% of APSF shares, and InterAguas, a Spanish company holding 14.92% of APSF shares.[15]

26. In response to the Claimants' Memorial, the Respondent submitted a Memorial with objections to jurisdiction on November 26, 2004, alleging six specific grounds as to why ICSID and the present Tribunal are without jurisdiction to hear and decide Claimants' claim for damages. The purpose of the present decision is to consider and decide upon each of the objections to jurisdiction raised by the Respondent. In undertaking this task, the Tribunal is mindful of the fact that other ICSID tribunals in other cases involving the Respondent have decided similar, if not identical jurisdictional

issues. While these decisions are not binding upon the present Tribunal, they are nonetheless instructive.

III. Consideration of Jurisdictional Objections

First Jurisdictional Objection: The Dispute Does Not Arise Directly Out of an Investment

27. Article 25 (1) of the ICSID Convention provides:

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre"* (emphasis supplied).

The Respondent challenges ICSID's and this Tribunal's jurisdiction on the ground that the underlying dispute between the Claimants and the Respondent does not arise directly out of an investment, as the ICSID Convention requires. The Respondent argues that in reality this dispute is about the wisdom of general economic measures taken by the government of Argentina to deal with the economic and financial crisis it was facing. In that light, according to the Respondent, the dispute in this case does not arise directly out of an investment, but rather out of the general measures adopted by the government. Further, Respondent argues that the word "directly" could also be "translated" as meaning "specifically" and that since none of the measures complained of were directed specifically at the Claimants' investments, but rather were measures of general applicability, it cannot be said that the dispute in the present case arises "directly" out of

the Claimants' investment.[16] In support of its position, the Respondent cites certain language from the NAFTA/UNCITRAL case of *Methanex Corporation v. United States of America*.[17]

28. The Claimants assert that the Respondent errs when it states that they complain of general economic measures and that, in these circumstances, the dispute cannot arise directly out of investments as required by Article 25(1) of the ICSID Convention. Indeed, the Claimants complain that Argentine measures specifically, concretely and directly violated commitments made to them as foreign investors in the privatized water industry, in particular Argentina's failure to reestablish the concession's financial equilibrium and to adjust tariffs. The Claimants further argue that *Methanex*, though not directly relevant to this case, actually supports their position in that the words "relating to" in Article 1101(1) of the NAFTA were interpreted to mean that "there must be a legally significant connection between the measure and the claimant investor or its investment". Moreover, this holding should be interpreted in conjunction with the rejection in *Pope & Talbot v. Canada*, another NAFTA case, of Canada's submission that "a measure can only relate to an investment if it is primarily directed at that investment and that a measure aimed at trade in goods ipso facto cannot be addressed as well under *Chapter 11*."[18]

29. The Tribunal does not accept the Respondent's interpretation of Article 25(1) of the ICSID Convention. Article 25(1) requires a connection of a sufficient degree of directness between a *dispute* submitted to ICSID and a claimant's *investment*.[19] The

International Court of Justice has defined the word "dispute" to mean "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."[20] That a disagreement exists between the Claimants and the Respondent about law, facts, and legal views is beyond doubt. It is also beyond doubt (which the Respondent does not contest) that the Claimants have made an investment in certain water distribution and waste water systems in the Province of Santa Fe. The disagreement between Claimants and the Respondent arises directly out of Claimants' investments in the water distribution and waste water systems in the Province of Santa Fe, since the disagreement is specifically about the legality under international law of the treatment accorded to those investments by the measures taken by the Respondent and its subdivisions. The Claimants allege that the treatment they have received violates Argentina's treaty obligations towards those investments, while the Respondent takes a different view. That disagreement arises directly out of the investment impacted by governmental measures, not out of the measures themselves. The Tribunal is not concerned with the wisdom, legality, or soundness of the policy measures taken by Argentina to deal with the economic crisis. Rather, the Tribunal's task is to judge, at the merits stage of this case, whether the effect of Respondent's actions on the Claimants' investments violates the Respondent's international legal obligations contained in the Argentina-France and the Argentina-Spain BITs. In short, the core of the dispute centers on a basic question: Did the Respondent by its actions violate the rights granted to the Claimants and their investment under international law?

30. The Respondent's proposed interpretation of the ICSID treaty that jurisdiction only exists if the measure in question was aimed or directed "specifically" at the investment finds no basis in the plain language of the treaty. First, the jurisdictional element demanded by the ICSID Convention is a dispute arising directly out of an investment. The Convention makes no reference to governmental measures as a jurisdictional element. To infer that requirement without justification in the face of the plain meaning of Article 25 of the Convention would do violence to the arbitral regime that was carefully put in place by its founders. Second, it would lead to results that were clearly not intended by the drafters of the Convention. For example, such an interpretation would exclude from ICSID jurisdiction disputes caused by a governmental act of general expropriation while a governmental act expropriating a specific investment would be within the jurisdiction of the Centre. The Respondent cites language from *Methanex v. United States of America* in support of its position. In the *Methanex* case, the tribunal was interpreting Article 1101(1) of the NAFTA whose fundamental jurisdictional requirement, unlike Article 25 of the ICSID Convention, applies the dispute settlement provisions of Chapter 11 to "measures adopted or maintained by a Party relating to: (a) investors of another Party [or] investments of investors of another party in the territory of a Party" (emphasis supplied). An interpretation of that provision requires quite a different analysis from that required by Article 25 of the ICSID Convention. Whereas NAFTA requires by its terms a connection between the investments and contested governmental measures, Article 25 of the ICSID Convention requires a direct connection between the investment and the dispute. As a result, the language from the

Methanex case advanced by the Respondent is not relevant to an interpretation of Article 25.

31. The Tribunal finds support for its conclusion that the dispute in the present case is directly related to an investment in the ICSID case of *CMS v. Argentina*[21] which also addressed the question of whether the dispute in question arose directly out of an investment. In that case, the claimant, which had invested in the context of Argentina's privatization program in a gas distribution system, brought a claim in ICSID arbitration under the Argentina-U.S. bilateral investment treaty on the grounds that various economic measures taken by the government violated its rights under that BIT. In that case, as in the present dispute, Argentina challenged the jurisdiction of the Tribunal and ICSID on grounds, *inter alia*, that the dispute did not arise directly out of an investment and that the claimant was asking the tribunal to judge the validity of general economic measures. The tribunal in *CMS v. Argentina* rejected that objection to jurisdiction, stating that while it does "not have jurisdiction over measures of general economic policy and could not pass judgment on whether they were right or wrong", it did have jurisdiction "…to examine whether specific measures affecting Claimant's investments or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments given to the investor in treaties, legislation or contracts"[22]. It further clarified its position by stating: "[w]hat is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments."[23]

32. On the basis of its foregoing analysis, the Tribunal holds that the dispute between the Claimants and the Respondent arises directly out of the Claimants' investment in the water distribution and waste water systems of the Province of Santa Fe and that therefore the Respondent's first objection to jurisdiction must fail.

Second Jurisdictional Objection: The Dispute is not a Legal Dispute

33. Article 25 not only requires as a jurisdictional element that a dispute arise directly out of an investment but it also requires that the dispute be a "legal" dispute. The Respondent objects to the jurisdiction of ICSID and of the Tribunal on the grounds that the dispute which the Claimants have submitted to arbitration is not "legal" in nature. It supports this position by pointing out that the Claimants' case is based upon Argentina's failure to adjust the tariff regime and to respect the equilibrium principle whereby Claimants would be assured a fair return on their investment, but that neither Argentine law nor the Respondent's contract with the Claimants imposes a legal obligation to do so. Consequently, the Respondent asserts that the dispute between the Claimants and the Respondent is a business or commercial dispute rather than a "legal" dispute required to establish ICSID jurisdiction. The Respondent further alleges that the dispute over the effects of the devaluation measures on the concession is one over policy and fairness ("una cuestión de política pública y de equidad", Memorial on Jurisdiction, para. 46), hence not legal in nature.

34. A legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations. In its Counter-Memorial on Jurisdiction, the Claimants assert that

their claim is indeed based on legal rights – the legal rights granted to them under the Argentina-France and the Argentina-Spain BITs. They allege that, by failing to make tariff adjustments and to respect the equilibrium principle, the Respondent violated its legal obligations under the Argentina-France BIT to accord "just and equitable treatment, in accordance with the principles of international law" to the Claimants and their investments and " not [to] take, directly or indirectly, any expropriation or nationalization measures or any other equivalent measures having a similar effect of dispossession" without payment of prompt and adequate compensation (Art. 3, 5(1), and 5(2)). They further allege that the Respondent also violated its legal obligations under the Argentina-Spain BIT to guarantee "fair and equitable treatment of investments made" by the Claimants and to pay compensation for "the nationalization, expropriation or any other measures having similar characteristics or effects" taken by Respondent (Art. IV(1) and V).

35. At this stage of the proceedings, the task of the Tribunal is not to judge the merits of these claims but to determine whether the claims made by the Claimants are legal in nature and therefore constitute a basis for establishing ICSID jurisdiction. Furthermore, although the ICSID Convention itself does not define the meaning of "legal" dispute, the accompanying Report of the Executive Directors of the World Bank gives some clarification:

> *"The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."*[24]

36. In his commentary on the ICSID Convention, Professor Schreuer characterizes legal disputes as follows:

> *"The dispute will only qualify as legal if legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed. Consequently, it is largely in the hands of the claimant to present the dispute in legal terms."*[25]

37. In the present case, the Claimants clearly base their case on legal rights which they allege have been granted to them under the bilateral investment treaties that Argentina has concluded with France and Spain. In their written pleadings and oral arguments, the Claimants have consistently presented their case in legal terms. Bilateral investment treaties are not mere statements of good will or declarations of benevolent intent toward the investors and investments of the two countries concerned. They are international legal instruments by which sovereign states make firm commitments under international law concerning the treatment they will accord to investors and investments from the other state. A basic purpose of the Argentina-France BIT and the Argentina-Spain BIT, as their titles indicate, is the "protection of investments." They seek to achieve this goal by granting investors and investments from the treaty partner certain legal rights and to provide a legal means for their enforcement. In the present case, the Claimants have invoked both BITs as a basis for their claim and have based their claims on the specific legal rights enumerated in specific treaty provisions, which they allege have been granted to them by the treaties in question. Whether they will prevail in establishing their legal rights and the Respondent's violation thereof remains to be seen and is for a subsequent stage of this proceeding. What is certain at this stage, however, is

that the dispute as presented by the Claimants is legal in nature. As a result, the Tribunal concludes that Respondent's second objection to jurisdiction must also fail.

Third Objection to Jurisdiction (now moot): APSF does not qualify as a foreign investor under the applicable treaty and, in any event, has not consented to the jurisdiction of ICSID and of the Tribunal

38. APSF, one of the original Claimants in this dispute, is an Argentine corporation which formally holds the concession for water distribution and waste water treatment in the Province of Santa Fe and through which the other Claimants made their investments. Since APSF is not a foreign entity, but a national entity, the Respondent asserted that APSF is not entitled to bring a case to ICSID.

39. In response, the Claimants argued that APSF must be deemed a French investor, as Suez, a French company, holds 51.69% of its shares, majority shareholding being evidence of control, the relevant test, under Article 25 of the ICSID Convention and Article (1)(2)(c) of the Argentina-France BIT.

40. Since the Tribunal, at the request of APSF and without opposition from the Respondent, has ordered the discontinuance of the proceedings in this case with respect to APSF in Procedural Order No. 1, discussed above, and since this third objection to jurisdiction relates to and affects only APSF and none of the other claimants, the Tribunal has concluded that it need not consider and decide upon this objection to jurisdiction.

Fourth Jurisdictional Objection: Claimants' Right to Bring an Action in Arbitration is Precluded by the Dispute Resolution Clause in the Concession Contract Concluded by APSF

41. The contract granting APSF a concession to operate the water distribution and waste water systems in specified urban areas in the Santa Fe Province contained a dispute resolution clause whereby the parties to the contract agreed to submit all disputes relating to its interpretation and execution to the local courts of the Province of Santa Fe.[26] From this fact, the Respondent draws two implications challenging ICSID and the Tribunal's jurisdiction. First, the dispute resolution clause, according to the Respondent, shows that APSF did not agree to ICSID jurisdiction, thus vitiating a fundamental element of ICSID jurisdiction: consent. Second, by agreeing to settle all disputes arising out of their transaction, including those that are the basis for the present arbitration, in the courts of Argentina, not before an ICSID tribunal, both the Claimants and the Respondent agreed to settle their disputes in a manner which necessarily excludes recourse to ICSID.

42. The Claimants object that arbitral tribunals have consistently rejected arguments relating to the preclusive effect of contractual dispute resolution clauses providing for the jurisdiction of local courts where breaches of the BITs were alleged, and that they do not claim any contractual right or assert any cause of action under the concession contract. In support of their first objection, the Claimants rely in particular on decisions in other ICSID cases involving Argentina, namely *CMS v. Argentina*, *Enron v. Argentina*, *Azurix v. Argentina*, *Compañía de Aguas del Aconquija S.A.* and *Compagnie Générale des Eaux*

v. Argentina, as well as on other decisions such as *Salini v. Morocco and CME Czech Republic B.V. v. The Czech Republic*. As regards their second argument, the Claimants specify that their claims are for breach of the treaty protection and not for breach of contract. In this respect, they gave particulars of the principles and provisions of the concession contract solely to explain the investment regime that Santa Fe established in order to attract foreign investments.

43. In order to assess the Respondent's jurisdictional objections on this point, one must consider the nature and implications of the dispute settlement clause concluded by APSF and the Province of Santa Fe. By its terms, the dispute resolution clause covers all controversies arising out of the concession contract. The dispute resolution clause makes no mention of Claimants' rights under the Argentina-France BIT, the Argentina-Spain BIT, or their right to seek recourse in arbitration for violation of those rights. In the present case, the Claimants, as they rightly point out, do not allege any violation of their rights under the concession contract. Rather, the basis of their claim is that the Respondent has violated the Claimants' rights under the BITs. BIT claims and contractual claims are two different things. As the ICSID Annulment Committee stated in *Vivendi*, which involved one of the BITs at the center of the present dispute:

> *"A state may breach a treaty without breaching a contract, and vice versa […]";*
>
> *"[…] whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract by the proper law of the contract […]".*[27]

44. Many other international arbitral tribunals have taken the position that a dispute resolution clause in an underlying contract whereby contractual disputes are within the exclusive jurisdiction of local courts or arbitrations does not preclude an investor who is a party to such contract from bringing an arbitration proceeding to enforce its rights under a bilateral investment treaty.[28]

45. It follows from the above discussion that, contrary to Argentina's argument, the execution of a dispute resolution clause in the concession agreement does not mean that the parties have waived ICSID jurisdiction. Certainly, the execution of a dispute settlement clause, like the one in the Santa Fe concession contract, which makes no reference to the BIT or to the treatment that the BIT guarantees investors, cannot support any inference that such dispute resolution clause is a waiver of the investors' rights under a BIT. The Tribunal concludes that the existence of the dispute resolution clause in the concession contract does not preclude the Claimants from bringing the present action. Consequently, Respondent's fourth objection to the ICSID's and this Tribunal's jurisdiction must fail.

Fifth Jurisdictional Objection: Suez, AGBAR, and InterAguas, as mere shareholders of APSF are not legally qualified to bring claims in ICSID arbitration for alleged injuries done to APSF

46. The Respondent contends that the three shareholders in APSF, Suez, AGBAR, and InterAguas, have no standing to bring a claim in arbitration for alleged injuries done

to APSF. In support of this position, the Respondent, drawing analogies to domestic corporation law, argues that any injury to the shareholders is derivative of the alleged injury to the company in which they hold shares, as opposed to a direct injury to the shareholders themselves. The alleged injury is done to the corporation, not to the shareholders whose shares, because of an alleged wrongful action done to the corporation, may have diminished in value. Thus, the shareholders have no right to bring an action on grounds that they have sustained a direct injury by virtue of the alleged wrongful actions of the Respondent. The right to bring an action for any alleged injury lies with the corporation itself, not its shareholders. The Respondent further pointed out that to award a monetary recovery to the Claimants in their capacity as shareholders, as well as to APSF as the entity directly wronged, would result in an unjust double recovery and moreover would grant a recovery to specific shareholders, thus prejudicing other APSF shareholders as well as its creditors. The Respondent also reiterated this argument at the time that the Tribunal, at the request of APSF to withdraw from this case and without objection from the Respondent, ordered the discontinuance of the proceedings with respect to APSF. In its submissions of March 31, 2006, the Respondent argued that the Shareholder Claimants' claims were dependent or derivative of APSF's claim and that since APSF was no longer a party, the Claimant Shareholders had no right to bring a claim in ICSID arbitration in the absence of APSF.

47. In response, the Claimants argue that the basis for a shareholder having standing to bring a case because of an alleged injury is to be found in international law, not domestic law. Specifically, it is to be found in the Argentina-France and Argentina-Spain

BITs which were concluded by the countries concerned to protect the investors and investments of one State in the territory of another State. Suez is a French national under the Argentina-France BIT and as such falls within the definition of the term "investor" in Article 1(2)(b). Under Article 8 of the Argentina-France BIT, an "investor" may have recourse to ICSID arbitration with respect to "… any disputes relating to an investment under this Treaty." Article 1(1) contains a quite detailed definition of investment. It provides in part:

> *1. The term "investment" shall apply to assets such as property, rights and interests in any category, and particularly but not exclusively to: …*
>
> > *b) Shares, issue premiums and other forms of participation, albeit minority or indirect, in companies constituted in the territory of either Contracting Party…"* [29]

48. The Claimants likewise refer to Article I(2) of the Argentina-Spain BIT which defines investments as "any kind of assets, such as property and rights of every kind […]", including "shares and other forms of participations in companies."[30]

49. Accordingly, under the plain language of these BITs, the Tribunal finds that Suez's as well as AGBAR's and InterAguas' shares in APSF are "investments" under the Argentina-France and Argentina-Spain BITs. These shareholders thus benefit from the treatment promised by Argentina to investments made by French and Spanish nationals in its territory. Consequently, under Article 8 of the French treaty and Article X of the Spanish treaty, these shareholder Claimants are entitled to have recourse to ICSID arbitration to enforce their treaty rights. Neither the Argentina-France BIT, the Argentina-Spain BIT, nor the ICSID Convention limit the rights of shareholders to bring actions for direct, as opposed to derivative claims. This distinction, present in domestic

corporate law of many countries, does not exist in any of the treaties applicable to this case.

50. During the oral arguments, the Respondent relied heavily on the International Court of Justice case *Barcelona Traction,*[31] in which Belgium sought damages against Spain for injuries done to Belgian shareholders in a Canadian corporation that was operating an electricity distribution system in Barcelona. The Court held that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain. In this Tribunal's opinion, *Barcelona Traction* is not controlling in the present case. That decision, which has been criticized by scholars over the years, concerned diplomatic protection of its nationals by a State, an issue that is in no way relevant to the current case. Unlike the present case, *Barcelona Traction* did not involve a bilateral treaty which specifically provides that shareholders are investors and as such are entitled to have recourse to international arbitration to protect their shares from host country actions that violate the treaty. In this regard, it is interesting to note the ICJ's commentary on the underdeveloped state of international investment law in 1970, the year of the Barcelona Traction decision:

> "*Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.*"[32]

At that time, the movement to conclude bilateral investment treaties was in its infancy. Today, over 2200 bilateral investment treaties exist in the world, and Argentina alone has concluded fifty seven. Moreover, there exists today a growing jurisprudence of arbitral decisions interpreting treaty provisions, something which hardly existed in 1970. The applicable international law on investment between Argentina and France and Argentina and Spain found in the relevant BITs is much more specific and far reaching than was the case in 1970.

51. Relying on the specific language of the Argentina-France BIT, as well as that of the Argentina-Spain BIT which also gives shareholders standing to have recourse to arbitration to protect their shares, the Tribunal finds that Suez, AGBAR, and InterAguas have standing to bring this arbitration. Many other decisions in ICSID cases, including a good number involving Argentina, have made similar holdings.[33] While the Respondent's concern about the danger of double recovery to the corporation and to the shareholders for the same injury is to be noted, the Tribunal's decision at this point relates only to jurisdiction. Moreover, the Tribunal believed that any eventual award in this case could be fashioned in such a way as to prevent double recovery. In any event, the withdrawal of APSF from the case vitiates any concerns about a possible double recovery to the shareholders and the corporation for the same injury. Finally, the Tribunal believes that the discontinuance of these proceedings with respect to APSF does not affect the rights of the Shareholder Claimants to bring a claim in ICSID arbitration under the two BITs in question. The Claimant Shareholders would have had a right to bring such claims independently without the participation of APSF in first instance. The initial

participation of APSF and its subsequent withdrawal do not alter the Claimant Shareholders' rights. According to Art. 1(1)(b) of the Argentina-France BIT and I(2) of the Argentina-Spain BIT (quoted above, para. 47,48), shares fall within the definition of investments protected by the BITs. APSF's withdrawal cannot erase the legal effects of the shareholders' investment nor affect their *ius standi* under the BITs. As a consequence, the Tribunal concludes that the Respondent's fifth objection to jurisdiction fails.

Sixth Jurisdictional Objection: Since Claimants InterAguas and AGBAR have not complied with the provisions of the Argentina-Spain BIT requiring submission of an investment dispute to local courts before invoking international arbitration, they have no standing to have recourse to ICSID arbitration at this time

52. Claimants InterAguas and AGBAR, both nationals of Spain, seek to assert their claims under the Argentina-Spain BIT. Unlike Article 8(2) of the Argentina-France BIT, which allows an investor to have recourse to international arbitration after a period of six months of negotiation from the time it asserts its claim, Article X of the Argentina-Spain BIT requires the investor, at the end of the same six month period, to bring a judicial proceeding in the local courts and allows it to have recourse to arbitration only after a further period of eighteen months in the local courts. InterAguas and AGBAR have not pursued their claims by litigation in Argentina's courts. As a result, the Respondent argues that these two Claimants have no standing at the present time to pursue this case before an ICSID tribunal. In response, the Claimants argue that by virtue of the most-

favored-nation clause in the Argentina-Spain BIT they may take advantage of the more favorable treatment provided in the Argentina-France BIT with respect to dispute resolution and that therefore they may bring their action to ICSID without first pursuing their claims in the local courts of Argentina. The Respondent opposes this interpretation of the Argentina-Spain BIT, arguing that the most-favored-nation clause does not include matters relating to investment dispute settlement.

53. A decision on this objection requires the Tribunal, as with Respondent's other objections, to begin with an interpretation and analysis of the relevant BIT provisions. Article IV of the Argentina-Spain BIT, entitled *"Tratamiento"* (Treatment) is relied upon by the Claimants InterAguas and AGBAR as obviating the need to have recourse to Argentine courts before bringing an international arbitration. The first three paragraphs of Article IV provide as follows:

> *1. Cada Parte garantizará en su territorio un tratamiento justo y equitativo a las inversiones por inversores de la otra Parte.*
>
> *2. En todas las materias regidas por el presente Acuerdo, este tratamiento no será menos favorable que el otorgado por cada Parte a las inversiones realizadas en su territorio por inversores de un tercer país.*
>
> *3. Este tratamiento no se extenderá, sin embargo, a los privilegios que una Parte conceda a los inversores de un tercer Estado en virtud de su participación en:*
>
> * *Una zona de libre cambio*
> * *Una unión aduanera*
> * *Un mercado común*
> * *Un acuerdo de integración regional, o*
> * *Una organización de asistencia económica mutual en virtud de un acuerdo firmado antes de la entrada en vigor del presente Acuerdo que prevea disposiciones análogas a aquellas que son otorgadas por esa Parte a los participantes de dicha organización."*

The English translation of this provision in the United Nations Treaty Series is as follows:

> *1. Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party.*
>
> *2. In all matters governed by this Agreement, such treatment shall be no less favorable than that accorded by each Party to investment made in its territory by investors of a third country.*
>
> *3. Such treatment shall not, however, extend to the privileges which either Party may grant to investors of a third State by virtue of its participation in:*
>
> - *A free trade area;*
> - *A customs union:*
> - *A common market;*
> - *A regional integration agreement; or*
> - *An organization of mutual economic assistance by virtue of an agreement concluded prior to the entry into force of this Agreement, containing terms similar to those accorded by that Party to participants of said organization."*

54. In interpreting these provisions, the Tribunal is guided by established principles of treaty interpretation as provided by Article 31 of the Vienna Convention on the Law of Treaties, pursuant to which treaty language is to be interpreted in accordance with its "ordinary meaning." In that respect, the text of the treaty is presumed to be the authentic expression of the parties' intentions. The starting place for any exercise in interpretation is therefore the treaty text itself.

55. The text quoted above clearly states that "in all matters" (*en todas las materias*) a Contracting party is to give a treatment no less favorable than that which it grants to investments made in its territory by investors from any third country. Article X of the Argentina-Spain BIT specifies in detail the processes for the "Settlement of Disputes

between a Party and Investors of the other Party." Consequently, dispute settlement is certainly a "matter" governed by the Argentina-Spain BIT. The word "treatment" is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty. In the present situation, Argentina concluded a BIT with France which permits aggrieved investors, after six months' of attempting to resolve their disputes to have recourse to international arbitration without the necessity of first bringing a case in the local courts of a contracting State. Consequently, French investors in Argentina, as a result of the Argentina-France BIT, receive a more favorable treatment than do Spanish investors in Argentina under the Argentina-Spain BIT. That being the case, by virtue of Article IV, para. 2, Spanish investors are entitled to a treatment with respect to dispute settlement no less favorable than the one accorded to French investors. In specific terms, granting a treatment to Spanish investors that is no less favorable than that granted to French investors would mean that Spanish investors would be able to invoke international arbitration against Argentina on the same terms as French investors. That is to say, Spanish investors, like French investors, may have recourse to international arbitration, provided they comply with the six months negotiation period but without the need to proceed before the local courts of Argentina for a period of eighteen months.

56. Argentina contests this interpretation on various grounds. First it argues that the Contracting States did not intend the most-favored-nation clause in Article IV of the Argentina-Spain BIT to cover dispute settlement. The Tribunal finds no evidence in the

text or elsewhere to support that conclusion. The text of the Argentina-Spain BIT strongly implies just the opposite. Paragraph 3 of Article IV contains a definite list of "matters" that the Contracting States specifically *excluded* from the most-favored-nation clause in paragraph 2. Dispute settlement is not among them. The failure to refer among these excluded items to any matter remotely connected to dispute settlement reinforces the interpretation that the term "all matters" in paragraph 2 includes dispute settlement matters. In negotiating the Argentina-Spain BIT, the Contracting States considered and decided that certain matters should be excluded. The fact that dispute settlement was not covered among the excluded matters must be interpreted to mean that dispute settlement is included within the term "all matters" in paragraph 2.

57. Moreover, after an analysis of the substantive provisions of the BITs in question, the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty. From the point of view of the promotion and protection of investments, the stated purposes of the Argentina-Spain BIT, dispute settlement is as important as other matters governed by the BIT and is an integral part of the investment protection regime that two sovereign states, Argentina and Spain, have agreed upon. In this context, the Respondent further argues that this Tribunal should apply the principle of *ejusdem generis* in interpreting the Argentina-Spain BIT so as to exclude dispute settlement matters from the scope of the most-favored-nation clause, because the category "dispute settlement" is not of the same *genus* as the matters addressed in the clause. The Tribunal finds no basis for applying the *ejusdem generis* principle to arrive at that result.

58. Similarly, Argentina contends that the Tribunal should interpret the most-favored-nation clause strictly because such an approach would restrict the principle of *res inter alios acta*, so as to limit the effects of the treaty to the parties. The Tribunal cannot follow this argument. The BIT in question contains mutual promises by Argentina and Spain to treat each others' nationals in the same way that they treat nationals from any third State. The principle of *res inter alios acta* has no application, because the Tribunal is not applying the Argentina-France BIT (presumably the alleged act between third parties) to this case. Rather it is applying the Argentina-Spain BIT's provisions on equality of treatment.

59. Further, the Respondent seems to argue that the Tribunal should interpret a most-favored-nation provision strictly. Here too, the Tribunal finds no rule and no reason for interpreting the most-favored-nation treatment clause any differently from any other clause in the Argentina-Spain BIT. The language of the treaty is clear. Applying the normal interpretational methodology to Article IV of the Argentina-Spain BIT, the Tribunal finds that the ordinary meaning of that provision is that matters relating to dispute settlement are included within the term "all matters" and that therefore InterAguas and AGBAR may take advantage of the more favorable treatment provided to investors in the Argentina- France BIT with respect to dispute settlement.

60. The Tribunal finds strong support for this conclusion in previous ICSID cases. In particular, *Maffezini v. Spain* [34] applied the Argentina-Spain BIT, the very treaty at issue

in the present case, to find that the most favored-nation-clause allowed the Claimant, a national of Argentina, to take advantage of Spain's BIT with Chile to avoid the necessity of having recourse to the local courts in Spain before bringing an ICSID action. The most relevant passages of Maffezini are worth quoting in full because they well show the rationale behind the application of the most-favored nation clause to dispute settlement:

> "The Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of trader and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such person abroad. It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.
>
> International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded."[35]

These considerations then lead the *Maffezini* tribunal to conclude with the following words:

> "[I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle."[36]

61. Other cases that have considered and rejected arguments similar to the ones raised by Argentina in the present case and which found that the most-favored-nation-clause allows a claimant to take advantage of more favorable dispute resolution provisions

found in other treaties are in particular *Siemens A.G. v. The Argentine Republic*[37] and *MTD Equity Sdn. Bhd and MTD Chile SA v. Republic of Chile.* [38]

62. In opposition to this line of cases, the Respondent referred during oral argument to *Plama Consortium Limited v. the Republic of Bulgaria*.[39] In that case, the Claimant, a Cypriot company, sought to establish ICSID jurisdiction on the basis of the Energy Charter Treaty and of a BIT between Cyprus and Bulgaria. The tribunal affirmed ICSID jurisdiction under the Energy Charter Treaty; for various reasons, it also considered whether it had jurisdiction under the Bulgaria–Cyprus BIT. Such BIT contained a very limited international dispute settlement offer. In essence, it provided that only the measure of compensation for expropriation could be submitted to an UNCITRAL arbitration. It contained no offer for ICSID arbitration. It did, however, embody an MFN clause. Since other BITs concluded by Bulgaria provide for ICSID arbitration, the Claimant relied upon such MFN clause to take advantage of the ICSID dispute settlement mechanism included in the other BITs. The tribunal did not follow the Claimant and ruled that it lacked jurisdiction under the Bulgaria-Cyprus BIT.

63. Having duly considered the reasons set forth in the *Plama* decision, this Tribunal comes to the conclusion that, whatever its merits, it is in any event clearly distinguishable from the present case on a number of grounds. First, at a basic level, it must be noted that the most-favored-nation-clause in the Argentina-Spain BIT is much broader in scope than was the language of the Bulgaria-Cyprus BIT in *Plama.* Whereas the Argentina-Spain BIT states that "*In all matters governed by this Agreement,* …treatment shall be no less

favorable than that accorded by each Party to investment made in its territory by investors of a third country" (emphasis supplied), the comparable clause in the Bulgaria-Cyprus BIT stated "Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states." As noted above, the use of the expression "in all matters" when coupled with a list of specific exceptions that does not include dispute resolution, leaves no doubt that dispute resolution is covered by the MFN clause. Second, and perhaps more important, the *Plama* tribunal was guided by the actual intent of the contracting States. Indeed, subsequent negotiations between Bulgaria and Cyprus showed the "two Contracting Parties to the BIT themselves did not consider that the MFN provision extends to the dispute settlement provisions in other BITs"[40]. This was in line with the fact that, at the time of conclusion of the BIT, "*Bulgaria was under a communist regime, which favored bilateral investment treaties with limited protection for foreign investors and very limited international dispute resolution provisions*"[41]. No evidence of any comparable intent has been suggested in this case. Third, as a further distinguishing factor, one may refer to the effect of the MFN provision. In *Plama*, the Claimant attempted to replace the dispute settlement provisions in the applicable Bulgaria-Cyprus BIT *in toto* by a dispute resolution mechanism "incorporated" from another treaty.[42] Without expressing an opinion on whether an MFN clause may achieve such a result, this Tribunal distinguishes that radical effect from the much more limited one caused here, which merely consists in waiving a preliminary step in accessing a mechanism, i.e., ICSID arbitration, offered in both the Spanish and the French treaties.

64. The *Plama* tribunal also stated, in its reasons, that an arbitration agreement must be clear and unambiguous, especially where it is incorporated by reference to another text.[43] This Tribunal does not share this statement. As stated above, it believes that dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal.

65. Be this as it may, at the end of its reasoning, the *Plama* tribunal suggested what could be called a "non-sense exception to the non application of the MFN clause." Addressing the very requirement at issue here, i.e., that the dispute be tried in local courts during eighteen months, which it called "a curious requirement," the *Plama* tribunal said that it "sympathize[d] with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view".[44] It therefore concluded that "[t]he decision in Maffezini is perhaps understandable."[45]

66. For all these reasons, the Tribunal concludes that Claimants InterAguas and AGBAR, relying on Article IV of the Argentina-Spain BIT, may invoke the more favorable treatment afforded in the Argentina-France BIT and may therefore bring an ICSID arbitration without the necessity of first having recourse to the local courts of Argentina. The Respondent's sixth objection to jurisdiction therefore fails.

IV. Decision on Jurisdiction

67. After having considered each and every jurisdictional objection raised by the Respondent, the Tribunal finds that it must reject them all, except for the fourth objection based on the status of APSF as an Argentine corporation, which objection has now become moot because of the discontinuance of the proceedings in the case with respect to APSF. The Tribunal thus decides that ICSID and this Tribunal have jurisdiction over this case, and it therefore directs that the case proceed on the merits in accordance with the ICSID Convention, the ICSID Rules, and the applicable bilateral investment treaties. The Tribunal has, accordingly, made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

[signature]
Prof. Jeswald W. Salacuse
President of the Tribunal

[signature]
Prof. Gabrielle Kaufmann-Kohler
Arbitrator

[signature]
Prof. Pedro Nikken
Arbitrator

[1] On the same date, the Centre received two further requests for arbitration under the ICSID Convention regarding water concessions in Argentina from (i) Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. and (ii) Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. regarding similar investments and disputes. As explained below, these requests would later be registered by the Centre and submitted by agreement of the parties to one same Tribunal.

[2] Accord entre le Gouvernement de la République française et le Gouvernement de la République Argentine sur l'encouragement et la protection réciproques des investissements (Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments), signed on July 3, 1991 and in force since March 3, 1993; 1728 UNTS 298.

[3] Acuerdo para la promoción y protección recíprocas de inversiones entre el Reino de España y la República Argentina (Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic), signed in Buenos Aires on October 3, 1991 and in force since September 28, 1992; 1699 UNTS 202.

[4] As noted in footnote 1 supra, on this same date the Centre registered two further requests for arbitration regarding water concessions in Argentina: ICSID Case No. ARB/03/18 (Aguas Cordobesas S.A., Suez, and AGBAR v. Argentine Republic) and ICSID Case No. ARB/03/19 (Aguas Argentinas S.A., Suez, AGBAR and Vivendi Universal S.A. v. Argentine Republic).

[5] The parties agreed that this same Tribunal would decide ICSID Cases Nos. ARB/03/18 and ARB/03/19. The parties also agreed that this same Tribunal would decide the dispute between AWG Group Plc., a company incorporated in the United Kingdom, and the Argentine Republic. The proceedings in this last case, instituted under the UNCITRAL Arbitration Rules, are also being administered by ICSID following the parties' agreement and the Tribunal's consent.

[6] During the session the parties agreed on a series of procedural matters related to the present case, ICSID Cases Nos. ARB/03/18 and ARB/03/19 and the UNCITRAL Arbitration Rules instituted by AWG Group Plc. These agreements included a staggered schedule of written and oral submissions. A copy of the minutes of the session is enclosed as Annex. No.1 to this Decision.

[7] This request follows a similar request filed by four non-governmental organization in ICSID Case No.ARB/03/19. The Tribunal's Order of May 19, 2005, is available online at ICSID's website www.worldbank.org/icsid.

[8] Claimants' Memorial on the Merits of September 20, 2004. para. 9 and Exhibit C2.

[9] Law No. 23,696 of 18 August 1989 (the State Reform Law).

[10] Law No. 23,928 of March 27, 1991.

[11] Law No. 10,472, as amended by Law No. 10,798 of January 22, 1990.

[12] The "Information Memorandum," Claimants' Exhibit C-28.

[13] Claimants' Memorial, para. 161.

[14] Law No. 25,561 (Ley de Emergencia Pública y de Reforma del Régimen Cambiario) of 6 January 2002.

[15] Claimant's Memorial, para. 41.

[16] Respondent's Memorial on Jurisdiction, para. 18.

[17] Methanex Corporation v. United States of America. 1st Partial Award, August 7, 2002, Respondent's Exhibit AL RA 3.

[18] Claimants' Counter Memorial on Jurisdiction, para. 51 with citation.

[19] See Christoph H. Schreuer, *The ICSID Convention: A Commentary* 114 (2001).

[20] See *Case concerning East Timor*, 1995 ICJ Reports 89, 99.

[21] CMS Gas Transmission Co. v. The Republic of Argentina (ICSID Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003), 42 ILM 788 (2003); also available online at www.worldbank.org/icsid; Claimants' Legal Authorities No. 85.

[22] Ibid at para. 33.

[23] Ibid at para. 27.

[24] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1 ICSID Reports 28; also available online at www.worldbank.org/icsid.

[25] Christoph H. Schreuer, *The ICSID Convention: A Commentary* 105 (2001).

[26] Contrato de Concesión, dated November 27, 1995, between the Province of Santa Fe and APSF. Artículo 15.4 (Jurisdicción): Sin perjuicio de lo establecido en el artículo 115 de la Ley 11.220, en caso de cualquier controversia relativa a la interpretación y ejecución del Contrato, las partes se someten a la jurisdicción local de la Provincia de Santa Fe, con renuncia expresa a cualquier otro fuero o jurisdicción que pudiera corresponder por cualquier causa.

[27] Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment (July 3, 2002) paras. 95 and 96. Available online at www.worldbank.org/icsid.

[28] E.g., Lanco International Inc. v. The Argentine Republic, (ICSID Case No. ARB/97/6), Preliminary Decision on Jurisdiction, at sections 39-40; Salini Costruttori SpA and Italstrade v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (July 23, 2001) at para. 62; Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction (December 8, 2003), at para. 76.

[29] United Nations Treaty Series, volume 1728, p. 298. The official Spanish text of the above-quoted provisions is as follows:

1. El término "inversiones" designa los activos tales como los bienes, derechos e intereses de cualquier naturaleza y, en particular, aunque no exclusivamente:

b) las acciones, primas de emisión y otras formas de participación aún minoritarias o indirectas, en las sociedades constituidas en el territorio de una de las Partes Contratantes.

The official French text of the quoted provision is as follows:

1. Le terme «investissement» désigne des avoirs tels que les biens, droits, et intérêts de toute nature, et plus particulièrement mais non exclusivement:

b) Les actions, primes d'emission et autres, formes de participation, même minoritaires ou indirectes aux sociétés constituées sur le territoire de l'une des Parties contractantes;

[30] Ibid.

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

[32] Barcelona Traction Company (Belgium v. Spain), 1970 I.C.J. 3, 46-47 (1970).

[33] E.g., CMS Gas Transmission Company v. The Republic of Argentina (ICSID Case No. ARB/01/8). Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003); Enron Corporation & Ponderosa Assets, LP v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction (January 14, 2003); Siemens A.G. v. The Argentine Republic (ICSID No ARB/02/8), Decision on Jurisdiction (August 3, 2004).

[34] Emilio Agustin Maffezini v. The Kingdom of Spain (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction (January 25, 2000); available online at www.worldbank.org/icsid.

[35] Ibid., para. 54-55.

[36] Ibid. para. 56.

[37] ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, in particular para.102: "Access to these [dispute settlement] mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investment and of the advantages through the MFN Clause"; available online at www.worldbank.org/icsid.

[38] ICSID Case no. ARB/01/7, Award of May 25, 2004.

[39] Plama Consortium Limited (Claimant) and Republic of Bulgaria (ICSID Case No. ARB/03/24), Decision on Jurisdiction (February 8, 2005), available online at www.worldbank.org/icsid

[40] Ibid., para. 195.

[41] Ibid., paras. 196.

[42] Ibid., para. 210.

[43] Ibid., paras. 198ff.

[44] Ibid., para. 224.

[45] Ibid., para. 224.