

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

In the proceedings between

Continental Casualty Company
(Claimant)

and

The Argentine Republic
(Respondent)

Case No. ARB/03/9

DECISION ON JURISDICTION

Members of the Tribunal

Prof. Giorgio Sacerdoti, President
Mr. V.V. Veeder, Arbitrator
Lic. Michell Nader, Arbitrator

Secretary of the Tribunal

Mr. Gonzalo Flores

Representing the Claimant

Messrs. Barry Appleton and
Robert S. Wisner
Appleton & Associates
Internacional Lawyers
Toronto, Ontario M5S 1M2

Representing the Respondent

Procurador del Tesoro de la Nación Argentina
Dr. Osvaldo César Guglielmino
Procuración del Tesoro de la Nación Argentina
Buenos Aires
República Argentina

Date of Decision: February 22, 2006

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A. Procedure

1. On January 17, 2003, the International Centre for Settlement of Investment Disputes (“ICSID or “the Centre”) received a Request for Arbitration against the Argentine Republic (hereinafter “the Respondent” or “Argentina”) from Continental Casualty Company (hereinafter “the Claimant” or “Continental”), a company incorporated under the law of the State of Illinois, United States of America. The Request concerned Continental’s investment in CNA Aseguradora de Riesgos del Trabajo S.A. (“CNA ART”), an insurance company incorporated in Argentina, which Continental claims to wholly own, and Argentina’s alleged breaches of Continental’s rights as investor under the 1991 Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (the “Argentina–U.S. Bilateral Investment Treaty” or the “BIT”).¹

2. In its request, Continental invoked Argentina’s advance consent to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention” or “the Convention”) in the Argentina–U.S. Bilateral Investment Treaty.

3. By letter dated January 28, 2003, Continental supplemented its request, attaching a copy of a letter dated January 15, 2003 with its consent to arbitration in accordance with the procedures set out in the BIT, and a power of attorney authorizing the law firm of Appleton & Associates to represent it in these proceedings.

4. On January 29, 2003, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for 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.

¹ Done in Washington, D.C. on November 14, 1991, in force since October 20, 1994.

5. By letter of January 17, 2003, the Centre requested Continental to provide: (i) further information regarding the steps taken to resolve the dispute through consultation and negotiation, as foreseen in Article VII (2) of the BIT; and (ii) confirmation that the dispute had not been submitted to the local courts of Argentina or any previously agreed dispute settlement procedures, also in accordance with Article VII (2) of the BIT. Continental responded by letter of March 17, 2003.

6. By letter of May 2, 2003 the Centre further asked Continental to clarify whether the condition set forth in the BIT that six month should elapse between the date in which the dispute arose and the submission of the request for arbitration had been fulfilled. Claimant responded by letter of May 5, 2003.

7. On May 22, 2003, the Acting Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention. On the 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.

8. More than sixty days elapsed since the date of registration without the parties being able to agree on the number of arbitrators that would comprise the tribunal in this case or on the method for their appointment. Accordingly, on July 22, 2003, the Claimant requested that the tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention (i.e. a Tribunal comprising three arbitrators, one appointed by each party, and the third, presiding arbitrator, to be appointed by agreement of the parties).

9. On August 20, 2003 the Argentine Republic appointed Licenciado Michell Nader, a Mexican National, as an arbitrator. On August 22, 2003, the Claimant appointed Sir Elihu Lauterpacht, a national of the United Kingdom as an arbitrator.

10. Also on August 22, 2003, more than ninety days having elapsed since the date of registration, Continental, invoking Article 38 of the ICSID Convention, requested that the president of the tribunal be appointed by the Chairman of ICSID Administrative Council.

11. With the agreement of both parties, the Chairman of the ICSID Administrative Tribunal appointed Professor Giorgio Sacerdoti, an Italian national, as the President of the Arbitral Tribunal. On October 6, 2003, the Acting Secretary-General, in accordance with Rule 6(1) of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

12. The first session of the Tribunal was held, with the agreement of the parties, on January 29, 2004, at the seat of the Centre in Washington, D.C. During the session the parties expressed 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.

13. During the first session the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. Among others, 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, with a subsequent courtesy translation into English. Also, the Tribunal, after consultation with the parties, fixed the following schedule for the written phase of the proceedings: the Claimant would file a memorial on the merits within ninety (90) days from the date of the first session; the Respondent would file a counter-memorial on the merits within ninety (90) days from its receipt of the Claimant's memorial; the Claimant would file a reply within forty-five (45)

days from its receipt of the counter-memorial; and the Respondent would file a rejoinder within forty-five (45) days from its receipt of the Claimant's reply.

14. During the first session it was noted that were Argentina to raise objections to jurisdiction, it may do so within the ninety (90) days time limit fixed for the filing of its counter-memorial on the merits. In that case the proceedings on the merits would be suspended in accordance with Arbitration Rule 41(3) and the Claimant would file its counter-memorial on jurisdiction within forty five (45) days from its receipt of the Argentine Republic's objections to jurisdiction. The Tribunal would thereafter, in consultation with the parties, fix a date for a hearing on jurisdiction.

15. On April 27, 2004, the Claimant filed its Memorial on the Merits with accompanying documentation. On June 29, 2004 Argentina filed a Memorial with objections to jurisdiction.

16. By letter of July 12, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with ICSID Arbitration Rule 41(3). In conformity with the procedural decisions referred above, the Claimant submitted its counter-memorial on jurisdiction on July 30, 2004.

17. On August 6, 2004, Sir Elihu Lauterpacht resigned as an arbitrator in this case due to health conditions. Following Professor Sacerdoti's and Licenciado Nader's consent to Sir Elihu's resignation and in accordance with Arbitration Rule 10, the proceedings were suspended until the vacancy created by Si Elihu's resignation was filled. In accordance with Arbitration Rule 11(1), the Secretary of the Tribunal invited Continental to appoint a new arbitrator in replacement of Sir Elihu. By letter of September 14, 2004, the Claimant appointed Mr. V.V. Veeder, a national of the United Kingdom as an arbitrator. The proceedings were resumed in October 14, 2004, following Mr. Veeder's acceptance of his appointment.

18. By letter of December 16, 2004, the Tribunal informed the parties that it wished to hold a hearing on jurisdiction and proposed dates for such hearing. The hearing was held, with the agreement of the parties, on February 1, 2005 at the seat of the Centre in Washington D.C. Messrs. Barry Appleton, Robert Wisner, Hernando Otero, Nick Gallus, Ali Ghiassi and Ms. Asha Kaushal from the law firm of Appleton & Associates, International Layers of Toronto Canada, and Ms. Sally Narey, General Counsel, Continental, attended the hearing on behalf of the Claimant. Ms. Cintia Yaryura and Ms. Maria Victoria Vitali from the Procuración del Tesoro de la Nación Argentina, Mr. Marcelo Massoni, from the Embassy of Argentina in Washington, D.C. and Mr. Roberto Bado from the Ministry of Economy of the Argentine Republic, attended the hearing on behalf of the Respondent. During the hearing Messrs. Appleton and Wisner addressed the Tribunal on behalf of Continental. Ms. Yaryura and Vitali addressed the Tribunal on behalf of the Argentine Republic. The Tribunal posed questions to the parties, as provided in Arbitration Rule 32(3).

19. Subsequent to the hearing the Tribunal received a communication from the Claimant pointing to recent ICSID decisions on jurisdiction issued in cases involving Argentina, and an answer from Argentina raising objections as to the relevance of those decisions. The Tribunal informed the parties, through the Secretariat, on July 20, 2005 that *“it believes it is empowered to take judicial notice of such published decisions. However, in accordance with due process principles, the Tribunal is of the opinion that should it consider necessary for its decision on jurisdiction to specifically rely on points raised and discussed in those decisions, it should give an opportunity first to the parties to comment on those possibly relevant points. The Tribunal would accordingly do so should the situation envisaged occur.”*

20. The Tribunal has deliberated and considered thoroughly the parties’ written submissions on the question of jurisdiction and the oral arguments delivered in the course of the February 1, 2005 hearing. As indicated in paragraph 16 above, the consideration of the merits has been suspended until the issue of the Centre’s jurisdiction and the Tribunal’s competence has been decided by the Tribunal. Having considered the basic

facts of the dispute, the ICSID Convention and the 1991 Argentina–U.S. BIT, as well as the written and oral arguments of the parties’ representatives, the Tribunal has reached the following decision on the question of jurisdiction.

B. The Subject Matter of the Dispute

21. 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 its Memorial on the Merits of April 27, 2004, taking into account thereafter the statements made up to now by Argentina. Such presentation is made for the sole purpose of comprehension of 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.

22. As indicated by the Claimant in its briefs, Continental is a company incorporated in Illinois, in the U.S., and is a subsidiary of CNA Financial Inc. (CNA) “a leading financial services provider which has its head offices in Chicago.” Continental owns and controls CNA ART which “is one of Argentina’s leading providers of workers compensation insurance services.” CNA ART was incorporated in Argentina in 1996 under the name of “OMEGA Aseguradora de Riesgos del Trabajo SA.” In June 1997, Continental acquired a 70% interest in this company and increased its participation to practically 100% (precisely 99,995%) in December 2000. Thereupon Omega changes its name into CNA ART.

23. CNA ART, like other insurance companies, maintains a portfolio of investment securities in order to earn a return on its capital, consisting mainly of “low-risk assets such as cash deposit, treasury bills and government bonds.” Under Argentinean regulations of CNA’s insurance operation “such capital must be invested within Argentina, with minor exceptions.”

24. According to the Claimant, prior to March 2001, CNA investment portfolio was primarily in assets denominated in Argentine pesos, which were at the time fully convertible to U.S. dollars at a one to one exchange rate. In order to hedge the risk of devaluation, CNA's management decided to invest assets within Argentina in low risk U.S. denominated assets. As a result of various investment operations CNA held thereafter a portfolio of cash accounts, certificates of deposit, T-bills, Government bonds and Government loans (GGLs) for a U.S. value of \$100,998,000.

25. Continental indicates that "Commencing in December 2001, Argentina enacted a series of decrees and resolutions that destroyed the legal security of the assets held by CNA ART. These measures frustrated CNA ART's ability to hedge against the risk of the devaluation of the pesos." Claimant refers to "Argentina's restrictions on transfers out of its territory"; to "rescheduling of cash deposits;" to "pesification of U.S. dollar deposits;" to "pesification and defaults on its debt obligations" as well as to other measures. Continental indicates that due to these measures (collectively referred to as "Argentina's *Capital Control Regime*."), as an investor in Argentina, it has suffered an absolute loss in value of its assets of US\$ 45,456,000; in addition it is or was unable due to the "Bank Freeze" to access its investments in Argentina.

26. From a legal point of view, Continental asserts that it is protected under the BIT as "a U.S. investor with an investment in Argentina," its protected investment being namely CNA ART. Continental claims that, by the conduct and acts summarily referred to above, Argentina has failed to meet its existing bilateral investment treaty obligations owed to it as a U.S. investor with investment in Argentina. Continental claims that Argentina has violated, at least the following provisions of the BIT:

- (i) the requirement to observe obligations required by Art. II(2)(c) of the BIT;
- (ii) the requirement to provide treatment in accordance with international law, including fair and equitable treatment and full protection and security, as required by Art. II(2)(b) of the BIT, as well as MFN treatment under Art. II(2)(a);

- (iii) the requirement to permit all transfers relating to an investment without delay, set out in Art. V of the BIT; and
- (iv) the requirement to pay compensation upon acts of expropriation, set out in Art. IV of the BIT.

Claimant refers to international law as to the law applicable to its claims of breach of the BIT by Argentina, in conformity with Art. 42 of the ICSID Convention.

27. In view of the facts and arguments set out in its Memorial, the Claimant has submitted that “Owing to these violation of the BIT, singly and in combination, the Investor is entitled to compensation in an amount equal to the full amount of the damages suffered as a consequence.”

C. The objections of Argentina to jurisdiction

1. Generally

28. In the introductory part of its Memorial on Jurisdiction, Argentina takes issue with various statements of facts and the legal basis of Continental’s claims. Argentina objects to the characterization by the Claimant of the various measures referred to by same “as involving an alleged breach of the treaty.” Argentina points out generally that “The Guaranteed Loans, the LETEs and the Term Deposits in the different financial entities in Argentina are operations governed by the law in force in the Argentine Republic. The regulations applicable to those operations were changed in the context of the most serious financial, institutional and political crisis that took place in Argentine by the end of 2001” which made it “necessary to take urgent and exceptional measures” of various kinds involving the “restructuring of the financial banking and exchange markets.”

29. Specifically Argentina addresses in some details the various measures that affected (a) the *Argentine Government Guaranteed Loans*, in the context of the end of the

convertibility; (b) the restructuring of the financial system, as it brought to the conversion in pesos of deposits made originally in U.S. dollars, their rescheduling and the option to receive government bonds in pesos; as well as (c) the restructuring of defaulted debt.

30. Argentina further indicates that it is undisputed that “CNA ART is a corporation incorporated under Argentinean law and governed by the Argentine Law” which applies not only to its legal status and capacity but also in respect to its operation. Argentina submits that in the case submitted by Claimant “all the investment operations are only related to the Argentine Republic, both in respect of the parties involved and the place of performance of the contracts”. Argentina points out that the two agreements referred to by the Claimant were entered by CNA with CADISA (an Argentine company) and the Argentine subsidiary of Citicorp S.A. and were both subject to Argentine law and jurisdiction according to their terms. These were contracts without international connection subject to Argentine law including “the mandatory and non waivable laws passed by the Argentine Government during the economic emergency” that modified those contractual relationships.

31. Argentina concludes the general part of its Memorial on Jurisdiction by stressing that CNA, which had entered into an investment management agreement with another Argentine company to be performed in Argentina, is an Argentine corporation, notwithstanding the fact that its shares have been bought by an American corporation, namely the Claimant. As to CNA “the interest in shares has not the effect of changing its special law or changing the legal system applicable to its acts”. Argentina concludes generally that it has never given its consent to the international arbitral tribunals of ICSID as to disputes of the type submitted by Claimant. This is because, in Argentina’s view, the dispute involves claims between individuals and issues arising from the taking of business risks.

32. Before examining the specific objections of Argentina to jurisdiction, together with the counter arguments of Claimant, mention must be made that Claimant disputes the summarization of facts by Argentina as not accurate. The Claimant does not rebut in

detail the factual presentation by Argentina, since in its view “On a jurisdictional motion, the facts alleged in the Claimant’s Memorial are assumed to be true on a *prima facie* basis.” The Claimant elaborates therefore further on the factual aspect in its counter-memorial only in so far the facts are relevant in its view for jurisdictional purposes.

2. **Argentina’s specific objections to jurisdiction**

33. Argentina raises four objections to jurisdiction in its memorial on jurisdiction, which are being listed hereunder and are being thereafter specifically described and addressed together with the counter-arguments of the Claimant:

- (i) *“Argentina has not given its consent to submit to this arbitration;”*

- (ii) *“The dispute submitted by Claimant does not comply with the requirements of the Convention or those under the U.S.-Argentina BIT,” particularly as to (a) the existence of a legal dispute and as to (b) the requirement that the legal dispute arises directly out of an investment;*

- (iii) *“The claim is premature or not ripe;”*

- (iv) *“The Claimant lacks “jus standi” to submit the dispute to the Tribunal.*

a. First and second jurisdictional objections of Argentina:

- (i) *“Argentina has not given its consent to submit to this arbitration”*

- (ii) *“The dispute submitted by Claimant does not comply with the requirements of the Convention or those under the US-Argentina BIT”, particularly as to (a) the existence of a legal dispute and as to (b) the requirement that the legal dispute arises directly out of an investment*

i. Argentina's arguments

34. The first objection is presented by Argentina as an introduction to the second objection, so that it appears warranted to examine them jointly.

35. Under its first objection Argentina "insists on the need to examine the extent of the consent by the Argentine State to submit to the ICSID system" by examining, according to the principles of interpretation of treaties under international law, the relevant clauses of both the ICSID Convention and the Argentina-U.S. BIT.

36. Within its second objection Argentina points out that it gave its consent under the BIT "only for those cases that – complying with requirements of the Washington Convention are encompassed within the Treaty's scope of application." Argentina refers to three basic and essential requirements that restrict the jurisdiction of the arbitral tribunals pursuant to Art.25(1) of the ICSID Convention:

- a. the existence of a legal dispute
- b. directly arising out of an investment
- c. between a Contracting State and a National of another Contracting State

37. As to requirement (a) Argentina submits, based also on *travaux préparatoires*, that the dispute must be about "rights and obligations," about legal titles and not some "undesirable consequences" that have not as the proximate cause the host State's conduct in respect of its investment. In Argentina's view in this case the Claimant is not submitting a legal claim within those requirements because it "is not the holder of the legal rights that it alleged have been breached by the Argentine Republic."

38. As to requirement (b) Argentina submits that the legal dispute must arise directly out of the investment in that "the measure or measures alleged as in violation of the U.S.-Argentina BIT must be *specifically* addressed to the investments." Argentina considers

that the word “directly” in Art. 25(1) “may also be translated as specifically....The measure must be addressed to the investment. Universal measures addressed to the general public cannot be considered by ICSID Tribunals. That would be to judge a public policy and not a legal conflict.”

39. Argentina considers accordingly that in order that jurisdiction be established “Continental must show which specific obligations, vis a vis the claimant were breached by Argentina through its devaluation of the Peso, the establishment of a new exchange rate and the temporary pesification of the tariffs.” As a support to its approach, Argentina relies on the recent NAFTA arbitration awards on jurisdiction “*Methanex v. U.S.A.*” and “*GAMI v. Mexico*” to the effect that it is not enough that the measure “affects” the investor or its investment. Argentina concludes that Continental has not been able to prove, as is required in Argentina’s view also for jurisdictional purposes, “a direct proximate and immediate connection between the measure its alleged investment.”

40. In Argentina’s view the only position that the Claimant is able to assert is its position as shareholder of CNA. According to Argentina, however, this position does not enable Continental to claim in the circumstances impairment to its “legal rights born out of the ownership of shares” due to Argentina’s measures. Argentina submits further that also the damages suffered by the investor must be direct, that is grounded on an action that “specifically impairs a legal right born out of the ownership of the shares.” This requirement that those damages result from an interference with a right and not with a mere interest of the shareholders, be they minority or majority shareholders, is not met either in the present case, according to Argentina.

ii. The Claimant’s counterarguments:

41. The Claimant argues generally in the first place that the “Proper Approach to a Jurisdictional Challenge” requires that the Tribunal must determine whether the pleadings have disclosed a *prima facie claim*. The Claimant submits that for this purpose the Tribunal must accept the Claimant’s description of the facts as true referring to

international case law in support of its position. The Claimant points out that, accordingly, Argentina's attempt to justify its measures as necessary to respond to its economic crisis is irrelevant at the jurisdictional phase. The Claimant also objects to Argentina's description of the facts alleged by Claimant and Argentina's introduction of new unsubstantiated facts as improper for jurisdictional purposes and invites the Tribunal to disregard them.

42. The Claimant maintains that the following facts it has alleged are sufficient to establish jurisdiction:

- Continental is a U.S. juridical person;
- Continental owns 99.995% of the shares of CNA;
- CNA owned a portfolio of low-risk assets in Argentina;
- Argentina enacted a series of measures that directly interfered with the legal security of CNA assets, which violated specific commitments to Continental and CNA in treaties, legislation and contracts.

43. To clarify its assertions that "the measures taken by Argentina had a direct legal connection to CNA ART and violated specific commitments in treaties, legislation and contracts," the Claimant sets forth a table summarizing Argentina's "Measures Violating Specific Legal Commitments" and correlating each of them to the "Direct Legal Connection to CNA ART" and to the "Legal Commitment violated", specifying their respective source, in contract, legislation and/or the BIT.

44. Specifically, in respect of the first and second jurisdictional objections of Argentina the Claimant argues as follows.

45. The dispute is a "legal dispute" because it arises from a conflict of rights rather than a conflict of interests. More specifically, according to the Claimant, the dispute at issue "concerns the different views of the Claimant and Argentina on questions of legal rights and obligations in connection with the existence of an investment, and the effects

this may have on Argentina's obligations to honour debt instruments, to preserve the Claimant's property rights in the cash deposits and its right under the BIT to transfer capital". As to the argument of Argentina that the claim concerns the commercial relationship between CNA and CADISA, the Claimant indicates that the dispute does not arise from that relationship, so that "simply because a dispute involves commercial relationships does not preclude it from also concerning legal rights based on treaty...and therefore being a legal dispute."

46. The Claimant objects to Argentina's approach. In its view, the requirement that a dispute must arise "directly" from an investment does not imply that the measure challenged must be "specifically" addressed at the business concerned. The Claimant submits that for jurisdictional purposes it is enough – as held in the *CMS* decision on jurisdiction - that the impugned measures *prima facie* adversely affect the Claimant's investment, so that the Tribunal is competent to examine whether those measures are in breach of specific commitments given to the investor.

47. Further more the Claimant states that the impugned measures need not be "specifically directed against investments." The Claimant points out that the NAFTA precedents referred to by Argentina are irrelevant, both because the text of Art. 1101(1) of NAFTA is worded differently from that of Art.25(1) of the ICSID Convention, and because in the *Methanex* case the measure at issue did not concern an investment of said company but affected the operations of other companies to which Methanex supplied its products. In this case, by contrast, Claimant points out that "Argentina's measures affected the legal rights of Continental and CNA ART by interfering with commitments given to them in contracts, legislation and the BIT." In any case, according to the Claimant, there is no requirement in the NAFTA either, as interpreted and applied in various disputes, that the measure be specifically directed at a particular investment.

48. As to the argument of Argentina that "the measure must affect assets owned by the investor and not just by the investment," the Claimant addresses it when discussing Argentina's objection to jurisdiction as to the *jus standi* of the Claimant. The Claimant

believes that Argentina “recharacterizes this issue as one on Continental’s ‘standing’ to bring the claim.”

b. Third jurisdictional objection of Argentina:

(iii) The Company may not file a claim because the claim is premature or not ripe.

49. Argentina considers that Continental’s claim is not ripe – in legal terms and not just from a policy point of view – because the alleged damages fluctuates constantly since Argentina’s negotiations with foreign creditors are not yet over; therefore “A claim on the indirect consequences that may have affected foreign shareholders of Argentine corporations can hardly be thought of.” Moreover, according to Argentina this would be contrary to a proper interpretation of the BIT: “Should it be admitted that this is applicable to the contractual relations governed by local law and submitted to the jurisdiction of the local courts, the scope of application of the BIT would be unlawfully extended.”

50. The Claimant rejects Argentina’s argument that the claim is not ripe. The Claimant recalls that in a previous decision that Tribunal has stated that the perspective of negotiations between Argentine authorities and a company owned by foreign investors and/or those investors are immaterial in order to determine the jurisdiction of the ICSID tribunal. The Claimant states that the principles relied to by Argentina in support of this objection do not affect the jurisdiction of the present Tribunal, which depends on the claim satisfying the requirements of Art.25 of the ICSID Convention and of the BIT.

c. Fourth jurisdictional objection of Argentina

(iv) Continental’s lack of action to submit a dispute to this Tribunal: the “Jus Standi”

i. Argentina's arguments

51. Argentina submits that the present dispute does not fall within the scope of the application of the BIT for different reasons, all related to the definition of "investment" suggested by Argentina as being the correct one under that treaty. It is Argentina's view that the Claimant "has presented a claim founded on the loss in value of its investment represented by the acquisition of shares in an Argentinean corporation – CNA ART" and that the foreign investor has alleged "that its interests have been impaired by commercial and financial decisions taken in the framework of a shares investment business made within Argentina". Argentina submits further that the purchase of shares in that Argentine corporation is a business subject to Argentina's law, which is also the law applicable to the interest in those shares and more generally to the existing legal relationship between the Claimant and CNA. In view of the above Argentina concludes that "the claimant has not proved that the Argentine State has issued any measure addressed directly to that acquisition of shares."

52. Argentina further indicates that since the investment of the Claimant consists in shares of an Argentine company, while the measures have affected the Argentinean corporation of which the Claimant is a shareholder, the lack of the required relationship between the dispute brought and the investment in accordance with the BIT result in a lack of jurisdiction on the "indirect claim" which is the subject matter of this dispute. This is because the situation here is that of a shareholder making a claim in connection to assets or circumstances related to the entity where it has interests, in disregard therefore of the acknowledged principle that the partners and the corporation are different legal persons. Argentina concludes that while the definitions of investment in the BIT are broad, CNA - whose interests have been affected - "does not qualify either as an investor or as an investment pursuant to the mentioned international instrument."

ii. The Claimant's counterarguments

53. The Claimant considers that it is “now well settled that an investor may bring an investor-state claim under the BIT for measures interfering with the legal rights of its Argentine subsidiary and not just for measures affecting the investor’s shares in the subsidiary.” In support of its position the Claimant refers, with extensive quotes, to various decisions of ICSID tribunals, to the effect that there is no bar in current international law, including under the ICSID Convention and the Argentina-U.S. BIT, to the concept of allowing claims by shareholders independently from those of the corporation concerned, even if those shareholders are minority or non controlling shareholders. The Claimant also recalls that, some years after *Barcelona Traction* (relied upon by Argentina), the ICJ in the *Elsi* case accepted the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant’s State legislation.

54. The Claimant refers to various decisions recognizing that the ICSID Convention “looks to the real interests behind an investment.” These decisions rejected Argentina’s argument that, in a case of an investment in shares in an Argentinean company, claims can be only made in respect of measures affecting the shares *qua* shares , as in the event of expropriation of the shares or other measures affecting directly the economic rights of the shareholders. The Claimant concludes that “the ability of shareholders to claim for damage suffered by the company in which they hold shares,” in any case when the protected investor is a controlling shareholder (as here), is well settled in jurisprudence and cannot be open to challenges at the jurisdictional stage.

d. Other jurisdictional arguments by Argentina

55. Argentina raises also a different argument in its Memorial on Jurisdiction, namely relating to the Most Favored Nation clause (MFN) referred to by the Claimant in its briefs. Argentina challenges the reference made to this standard by the Claimant. Argentina submits that, based on the intention of the parties and as held in various precedents, the MFN clause in the Argentina-U.S. BIT is inapplicable to jurisdictional

issues. In this respect Argentina stresses that in its view the *Maffezzini* decision rendered under the Argentina–Spain BIT has no precedential value here.

56. Continental points out in turn that it has invoked the MFN clause of the Argentina-U.S. BIT (Art. II(1)) in relation to the treatment granted to Chilean investors as to the remittance of capital transfers under the Argentina-Chile BIT, since the latter appears to grant a better treatment. The Claimant points out that this argument pertains in any case to the merits and that it does not seek to use Article II(1) of the Argentina – U.S. BIT in order to enjoy the better *dispute resolution provisions* in another treaty. Therefore the Claimant “does not rely on the aspects of the *Maffezzini* decision that Argentina impugns.” The proper interpretation of the MFN clause in the BIT is therefore not a jurisdictional issue.

D. Consideration by the Tribunal on the Objections to Jurisdiction

1. In general

57. As announced by the President of the Tribunal at the end of the hearing on jurisdiction and in conformity with Art. 31 of the ICSID Convention and Arbitration Rule 41, the Tribunal is called 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 touching upon the merits, the Tribunal will consider hereafter only those that are relevant to its decision regarding the objections of the Respondent to jurisdiction.

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

- a. that the dispute is between Argentina (as a contracting party to ICSID and the BIT) and a national of the U.S.A., as defined in the BIT;
- b. that the dispute is a “legal” dispute (Art. 25 (1) ICSID Convention);
- c. that said legal dispute arises “directly” out of an investment (Art. 25(1) ICSID Convention);
- d. that said dispute is “an investment dispute” within the meaning of Art. VII of the BIT, namely “arising out or relating to...(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment;” and
- e. that such investment is of the type covered under the BIT in accordance with the definition of “investment” found in Art.I(1)(a) of the BIT.

2. The proper methodology to resolve the jurisdictional challenge

59. Before starting the above examination on the basis of the parties’ documentation and arguments, 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 to make in order to ascertain its jurisdiction in the present case.

60. In order to determine its jurisdiction, the Tribunal must consider whether the dispute, as presented by the Claimant, is *prima facie*, that is at a summary examination, a dispute that falls generally within the jurisdiction of ICSID and specifically within that of an ICSID Tribunal established to decide a dispute between a U.S. investor and Argentina under the BIT. The requirements of a *prima facie* examination for this purpose have been elucidated by a series of international cases². The object of the investigation is to ascertain whether the claim, as presented by the Claimant, meets the jurisdictional requirements, both as to the *factual subject matter* at issue, as to the *legal norms* referred

² A detailed examination of international cases can be found in the Decision on Jurisdiction by the ICSID Tribunal in *Impregilo v. Pakistan* ICSID Case No. ARB/03/3, of April 22, 2005, para. 237-253. Available at <http://www.worldbank.org/icsid/cases/impregilo-decision.pdf>

to as applicable and having been allegedly breached, and as to the *relief* sought.³ For this purpose the presentation of the claim as set forth by the Claimant is decisive. The investigation must not be aimed at determining whether the claim is well founded, but whether the Tribunal is competent to pass upon it.

61. As to the *facts of the case*, the presentation of the Claimant is fundamental: it must be assumed that the Claimant would be able to prove to the Tribunal satisfaction in the merit phase the facts that it invokes in support of its claim. This does not mean necessarily 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 at a preliminary scrutiny, so that the Tribunal would not be competent to address the subject matter of the dispute as properly determined. In such an instance the Tribunal would have to look to the contrary evidence supplied by the Respondent and should dismiss the case if it found such evidence convincing at a summary exam.

62. In the present dispute, however, there does not seem to be any basic disagreement between the parties as to the factual elements of the case, as far as this may be relevant to identify the ambit of the Tribunal’s jurisdiction in relation to the dispute. Argentina does not basically dispute that its measures, referred to by the Claimant (notably the *pesification* of assets denominated in U.S. dollars), have had generally the factual impact described by Continental on the investment portfolio held by CNA, the Argentine subsidiary of the latter. The Tribunal recognizes the arguments of Argentina that CNA had entered into certain contracts with other Argentine companies concerning the management of some of its assets, and that Argentine law is applicable both to those contracts and to CNA as a company incorporated in Argentina. The Tribunal considers however that these arguments pertain to the merit of the case and do not affect its jurisdiction.

³ This corresponds to the traditional Roman law description of the elements of a claim: *factum, causa petendi* and *petitum*.

63. As to the *legal foundation* of the case, in accordance with accepted judicial practice, the Tribunal must evaluate whether those facts, when established, could possibly give rise to the Treaty breaches that the Claimant alleges, and which the Tribunal is competent to pass upon⁴. In other words those facts, if proved to be true, must be “capable” of falling within the provision of the BIT and of having provoked the alleged breach⁵. It is of course a question for the merits whether the alleged facts constitute breaches of the BIT for which the Respondent must be held liable.

64. As to the *relief* sought, there is no challenge here as to the admissibility of the request for relief that the Claimant has sought against and from Argentina (notably a declaratory judgment concerning various BIT’s violations and the adjudication of alleged damages stemming therefrom). With these considerations in mind the Tribunal will turn to examine the jurisdictional basis of the claim challenged by Argentina.

65. The Tribunal wishes immediately to dispose of the first requirement listed above, namely that concerning the parties. Argentina does not dispute that the Claimant, Continental Casualty Company, is a juridical person having the nationality of another Contracting State in conformity with Art. 25(1)(a) of the ICSID Convention. More specifically, Argentina does not dispute that the Claimant meets moreover the requirements of being a U.S. company under the BIT.

3. The requirement that the dispute be of a “legal” nature

66. Both parties acknowledge that, pursuant to Art. 25(1) of the ICSID Convention, the dispute must have a “legal” character. Indeed judicial organs can by their very nature only pass upon disputes which involve the attribution between the parties of rights and obligations, stemming from binding norms and instruments. Such disputes must be resolved by the proper interpretation and application of those norms and other relevant

⁴ See ICJ, *Oil Platforms* case, ICJ Reports 1996, p. 806, para. 16; see also the separate Opinion of Judge Higgins, at para 32 of her separate Opinion; *SGS v Philippines (Jurisdiction)* ICSID Case No. ARB/02/6, ICSID Reports , p. 518, para 157; also available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

⁵ ICJ, *Legality of the Use of Force* (Yugoslavia v. Italy) ICJ Reports 1999-1, para. 25.

rules to the facts of the case⁶. This is confirmed within the ICSID system by Art. 42 of the ICSID Convention that indicates the different “rules of law” in accordance to which the Tribunal “shall decide” a dispute.

67. In this case, the Claimant invokes specific legal acts and provisions as the foundation of its claim: it indicates that certain measures by Argentina have affected its legal rights stemming from contracts, legislation and the BIT. The Claimant further indicates specific provisions of the BIT granting various types of legal protection to its investments in Argentina, that in its view have been breached by those measures.

68. The Tribunal considers as crucial for reaching its conclusions the reference by Continental to specific provisions of the BIT as the legal foundation of its claim. This is because the alleged violation of domestic laws and contracts by Argentina would not give rise *per se* to an international claim cognizable by the present ICSID Tribunal in the absence of an allegation that the BIT has been thereby breached by Argentina. It will be of course for the merits to determine whether such breaches have indeed taken place to the prejudice of the protection to which the Claimant, as a U.S. investor, is entitled under the treaty⁷.

69. In the Tribunal’s view, these indications set forth in detail by the Claimant allow the Tribunal to conclude that the Claimant has made legal claims against Argentina, so that the Tribunal is presented with a legal dispute within its jurisdiction. The Tribunal does not find support on the face of the claim for the contrary argument that the intervention of ICSID is being requested here for “mere commercial or political disputes.”⁸

⁶ A possible exception is when the parties expressly confer to the Tribunal the power to decide “ex aequo et bono.”

⁷ The observations made in this paragraph are also relevant in order to conclude that the present dispute is “an investment dispute” within the meaning of Art.VII(c) of the BIT; cfr. above para.58(d).

⁸ We find therefore that this dispute fits the indications of the “Report of the Executive Directors on the Convention, para. 26:” 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 the breach of a legal obligation.”

4. The requirement that the dispute arises “directly” out of an investment.

70. We turn now to Argentina’s objection that its measures are not “specifically” addressed against Continental’s investments. Argentina bases this objection on the premise that by referring to “any legal dispute arising directly out of an investment,” Art.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 an investment. In the present case, according to Argentina, at issue are general measures, taken by Argentina in case of emergency and affecting all the sectors of its economy. Argentina concludes that since “The measures were not intended to have any specific effect on the claimant” its claim is not amenable to the jurisdiction of ICSID.

71. The Tribunal does not share the argument of Argentina nor its conclusions for the following reasons. First of all, the Tribunal does not consider that from a textual point of view the term “specific” can be considered as a synonym of “directly.” A measure of the host State can affect directly an investment, 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 at that investment.

72. International practice indeed shows that many, if not most, 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 of direct arbitration, have arisen from general measures taken by host States, that affected directly those investments, without necessarily being specifically aimed at them. Were this not the case, 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.

73. The requirement that the dispute arises directly from an investment is surely met when, as in the present case, the Claimant challenges some measures of the host State

that affected directly the investment, in that they were applicable and were applied to such an investment. There is no doubt that the measures of Argentina described by the Claimant brought about, immediately and directly, an unfavorable change of the legal and economic regime applicable to the assets in Argentina that the Continental indicates represented its investment in that country, in breach – according to Continental - to Argentina’s obligations under the BIT.

74. It is important to clarify that the subject matter of the dispute is not those general measures of Argentina *per se*, nor can the Tribunal 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, pursuant to an objective exercise of its competence under the ICSID Convention and the BIT, to determine whether any specific measures, “or measures of general economic policy having a bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts”⁹. “What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments.”¹⁰

75. Argentina relies to the contrary on the decision on jurisdiction in the well known *Methanex* case, rendered under Art. 1101(1) of the NAFTA¹¹. 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 to supply to the producers of that additive a component it manufactured in the U.S.A. (methanol), did not present a measure “relating to” a protected investor or to an investment as required by Art.1101(1). The Methanex tribunal held that the language of Art. 1101(1) required that “there must be a legally significant connection between the

⁹ *CMS Gas Transmission Co v Argentina*, ICSID Case No. ARB 01/12, Decision on Jurisdiction, December 8, 2003, para. 33. Available at http://www.worldbank.org/icsid/cases/CMS_Decision_english.pdf

¹⁰ *Ibid*, para. 27, referred to by Argentina in its memorial on Jurisdiction.

¹¹ *Methanex Corp. v. U.S.A.*, Decision on Jurisdiction, August 7, 2002, para. 127-139 (this decision on jurisdiction has since been applied in the Final Award of August 3, 2005).

measure and the investor or the investment”¹². It concluded that since the measure did not relate to methanol or Methanex it had no jurisdiction on the claim: Methanex had not alleged facts “establishing a legally significant connection between the U.S. measures, Methanex and its investments.”¹³. Irrespective of the question whether the term “relating to,” used by the NAFTA, can be considered as equivalent to the term “directly arising from” found in the ICSID Convention, 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 this direct impact cannot be denied, to the effect that the jurisdictional requirement pertaining to “directly” is satisfied.

5. The nature of the investment affected by Argentina’s measure (*ius standi* of the Claimant).

76. The Tribunal recalls that Argentina considers that the Claimant, as a U.S. investor having acquired the shares of an Argentinean company (CNA ART), has no *locus standi* to challenge measures, as those at issue, that do not legally affect its position as shareholder of the said company. Argentina concludes that the Claimant has submitted an indirect claim as shareholder for damages suffered by the company that represents its investment. This would be, in Argentina’s view, an inadmissible “indirect” claim.

77. The question whether under a BIT, such as the one at issue here, a controlling or even a minority foreign shareholder can bring a suit for the damages suffered by the local company, in which it hold shares, caused by expropriation or other measures affecting directly the economic rights of the shareholders, is a key legal issue in many disputes brought under BITs.

¹² *Ibid*, para. 139.

¹³ *Ibid*, para. 150.

78. The starting point must be therefore the very BIT between Argentina and the U.S. According to Art. I(1)(a) “investment” means every kind of investment in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other party....and includes without limitation: (ii) a company or shares of stock or other interests in a company or interests in the assets thereof.” Not only are investments, as defined above, protected under the substantive obligations undertaken by the two Contracting Parties in the BIT for the benefit of their investors. The BIT includes also a definition of “associated activities” at Art. I(1)(e) which “include the organization, control, operation, maintenance and disposition of companies.” These associated activities are subject to the national and most-favored-nation treatments provided for in Art. II(1). Moreover, according to Art. II(2)(b) “Neither Party shall in any way impair by arbitrary or discriminatory measures the management, use, enjoyment, acquisition, or disposal of investments.”

79. These provisions warrant an interpretation of the BIT according to which, in case of an acquisition by an investor of one Contracting Party of the entire capital of a company of the other Party, the treaty protection is not limited to the free enjoyment of the shares, that is the exercise of the rights inherent to the position as a shareholder, specifically a controlling or sole shareholder. It also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the investment.

80. This interpretation is supported by the object and purpose of the BIT. As results from its very title, the BIT is a Treaty “concerning the Reciprocal Encouragement and Protection of Investment.” In the Preamble, the Parties recognize that “agreement upon the treatment to be accorded to such investment (“by nationals and companies of one Party in the territory of the other Party”) will stimulate the flow of private capital and the economic development of the Parties,” and agree that “fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum use of economic resources.” Disregard of the actual treatment of the company representing the investment, by removing it from the BIT coverage would therefore

require a restrictive interpretation of the BIT's terms contrary to its object and purpose. Such an interpretation would moreover render most of its provisions ineffective and useless for investors, especially those that can be defined, as Continental in this case, as having made a "direct investment" in and through the local company that they have established or acquired.

81. It is widely recognized that "Traditionally, home countries have relied on BITs as a mechanism to ensure protection for their investments in developing countries, while developing countries have entered into BITs as part of their strategies to attract foreign direct investment (FDI)"¹⁴. An investment is considered direct when the investor's share of ownership is sufficient to allow control of the company, while an investment that provides the investor with a return, but not control over the company, generally is considered portfolio investment. Because an investor may be able to control a company with less than the majority of the stock, the degree of ownership required for investment to be regarded as direct may vary with the circumstances. In some instances, investment may be defined as direct if it is to be of lasting duration."¹⁵ Besides a contribution of capital resources, FDI entails usually a transfer of managerial skills, as well as of proprietary commercial and technical know-how. Although portfolio investments are not excluded from the coverage of a BIT such as the one at issue, the specific listing in it of various "associated activities", which typically pertain to FDI, indicates that in case of acquisition of a company established in the other country the scope of its application is not merely limited to the ownerships of the shares. The absence in the Argentina-U.S. BIT of a detailed asset-based definition of investment (as found in Art. 1139 of the NAFTA) does not limit therefore the broad coverage of the BIT.

82. Reliance on the decision of the International Court of Justice (ICJ) in the *Barcelona Traction* case in 1970 to deny the possibility that action taken by the host

¹⁴ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, United Nations 1998, at p.1. See also *ibid*, p.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."

¹⁵ UNCTAD, IIA Series, *Scope and Definition*, United Nations 1999, p.8; reprinted in UNCTAD, *International Investment Agreements: Key Issues*; United Nations 2004, Ch.3, *Scope and Definitions*, p.115.,

country against the activities and assets of a local company fully owned or controlled by foreign investors may constitute a breach of the BIT would be therefore misplaced, since 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 had to treaty stipulations. The Court recalled that “Indeed, whether in the form of multilateral or bilateral treaties between States, or that in agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments.”¹⁶ The impressive development of BIT has been a response to the uncertainty of customary international law relating to foreign investment.

83. The Tribunal is comforted in its holding by the decisions of several ICSID arbitral tribunals in disputes involving Argentina as respondent under the same U.S.-Argentina BIT which constitutes the basis of jurisdiction in the present case. These tribunals have ruled that their jurisdiction extends to examining whether measures, taken by Argentina in connection with its economic crisis of 2001, and legally and economically affecting directly companies controlled, in whole or in part, by U.S. investors, constitute a breach of the protection afforded to the latter in the BIT.

84. Thus, the decisions on jurisdiction in the *Lanco* and *CMS* cases have held that the term investment in the Argentina-U.S. BIT is “very broad and allows for many meanings”¹⁷. In the *CMS* decision on jurisdiction the arbitral tribunal rejected the interpretation suggested by Argentina according to which in case of an investment in shares only claims against measures affecting the shares as such are allowed, not claims connected to damages suffered by the corporate entity. The arbitral tribunal concluded to

¹⁶ ICJ Reports (1970) para. 88-89. In the subsequent *Elsi* case 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 corporations of either party the right to “organize, 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), para. 68 ff. The relevance of this decision for the interpretation of BITs has been highlighted by the late Dr. F.A. Mann in his comment *Foreign Investment in the International Court of Justice*, American J. Int. Law, 86, p. 92- 102.

¹⁷ *Lanco International Inc. v. Argentina*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, Dec. 8, 1998, at para. 10; *CMS v. Argentina cit.*, Decision on Jurisdiction cit. at para. 57, 59. Both companies held a minority shareholding in the relevant Argentine companies.

the contrary that jurisdiction could be established under the terms of the specific provisions of the treaty “since there is a direct right of shareholders”¹⁸. Those tribunals found that it was immaterial for jurisdictional purposes to rely on the additional factual circumstances that those claimants were moreover a party to a concession or a license agreement.

85. The *ius standi* of U.S. corporate investors in Argentinean companies under the Argentina–U.S. BIT has been further affirmed in the *Azurix* decision on jurisdiction, since “Azurix is the investor that made the investment through indirectly owned and controlled subsidiaries”¹⁹. In the decision on jurisdiction in the *Enron* case, the arbitral tribunal based itself on a similar reasoning as to shareholder’s rights under the BIT. It concluded that “Whether the locally incorporated company may further claim for the violation of its rights under contracts, licenses, or other instruments, does not affect the direct right of action of foreign shareholders under the Bilateral Investment Treaty for protecting their interest in the qualifying investment.”²⁰

86. The Tribunal concludes therefore that it has jurisdiction to pass upon the present dispute, even assuming that the measures taken by Argentina and challenged by Continental as having breached its treaty rights were addressed and affected primarily or essentially the assets, investments, activities of the wholly owned subsidiary of Continental in Argentina.

87. In so deciding the Tribunal does not deny the relevance of the separate legal personality of the U.S. investor on the one hand, which is a U.S. corporation, and of its subsidiary in Argentina on the other hand, namely CNA ART, a company established and organized under the laws of Argentina, and which represents the investment of Continental. These two entities are clearly separate legal entities having different, though

¹⁸ *CMS Decision, ibid.* at para. 65, 68.

¹⁹ *Azurix Corp. v. Argentina*, ICSID Case No., ARB/01/12, Decision on Jurisdiction, Dec. 8, 2003, at para. 74, available at <http://www.worldbank.org/icsid/cases/azurix-decision-en.pdf>

²⁰ *Enron Corp. and Ponderosa Asset, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan.14, 2004, at para. 49.

inter-connected rights relevant to the present dispute. CNA may have claims against the authorities of Argentina under local law, be they based on constitutional, civil or administrative legislation, for damages suffered as a consequence of actions taken by those authorities in breach of applicable legal provisions of such law. Continental, on the other hand, invokes here treaty rights concerning its investment in Argentina protected by the BIT. The claims of Continental cannot therefore be defined as indirect claims (or “derivative” claims), as if Continental was claiming on behalf or in lieu of CNA in respect of rights granted to the latter by the laws of Argentina. It is therefore irrelevant that such claims would be inadmissible under the laws of Argentina and that they would not be amenable in any case to the jurisdiction of an ICSID arbitral tribunal.

88. In this respect, the Tribunal recalls the important statement of the ICJ in the *Elsi* case: “Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in municipal law and what is unlawful in the municipal law may be fully innocent of violation of a treaty provision.”²¹

89. This principle underlines another dimension of the distinction between the foreign investor and the local company in and through which the investment was made: not any and all action by the host State that causes a damage or prejudice to the assets of the local company automatically and necessarily represents an indemnifiable treaty breach. Generally speaking, this requires that:

- a. the prejudice to those assets amount at the same time, quality or quantity wise, to an injury caused to the very investment of the foreign investor; and
- b. the action be in breach of a treaty obligation owed by the host State to the foreign investor under the BIT.

²¹ *Elsi* case cit. at para.73. See also to the same effect Art.3 of the Articles on Responsibility of States for Internationally Wrongful Acts, annexed to the UN General Assembly Resolution 56/83 of 12 Dec. 2001 “Responsibility of States for Internationally wrongful acts.”

90. As to the latter requirement, the Claimant has several times indicated in its counter-memorial on jurisdiction that the measures taken by Argentina “violated specific commitments in treaties, legislation and contracts.”²² More specifically the Claimant has stated that “In addition to the violation of provisions of the BIT, Argentina’s measures violated specific contractual commitments regarding payment, maturity and security interests made by Argentina to CNA ART in GGLs and LETEs”. The Claimant also stated that Argentina’s pesification and reprogramming commitments should “be assessed against the specific commitments made by Argentina in the Intangibility Law.”²³ In view of the principle recalled in para. 88 above, it should be clear that it is the concurrent denunciation of an alleged breach of a legal commitment stemming from the BIT that brings these actions or measures within the purview of our jurisdiction, not the alleged breach of contractual or legislative provisions *per se*.

6. Alleged lack of jurisdiction because the claim is premature or “not ripe”

91. Some of the arguments made by Argentina in its third objection dealing with the argument that the claim is premature relate to the relationship between the local company and its foreign shareholders. They have been dealt with above. The Tribunal is unable to follow Argentina as to the other arguments it makes to support its objection, both as to its content and as to its relevance for jurisdictional purposes.

92. The claim of Continental cannot be considered to be without content because the measures challenged as being in breach of the BIT have not yet been enacted (so that they would be non-existent) or have not yet been applied. This is clearly not the case here. Nor does the possible uncertainty as to the final amount of the damages represent a bar to jurisdiction, especially since the Claimant has petitioned i.a. for a declaratory judgment.

²² Claimant’s counter-memorial, p.5-6.

²³ *Ibid.* para. 10 and 13.

93. Nor does the existence of ongoing negotiations with local companies or the foreign shareholders (which are however disputed by the Claimant) represent a bar to the introduction or furtherance of an international claim such as the one at issue. Negotiations in view of a settlement are often carried on by the parties to a dispute, domestically and internationally, between private parties, between governments and between governments and foreign investors, while the dispute is pending before a court of law or an international or arbitral tribunal. This situation does not undermine the jurisdiction of those judicial or arbitral bodies, except if the parties jointly decide to suspend proceedings or to intervene otherwise on the course of the pending dispute. Since this is clearly not the situation given here, the Tribunal has no other choice than to reject this objection as being without foundation.

7. Other jurisdictional objections

94. As mentioned before, Argentina has raised an argument based on the Most-Favored-Nation clause in the context of its memorial on jurisdiction. Specifically Argentina has criticized the *Maffezini* decision on jurisdiction whereby a jurisdictional requirement provided for in the Argentina-Spain BIT was superseded by a different provision in another BIT incorporated by virtue of the MFN clause of the Argentina-Spain BIT.²⁴ Since however the Argentina-U.S. BIT contains no such requirement, nor has any such argument been made here by the Claimant, the Tribunal finds those arguments of no relevance to resolve the jurisdictional objections raised by Argentina. The Claimant has relied on the MFN clause in its written submissions on the MFN clause, but for a different purpose, namely in respect to the substantive obligations concerning the treatment of its investments. This is an issue for the merits with no relevance at the present jurisdictional phase.

²⁴ *Emilio Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, Jan. 25, 2000. Available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf

Decision

For the reasons stated above the Tribunal concludes that all jurisdictional requirements laid down 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. The Order necessary for the continuation of the proceedings pursuant to Arbitration Rule 41(4) and in accordance with the Order made for such a case at the first hearing is being handed down separately.

Giorgio Sacerdoti
President of the Tribunal

Michell Nader
Arbitrator

V.V.Veeder
Arbitrator