INTERNATIONAL CENTRE FOR SETTLEMENT

OF INVESTMENT DISPUTES
WASHINGTON, D.C.

DECISION ON OBJECTIONS TO JURISDICTION

ICSID Case No. ARB/04/01

Total S.A.
Claimant

v.

The Argentine Republic
Respondent

before the Arbitral Tribunal composed of:

Prof. Giorgio Sacerdoti (President)

Sr. Luis Herrera Marcano (Arbitrator)

Mr. Henri C. Alvarez (Arbitrator)

Secretary of the Tribunal

Gabriela Alvarez Avila

Washington, D.C., 25 August 2006

Decision of the Tribunal on Objections to Jurisdiction

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Index of Abbreviations

"Total" or the "Claimant"	Total S.A.
"Argentina" or the "Respondent"	The Argentine Republic
"ICSID Convention"	The Convention on the Settlement of Investment Disputes between States and Nationals of other States
"BIT"	The Treaty between France and Argentina concerning the Reciprocal Promotion and Protection of Investment
"Institution Rules"	The ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
"Arbitration Rules"	Rules of Procedure for Arbitration Proceedings
"CMM"	Claimant's Memorial on the Merits
"RMJ"	Respondent's Memorial on Jurisdiction
"CCMJ"	Claimant's Counter-Memorial on jurisdiction

I. Procedural background

1. On October 12, 2003 Total S.A. (hereinafter "Total" or the "Claimant") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes a "Request for Arbitration" against the Argentine Republic (hereinafter "Argentina" or the "Respondent") pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereinafter the "ICSID Convention") and the Treaty between France and Argentina concerning the Reciprocal Promotion and Protection of Investment (hereinafter the "BIT") of July 3, 1991.

2. In accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter the "Institution Rules"), the Secretary-General on November 3, 2003 acknowledged receipt of the request and on November 4, 2003 transmitted a copy of the request to the Argentine Republic and to the Argentine Embassy in Washington, D.C. After further correspondence, the Secretary-General duly registered Total's request for arbitration on January 22, 2004 pursuant to Article 36(3) of the ICSID Convention and gave notice thereof to the parties. At the same time, the Secretary-General invited the parties, pursuant to Rule 7(d) of the Institution Rules, to proceed as soon as possible to constitute an Arbitral Tribunal in accordance with Articles 37 to 40 of the ICSID Convention.

3. On March 29, 2004, the Claimant appointed Mr. Henri C. Alvarez, a Canadian national, as arbitrator. On April 14, 2004, the Argentine Republic appointed Dr. Luis Herrera Marcano, a national of Venezuela, as arbitrator. On August 20, 2004, in accordance with Rule 4 of the Rules of Procedure for Arbitration Proceedings (hereinafter the "Arbitration Rules"), the Chairman of the Administrative Council of ICSID appointed Professor Giorgio Sacerdoti, a national of Italy, as President of the

Tribunal. On August 24, 2004, the Deputy Secretary-General of the ICSID informed the parties that all members of the Tribunal had accepted their appointment so that, in accordance with Arbitration Rule 6(1), the Tribunal was deemed to have been constituted on that same day.

4. The first session of the Arbitral Tribunal was held on November 15, 2004. The parties appeared and were duly represented. The parties confirmed that the Tribunal had been properly constituted on August 24, 2004 in accordance with the ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect.

5. During the course of the first session, the parties agreed on a number of procedural matters as reflected in the written minutes signed by the President and the Secretary of the Tribunal. Among the various procedural decisions taken at that hearing, it was agreed that, in accordance with Arbitration Rule 22, the languages of the proceedings would be English and Spanish. The Claimant would file its pleadings in English and Argentina would file its pleadings in Spanish, without the need of subsequent translation of the written pleadings into the other party's chosen procedural language. After hearing the parties, the Tribunal decided by Procedural Order No.1 that the Claimant would file its Memorial on the merits within five months from the date of the first session. The Tribunal also decided that if the Respondent wished to raise any objections to jurisdiction, it should do so within 45 days from the receipt of the Claimant's Memorial on the merits. In the event of an objection to jurisdiction, the Claimant would file its counter-Memorial on jurisdiction within 45 days from the receipt of the Respondent's Memorial on jurisdiction. In the same Procedural Order, the Tribunal further decided that should the Respondent not raise any objections to jurisdiction, it should file its Counter-Memorial on the merits

within five months from the receipt of the Claimant's Memorial on the merits; the Claimant should thereafter file its Reply on the merits within 60 days from the receipt of the Respondent's Counter-Memorial on the merits; and the Respondent should file its Rejoinder on the merits within 60 days from the receipt of the Claimant's Reply on the merits.

6. The Claimant filed its Memorial on the merits on April 11, 2005 (hereinafter "CMM"); Argentina filed its "*Memorial sobre objeciones a la jurisdicción del Centro y a la competencia del Tribunal*" (hereinafter "RMJ") on June 3, 2005. In accordance with Arbitration Rule 41(3), the proceeding on the merits was thereby suspended. In conformity with Procedural Order No.1, the Claimant then submitted its Counter-Memorial on jurisdiction (hereinafter "CCMJ") on August 1, 2005.

7. The hearing on jurisdiction was held in Washington on September 5, 2005. Ms. Cintia Yaryura, Ms. María Victoria Vitali and Mr. Ariel Martins addressed the Tribunal on behalf of Argentina. Mr. Nigel Blackaby, Mr. Georgios Petrochilos and Mr. Luis A. Erize addressed the Tribunal on behalf of the Claimant. During the course of the hearing, the Tribunal posed questions to the parties, as provided for in Arbitration Rule 32(3).

II. The Subject Matter of the Dispute

8. Before examining the issue of jurisdiction submitted to the Tribunal, it appears useful to highlight briefly the subject-matter of the dispute, in fact and in law, as presented by the Claimant in its "Request for Arbitration", as thereafter expanded in the CMM taking into account also the statements presented to date by Argentina. Such presentation is made for the sole purpose of setting out the factual circumstances and the legal claims made by Claimant in respect of which Argentina has raised

objections to jurisdiction. No legal evaluation is hereby implied or made by the Tribunal, nor should any such significance be attached to it for the purpose of the present case.

9. As indicated by Total in its submissions, the Claimant is a company incorporated in accordance with the laws of France and has its registered office in France, therefore qualifying as a French "investor" within the meaning of Article 1.2(b) of the BIT. Total has made a number of investments in Argentina in the gas transportation, hydrocarbons exploration and production and power generation industries. According to Total, its investments in Argentina include majority and minority shareholding interests in companies operating in the gas transportation, exploration and production, and power generation sectors, as well as various licenses and rights, concessions and loans, all and each of them qualifying as an "investment" in accordance with the meaning of this term in Article 1.1 of the BIT.

10. In the gas transportation industry, Total has an indirect 19.21% stake in Transportadora de Gas del Norte S.A. ("TGN"), one of two gas transmission companies established when the Republic of Argentina privatized Gas del Estado, Sociedad del Estado, in 1992. TGN was granted a license to transport gas in northern and central Argentina for a term of 35 years, extendable at TGN's option for a further ten years. In May 1992, Argentina enacted Law 24,076 (the "Gas Law") and Decree 1738/1992 (the "Gas Decree"), which established the legal framework for the privatization of the gas industry. After a public bidding process, the Government of Argentina then sold a 70% share in TGN to Gasinvest, a consortium of investors, in 1992. In May 2000, one of the investors in Gasinvest, the TransCanada Group, agreed to sell its 19.21% share in TGN to Total. This agreement was completed on January

23, 2001. Total currently holds its shares in TGN through Gasinvest, in which it holds a 27.23% indirect stake, and a number of other indirect shareholdings.[1]

11. Total's investments in the petroleum exploration and production industry commenced in 1978 when it formed a consortium with three other companies (the "Consortium") to explore and exploit a series of oil and gas lots in the area around Tierra del Fuego. In 1979, each of the Consortium members, including Total Exploración, S.A., now known as Total Austral S.A., entered into a contract (Contract 19.944) with Yacimientos Petroliferos Fiscales Sociedad del Estado ("YPF") to explore and exploit hydrocarbons in that area. As part of a plan to privatize the oil and gas industry beginning in 1989, this contract was replaced by a new 25 year concession to exploit oil and gas in accordance with Law 17,319/1967 (the "Hydrocarbons Law") and its regulating Decrees Nos. 1055/1989, 1212/1989 and 1589/1989. According to Total, in order to induce it and the other investors to agree to terminate their previous contract and to enter into the new concession, Argentina offered the Consortium partners the right to explore and exploit additional lots and certain rights to dispose of the oil and gas they extracted.[2] Further, according to Total, the representations made by Argentina were incorporated into Decree 214/1994 (the "Concession Decree") which was adopted to govern the new investment.[3] Other aspects of the legal and regulatory framework governing Total's investment were set out in a number of decrees and laws. Total states that as a result of the representations and assurances provided to it and incorporated in the legal and regulatory framework, it agreed to terminate its earlier contract and make new investments as part of the new

[1] Request for Arbitration, para. 101 and Exhibit C-56 which shows the structure of Total's shareholding in TGN. See also copies of extracts from TGN's share register reflecting Total's shareholdings in TGN at Exhibit C-44.
[2] See Request for Arbitration, paras. 122-123.
[3] See Request for Arbitration, para. 124 and the decrees and sources referred to at footnotes 126 and 127.

concession. These investments were made through Total Austral and include exploration and production assets in various areas in southern Argentina, production facilities and equipment and long-term gas sale contracts.

12. In the power generation industry, Total has invested in two major power generation companies, Central Puerto S.A. ("Central Puerto") and Hidroeléctrica Piedra de Aguila S.A. ("HPDA"). Central Puerto is a large dual-fuel electricity generator, having the capacity to produce 2,165 megawatts, which represents 9.5% of Argentina's total installed capacity. Central Puerto was created in 1992 as part of the privatization of Servicios Electricos del Gran Buenos Aires S.E. ("SEGBA"), a state-owned enterprise, whose power generation business was split into four thermal power generation companies. At the time of privatization, approximately 63.93% of the total stock of Central Puerto was acquired by three Chilean companies. Eventually, one of these companies, Compañía Chilena de Generación Eléctrica (later renamed "Gener") acquired the interest of the other two companies. In July 2001, Total acquired all of the shares in Central Puerto held by Gener (which had been acquired in 2000 by AES Corporation). Total says it paid approximately US $255 million and subscribed to US $120 million of debt to acquire the shares of Central Puerto.[4] Total states that Central Puerto subsequently made significant investments of approximately US $387 million in acquiring power generation units to expand and upgrade its capacity. HPDA is said to be the largest private hydroelectric generation company in Argentina. It was created in 1993, as part of the privatization of Hidroeléctrica Norpatagónica S.A., the state-owned hydroelectric generation company which was split into five separate business units for the purposes of privatization. At the time of privatization in 1993, a number of foreign investors created an Argentine company, Hidroneuquén S.A., for

[4] See Exhibit C-70 for a diagram of Total's shareholdings in Central Puerto and Exhibit C-44 for a copy of an extract from Central Puerto's share register.

the purposes of bidding for and acquiring 59% of HPDA's shareholding. Hidroneuquén S.A. remains the owner of the shares. In September 2001, Total, through Total Austral, acquired 70.03% of Hidroneuquén from Gener for the payment of US $72.5 million and by acquiring approximately US $57 million of subordinated debt in the form of bonds. As a result, Total owns indirectly a 41.3% shareholding in HPDA.[5] After privatization, HPDA expended significant sums to acquire equipment and services (US $161.7 million) and has assumed existing debt (US $405 million). According to Total, HPDA's hydroelectric plant currently comprises four units with an aggregate installed capacity of 1,400 megawatts. These units entered into service in 1993-1994 and represent 6.13% of Argentina's installed electricity capacity.

13. Total maintains that in respect of each of the areas in which it invested, it did so on the basis of the representations and promises made by the Argentine government in the legal and regulatory framework for privatized gas transmission companies, the oil and gas exploration and production industry and the power generation industry. Total alleges that a number of measures taken by the Argentine government, most of which derive from or followed Law 25,561/2002 (the "Emergency Law") together with the Emergency Law itself, breached or revoked the commitments given to attract investment upon which Total relied in making its investments.

14. More specifically, Total indicates that the measures (the "Measures" in Total's submissions) include

- the forced conversion of dollar-denominated public service tariffs into pesos (or "pesification") at a rate of one to one

[5] See Request for Arbitration, paras. 158-160 and Exhibits C-72, a diagram showing Total's participation in HPDA and Exhibit C 44, a copy of HPDA's share register.

- the abolition of the adjustment of public service tariffs based on the US Producer Price Index and other international indices
- the "pesification" of dollar-denominated private contracts at a rate of one to one
- the freezing of the gas consumer tariff (which is the sum of the: (a) well-head price of gas; (b) gas transportation tariff; and (c) gas distribution tariff)
- the imposition of (a) export withholding taxes on the sale of hydrocarbons; and (b) restrictions on the export of such hydrocarbons
- the abandonment of the uniform marginal price mechanism in the power generation market by price caps and other regulatory measures
- the pesification, at a one to one rate, of all other payments to which power generators are entitled; and
- the refusal to pay power generators their dues, even at the dramatically reduced values resulting from the Measures.[6]

15. The Claimant complains that those Measures adopted by Argentina have resulted in several breaches of the BIT. As to Total's gas transmission assets, Total argues that the Measures expropriated Total's investment in TGN, in breach of Article 5.2 of the BIT; that the Measures treated Total's investment in TGN unfairly and inequitably, in breach of Article 3 of the BIT; that the Measures discriminated against Total's investment in TGN in breach of Articles 3 and 4 of the BIT; and that Argentina has breached its obligation to respect specific undertakings in violation of Article 10 of the BIT.

[6] This list is contained in para. 33 of the CMM of April 8, 2005. A more detailed description of the measures complained of and their specific impact is found in Total's Request for Arbitration, paras. 104-116, 135-140, 180-198.

16. As to Total's investments in the exploration and production of crude oil and natural gas, Total complains that the various measures listed revoked Total's right freely to dispose of its hydrocarbons in breach of the duty of fair and equitable treatment pursuant to Article 3 of the BIT; that the measures treated Total in respect of its hydrocarbon production in an arbitrary and discriminatory manner contrary to Articles 3 and 4 of the BIT by benefiting domestic, industrial, commercial or residential consumers to the detriment of Total; and that the measures restricting export of hydrocarbons constitute further, separate breaches of the duty of fair and equitable treatment pursuant to Article 3 of the BIT.

17. As to Total's investments in the power generation sector, according to Total, Argentina through the Measures has failed to observe the obligation not to take measures equivalent to expropriation without prompt, adequate and effective compensation in breach of Article 5.2 of the BIT; has breached the duty of fair and equitable treatment in Article 3 of the BIT and that of refraining from discriminating against Total (Article 4) owed to Total in respect of its investments in Central Puerto and HPDA.

18. Based on the above, the Claimant asks the Tribunal to declare that Argentina by its various acts and conduct specified in Claimant's Request for Arbitration and Memorial has breached the above mentioned Articles of the BIT. The Claimant further seeks compensation for the alleged damages caused thereby to its investment "in an amount to be assessed and which is provisionally assessed to be no less than US$ 940 million",[7] in addition to interest, additional reparation to be further specified and payment by Argentina of all costs and expenses of this arbitration. Total considers that an ICSID Tribunal is competent under the ICSID Convention and the BIT to

[7] CMM para. 403.

examine its claims and grant to it the relief sought. Total asserts that it is a French investor having made protected investments in Argentina in accordance with Article 1.1 of the BIT. Total asserts further that the parties to the dispute have duly given their consent to the present arbitration in accordance with Article 25(1) and (2) of the ICSID Convention and Article 8 of the BIT, so that all the requirements to establish jurisdiction are met.

19. Argentina has yet to reply to the Claimant's arguments on the merits since Argentina has raised preliminary objections to jurisdiction. Acceptance of any of these cannot therefore be inferred from Argentina's silence on any given matter. However, for the sole purpose of deciding the preliminary objections, the Tribunal takes note that certain matters pertaining directly to its jurisdiction in this case have not been challenged by Argentina. Thus, Argentina has not challenged the claim that Total is a French corporation that has made investments in Argentina, nor has it basically challenged the facts referred to by Total concerning its operations in Argentina, nor Claimant's references to the various Argentine laws in force before, during and after the privatization process relevant to Total's operations. Neither has Argentina challenged the existence and scope of the measures it enacted in 2001/2002 to which Total refers as relevant to the legal regime applicable to its investments.

III. The objections of Argentina to jurisdiction

20. In the RMJ Argentina raises six grounds for challenging the jurisdiction of ICSID and the competence of the Arbitral Tribunal to hear the present dispute. The objections to jurisdiction are listed here and thereafter specifically described and addressed together with the counter-arguments of the Claimant.

A. The claim is not admissible *ab initio*, since the foreign investor seeks remedies from the effects of a general crisis.

B. The dispute submitted to the Tribunal does not arise directly from a measure adopted against the investment.

C. The dispute submitted to the Tribunal is not an "investment dispute" according to Article 8 of the BIT, because: (1) the dispute is not a legal dispute; (2) even if the dispute were a legal dispute, it would be of a contractual nature, and it consequently would fall outside the competence of the Tribunal.

D. Total lacks the *ius standi* to sue under international law and applicable Argentine law.

E. The Tribunal lacks competence because the parties agreed on the exclusive jurisdiction of the Federal contentious-administrative tribunals of the City of Buenos Aires, for the interpretation and enforcement of the concession contract.

F. The claim is inadmissible due to lack of damages.

A. First objection:

Inadmissibility of the claim

Argentina's arguments:

21. According to Argentina, any damages which may have been suffered by the foreign investor have been caused by the economic crisis which affected the

Republic of Argentina. As a consequence of the crisis, all those who have been affected have suffered proportionately to their means. It follows that the foreign investor cannot claim protection from the effects of a general crisis under the protection standards laid down in a bilateral investment treaty.

Claimant's counter-arguments:

22. In the CCMJ, the Claimant maintains that the so-called *ab initio* objection is to be considered "a point going to the merits, not the admissibility, of the claim." In support of this position, the Claimant refers to various decisions to this effect by other ICSID tribunals before which Argentina raised the same objection.

B. Second objection:

The dispute submitted to the Tribunal does not arise directly from a measure adopted against the investment.

Argentina's arguments:

23. The second objection presented by Argentina concerns the requirement that the "dispute aris[e] directly out of an investment" according to Article 25 of the ICSID Convention.[8] In order to meet such a requirement, in Argentina's view, the measure or measures alleged in violation of the pertinent BIT have to be specifically addressed to the investment. Universal measures addressed to everyone – investors and others, nationals and foreigners alike - cannot be considered by ICSID Tribunals.

[8] The text of Article 25(1) of the ICSID Convention is as follows: "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. When the parties have given their consent, no party may withdraw its consent unilaterally."

Argentina argues that to hold otherwise would be judging Argentina's public policy and not deciding a legal dispute.

24. Argentina considers that none of the measures complained of by the Claimant have been addressed or directed specifically at its investments. The fact that the Claimant suffered as a consequence of the economic crisis which had a general character, does not automatically mean that the investor has been directly affected by a measure specifically taken against it. In support of this approach, Argentina relies on the theory of legal causation construed by the *Methanex* tribunal in its Partial Award of August 7, 2002. In Argentina's view, since the various measures at issue adopted by the Republic of Argentina have not been directed specifically at the investor, the dispute cannot be considered as "arising directly out of an investment", under the terms of Article 25 of the ICSID Convention.

Claimant's counter-arguments:

25. To reply to the second jurisdictional objection made by the Respondent, the Claimant relies, first of all, on a literal interpretation of Article 25 of the ICSID Convention requiring that the disputes submitted to the Centre "arise directly out of an investment". According to the Claimant, Argentina reads this requirement wrongly as relating not to the investment *per se* but to the measures complained of by the Claimant. Moreover, the Claimant submits Argentina errs in considering the word "directly" in Article 25 of the ICSID Convention as synonymous with "specifically", thus reading the above-mentioned article "as providing for ICSID jurisdiction in respect of disputes 'arising directly out of measures specifically directed at an

investment'"[9]. According to the Claimant, on the contrary, Article 25 of the ICSID Convention must be correctly interpreted as requiring that the dispute brought to the Centre be "directly" – and not "specifically" – related to "an investment" – and not to the "measures complained of".

26. The Claimant specifies also that it "does not complain of the economic conditions in Argentina, nor does it take issue with the Government's general economic policies, including the floating of the peso and its devaluation. Rather the Claimant complains of "specific" measures taken by Argentina "in furtherance or as a consequence of its general economic policies."[10] These measures were, in the Claimant's view, "directly aimed at Total's investments"[11] and violated the commitments given by Argentina in order to attract investment and relied on by the investor, thus constituting a breach of the BIT provisions granting protection to French investors.

27. Secondly, the Claimant opposes Argentina's reliance on the award rendered in the *Methanex* case to support its position. The Claimant argues that since that dispute concerned a claim under different language contained in NAFTA Chapter 11 and was decided according to different procedural rules from the case at issue here (that is, the UNCITRAL Rules), it would be misleading to use the reasoning developed by the arbitral tribunal on that occasion to address the issues in dispute in these proceedings.

C. Third objection:

The dispute submitted to the Tribunal is not an "investment dispute" according to Article 8 of the BIT because: (1) the dispute is not a legal dispute; (2) even if the dispute were a legal dispute, it would be of a contractual nature, and it consequently

[9] CCMJ para. 27.
[10] *Ibid*. para 42.
[11] *Idem*.

would fall outside the competence of the Tribunal. In any case Total's minority shareholdings were not affected.

Argentina's arguments:

28. Argentina maintains that the dispute submitted to the Centre should be about rights and obligations and not about some negative factual consequences that affected the Claimant. In Argentina's view, the dispute at issue here is about a price control system, concerning the alleged intangibility of the public service utility tariffs: the only right that the Claimant could invoke in this respect is the right to renegotiate a contract. Since Total's claim is of a contractual nature, the Tribunal lacks jurisdiction and competence to hear the case. Argentina suggests that the alleged legal disputes that may arise from any disagreements about the process of tariff revision, which is still ongoing, should be submitted to the domestic tribunals freely agreed by the parties in dispute. For these reasons, Argentina denies that the Claimant's complaints give rise to a "legal dispute" under the terms of Article 25 of the ICSID Convention, or to an "investment dispute" according to Article 8 of the BIT.[12]

[12] Art. 8.1, 2 and 3 of the Argentine-France BIT is as follows:

> 1. Any dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the two parties concerned.
> 2. If any such dispute cannot be so settled within six months of the time when a claim is made by one of the parties to the dispute, the dispute shall, at the request of the investor, be submitted:
> - Either to the domestic courts of the Contracting Party involved in the dispute;
> - Or to international arbitration under the conditions described in paragraph 3 below.
>
> Once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final.
> 3. Where recourse is had to international arbitration, the investor may choose to bring the dispute before one of the following arbitration bodies:
> - The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature in Washington on 18 March 1965, if both States Parties to this Agreement have already acceded to the Convention. Until such time as this requirement is met, the two Contracting Parties shall agree to submit the dispute to arbitration, in accordance with the rules of procedure of the Additional Facility of ICSID;
> - An ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nation Commission on International Trade Law (UNCITRAL).

29. Argentina also challenges the competence of the Tribunal on the ground that the dispute at issue concerns the rights of minority shareholders (19.23 % in TGN and 41.3 % in HPDA) and no measure taken by the Republic of Argentina has ever impaired those rights. Argentina recalls in this regard that the BIT refers to "any body corporate effectively controlled, directly or indirectly, by nationals of one Contracting Party or by bodies corporate having their registered office in the territory of one Contracting Party". In any case, according to Argentina, the BIT requires a situation of control. Argentina concludes that the dispute at issue is not a legal dispute because it concerns indirect minority shareholders who do not exercise any control over the Argentine companies involved. The Claimant complains of the impairment of rights pertaining to those companies due to alleged contractual violations of their rights.

Claimant's counter-arguments:

30. In the CCMJ, the Claimant stresses that the third objection raised by Argentina relates only to Total's investment in TGN. Total then addresses separately the different aspects of the third objection to jurisdiction. First, the Claimant disputes Argentina's argument that Total's claim does not involve an "investment dispute" under the BIT because it is about a tariff renegotiation process. Second, it contests the argument that the dispute is a "political dispute or – at most - a contractual matter subject to the 'renegotiation process' under Argentine law".[13]

31. According to the Claimant "'renegotiation' was a mechanism that Argentina unilaterally imposed on TGN … in order to evade its international obligation to arbitrate under Article 8 of the Treaty."[14] The Claimant submits that the renegotiation process is not a bar to the Tribunal's jurisdiction because the Claimant

[13] CCMJ para. 54.
[14] *Ibid*. paras. 58-59.

does not ask the Tribunal to second-guess the on-going renegotiation process, but to decide on the breaches of the BIT by Argentina. Total has never participated directly in the renegotiation process and its treaty claims are entirely distinct from that process. The Claimant contends at length in the CMM that in taking the measures at issue Argentina has breached the legal rules contained in the BIT. The fact that the legal dispute stemming therefrom may have political repercussions or aspects is immaterial. Claims involving the international responsibility of a State, such as those presented by Total in this case, often involve the compatibility of the exercise of sovereign powers with treaty obligations and entail a political dimension. Such a dispute does not cease to be legal and does not become, as a consequence, non-justiciable because of those dimensions.

32. As to Argentina's argument that it has taken no measure that impairs the rights of Total as a minority shareholder and that the BIT protects French investors only if they exercise control, Total points to the definition of investments in Article 1.1(b) of the BIT. The definition includes explicitly "Shares…and other forms of participation, *albeit minority or indirect*, in companies constituted in the territory of either Contracting Party" (emphasis added), without any requirement that control be exercised by the foreign investor. Total addresses further this point within its response to Argentina's fourth objection which involves the same or similar arguments.

D. Fourth objection:

Total lacks the ius standi *to sue under international law and applicable Argentine law.*

Argentina's arguments:

33. Argentina submits that Total lacks *ius standi* to sue because, according to a well-known principle of both international and Argentine law, a company's shareholders cannot bring a claim to redress the impairment of rights of the company itself. Allowing shareholders to exercise such an action and eventually obtain compensation for damages suffered by the company, would lead to the ultimate destruction of the company. Therefore, corporate claims of a derivative nature are inadmissible unless a specific provision, as found also in some international agreements, would provide for them. In Argentina's view, if the Tribunal allowed the action brought by some shareholders, it could not ensure (in the event of deciding in their favor) that the resources so recovered by the shareholders would compensate the company for the corporate property allegedly damaged. This would lead to the anticipatory liquidation of the company because of the ensuing diversion of the company's resources, a measure that an ICSID tribunal is clearly not competent to order. The shareholders, as shareholders, have no legal right to the preservation of the value of their shares.

34. To support its argument, Argentina relies first of all, as to international law, on the International Court of Justice ("ICJ") decision in the *Barcelona Traction* case. In the Respondent's view, the pronouncement by the ICJ in that case supports its argument that a harm caused to shareholders by measures taken by the State against the company itself cannot imply the shareholders' entitlement to compensation. Argentina submits that the ICJ's decision is still valid and also extends beyond the exercise of diplomatic protection. The same principles apply in respect of ICSID because foreign shareholders do not enjoy under the Convention a right of action on behalf of their locally incorporated subsidiary, which does enjoy such a right in accordance with Article 25(2)(b). A specific international treaty provision would be

necessary to that effect which, Argentina submits, is found in the NAFTA and some other free trade agreements.

35. Further relying on its Companies Law (Ley de Sociedades Comerciales N° 19550),[15] Argentina explains that only the corporation can defend its own interests. There is no provision in the Companies Law that allows a shareholder to make a complaint on behalf of the corporation. According to the same line of reasoning, a shareholder cannot make a complaint on its own behalf in order to obtain compensation for the alleged damages suffered by him in proportion to his corporate participation. This would be tantamount to a misappropriation of the company's assets. Argentina distinguishes the inadmissible derivative claims that in its view Total has put forth from certain corporate actions that its company law grants in certain cases to a shareholder in defense of the corporate interest. In the present proceedings, the Claimant did not however introduce such a claim, nor an individual claim for damages directly caused to its own property. The Claimant is seeking to enforce rights of another legal person. This is inadmissible according to Argentine law, which Argentina submits is the only law applicable to the present case.

Claimant's counter-arguments:

36. To address the fourth objection to jurisdiction advanced by Argentina, Total relies, first of all, on the provision of the BIT defining covered investments. In fact, Total's equity participation in TGN, Central Puerto and HPDA, all of which are companies incorporated in Argentina, is contemplated by Article 1.1 of the BIT as: "(b) Shares, … and other forms of participation, *albeit minority or indirect*, in

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

companies constituted in the territory of either Contracting Party." (emphasis added). Consequently, according to the Claimant, the dispute at issue relates to investments made under the BIT within the coverage of Article 8.1 of the BIT.

37. The reference made by the Respondent to Argentine Companies Law, which would not admit derivative claims, is irrelevant in these proceedings because Total's claim is a claim based on the BIT. For this reason, general international law, referred to by the Respondent, also has no bearing on the matter. Total challenges consequently the reliance by Argentina on the *Barcelona Traction* case.

38. The Claimant submits that in order to dismiss the objection to jurisdiction at issue, it suffices to refer to Article 1.1(b) of the BIT, which defines an investment as including different forms of participation – including minority or indirect - in companies constituted in the territory of the other Contracting State. In order to protect these investments, the BIT grants a direct right of protection, including access to international arbitration under the ICSID Convention. According to Total, the Respondent's position that a claim for the defense of the rights of the shareholders would be admissible under the ICSID Convention only through Article 25(2)(b), that is through a direct claim by the locally incorporated company, runs contrary to the ICSID Convention itself and does not take into account the very provision of the BIT which defines covered investments. According to the Claimant, Article 1.1(b) of the BIT was meant to enlarge the jurisdictional protection available to investors pursuant to the ICSID Convention. Answering the Respondent's assertion that derivative claims are admissible only when an international agreement so provides, the Claimant maintains that "Article 1.1(b) of the Treaty contains a clear and dispositive rule to that effect".[16] Total concludes that treaty provisions such as Article 1.1(b) of the BIT

[16] CCMJ para. 107.

"permit shareholders to claim for the damage caused to their shareholdings by measures directed at the company in which they participate"[17] as is well established in arbitral case law, independent from any right of action that the company itself may have.

E. Fifth objection:

The Tribunal lacks competence since the parties agreed on the exclusive jurisdiction of the Federal contentious-administrative tribunals of the City of Buenos Aires, for the interpretation and enforcement of the concession contract.

Argentina's arguments:

39. Argentina points out that the Bidding Rules for the privatization of *Gas del Estado* provide (at Section 1.3.5) that "The Bidders, the Investor Company and the Licensee shall be subject to the jurisdiction of the Federal Contentious-Administrative Courts of the City of Buenos Aires for the purpose of any conflict arising in connection with the Bidding Process, including performance or termination of the Transfer Agreement, hereby waiving any other competent court or jurisdiction." (Translation).

40. Argentina cites as relevant precedents the *Woodruff* case decided by the Claims Committee between the US and Venezuela; the *North American Dredging Company* (*NADC*) case decided by the American-Mexican Claims Committee in 1926 and the more recent *SGS v. Pakistan* and *SGS v. Philippines* cases. In the Respondent's view, such jurisprudence points out a fundamental theory of continental law, namely the theory of "*actos propios"*, known also in international law under the common law term of "estoppel".

[17] *Ibid*. para. 109.

41. According to the Respondent, the Claimant, by agreeing to a clause providing for exclusive jurisdiction of domestic courts, waived its consent to the jurisdiction of the ICSID to hear the dispute. Article 26 of the ICSID Convention provides for the exclusive jurisdiction of the Centre, "unless otherwise stated".[18] In the Respondent's view, through the above-mentioned clause of the Bidding Rules, Total clearly declined Argentina's offer to arbitrate under the ICSID Convention and consented instead to the jurisdiction of domestic tribunals of Argentina over any dispute related to the investment. Argentina concludes that Total has waived its consent to arbitrate under the ICSID Convention by agreeing to a clause recognizing a different jurisdiction. As a result, the written consent required by Article 25 of the ICSID Convention is lacking as to the Claimant since it has consented instead to accept the jurisdiction of the domestic courts.

Claimant's counter-arguments:

42. The Claimant rejects Argentina's argument that the Tribunal cannot hear the claim because the Bidding Rules for the privatization of the *Gas del Estado* provide, at section 1.3.5, for the exclusive jurisdiction of domestic tribunals to hear any dispute arising in connection with the Bidding Process. The Claimant maintains that it is not bound by the Bidding Rules, since it was not a party to that agreement, and that its claims have nothing to do with the Bidding Rules since its claims are founded on the BIT. Article 26 of the ICSID Convention, invoked by Argentina, is totally irrelevant here. Total never signed a clause regarding disputes related to its

[18] Article 26 of the ICSID Convention provides as follows: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

investment which would have the effect of "declin[ing] Argentina's offer to arbitrate Treaty disputes pursuant to the ICSID Convention".[19]

43. To distinguish the *NADC* case relied upon by the Respondent, the Claimant points out that *NADC* dealt with the subscription by an investor to a so-called "Calvo clause" in a contract with the host State. Such a clause would prevent the investor from asking its home State to intervene in diplomatic protection; it cannot however bar a foreign investor from pursuing its claim under international law. In the same line of reasoning, according to the Claimant, the reference by the Respondent to the *SGS v. Philippines* case is misplaced. That case concerned a contractual claim brought under the cover of an "umbrella clause" of a BIT before an arbitral tribunal. Although the tribunal admitted in principle its competence to hear the case, it declined to exercise it because the parties had submitted the claim to the Philippine courts. In the present case, on the contrary, Total's claims are not contractual, they are not asserted under Article 10 of the BIT, and they have not been submitted to any other forum. In support of this argument, the Claimant relies on various decisions on jurisdiction by arbitral tribunals in investment disputes, such as *Impregilo v. Pakistan*; *CMS v. Argentina*; *Enron v. Argentina*; and *Azurix v. Argentina*. The Claimant goes on to refer to other cases in support of its position that "claims asserting a cause of action under a treaty cannot be reduced to contract claims … simply because they may raise some contractual issues, or be somewhat related to an underlying contract."[20]

F. Sixth objection:

The claim is inadmissible due to lack of damage.

[19] CCMJ para. 116.
[20] *Ibid*. para. 128.

Argentina's arguments:

44. Under this argument Argentina asserts the non-existence of a controversy because the damages that Total claims it has suffered do not exist and the issues raised by Total have been resolved by an agreement for the normalization of the "Mercado Electrico Mayorista" (MEM). Argentina considers that the dispute has thereby ceased to exist so that the contentious jurisdiction of the Tribunal does not subsist. To support its view, Argentina relies on a passage of the ICJ decision in the *Nuclear Tests* case to the effect that "the existence of a dispute is the primary condition for the Court to exercise its judicial function."[21] In Argentina's submission, this function cannot be further exercised if the dispute has disappeared.

45. Specifically, as far as the alleged lack of damage is concerned, Argentina refers to certain measures that it has taken, as part of its emergency measures, in order to cope with the increase of costs incurred by energy generators. Argentina maintains that, during the period January 2002 to December 2003, power generators did not suffer any damage because, when the costs of power generation companies increased, the differences were covered by the Stabilization Fund of the MEM. As far as the subsequent period from January 2004 to December 2006 is concerned, the special fund "Foninvemem" (established in 2004) will use the "sales credit" (liquidaciones de venta) of the generators in order to finance new power plants. These generators (including the Claimant) would become shareholders of the new plants, entitled to receive dividends, as allegedly accepted by the Claimant. At the present time, Argentina maintains that power generators' income has increased by 25% in 2005

[21] See the *Nuclear Tests Case* (Australia v. France). International Court of Justice. December 20, 1974. para. 55. Respondent's Legal Authority AL RA 14.

compared with 2001. The profits of the Claimant being unchanged, the non-existence of damage on the part of the Claimant is so evident that the claim must be considered inadmissible, without any need to look further to the merits.

Claimant's counter-arguments:

46. In reply to the sixth objection to jurisdiction advanced by Argentina, Total relies on two arguments: first, it maintains that the existence of damage is not a necessary element of a dispute under international law; second, it contests the Respondent's refutation of any damage suffered by Total in respect of Central Puerto and HPDA as contrary to the evidence and belonging to the merits.

47. In order to assert its jurisdiction, the Tribunal must be satisfied, according to Article 8 of the BIT and Article 25 of the ICSID Convention, of the existence of a "dispute". According to international law, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[22] The reliance on the *Nuclear Tests* case is thus misleading because it concerned "the absence of a legal interest in the resolution of a dispute on account of the disappearance of the facts that give rise to the dispute".[23] In the present case, on the contrary, the Claimant complains of measures taken by the Respondent which have reduced the value of its investment in an amount that the Claimant provisionally estimated in its Request for Arbitration.

48. For the above-mentioned reason, the Claimant considers the assertion by Argentina that it has not suffered any damage since 2002 as "disingenuous". The Claimant explains with reference to the various periods referred to by Argentina how

[22] See *The Mavrommatis Palestine Concessions* case, PCIJ, Series A, No.2 (1924) at 11.
[23] CCMJ para. 134.

the stabilization funds and other actions referred to by Argentina did not eliminate or mitigate the damages brought about by the measures in respect of which Total complains.

IV. Consideration by the Tribunal of the Objections to Jurisdiction

49. In conformity with Article 41 of the ICSID Convention and Rule 41 of the Arbitration Rules, the Tribunal is called upon to decide, as a preliminary question, the objections raised by the Respondent to the effect that the dispute is not within the jurisdiction of the Centre nor within the competence of the Tribunal. While the parties have advanced many arguments, some of which touch upon the merits, the Tribunal will consider hereafter only those that are relevant to its decision regarding the Respondent's objections to jurisdiction.

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

a) that the dispute is between Argentina (as a contracting party to the ICSID Convention and the BIT) and a national of France (as defined in the BIT and in the ICSID Convention);

b) that the dispute is a "legal" dispute (Article 25(1) of the ICSID Convention),

c) that said legal dispute arises "directly" out of an investment (Article 25(1) of the ICSID Convention);

d) that said dispute is a "*controversia relativa a las inversiones, en el sentido del presente Acuerdo, entre una Parte Contratante y un inversor de*

la otra Parte Contratante", that is a "dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party" (Article 8.1 of the BIT)[24]; and

e) that such investments are of the type protected by the BIT (Article 1.1 of the BIT).

A. The proper methodology to resolve the jurisdictional challenge

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

52.. Since, as has been noted above, preliminary objections to jurisdiction are made before the Respondent has replied to Claimant's memorial on the merits, in order to determine its jurisdiction, the Tribunal must consider whether the dispute, as presented by the Claimant, is *prima facie* within the jurisdiction of an ICSID tribunal established to decide a dispute between a French investor and Argentina under the BIT. The requirements of a *prima facie* examination for this purpose have been elucidated by a series of international cases.[25] The object of the investigation is to ascertain whether the claim, as presented by the Claimant, meets the jurisdictional requirements, as to the factual subject matter at issue, the legal norms referred to as applicable and having been allegedly breached, and the relief sought.[26] For this

[24] The BIT was made "in the French and Spanish languages, both texts being equally authentic" (Art. 13, last paragraph). When using an English translation, the Tribunal will use the text appearing in 1728 UNTS 298 (1993), No. 30174, also relied upon by the Claimant.

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

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

purpose the presentation of the claim as set forth by the Claimant necessarily forms the basis of the Tribunal's decision. The investigation does not prejudge whether the claim is well founded, but aims only to determine whether the Tribunal is competent to pass judgment upon it.

53. As to the facts of the case, the presentation of the Claimant is fundamental: it must be assumed, for the sole purpose of determining jurisdiction, that the Claimant would be able to prove to the Tribunal's satisfaction in the merits phase the facts that it invokes in support of its claim. That is, the existence and impact of Argentina's measures and actions that the Claimant considers have affected its investments in breach of the BIT. This does not necessarily mean that the Claimant's description of the facts must be accepted as true, without further examination of any type. The Respondent might supply evidence showing that the case has no factual basis even on a preliminary scrutiny, so that the Tribunal would not be competent to address the subject matter of the dispute as properly determined.

54. In the present dispute, however, there does not appear to be any basic disagreement between the parties as to most of the factual elements of the case, as far as this may be relevant to identifying the ambit of the Tribunal's jurisdiction in relation to the dispute. Argentina does not dispute, factually, that Total has made and holds certain investments, as Total has described in detail in its submissions and supporting documents, in the gas transportation industry, the petroleum exploration and production industry, and the power generation industry in Argentina. Furthermore, Argentina has not disputed that the Measures[27] complained of by Total as having breached its rights under the BIT, have had generally the scope described by Total. As mentioned above at paragraph 16, these measures have eliminated the

[27] Referred to by the Claimant in its various submissions and summarized above at paragraph 16, including specifically the Emergency Law of 2002 and those others that followed it and derived from it.

free convertibility of the peso into US dollars at the rate of one to one; have abolished the right of regulated public utilities - including TGN – to adjust their tariffs according to the CPI, the US dollar or other foreign currencies and indexes; have frozen the gas consumer tariff; have imposed an export withholding tax on the sale of hydrocarbons and have restricted export thereof; and have restricted the ability of power generators to adjust their prices. Argentina does not dispute either, as far as it might have addressed this issue in the jurisdictional phase, that those measures have specifically affected the operations of the local companies in which Total has invested, in accordance with the conditions that resulted from the legislation applicable to those operations when Total had made its investment therein.

55. As to the legal foundation of the case, in accordance with accepted judicial practice, the Tribunal must evaluate whether those facts, if established, namely the unilateral changes of the legal regime just mentioned and their alleged negative impact on Total's investment, could possibly give rise to the Treaty breaches that the Claimant alleges, and which the Tribunal is competent to pass judgment upon.[28] In other words, those facts, if proven to be true, must be "capable" of falling within the provision of the BIT and of having caused or representing treaty breaches as alleged by the Claimant.[29] It is of course a question for the merits whether the alleged facts (that is Argentina's measures and conduct) constitute breaches of the BIT for which Argentina must be held liable under the BIT in accordance with applicable legal provisions.[30] It is also for the merits to determine whether those measures have

[28] See ICJ, *Oil Platforms* case (Islamic Republic of Iran v. United States of America), Order of March 10, 1998, ICJ Reports 1998, p. 806, para. 16; see also the separate Opinion of Judge Higgins at para. 32; *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, (ICSID Case No. ARB/02/6), Decision on Jurisdiction of January 29, 2004, in ICSID Reports (2005), p. 518, para. 157.
[29] ICJ, *Case Concerning Legality of the Use of Force* (Yugoslavia v. Italy), ICJ Reports 1999-1, Order of June 2, 1999 para. 25.
[30] Art. 8.4 of the BIT is as follows: "The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is party to the dispute, including rules

actually had on Total's investments the specific negative impact of which Total complains, to the extent such determination is relevant to establish the alleged breaches and assess damages.

56. As to the relief sought, there is no doubt as to the admissibility of the claim for relief that the Claimant has sought against and from Argentina, notably a declaratory judgment that Argentina has committed various breaches of the BIT provisions and an order that Argentina compensate Total for the damages stemming therefrom.

57. With these considerations in mind the Tribunal will turn to examine the jurisdictional basis of the claim challenged by Argentina. The Tribunal wishes immediately to dispose of the first requirement listed above, namely the nationalities of the parties. Total has submitted evidence that it was incorporated and constituted in accordance with the laws of France and maintains its registered office (*siège social*) in France. Argentina has not disputed that the Claimant, Total S.A., is a juridical person having the nationality of another Contracting State in conformity with Article 25(2)(a) of the ICSID Convention. More specifically, Argentina has not disputed that the Claimant meets the requirement of being a French body corporate having its registered office in France in accordance with French law as required by Article 1.2(b) of the BIT.

B. The first objection to jurisdiction by Argentina

Inadmissibility of the claim.

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governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law".

58. Argentina considers that Total's claim is inadmissible because a foreign investor cannot claim to be sheltered from the effects of a general crisis in the host country by invoking a BIT's protection. In other words, Argentina submits that general measures of the host country cannot be challenged as being in breach of a BIT by an investor who alleges that it has been damaged thereby. However, international practice shows that many disputes based on an alleged breach of international standards concerning the treatment of the property of aliens, settled either by means of diplomatic protection or direct arbitration, have arisen from general measures taken by host States which affected those investments. Were this not admissible, nationalization measures, either aimed at the property of both nationals and foreigners, or just at foreign property, which have been the subject matter of a substantial portion of those disputes, would have escaped any international litigation and dispute settlement mechanisms.

59. It is important to clarify that the subject matter of the dispute is not those general measures of Argentina *per se* (including the changes of its exchange policy); nor is the Tribunal entitled to pass judgment on whether they were right or wrong from an economic or domestic legal point of view. The Tribunal is called upon by the Claimant to determine whether any specific measures, "or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts".[31] "What is brought under the jurisdiction of the Centre [are] not the general measures in themselves but the extent to which they may violate those specific commitments".[32]

[31] *CMS Gas Transmission Co v. Argentine Republic*, (ICSID Case No. ARB/01/08), Decision on Jurisdiction, July 17, 2003, para. 33. available at http://www.worldbank.org/icsid/cases/awards.htm
[32] *Ibid*, para. 27 cited by Argentina. The approach of the *CMS* Tribunal has been consistently followed by other ICSID tribunals before which Argentina has raised this argument; see, for example, *Enron*

60. The Tribunal sees therefore no bar to its jurisdiction in this respect: the fact that the breach of the BIT's protection alleged by Total might derive, in whole or in part, from general measures adopted by Argentina does not deprive the present dispute of the requirement that it be a "legal dispute" in accordance with Article 25(1) of the ICSID Convention.

C. The second objection to jurisdiction by Argentina

The dispute submitted to the Tribunal does not arise directly from a measure adopted against the investment.

61. We turn now to Argentina's objection that its measures are not "specifically" addressed against Total's investments. Argentina bases this objection on the premise that by referring to "any legal dispute arising directly out of an investment", Article 25(1) of the ICSID Convention requires that the measures impugned by the Claimant as being contrary to the BIT must be "specifically" addressed to, or directed at an investment. In the present case, according to Argentina, Total complains of general measures, taken for the general welfare ("*con el objeto de lograr el bien común").* Furthermore, according to Argentina, Total's claims raise contractual issues stemming from tariff questions pertaining to public services concessions.

62. The Tribunal does not agree with Argentina's argument nor its conclusions for the following reasons. From a textual point of view, Article 25(1) of the ICSID Convention refers to "any legal dispute arising directly out of an investment": this cannot be construed as meaning "any legal dispute arising from a measure by the host

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Corporation and Ponderosa Assets L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction (Ancillary Claim), August 2, 2004, para 12. available at http://www.worldbank.org/icsid/cases/awards.htm; *Camuzzi International S.A. v. Argentine Republic*, (ICSID Case No. ARB/03/2), Decision on Jurisdiction, May 11, 2005, para. 59. available at http://www.worldbank.org/icsid/cases/awards.htm.

country directed specifically at an investment". First, it is the "legal dispute" that must arise directly from, or be related to the investment (in a direct relation with the investment), not any "measure" that may have caused the legal dispute; second, "arising directly out of an investment" is not the equivalent of "specifically directed at an investment". In any case, a measure of the host State can affect an investment directly, so that the dispute as to the international legality of that measure arises directly out of that investment, even if the measure is not specifically aimed or directed at that investment.

63. In the present case, it appears from Total's claims and *prima facie* evidence, (as is sufficient for purpose of establishing jurisdiction) that certain measures, starting with Emergency Law N° 25.561, and more particularly its Sections 8 and 10, specifically affected Total's investments. For example, the legal regime applicable to the gas distribution service performed by TGN was changed and appears to have affected TGN's operations.

64. The requirement that the dispute arise directly out of an investment according to Article 25(1) of the ICSID Convention is met when, as is here the case, the Claimant challenges certain measures of the host State that affected the investment directly, in that these measures were applicable to such an investment as a matter of law and that they were in fact implemented in respect of such an investment.

65. Moreover, in the present case one could consider that the more restrictive criterion advocated by Argentina is also met. This is because a number of the measures referred to by Total as having affected adversely its investments, both legally and economically, were directed at and applied specifically to public services (*servicios publicos)* and their providers under license (*los concessionarios)*, including gas and electricity distributors, such as TGN, and Total's power generation

companies.[33] In this respect, the Tribunal does not consider that for a measure to be found "specifically" directed at a certain entity or at its assets it is necessary that said entity be singled out by name as an addressee of such measure.

66. Argentina relies to the contrary on the decision on jurisdiction in the well known *Methanex* case, rendered under Chapter 11 of NAFTA. In that case, the arbitral tribunal found that a measure enacted by the state of California that restricted the use of an additive of gasoline (MTBE) for environmental purposes, thus preventing Methanex from supplying to the producers of that additive a component it manufactured in the USA (methanol), did not present a measure "relating to" a protected investor or to an investment as required by Article 1101(1).[34] The Methanex Tribunal held that the language of Article 1101(1) required that "there must be a legally significant connection between the measure and the investor or the investment".[35] It concluded that since the measure did not relate to methanol or Methanex it had no jurisdiction over the claim: Methanex had not alleged facts "establishing a legally significant connection between the US measures, Methanex and its investments".[36] It must be noted that NAFTA does refer to "measures", while the ICSID Convention, as has been pointed out above, refers to "legal disputes", and that while NAFTA refers to measures "relating to" an investment, the ICSID

[33] See above para. 62. As to its hydrocarbons exploration and production operations, Total points to Decrees 1606/2001 and 2703/2002 which imposed on hydrocarbon producers the obligation to repatriate all or a substantial part of the foreign currency income derived from oil and gas exports. As to its power generation operation, Total points to various measures that have forcibly changed the previous mechanisms of price adjustment and frozen or capped relevant electricity prices "at artificial levels" (such as a number of Resolutions of the Secretariado de Energia issued in 2002/2003).

[34] *Methanex Corp. v. USA*, Preliminary Award on Jurisdiction and Admissibility, August 7, 2002, para. 127-139 (this decision on jurisdiction has since been applied in the Final Award of August 3, 2005), available at: www.naftalaw.org. Art. 1101(1) of NAFTA is as follows: "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."

[35] *Ibid*, para. 139. Even if the Tribunal were to consider jurisprudence under the NAFTA, the Tribunal notes that other tribunals have interpreted the same NAFTA language differently and reached different results.

[36] *Ibid*, para. 150.

Convention refers to legal disputes "arising directly out of an investment". Irrespective of this question, however, the Tribunal believes that the factual circumstances are here quite different. In the present case, the assets that the Claimant indicates as representing its investments in Argentina were directly subject to, and legally and economically affected by the measures at issue. In the light of what has been said above, the jurisdictional requirement that the dispute arise "directly" from an investment is satisfied.

D. Third jurisdictional objection of Argentina

The dispute submitted to the Tribunal is not an "investment dispute" according to Article 8 of the BIT because: (1) the dispute is not a legal dispute; (2) even if the dispute were a legal dispute, it would be of a contractual nature, and it consequently would fall outside the competence of the Tribunal. In any case Total's minority shareholdings were not affected.

67. The Tribunal is unable to share Argentina's view that Total is claiming a tariff revision while invoking a "*supuesta intangibilitad de las tarifas de los servicios publicos*".[37] Rather, as emerges clearly from Total's Request for Arbitration, subsequent memorials and documents, Total challenges the various measures taken by Argentina from 2001 onward that modified the tariff regimes as being in breach of various BIT provisions. Specifically as to gas transmission, Total has claimed that it invested in TGN based on the dollarized adjustable tariff structure and that this was a basic premise and condition of the IPO of Gas del Estado in 1992. Total alleges that as a result of the Argentinean measures of 2001-2003, which subverted that regime, it has been substantially deprived of the value and economic benefit that it reasonably expected to obtain from its investment in TGN. Total claims that Argentina breached

[37] RMJ para. 40.

thereby the BIT's obligations not to take measures equivalent to expropriation, to accord fair and equitable treatment, to refrain from discriminating and to respect specific undertakings as to TGN.

68. For the purpose of ascertaining jurisdiction, the Tribunal considers the above claims to fall within its competence since, *prima facie*, they present conduct by Argentina that may constitute a violation of the BIT obligations and standards of protection to which Total as a French investor is entitled. Total has clearly not asked this Tribunal to evaluate the renegotiation process under Argentina's regulations nor to enter into the merit of this process, on which – as Argentina points out – this Tribunal would have no competence. On the contrary, Total claims that the renegotiation process is itself in breach of the BIT and that, by invoking such process under its domestic law, Argentina attempts to evade its international obligations, including that of arbitrating the dispute in accordance with Article 8 of the BIT.

69. In the light of the above, the Tribunal cannot accept Argentina's arguments that the present dispute is not a legal dispute involving the application of the BIT under international law. Nor can the Tribunal accept that it is a contractual dispute involving the renegotiation process.

70. With reference to Total's rights as a minority shareholder in TGN (19,23%) and in HPDA (41.3%), Argentina objects in substance that a minority shareholder is not legally protected in respect of measures that cause prejudice to the local company in which such shareholding is owned by the other country's investor, as long as the latter's legal rights as an owner of those shares are not thereby affected in breach of the BIT.[38]

[38] Although Argentina does not specifically refer to Central Puerto in this section of its memorial, from the Tribunal's review of the facts it appears that this objection also applies to Total's minority shareholding in Central Puerto.

71. Total relies to the contrary on the inclusion of "Shares, issue premiums and other forms of participation, albeit minority or indirect, in companies constituted in the territory of either Contracting Party", within the definition of the term "investment" in Article 1.1(b) of the BIT. Total considers that it is immaterial that its rights as an owner of those shares may not have been affected, suppressed or interfered with by the measures it challenges. Total submits that since the minority shareholdings fit within the definition of "investments" in the BIT, Article 8.1 of the BIT unequivocally grants Total a direct right to protect its shareholdings from Argentina's measures, including access to international arbitration under the ICSID Convention.

72. Total argues further that Argentina's measures affected the economic conditions and value of the local companies in which Total holds both majority and minority investments. Total submits that Argentina radically changed – contrary to promises, guarantees and legitimate expectations – the legal regime in which the local companies operated, by changing the denomination and adjustment of tariffs and by unilaterally altering the terms of the licenses held by these companies.[39] Total further submits that the measures had an economic impact on the value of the companies: in particular, TGN's tariff income was reduced by about 70% due to the various measures that affected its operations, while its dollar-denominated costs and liabilities remained unchanged so that, as a consequence, TGN had to default under its loans. As a result, TGN's value plummeted, which in turn impacted the value of Total's shareholding in TGN. As to HPDA, Total says that as a consequence of the measures that affected its operations and dramatically reduced its source of income, HPDA

[39] Total argues that its acquisition of an equity participation in TGN in the year 2000 "was predicated on several explicit, firm guarantees provided by Argentina in the Gas Law, the Gas Decree and the TGN Licence" (CCMJ para. 56; CMM para. 51 ff.)

defaulted on its loans, and both HPDA and Central Puerto are currently at the mercy of their creditors.

73. The question at issue here is whether the measures of Argentina that allegedly adversely affected the local companies, in which Total holds minority shareholdings and whose value was in turn affected, are capable of constituting a breach of the protection afforded by the BIT to Total's investments as therein defined.[40] If the answer is affirmative on the basis of a *prima facie* examination, then the present case is one of a "dispute arising directly out of an investment" on which this Tribunal has jurisdiction.

74. The definition of "investments" in BITs is generally broad in accordance with their purpose of promoting reciprocally investments by nationals of one Contracting Party in the territory of the other in the form of capital, technology, know-how and related activities, by ensuring to the investors a definite standard of protection.[41] The employment of capital and other factors in the host economy is normally made through companies incorporated in the host country, owned and controlled by the foreign investor. As shareholder in these companies, the foreign investor is entitled and able to manage and control its investments. This is often the only way for a foreign investor to make investments, whenever the host State requires that certain activities be carried out by locally incorporated companies, as was the case for Argentina's privatization schemes. The protection that BITs afford to such investors is accordingly not limited to the free enjoyment of the shares but extends to the respect of the treaty standards as to the substance of their investments.

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[40] Some of the arguments raised and discussed in respect of this issue here are also relevant in case of majority shareholdings and have been raised by Argentina in its fourth objection to jurisdiction.

[41] UNCTAD, *Bilateral Investment Treaties in the Mid-1990s,* United Nations 1998, at p.1-2: "Bilateral investment treaties are one of the policy instruments available to provide legal protection to foreign investments under international law and thus to reduce as much as possible the non-commercial risks facing foreign investors in host countries". See also Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties (*1995), pp. 25-31.

75. These considerations are applicable to the BIT between Argentina and France interpreted in the light of its object and purpose.[42] The above conclusions are supported by international case law[43], by authors and by studies of international organizations active in this field.[44] There is no reason to hold otherwise when minority shareholdings in a locally incorporated company are at issue in a situation such as the present one.[45] The BIT specifically includes minority shareholdings within the definition of investment. The fact that minority participations are at stake here does not change the nature of the investment nor the exposure of the foreign investor to risks in respect of which the BIT is meant to afford protection. The position and role of Total as a French investor in respect of the companies in which it held minority shares does not appear different than in respect to the other companies it owns and controls in Argentina and their activities.

76. The Tribunal finds therefore that claims with respect to Total's indirect and minority shareholdings in TGN, HPDA and Central Puerto are disputes relating to

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[42] The Preamble recites that the two Governments have agreed on the operative provisions of the BIT "[D]esiring to develop economic cooperation between the two States and to create favourable conditions for French investments in Argentina and Argentine investments in France; Convinced that the promotion and protection of such investments are likely to stimulate transfers of capital and technology between the two countries in the interest of their economic development". Moreover, the BIT, besides defining investments and related terms, also covers "activities in connection with such investments", granting most-favored-nation and national treatment in that respect (Article 4, first paragraph of the BIT).

[43] See i.e. *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3), Award, February 10, 1999, para. 89 " … *le Tribunal observe que la jurisprudence antérieure du CIRDI ne limite pas la qualité pour agir aux seules personnes morales directement visées par les mesures litigieuses mais l'étend aux actionnaires de ces personnes qui sont les veritables investisseurs"*; *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award of June 25, 2001, para. 324; *Gas Natural SDG, S.A. v. Argentine Republic*, (ICSID Case No. ARB/03/10), Decision on Jurisdiction, June 17, 2005, paras. 34-35; *Comp. de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, ARB/97/3, Decision on Annulment, July 3, 2002 para. 46-48; *Azurix Corp. v. Argentine Republic*, (ICSID Case No. AR/01/12), Decision on Jurisdiction, December 8, 2003.

[44] UNCTAD, IIA Series, *Scope and Definition*, United Nations 1999, p.8; reprinted in UNCTAD, *International Investment Agreements: Key Issues;* United Nations 2004, Chp. 3, *Scope and Definitions*, p. 115.

[45] For recent cases where jurisdiction has been upheld in case of minority shareholdings by the foreign investor see *CMS Gas Transmission Co. v. Argentine Republic*, (ICSID Case No. ARB/01/8), Decision on Jurisdiction, July 17, 2003; *Enron Corp. and Ponderosa Assets L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3), Decision on Jurisdiction, January 14, 2004, para. 21; *GAMI Investments Inc. v. The United Mexican States*, Final Award, November 15, 2004, para. 33 (NAFTA Chapter 11, UNCITRAL arbitration), www.naftaclaims.com.

an investment, as defined in the BIT. Thus, the Tribunal finds that it has jurisdiction under Article 25(1) of the ICSID Convention and Article 8.1 of the BIT with respect to these legal disputes arising directly out of an investment. The issue of whether Argentina's measures actually breached any of Total's treaty rights is one for the merits stage of the proceedings and has not been considered by the Tribunal at this stage.

E. Fourth jurisdictional objection of Argentina[46]

Total lacks ius standi *to sue under international law and applicable Argentine law.*

77. The Tribunal has concluded that, notwithstanding Argentina's third objection, Total's claims fall within the ambit of the BIT and the Tribunal has jurisdiction to hear these claims.

78. Argentina is misplaced when it relies on the *Barcelona Traction* case to assert that action taken by the host country against the activities and assets of a local company cannot constitute a breach of the BIT. The factual and legal context was different in that case and only the protection of foreign shareholders under customary international law was at issue in that dispute. Without entering into the specifics of that case, the ICJ itself recognized in its decision that the protection of shareholders required that recourse be made to treaty stipulations. The Court recalled that "indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments".[47] The

[46] Objection D by Argentina is mistakenly indicated as "*Tercera defensa*" in the index and in the caption at page 22 of the RMJ.

[47] ICJ Reports (1970), para. 90. Respondent's Legal Authority AL RA 10. In the subsequent *ELSI* case (Elettronic Sicula S.p.A.) the Court upheld the applicability of Art. III.2 of the bilateral treaty of Friendship, Commerce and Navigation of 1948 between the US and Italy (granting to nationals and

impressive development of BITs has been a response to the uncertainty of customary international law relating to foreign investment.

79. The other defenses raised by Argentina under its fourth objection are based on the assumption that the assets and rights affected by the measures of Argentina challenged by the Claimant pertain exclusively to the local companies in which the foreign investor has bought shares representing the investment. As a consequence, Argentina considers that the claim brought here by Total could only be defined as a derivative suit. Argentina describes a derivative suit as one by which the shareholder attempts to make good in its own name rights that belong instead to its subsidiary in the host State. Such "derivative" suit being inadmissible under the domestic law of the subsidiary, namely the law of Argentina, the Claimant cannot present such a claim to an international arbitral tribunal.

80. Having found, however, that the assets and rights that Total claims have been injured in breach of the BIT fall under the definition of investments under the BIT, it is immaterial that they belong to Argentine companies in accordance with the law of Argentina. Total asserts its own treaty rights for their protection, regardless of any right, contractual or non-contractual that the various companies (TGN, Total Austral, Central Puerto, HPDA) might assert in respect of such assets and rights under local law before the courts of other authorities of Argentina, in order to seek redress or indemnification for damages suffered as a consequence of actions taken by those authorities.

81. Total, on the other hand, invokes here treaty rights concerning its investment in Argentina protected by the BIT. The claims of Total cannot therefore be

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corporations of either party the right to "control and manage" corporations controlled by them and created under the law of the other party), in a case where Italian authorities had requisitioned property of an Italian company owned by two US corporations, ICJ Reports (1989), paras. 68 ff. The relevance of this decision for the interpretation of BITs has been highlighted by F.A. MANN in his comment *Foreign Investment in the International Court of Justice,* in *Am. J. Int. Law*, 1986, p. 92-102.

defined as indirect claims (or "derivative" claims), as if Total was claiming on behalf or *in lieu* of its subsidiaries in respect of rights granted to the latter by the laws of Argentina. It is therefore irrelevant that such claims would be inadmissible under those laws and that they would not be amenable in any case to the jurisdiction of an ICSID arbitral tribunal. This objection of Argentina is therefore without merit.

F. Fifth jurisdictional objection of Argentina

The Tribunal lacks competence since the parties agreed on the exclusive jurisdiction of the Federal contentious-administrative tribunals of the City of Buenos Aires, for the interpretation and enforcement of the concession contract.

82. Total claims that Argentina has breached its BIT obligation; the Claimant does not rely on any breach of contract under Argentine law. To the contrary, Total considers that the terms of the Bidding for Gas del Estado to which Argentina refers are foreign to the present case and do not bind Total, which was not a party to the Bidding Rules.

83. Since this Tribunal has concluded that the rights that Total invokes qualify for protection under the BIT, recourse to the treaty dispute settlement mechanism provided in Article 8 is possible as a matter of right. The claim that the host State has breached the protections granted by the BIT in respect of a given investment can be entertained by this Tribunal irrespective of the existence of contractual remedies available to the Argentine companies in which Total has invested or to Total itself, should this be the case. The exclusive choice of forum clause contained in the TGN Bidding Rules and related documents operates therefore only in respect of claims based on those rules and documents and between parties bound by them. It cannot prevent the performance by this Tribunal of its obligations in accordance with the

BIT. Argentina's consent to ICSID arbitration under the BIT and the ICSID Convention has not been displaced or rendered ineffective with respect to the present dispute by the choice of forum clause in the Bidding Rules.

84. The Claimant has referred in support of its position to various cases where ICSID tribunals have held that claims based on alleged breaches of the BIT with respect to an investment by a foreign investor cannot be equated with contractual claims under a license agreement.[48] Argentina on the other hand relies on various cases to the effect that a contractual choice of local forum should be given effect over the international agreement that serves as the foundation of the jurisdiction of the international tribunal.[49]

85. It is not necessary to examine closely the issues raised in those cases and the decisions rendered by those tribunals because those issues are not before us in this case. Based on its examination of the claims made by Total and the respective arguments of the parties, this Tribunal considers that the subject-matter of the claims of Total to be decided here, and of which Argentina challenges the jurisdiction, is not the breach of a contract containing a choice of domestic forum clause. Total is not pursuing a contractual claim in these proceedings. The choice-of-forum clause of the Bidding Rules is therefore immaterial and cannot be a bar to the Tribunal's jurisdiction. The Tribunal is presented here with a claim based on the alleged breach by Argentina, through its legislative and other measures from 2001 onwards, of the

[48] See, for example, *LG&E Energy Corp. v. Argentine Republic*, (ICSID Case No. ARB/02/1), Decision on Jurisdiction, April 30, 2004, para. 66, available at: http://www.worldbank.org/icsid/cases/awards.htm.

[49] *Woodruff* Case (1974), IX Reports of International Arbitral Awards, p. 213 ff; *North America Dredging Co*. (1926), IV Reports of International Arbitral Awards, p. 26 ff; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decisions of the Tribunal on Objections to Jurisdiction, cit., para. 154.

legal regime applicable to Total's investments in violation of various terms of the BIT. The jurisdiction of this Tribunal over such claims must therefore be upheld.[50]

G. Sixth jurisdictional objection of Argentina

The claim is inadmissible due to lack of damages.

86. Total has claimed that the measures enacted by Argentina that affected its investments have inflicted on it substantial damages, notably by the transformation of the tariffs from US dollars (to which the peso was pegged at the rate of one to one) to devalued pesos; by the elimination of certain adjustment mechanisms; the imposition of restrictions on exports and on the use of the proceeds thereof; and by the introduction of regulatory measures affecting electricity producers. Total says that this constitutes a breach of the BIT's protection to which its investments in Argentina are entitled.

87. In order to establish jurisdiction over the claims made by the Claimant, the statements, arguments and documents submitted by Total appear sufficient to conclude *prima facie* that Total may have suffered economic prejudice from those measures. Contrary to Argentina's position that the dispute is non existent or has ceased to exist, a dispute definitely exists between the parties, because Argentina opposes the claims, while Total insists on them notwithstanding the argument of Argentina that Total suffered no damage.

88. The possible uncertainty as to the final amount of the damages does not represent a bar to jurisdiction, but rather an issue to be decided in the merits phase.

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

Thus the arguments developed by Argentina concerning the establishment and operation of the Stabilization Fund and other measures it took in order to cover the additional costs incurred by power generators pertain to the merits. Further, the arguments raised by Argentina address only some of the claims made by Total, namely those concerning the measures affecting the power generation companies.

89. Finally the Tribunal observes that the Claimant has requested a declaratory judgment that Argentina has breached the BIT. In this respect the issue of the damages is immaterial.[51] As a consequence, the objection by Argentina based on the alleged lack of damages must be rejected.

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

Decision

90. For the reasons stated above the Tribunal concludes that all jurisdictional requirements set out in the ICSID Convention and in the BIT are met in the present dispute. The Tribunal rejects accordingly Argentina's objections to jurisdiction and decides that the present dispute is within the jurisdiction of ICSID and the competence of the Tribunal. 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 decides to consider this matter as part of the merits.

So decided.

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

[SIGNED]

Giorgio Sacerdoti

President of the Tribunal

[SIGNED]

Henri C. Alvarez

Arbitrator

[SIGNED]

Luis Herrera Marcano

Arbitrator