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Jurisdiction – Dispute arising directly out of an investment – ICSID Convention, Article 25(1) – Whether measures affect investment directly even if not specifically aimed at investment

Foreign investment – Definition of investment – Investment through acquisition of shares – Whether licences and guarantees held by consortium an investment of shareholder – Whether consortium in which shareholder has shares an investment – Full control of shareholding – Separate legal personalities and rights and obligations of investor and consortium – Whether BIT protection limited to shareholding – Whether claims invoked on behalf of consortium

Foreign investment – Definition of investment – Licences and guarantees held by an entity other than investor – Additional circumstances in considering licences and guarantees as investment

Jurisdiction – Contract claims as opposed to treaty claims – Recourse to dispute settlement a matter of investor's right – Whether existence of contractual remedies limit such right – Effect of exclusive choice of forum clause in contract – Whether claims constitute breach of contract

Jurisdiction – Most-favoured-nation (MFN) clause – Requirement that claims be first submitted to domestic courts – Whether MFN clause applies to dispute settlement – Position of a party on the scope of MFN clause expressed in litigation and "subsequent practice" within the meaning of the Vienna Convention on the Law of Treaties

Jurisdiction – Damages, demonstration of at jurisdictional phase

Interpretation – Vienna Convention on the Law of Treaties, Article 31.3(b) – Whether pleading a certain interpretation of a treaty provision constitutes "subsequent practice"

TELEFÓNICA SA *v.* ARGENTINE REPUBLIC[1]

(ICSID Case No. ARB/03/20)

Decision on Objections to Jurisdiction. 25 *May* 2006

(*Arbitration Tribunal*: Sacerdoti, *President*; Brower and Siqueiros, *Members*)

[1] The Claimant was represented by Dr Guido Santiago Tawil. The Respondent was represented by Dr Osvaldo César Guglielmino, Dr Gabriel Bottini, Mr Florencio Travieso and Mr Ariel Martins.

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SUMMARY: *The facts*: — On 12 May 2003, Telefónica SA ("Telefónica" or "the Claimant"), a corporation constituted under the laws of the Kingdom of Spain ("Spain"), filed a request for arbitration against the Argentine Republic ("Argentina" or "the Respondent") under the bilateral investment treaty between Spain and Argentina ("the BIT").[2]

Following the enactment of the 1989 State Reform Law in Argentina, the State-owned telephone company, Empresa Nacional de Telecomunicaciones ("ENTel"), was privatized and its assets were transferred to four corporations created on the basis of two decrees adopted on 5 January 1990. A consortium formed by Telefónica International Holding BV (a fully owned subsidiary of the Claimant) ("Telefónica") and two other companies was awarded a 60 per cent shareholding (later increased to almost 100 per cent) in Sociedad Licenciataria Sur Sociedad Anónima. On 8 November 1990, the transfer agreement relating to the above shares ("the Transfer Agreement") was approved by Argentina's Decree 2332/90. The name of the consortium was later changed to Telefónica de Argentina SA ("TASA").

The new operators were granted a licence to provide basic telephone services. Licences could only be amended by the State when the licence itself so provided or with the consent of the licensee, and they could be terminated only in the case of breach of their conditions by the licensees. Termination by the State for reasons of public convenience was expressly excluded. TASA's licence envisaged a system to provide compensation in the event that the authorities ordered a price or tariff freezing that would not be in line with the tariff regime ("the Licence Tariff Regime") covered by the licence.

The tariffs method of calculation had been fixed in Gold Francs until 28 November 1991, when the Licence Tariff Regime was modified as a result of the enactment, on 7 March 1991, of Argentina's Convertibility Law. Domestic telephone tariffs were then converted into US dollars and subjected to an automatic semi-annual adjustment based on changes of the Consumer Price Index. International long-distance tariffs method of calculation was not changed.

On 6 January 2002, a Public Emergency and Foreign Exchange System Reform Act ("the Emergency Law") came into effect in Argentina, which among others eliminated the free convertibility of Argentine currency into US dollars at a 1:1 exchange rate.

The Claimant complained that the measures adopted pursuant to the Emergency Law amounted to several breaches of the BIT: the obligation to protect and not to impair by unjustified or discriminatory measures the investments of the other Contracting Party, the obligation to accord fair and equitable treatment to the investments, and the obligation not to expropriate the investments through measures tantamount to expropriation.

The Respondent raised objections to the Tribunal's jurisdiction on six grounds: first, that the dispute failed to meet the requirements in Article 25(1) of the ICSID

[2] The Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of Spain and the Argentine Republic, signed on 3 October 1991 and entered into force on 28 September 1992. The text of the agreement is available online at http://investmentpolicyhub.unctad.org/Download/TreatyFile/119 (in Spanish) (accessed 21 March 2016).

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Convention because the measures complained of by the Claimant were of a general nature and there was no direct connection between the measures and the alleged investment; second, that there was no "investment dispute" within the meaning of the BIT, because the only investment the Claimant had made was the acquisition of the shareholding in TASA and there was no relation between such investment and the Claimant's claims, which were of a contractual nature; third, that the Tribunal lacked competence because in the Transfer Agreement the parties had agreed on the exclusive jurisdiction of the Federal Courts in and for Buenos Aires, Argentina; fourth, that the Claimant lacked *ius standi* to sue since under international law and Argentine applicable law, corporate claims of derivative nature were inadmissible, and an action brought by some shareholders could lead to the liquidation of the corporation in which the Claimant was a shareholder; fifth, that Article X of the BIT allowed an investor to commence international arbitration provided it had submitted its claims to the competent tribunals of the host State and 18 months had passed without them rendering a decision on the merits, and such condition had not been complied with; and sixth, that the claim was inadmissible due to lack of damage.

The Claimant refuted the Respondent's objections to jurisdiction. According to the Claimant, the dispute was a legal dispute arising directly out of an investment, as required by Article 25(1) ICSID Convention, because the claims related to breaches of obligations under the BIT, and concerned not general but specific measures which had affected the investment. The Claimant maintained that the dispute resolution clause in the Transfer Agreement, which required the submission of disputes to domestic courts, could not have a preclusive effect on the jurisdiction of a tribunal established under the terms of the BIT. The Claimant insisted that it had standing because its claims arose directly from its rights under the BIT and, moreover, by virtue of the most-favoured-nation (MFN) clause in the BIT, the "umbrella clause" found in a bilateral investment treaty signed by Argentina with the United States should be applied. The Claimant emphasized that claims by shareholders were well recognized by ICSID practice and international law. The Claimant also invoked the MFN clause to reject the Respondent's objection concerning the 18-month period prescribed by the BIT, by pointing out that the respective provisions in another bilateral investment treaty signed by Argentina with Chile should apply, and they contained no such requirement. The Claimant also invoked the concept of "futility exception", pursuant to which if alternative means of dispute settlement were obviously futile, they need not be complied with.

Decision on Objections to Jurisdiction (25 May 2006)

Held (unanimously):— The Tribunal had jurisdiction.

(1) In order to determine its jurisdiction, the Tribunal had to consider whether the dispute was *prima facie* a dispute that fell generally within the jurisdiction of ICSID and specifically within that of an ICSID tribunal established to decide a dispute between a Spanish investor and Argentina under the BIT. The claim, as presented by the Claimant, had to meet the jurisdictional requirements as to the

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factual subject matter at issue, as to the legal norms referred to as applicable and alleged to have been breached, and as to the relief sought (paras. 53–7).

(2) The dispute was a "legal dispute" and one "arising directly out of an investment", within the meaning of Article 25(1) of the ICSID Convention. It was clear from the Claimant's arguments that the Claimant did not complain about general economic measures but of the violation of express legally binding commitments (neither political nor commercial) of the Respondent as regards the Claimant's investment under the BIT. The term "specific", relating to a host State's measures, was not a synonym of the term "directly". A measure of the host State could affect an investment directly, so that the dispute as to the international legality of that measure arose directly out of that investment, even if the measure was not specifically aimed at that investment. The requirement that the dispute arose directly out of an investment was met when, as was the case here, the Claimant challenged certain measures of the host State that affected directly the investment in a negative way, 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 (paras. 59–65).

(3) The shares held by the Claimant in TASA, the financing and loans that had allegedly been affected by the Respondent's action, as well as other rights invoked by the Claimant (licences and various guarantees) clearly fell within the illustrative definitions of "investment" in Article II.1 of the BIT. The licences and guarantees could properly be considered as investments of the Claimant notwithstanding the fact that they appeared to belong to and represented an entitlement of TASA under Argentina's law. Considering the general definition of "investment" and the fact that the Claimant fully controlled TASA due to its shareholding, also TASA, as a company, could be considered as a protected investment. The Respondent's obligation under Article III.1 not to hinder by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of the investment, warranted 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, treaty protection was not limited to the exercise of the rights inherent in the position of a shareholder. It also extended to the standards of protection spelled out in the BIT with regard to the operation of the local company that constituted the investment. This interpretation was supported by the object and purpose of the BIT (paras. 70–7).

(4) The Claimant's rights were not limited to the mere title to the shareholding in TASA. The Claimant had made an investment through TASA and not just in TASA. There were additional decisive circumstances, specific to the fact of the case, which supported the conclusions that licences and guarantees held by TASA could be considered as the investments of the Claimant. The Respondent had launched a public international bidding for the purpose of privatizing the State-owned company that provided telecommunications services in Argentina; the bidding was opened to foreign investors on the condition that they included as necessary participants "private companies dedicated to the telecommunication activities as Operator"; the companies involved had to be endowed with specific technical competences and qualifications besides having available adequate

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financial resources; and the Operator had to accept the rights and obligations as "Manager" under a contract to be entered with the licensee. It was clear that the legal regime applicable to TASA's operations was the object of an undertaking by the Respondent, with the Claimant as a participant in the privatization as "Operator". The dispute was one arising directly out of an investment, within the meaning of Article 25 of the ICSID Convention and meeting the requirements of the BIT (paras. 78–81).

(5) The Claimant's investments qualified for investment protection under the BIT, so that recourse to its dispute settlement mechanism provided in Article X was possible as a matter of right. The claim that the host State had breached the BIT in respect of an investment could be entertained by the Tribunal regardless of the existence of contractual remedies available to TASA or the Claimant under the Transfer Agreement. The exclusive choice of forum clause in the Transfer Agreement operated in respect of contractual claims and could not prevent the discharge by the Tribunal of its obligations in accordance with the BIT. The subject matter of the claims was not the breach of a contract containing a choice of domestic forum clause. Therefore, the Tribunal did not have to examine or rely on the Claimant's additional argument based on the applicability of the umbrella clauses present in various bilateral investment treaties entered into by Argentina, by virtue of the MFN clause in the BIT (paras. 85–7).

(6) The Respondent's objection that the Claimant's 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, were without merit. The Claimant's claims could not be defined as indirect (or "derivative") claims, as if the Claimant were invoking them on behalf or *in lieu* of TASA in respect of rights granted to the latter by the laws of Argentina. The Claimant was invoking its own treaty rights concerning its investment in Argentina, which was protected by the BIT (paras. 88–90).

(7) The 18-month requirement, or precondition, in Article X.3(a) of the BIT was best qualified as a temporary bar to the initiation of arbitration. The Respondent's argument that dispute settlement mechanisms were not covered by the MFN clause of Article IV.2 of the BIT was unwarranted. The protection of the rights of foreigners, including investors, through the granting of an explicit right to have access to courts and to avail themselves of specific remedies such as recourse to direct arbitration was a typical matter where the MFN treatment was relevant, traditional and recognized as applicable. The requirement in Article X.3(a) of the BIT fell within the purview of the MFN clause in Article IV.2. This conclusion respected the requirement of the *ejusdem generis* rule invoked by the Respondent, and was consistent with previous decisions on the issue (paras. 91–105).

(8) As to the Respondent's argument that Spain and Argentina had opposed the extension of the MFN clause to dispute settlement mechanisms in their pleadings before other international tribunals, a party's views on interpretation of a treaty provision expressed in defensive briefs filed in arbitration proceedings did not amount to "subsequent practice" within the meaning of Article 31.3(b) of the Vienna Convention. They were views expressed in litigations and could not be regarded as implying the agreement of the parties to a treaty regarding its interpretation (paras. 112–14).

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(9) As to the Respondent's objection based on the alleged lack of damage, the *prima facie* evidence of damages provided by the Claimant was adequate to establish jurisdiction. Any uncertainty over the final amount would be decided in the merits phase. The existence of ongoing negotiations with local companies or the foreign shareholders did not represent a bar to the introduction or pursuit of an international claim such as the one at issue (paras. 115–16).

The following is the text of the Decision on Objections to Jurisdiction:

DECISION OF THE TRIBUNAL ON OBJECTIONS TO JURISDICTION (25 MAY 2006)

A. PROCEDURE

1. On May 12, 2003, Telefónica S.A. (hereinafter "Telefónica" or "the Claimant") filed with the International Centre for Settlement of Investment Disputes (ICSID) a "Request for Arbitration" against the Argentine Republic (hereinafter "Argentina" or "the Respondent") pursuant to the ICSID Convention and the Treaty between the Kingdom of Spain and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (hereinafter "BIT") of October 3, 1991.

2. On May 14, 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.

3. On July 21, 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.

4. Following a request from the Claimant, and in accordance with Art. 37(2)(b) of the ICSID Convention, the Centre informed the parties that the arbitral tribunal in this case would consist of three arbitrators. By letter of October 22, 2003 the Claimant appointed as an arbitrator Judge Charles N. Brower, a U.S. national. By letter of December 12, 2003, the Argentine Republic appointed Licenciado Eduardo Siqueiros, a Mexican national, as an arbitrator.

5. As the parties failed to agree on the president of the tribunal, the Claimant requested that the Chairman of ICSID Administrative Council appoint the President pursuant to Art. 38 of the ICSID Convention. Accordingly the Acting Chairman of ICSID's Administrative Council appointed Professor Giorgio Sacerdoti, a national of Italy, as the President of the Tribunal on March 17, 2004. All members of the Tribunal duly accepted their appointment in writing.

6. The first session of the Arbitral Tribunal was held at the seat of the Centre in Washington, D.C. on July 6, 2004. The parties appeared and were duly represented. The parties confirmed that the Tribunal had been properly constituted on

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April 12, 2004 in accordance with the ICSID Convention and the ICSID Arbitration Rules and that they did not have objections in this respect.

7. During the course of the first session the parties agreed on a number of procedural matters 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 ICSID 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 subsequent courtesy translation of the written pleadings into the other party's chosen procedural language. Following a joint request from the parties and deliberation by the Tribunal, the President announced that the proceedings were to be suspended until October 5, 2004. It was further decided that the Claimant would file its Memorial on the merits within 60 days, if the Claimant would file a "reduced" Memorial (excluding questions of compensation, remedies and damages), or within 90 days, if the Claimant would file a "complete" Memorial (including questions of compensation, remedies and damages), from October 5, 2004 or from the end of any other suspension period agreed upon by the parties, and that the Respondent would file its objections to jurisdiction within 60 days from its receipt of the Claimant's Memorial on the merits. Thereafter 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 60 days from its receipt of the Respondent's objections to jurisdiction.

8. The Claimant filed its Reduced Memorial on December 5, 2004; Argentina filed its "Brief on defenses alleging the lack of jurisdiction of the Centre and the competence of the Tribunal" on February 23, 2005. In accordance with Arbitration Rule 41(3) the proceedings on the merits were thereby suspended. In conformity with the above procedural decisions, the Claimant then submitted its Counter-Memorial on Jurisdiction on May 9, 2005.

9. The hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. on June 20, 2005. Messrs. Gabriel Bottini, Florencio Travieso and Ariel Martins addressed the Tribunal on behalf of Argentina. Mr. Guido S. Tawil addressed the Tribunal on behalf of the Claimant. The Tribunal posed questions to the parties, as provided for in Arbitration Rule 32(3). The Tribunal granted to each party 15 days from the date of the hearing to file certain documents referred to at the hearing.

B. THE SUBJECT MATTER OF THE DISPUTE

10. 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", and thereafter expanded upon in its Reduced Memorial of December 2004, taking also into account the statements made up to now by Argentina. Such presentation is made for the sole purpose of comprehension of the factual circumstances and

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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 purposes of the present case.

11. As indicated by Telefónica in its written submissions, the Claimant is a corporation constituted under the laws of the Kingdom of Spain. Telefónica indirectly owns a 97.91 % shareholding of Telefónica de Argentina S.A. (hereinafter "TASA"), a corporation legally constituted under the laws of the Republic of Argentina, thus qualifying as an "investment" according to Art. I(2) (second paragraph) of the BIT, which refers to "shares and any other kind of participation in companies." Moreover, the Claimant has invested more than US$ 5,500 million in equity in TASA and disbursed other amounts of money which are, in the Claimant's view, covered by the BIT provision of Art. I(2) (third paragraph), according to which investments protected by the Treaty include: "rights arising from any kind of contributions made for the purpose of creating economic value, including loans directly related to a specific investment, whether or not capitalized." The investment made by Telefónica would also come under the scope of the BIT in accordance with Art. I(2) (sixth paragraph), by way of the rights granted by Argentina in respect of the tariff regime, the compensation mechanism in case of price control, the tax stability provision, the ownership of the Licensee's assets and to the right to hold a perpetual telecom license.

12. Following the 1989 State Reform Law, the State-owned telephone company, *Empresa Nacional de Telecomunicaciones* ("ENTel"), was privatized and its assets were transferred to four corporations created by Argentina through two Decrees of January 5, 1990. A consortium formed by *Telefónica International Holding BV* (a subsidiary of *Telefónica S.A.*), *Citicorp Venture Capital S.A.* and *Inversora Catalinas S.A.* was awarded a 60% shareholding in *Sociedad Licenciataria Sur Sociedad Anónima ("Consortium")*(Exhibit 11 R.A.). The Transfer Agreement was approved by Decree 2332/90 of November 8, 1990 providing for the transfer of this shareholding to the Consortium (Exhibit 12 R.A.). Pursuant to Art. 4.3(a) of the Transfer Agreement, the corporate name of *Sociedad Licenciataria Sur Sociedad Anónima* was changed to *Telefónica de Argentina S.A.* ("TASA"). Since the privatization was to be final, a license – and not a concession – was granted to the new operators in order to provide basic telephone services. Licenses could only be amended by the State when the license itself so provided or when the consent of the licensee was obtained. In addition, licenses could only be terminated by breach of their conditions by the licensees. Termination by the State for reasons of public convenience was expressly excluded. According to the Tariff Regime included in TASA's License, a system was created to provide compensation in the event that the authorities ordered a price or tariff freezing not in line with the Tariff Regime. On November 28, 1991, as a result of the enactment of the Convertibility Law in March 1991, the License Tariff Regime was modified converting domestic telephone tariffs into U.S. dollars and subjecting them to an automatic semi-annual adjustment based on CPI changes (the local cost-of-living index, the so called Consumer Price Index (*Índice de Precios al Consumidor*). The Tariff

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Agreement did not affect international long-distance tariffs method of calculation, which remained fixed in Gold Francs.

13. According to the Claimant, Telefónica made its investment in TASA on the basis of the specific legal, financial and economic guarantees provided for by Argentina in the Decrees enacted since the State Reform Law and in the Agreements entered into with the Claimant prior to the enactment of the Public Emergency and Foreign Exchange System Reform Act (hereinafter "The Emergency Law"), which became effective on January 6, 2002. Pursuant to the Emergency Law, the system established in the Convertibility Law whereby the Argentine currency was made freely convertible into U.S. dollars at a 1:1 exchange rate has been eliminated; moreover, as regards all agreements executed under public law by Argentina, U.S. dollar adjustment clauses and indexation clauses based on foreign price indexes have become invalid. (In particular, Art.8 of the Emergency Law extinguished the right of regulated public utilities – including TASA – and public works contractors to adjust their tariffs according to the variance to the CPI, the U.S. dollar, or any other foreign currency or indices). In the meantime, however, contractors or public service providers have been asked not to suspend the fulfillment of their obligations.

14. The Claimant complains that the measures adopted pursuant to the Emergency Law by Argentina amounted to breaches of the BIT in several ways: first of all, the obligation to protect and not to impair by unjustified or discriminatory measures the investments of the other Contracting Party, enshrined in Art. III(1) of the BIT; secondly, the obligation to accord fair and equitable treatment to the investments of the other Contracting Party, as prescribed by Art. IV(1) of the BIT; thirdly, the obligation not to expropriate the investments of the other Contracting Party through measures tantamount to expropriation, in breach of Art. V of the BIT. The Claimant seeks compensation for the damages caused to its investment as a result of the abovementioned breaches by Argentina of the BIT.

15. As far as the governing law is concerned, the Claimant asks the Tribunal to apply, according to Art. 42(1) of the ICSID Convention, the provisions of the BIT as *lex specialis* between the parties at dispute, and the rules of general international law as a residual source of law.

16. Argentina has not replied yet to the Claimant's arguments as to the facts since Argentina has raised preliminary objections to jurisdiction. Still, Argentina has not basically challenged the facts referred to by the Claimant, nor Claimant's references to the various Argentine laws relevant for the making of the investment and the changes in 2001/02 to the legal regime applicable to it. Argentina does not deny either that Telefónica is a Spanish corporation that has made indirectly an investment in Argentina – specifically as shareholder of TASA to which the Argentina-Spain BIT applies.

C. THE OBJECTIONS OF ARGENTINA TO JURISDICTION

17. In its "Brief on defenses alleging the lack of jurisdiction of the Centre and the competence of the Tribunal," Argentina raises six grounds for challenging the

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