

*(English Translation from Spanish Original)*

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

IN THE PROCEEDING BETWEEN

EMILIO AGUSTÍN MAFFEZINI  
(CLAIMANT)

and

THE KINGDOM OF SPAIN  
(RESPONDENT)

CASE NO. ARB/97/7

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A W A R D

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*Members of the Tribunal*

Professor Francisco Orrego Vicuña, President  
Judge Thomas Buergenthal, Arbitrator  
Mr. Maurice Wolf, Arbitrator

*Secretary of the Tribunal*

Mr. Gonzalo Flores

*Representing the Claimant*

Dr. Raúl Emilio Vinuesa  
Dra. María Cristina Brea  
Dra. Silvina González Napolitano  
Dra. Gisela Makowski  
Estudio Vinuesa y Asociados  
Buenos Aires  
Argentina

*Representing the Respondent*

Mr. Rafael Andrés León Cavero  
Abogado del Estado  
Subdirección General de los  
Servicios Contenciosos del  
Ministerio de Justicia  
Madrid  
Spain

*Date of dispatch to the parties:* **November 13, 2000**

## THE TRIBUNAL

Composed as above,

After deliberation,

Makes the following Award:

**A. Introduction**

1. The Claimant, Mr. Emilio Agustín Maffezini, is a national of the Argentine Republic (Argentina), with his domicile in Buenos Aires, Argentina. He is represented in this arbitration proceeding by:

Dr. Raúl Emilio Vinuesa,  
Dra. María Cristina Brea,  
Dra. Silvina González Napolitano, and  
Dra. Gisela Makowski  
Estudio Vinuesa y Asociados  
Alsina 2360  
San Isidro (1642)  
Buenos Aires, Argentina

2. The Respondent is the Kingdom of Spain (Spain), represented in this proceeding by:

Mr. Rafael León Cavero  
Abogado del Estado  
Subdirección General de los Servicios Contenciosos del Ministerio  
de Justicia  
Ayala 5  
28001, Madrid  
Spain

3. This Award contains the Tribunal's declaration of closure of the proceeding issued pursuant to Rule 38 of the ICSID Rules of Procedure for

Arbitration Proceedings (Arbitration Rules) as well as the Award on the merits in accordance with Arbitration Rule 47. The Tribunal has taken into account all pleadings, documents and testimony in this case insofar as it considered them relevant.

## B. Summary of the Procedure

### 1. *Procedure Leading to the Decision on Jurisdiction*

4. On July 18, 1997, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from Mr. Emilio Agustín Maffezini a Request for Arbitration against the Kingdom of Spain. The request concerned a dispute arising from treatment allegedly received by Mr. Maffezini from Spanish entities, in connection with his investment in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia. In his request the Claimant invoked the provisions of the 1991 “Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic” (the Argentine-Spain Bilateral Investment Treaty or BIT).<sup>1</sup> The request also invoked, by way of a most-favored-nation (MFN) clause in the Argentine-Spain BIT, the provisions of a 1991 bilateral investment treaty between the Republic of Chile (Chile) and Spain.<sup>2</sup>

5. On August 8, 1997, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt of the request and on the same day transmitted a copy to the Kingdom of Spain and to the Spanish Embassy in Washington, D.C. At the same time, the Centre asked Mr. Maffezini to provide (i) specific information concerning the issues in dispute and the character of the underlying investment; (ii) information as to the complete terms of Spain’s consent to submit the dispute to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention); (iii) information as to the basis of his claim that the MFN clause in the Argentine-Spain BIT would allow him to invoke Spain’s

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<sup>1</sup> Agreement between Argentina and Spain of October 3, 1991. Hereinafter cited as the Argentine-Spain BIT.

<sup>2</sup> Agreement between Chile and Spain of October 2, 1991. Hereinafter cited as the Chile-Spain BIT.

consent contained in the Chile-Spain BIT; and (iv) documentation concerning the entry into force of the bilateral investment treaties invoked in the request. Mr. Maffezini provided this information in two letters of September 10 and September 29, 1997.

6. On October 30, 1997, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention. On this same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

7. On December 22, 1997, the Claimant proposed to the Respondent that the Arbitral Tribunal consist of a sole arbitrator, to be appointed by agreement of the parties. The Claimant further proposed that, if the parties fail to agree in the name of the sole arbitrator by January 31, 1998, the sole arbitrator shall be appointed by ICSID's Secretary-General.

8. On March 5, 1998, Spain having failed to respond to the Claimant's proposal and more than 60 days having elapsed since the registration of the request, the Claimant informed the Secretary-General that he was choosing the formula set forth in Article 37(2)(b) of the ICSID Convention. The Tribunal, therefore, would consist of three arbitrators, one appointed by Mr. Maffezini, one appointed by Spain, and the third, presiding arbitrator, appointed by agreement of the parties.

9. On March 18, 1998, the Centre received a communication from the Spanish Ministry of Economy and Finance, whereby Spain anticipated having objections to the jurisdiction of the Centre and to the competence of the Tribunal, providing the Centre with a summary of the grounds on which such objections were based. The Centre promptly informed the Respondent that a copy of this communication, as well as copies of the request for arbitration and its accompanying documentation, of the notice of registration and of the correspondence exchanged between the parties and the Centre would be transmitted, in due course, to each of the Members of the Tribunal, noting that the question of jurisdiction was one for the Tribunal to decide.

10. On April 24, 1998, Mr. Maffezini appointed Professor Thomas Buergethal, a national of the United States of America, as an arbitrator. On May 4, 1998, Spain appointed Mr. Maurice Wolf, also a national of the

United States of America, as an arbitrator. The parties, however, failed to agree on the appointment of the third, presiding, arbitrator. In these circumstances, by means of a further communication of May 14, 1998, the Claimant requested that the third, presiding, arbitrator in the proceeding be appointed by the Chairman of ICSID's Administrative Council in accordance with Article 38 of the ICSID Convention and Rule 4 of the Arbitration Rules.<sup>3</sup>

11. Having consulted with the parties, the Chairman of ICSID's Administrative Council appointed Professor Francisco Orrego Vicuña, a Chilean national, as the President of the Arbitral Tribunal. On June 24, 1998, ICSID's Legal Adviser, on behalf of the Centre's Secretary-General, and in accordance with Rule 6(1) of the 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, Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

12. On July 3, 1998, the Respondent filed an application for provisional measures, requiring the Claimant to post a guaranty in the amount of the costs expected to be incurred by Spain in defending against this action. By further filing of August 7, 1998, the Claimant requested the Tribunal to dismiss such application.

13. After consulting with the parties, the Tribunal scheduled a first session for August 21, 1998. On August 20, 1998, counsel for the Respondent hand-delivered a document containing Spain's objections to the jurisdiction of the Centre. A copy of Spain's filing was distributed by the Centre to the Members of the Tribunal on that same date. A copy of Spain's filing was later handed by the Secretary of the Tribunal to the Claimant's representative in the course of the Tribunal's first session with the parties.

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<sup>3</sup> Under Article 38 of the ICSID Convention and Rule 4 of the Arbitration Rules, if the Tribunal is not yet constituted within 90 days after the notice of registration of the request has been dispatched, the Chairman of ICSID's Administrative Council shall, at the request of either party, and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal.

14. The first session of the Tribunal with the parties was held, as scheduled, on August 21, 1998, at the seat of ICSID in Washington, D.C. At 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 Arbitration Rules, and that they did not have any objections in this respect. The Tribunal hereby states that it was therefore established under the Convention.

15. During the course of 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. Spanish was chosen by the parties as the procedural language and Washington, D.C., the seat of the Centre, was selected as the formal place of proceedings. The Respondent, represented at the session by Mr. Rafael Andrés León Cavero, drew the Tribunal's attention to its objections to the jurisdiction of the Centre. The Tribunal, after briefly ascertaining the views of the parties on this matter, fixed the following time limits for the written phase of the proceedings: the Claimant would file a memorial, with all of his arguments on the question of jurisdiction and on the merits within 90 days from the date of the first session; the Respondent would then file a counter-memorial, with all of its arguments on the question of jurisdiction and on the merits within 90 days from its reception of the Claimant's memorial. The Tribunal left open the possibility of requiring the submission of a reply and a rejoinder to the parties. The Tribunal also left open the possibility of holding a hearing on the issue of jurisdiction.

16. In accordance with the above-described schedule, the Claimant submitted to the Centre his memorial on the merits and on the question of jurisdiction on November 19, 1998. On April 9, 1999, after a request for an extension of the time limit for the filing of its counter-memorial was granted by the Tribunal, the Respondent submitted its written pleadings on the merits and on the question of jurisdiction.

17. On May 14, 1999, the Tribunal invited the parties to submit any further observations they may had on the question of jurisdiction, calling for a hearing on jurisdiction to be held on July 7, 1999, at the seat of the Centre in Washington, D.C. The parties filed their final observations on the question of jurisdiction on June 3, 1999 (the Claimant) and June 18, 1999 (the Respondent). Due to consecutive requests filed first by counsel

for the Respondent, and later by counsel for the Claimant, the hearing on jurisdiction was postponed until August 9, 1999.

18. At the August 9, 1999 hearing, Dr. Raúl Emilio Vinuesa addressed the Tribunal on behalf of the Claimant, referring to the arguments put forward in his written pleadings. Mr. Rafael Andrés León Cavero addressed the Tribunal on behalf of the Kingdom of Spain. The Tribunal then posed questions to the representatives of the parties, as provided in Rule 32(3) of the Arbitration Rules.

19. Having heard the views of the parties, the Tribunal rendered, on August 26, 1999, Procedural Order No 1, deciding that, in accordance with Article 41(2) of the ICSID Convention and Rule 41(3) of the Arbitration Rules, it would deal with the question of jurisdiction as a preliminary matter, therefore suspending the proceedings on the merits.

20. On October 28, 1999, the Tribunal issued Procedural Order No. 2, addressing Spain's request for provisional measures. The Tribunal, pointing out that the recommendation of provisional measures seeking to protect mere expectations of success on the side of the Respondent would amount to a pre-judgement of the Claimant's case, unanimously dismissed Spain's request. Certified copies of the Tribunal's Procedural Order No. 2 were distributed to the parties by the Secretary of the Tribunal. A copy of Procedural Order No. 2 is attached to the present Award as an integral part of such.

21. On January 25, 2000 the Tribunal, having deliberated by correspondence, issued its unanimous Decision on the Objections to Jurisdiction raised by the Kingdom of Spain. In its Decision, the Tribunal rejected the Respondent's contention that the Claimant failed to comply with an exhaustion of local remedies requirement set forth in Article X of the Argentine-Spain BIT. Also, in light of the application of the most favored nation clause included in the Argentine-Spain BIT, and therefore relying on the more favorable arrangements contained in the Chile-Spain BIT, the Tribunal rejected Spain's contention that the Claimant should have submitted the case to Spanish courts before referring it to international arbitration under Article X(2) of the BIT, and concluded that the Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts. Finally, the Tribunal, addressing the other objections to jurisdiction raised by Spain, concluded that the Claimant had

made out a *prima facie* case that he had standing to file this case, that the *Sociedad para el Desarrollo Industrial de Galicia Sociedad Anonima* (SODIGA S.A. or SODIGA) was a State entity acting on behalf of the Kingdom of Spain and that the dispute came into being after both the Argentine-Spain and the Chile-Spain BITs had entered into force. On these basis, the Tribunal concluded that the Centre had jurisdiction and that the Tribunal was competent to consider the dispute between the parties in accordance with the provisions of the Argentine-Spain BIT.

22. Certified copies of the Tribunal's decision were distributed to the parties by the Secretary of the Tribunal. A copy of the Tribunal's Decision on Jurisdiction is attached to the present Award as an integral part of such.

*2. Procedure leading to the Award on the Merits*

23. On January 25, 2000, the Tribunal, following its Decision on Jurisdiction, issued, in accordance with Rules 19 and 41(4) of the Arbitration Rules of the Centre, Procedural Order No. 3 for the continuation of the proceedings on the merits. In that Procedural Order the Tribunal fixed the following schedule for the further procedures: having the parties filed their principal written pleadings, the Claimant would file a reply on the merits within forty five days from his receipt of the Tribunal's Decision on Jurisdiction and the Respondent would file a rejoinder on the merits forty-five days from its receipt of the Claimant's reply. Once the Tribunal has received these memorials it would fix a date for a hearing.

24. Pursuant to that schedule, the Claimant submitted to the Centre, on March 21, 2000, his reply on the merits. On May 3, 2000, the Respondent submitted its rejoinder on the merits.

25. By letter of May 10, 2000, the Tribunal, having previously consulted with counsel for both parties, called for a hearing on the merits to be held during the week of July 10, 2000, in London, England.

26. By letter of June 2, 2000, the Tribunal, in accordance with Arbitration Rule 34(2)(a), call upon the Claimant to produce the following witnesses to be available for examination at the hearing on the merits: Mr. Emilio Agustín Maffezini, Mr. Silverio Bouzas Piñeiro and Mr. Héctor Rodríguez Molnar.

27. By same letter of June 2, 2000, the Tribunal, in accordance with Arbitration Rule 34(2)(a), call upon the Respondent to produce the following witnesses to be available for examination at the hearing on the merits: Mr. Ricardo Méndez Rey, Mr. Manuel Mucientes Iglesias, Mr. Luis Fernández García and Mr. Luis Soto Baños. Additionally, the Tribunal requested that the Respondent make available for examination the following expert: Mr. José Ramón Álvarez Arnau.

28. In accordance with the Tribunal's directions of June 2, 2000, the hearing on the merits would follow this order:

The Tribunal would deliberate privately on Monday, July 10, 2000.

The Hearing on the merits would commence on Tuesday, July 11, 2000 at 10 a.m.

Counsel for the Claimant would open with a 30-minute oral presentation, followed by a 30-minute presentation by counsel for the Respondent. Each party may then present, by way of rebuttal and surrebuttal, any further remarks it may have for 15 minutes each.

The Claimant would then be entitled to a 30-minute examination of each of its witnesses, followed by a 30-minute examination of each of the Claimant's witnesses by counsel for the Respondent. The Respondent would thereafter be entitled to a 30-minute examination of each of its witnesses and of the expert, followed by a 30-minute examination of each of such witnesses and expert by counsel for the Claimant.

Finally the Claimant would close with a statement of no more than 30 minutes, followed by a 30-minute closing statement by the Respondent.

The members of the Tribunal may put questions to the witnesses and to the expert witness, and ask them for explanations at any moment during the hearings, but such questions would not be chargeable to the parties' time.

29. By letter of July 5, 2000, counsel for the Claimant submitted the written deposition of the witness requested from that party, Mr. Silverio

Bouzas Piñeiro, and an additional deposition made by Mr. Emilio Agustín Maffezini.

30. The hearing on the merits was held, as scheduled, the week of July 10, 2000, in London, at the seat of the International Dispute Resolution Centre (IDRC). Present at the hearing were:

*Members of the Tribunal:*

Professor Francisco Orrego Vicuña, President, Judge Thomas Buergethal, Arbitrator and Mr. Maurice Wolf, Arbitrator

*ICSID Secretariat:*

Mr. Gonzalo Flores, Secretary of the Tribunal

*On behalf of the Claimant:*

Dr. Raúl Emilio Vinuesa, Dra. Silvina González Napolitano and Dra. Gisela Makowski

*On behalf of the Respondent:*

Mr. Rafael León Cavero, Abogado del Estado

*Also attending on behalf of the Respondent:*

Ms. Pilar Morán Reyero, Subdirectora General de Inversiones Exteriores del Ministerio de Economía del Reino de España and Mr. Félix Martínez Burgos, Consejero Comercial Jefe de la oficina Comercial de España en Gran Bretaña

31. The hearing commenced, as scheduled, on July 11, 2000 at 10 a.m. After a brief introduction by the President of the Tribunal, Dr. Raúl Emilio Vinuesa addressed the Tribunal on behalf of the Claimant, referring to the arguments put forward in his written pleadings. Mr. Rafael Andrés León Cavero then addressed the Tribunal on behalf of the Kingdom of Spain.

32. Of the witnesses requested by the Tribunal from the Claimant only Mr. Rodriguez Molnar appeared at the hearing. As noted in paragraph 29 above, Messrs. Maffezini and Bouzas Piñeiro submitted written deposition to the Centre on July 5, 2000. Of the witnesses requested by the Tribunal from the Respondent, Mr. Mendez Rey, Mr. Mucientes Iglesias, Mr. Fernández García and Mr. Soto Baños appeared at the hearing. So did the expert requested by the Tribunal from the Respondent, Mr. Álvarez Arnau.

33. The hearing was suspended on the afternoon of July 11, 2000, during the Claimant's interrogation of the expert, due to a health emergency suffered by Mr. Wolf. The parties having agreed during the August 21, 1998 session of the Tribunal with the parties, that only the presence of the majority of the members of the Tribunal would be required at its sittings, the other members of the Tribunal, with the agreement of the parties, decided to continue with the hearing. The hearing continued thus, in the absence of Mr. Wolf and the Secretary of the Tribunal, who left the hearing to help Mr. Wolf. Even though part of the witnesses' depositions of the afternoon of July 11, 2000 were not recorded due to a technical mishap, which was made known to both of the parties, the recordings were subsequently made available to Mr. Wolf and the other arbitrators, so that all members of the Tribunal had access to most of the testimony presented by the witnesses and the expert. All of the witnesses and the expert that attend the hearing were examined by the presenting party, cross examined by the other party and questioned by the Tribunal. The examination, cross-examination and questioning of all of the witnesses took place during the session of July 11, 2000.

34. The hearing continued on the morning of July 12, 2000. Mr. Wolf could not attend this session due to ill health. During this session, counsel for both parties made their closing presentations, as scheduled. The hearing concluded with some final remarks by the President of the Tribunal concerning the efficient and professional presentation of their cases made by counsel for both parties.

35. On November 9, 2000, the members of the Tribunal met for the last time at the seat of the Centre, in Washington, D.C., for final deliberations.

### *3. Declaration of Closure of the Proceeding*

36. ICSID Arbitration Rule 38 (1) requires that when the presentation of the case by the Parties is complete, the proceeding shall be declared closed.

37. Having reviewed all of the presentations by the parties, the Tribunal, came to the conclusion that there is no request by a Party or any reason to reopen the proceeding, as is possible under ICSID Arbitration Rule 38(2).

38. Accordingly, by letter dated November 2, 2000, the Tribunal declared the proceeding closed, in accordance with ICSID Arbitration Rule 38(1).

### C. Summary of Facts and Contentions

39. In 1989, Mr. Emilio Agustín Maffezini decided to embark on the production of various chemical products in Galicia, Spain, by establishing and investing in a corporation named Emilio A. Maffezini S. A. (EAMSA). EAMSA was incorporated under the laws of Spain on November 15, 1989. Mr. Maffezini subscribed to 70% of the capital for 35 million Spanish Pesetas, paying 66.36% thereof at the time of incorporation, with the balance to be paid at a later time. The *Sociedad para el Desarrollo Industrial de Galicia*, a Spanish entity whose legal status will be discussed below, subscribed to 30% of the capital or 15 million Spanish Pesetas. A third nominal shareholder was included to comply with the legal requirements relating to the incorporation, but that share was immediately repurchased by Mr. Maffezini. A contract was also made for the repurchase of SODIGA's shares by Mr. Maffezini. This contract provided for an interest rate of 12%. That rate was lower than the current market rate of 16.6% and reflected a preferential arrangement. SODIGA also granted a loan of 40 million Spanish Pesetas to the newly incorporated company, at a preferential interest rate, to be applicable at least for the first year. Various subsidies were requested from and approved by the Spanish Ministry of Finance and the *Xunta de Galicia*.

40. Information on prospective markets was requested from various Spanish government agencies. At the same time, EAMSA proceeded to hire a private consulting firm in order to identify the appropriate plot of land to buy and to undertake a study on the costs of construction and whatever other requirements the new company might have to begin production. On the basis of this study the land was purchased and contracts concluded with various firms and suppliers. SODIGA, for its part, had also undertaken an economic evaluation of the project in order to decide whether to participate in it.

41. On June 24, 1991, an environmental impact assessment (EIA) study was filed with the *Xunta de Galicia*, the government of the Autonomous Region of Galicia. Additional information was requested and provided,

and the EIA was finally cleared on January 15, 1992. Before such clearance was obtained, work commenced on readying the land for construction. Construction of the plant itself was also begun.

42. While these preparations for the implementation of the project were in progress, EAMSA began to experience financial difficulties. A capital increase was agreed to, new loans were requested and applications for additional subsidies were made. Some of these efforts did not succeed, however. A transfer of 30 million Spanish Pesetas was made from a personal account of Mr. Maffezini to EAMSA, under circumstances that will be considered below.

43. In early March 1992, Mr. Maffezini ordered the construction to stop and the dismissal of EAMSA employees. In June 1994 an attorney working for Mr. Maffezini approached SODIGA with an offer inviting it to cancel all outstanding debts owed it by EAMSA and Mr. Maffezini in exchange for EAMSA's assets. SODIGA indicated that it would accept this offer provided Mr. Maffezini was willing to add 2 million Spanish Pesetas. This proposal was rejected by Mr. Maffezini. The Argentine embassy in Madrid was then asked by Mr. Maffezini to intervene. After an exchange of more correspondence, SODIGA indicated, on June 13, 1996, that it was willing to accept the original proposal made by Mr. Maffezini's attorney. Mr. Maffezini did not follow up on SODIGA's latest proposal. Not long thereafter he instituted the ICSID proceedings described above.

44. Based on the foregoing facts, Mr. Maffezini has submitted four main contentions to this Tribunal. First, that because of SODIGA's status as a public entity, all of its acts and omissions are attributable to the Kingdom of Spain. Second, that the project failed because of the wrong advice given by SODIGA with regard to the costs of the project, which turned out to be significantly higher than originally estimated. Third, that SODIGA was also responsible for the additional costs resulting from the EIA since EAMSA was pressured to make the investment before the EIA process was finalized and before its implications were known. Fourth, that Mr. Maffezini had not agreed to a loan to EAMSA for 30 million Spanish Pesetas and that the transfer of this amount from his personal account to EAMSA was irregular.

45. The Kingdom of Spain has contested these allegations. It considers that SODIGA is a private company whose acts are not attributable to the

State. In any event, the Kingdom contends that the one year statute of limitation applicable under Spanish law to such claims against public entities bars the instant action even if SODIGA were to be considered a public entity. Spain also argues that Mr. Maffezini was responsible for the feasibility study of the project, including availability of markets for its products and costs, and that SODIGA's studies and estimates were intended purely for its own purposes in order to enable it to decide whether to participate in the venture. The Kingdom of Spain further argues that Mr. Maffezini was fully aware of the requirements of the EIA and that he decided to acquire the land and proceed with the construction before receiving EIA approval and did so against the advice of his own employees and consultants. According to Spain, the transfer of funds to EAMSA was fully authorized by Mr. Maffezini and was carried out by an official of SODIGA acting in his personal capacity on instructions of Mr. Maffezini. The Kingdom also considers that, as a matter of law, Mr. Maffezini's 1994 settlement proposal was an offer to conclude a contract. That offer was never withdrawn and, therefore, became a binding contract when SODIGA accepted it in 1996.

#### D. Considerations

##### *SODIGA's status in the Kingdom of Spain.*

46. The status of SODIGA in the Kingdom of Spain was considered by the Tribunal at the jurisdictional stage of these proceedings from two points of view. The Tribunal first considered whether or not SODIGA was a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal. Here the Tribunal found that the Claimant had made out a *prima facie* case that SODIGA was a State entity acting on behalf of the Kingdom of Spain. Both a structural and a functional test were applied to reach this conclusion.

47. This *prima facie* determination can now be confirmed by the Tribunal since no convincing evidence has been produced to rebut it. The Kingdom of Spain has continuously relied on the structure of the Spanish public administration to argue that SODIGA did not fall in this category and that it is merely a financial company created as a private corporation. Among other arguments in support of this position, the Kingdom of Spain invoked Article 2 of Law 30/92, dated November 27, 1992, which establishes the legal regime of Public Administrations and Common Adminis-

trative Procedure.<sup>4</sup> This provision identifies as public administrations the General Administration of the State, the Administration of Autonomous Communities and the entities belonging to local administrations. It further identifies in this category the entities created under public law and that have a legal personality associated with any of the entities mentioned. This listing is consistent with the structural test employed by the Spanish Administration.

48. But even if the structural test is applied, it is clear that financial companies such as SODIGA could not at the period relevant to the present dispute be held to fall entirely outside the overall scheme of public administration. In fact, there existed a variety of public entities that were governed by private law but which would occasionally exercise public functions that were governed by public law.<sup>5</sup> Thus, the *Instituto Nacional de Industria*, established in 1941, followed in 1992 by the Group *TENEO S. A.*, both with close institutional and financial relations to SODIGA, as well as the creation in 1995 of the State Corporation for Industrial Participation (“Sociedad Estatal de Participaciones Industriales”), were all in this mixed category of public entities with private law regimes.<sup>6</sup> Their status always gave rise to great confusion.<sup>7</sup>

49. The enactment of Law 30/92 clarified this situation in part. It must be noted, however, that this law is of a date subsequent to the here relevant period—November 27, 1992. Gradually the distinction came to be made between Public Business Entities (“Entidades públicas empresariales”) which, although governed by private law, could eventually exercise some public functions under public law,<sup>8</sup> and State commercial corporations (“Sociedades mercantiles estatales”). The latter, although considered public entities from an economic point of view, are as a matter of law governed by private law, and not administrative law.<sup>9</sup> But even here some activities of

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<sup>4</sup> Law No. 30/1992, November 26, 1992, as amended, text in Luis Martín Rebollo: *Leyes Administrativas*, 1999, at 369.

<sup>5</sup> Luis Martín Rebollo: “Estudio Preliminar y Esquema de la Organización de la Administración General del Estado y de la Estructura Orgánica Básica de los diferentes Ministerios”, in *op. cit.*, supra note 4, 636, 639.

<sup>6</sup> *Ibid.*, at 639-640.

<sup>7</sup> *Ibid.*, at 679.

<sup>8</sup> See in particular Article 2.2 of Law No. 30/1992, and the notes to this Article by Martín Rebollo, *op. cit.* supra note 4, at 385.

<sup>9</sup> Martín Rebollo, *op. cit.*, supra note 4, at 679.

these commercial corporations, such as contracting for example, were governed by administrative law.<sup>10</sup> It was not until the adoption of Law 6/1997 of April 14, 1997 that state commercial corporations were clearly forbidden to “perform functions that imply the exercise of public authority.”<sup>11</sup> The regime only came to be completed recently with the enactment of Law 1/1999, dated January 5, 1999, which governs capital venture entities and the corporations established to manage such entities, including “XesGALICIA S.G.E.C.R., S.A,” established in 1999, the present corporation that now controls SODIGA.<sup>12</sup>

50. The structural test, however, is but one element to be taken into account. Other elements to which international law looks are, in particular, the control of the company by the State or State entities and the objectives and functions for which the company was created. As the Tribunal emphasized in its Decision on jurisdiction, many of these elements point in the instant case to its public nature.

51. The second issue the Tribunal considered at the jurisdictional stage was whether the actions and omissions complained of by the Claimant were attributable to the State. In dealing with this question, the Tribunal concluded that whether SODIGA was responsible for those acts, whether they were wrongful, whether all these acts and omissions always were governmental rather than commercial in nature, and, hence, whether they can be attributed to the Spanish State, were all issues that could only be decided at the merits stage of the case.

52. In dealing with these questions, the Tribunal must again rely on the functional test, that is, it must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed.

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<sup>10</sup> Ibid., at 679.

<sup>11</sup> Law No. 6/1997, April 14, 1997, in Martín Rebollo, op. cit., supra note 4, at 677, Disposición Adicional Duodécima, at 713.

<sup>12</sup> José Martí Pellón: *El capital inversión en España 1999*, Asociación Española de Capital Inversión, 1999, at 24. For a description of “XesGalicia S. G. E. C. R., S. A.”, see Ibid., at 197.

53. SODIGA was incorporated in 1972 at a time when the Spanish State pursued an active policy of industrial promotion, particularly in depressed areas of the country. This policy was specifically designed by the public sector to encourage the industrial development of Spain. To this end not less than twenty-two such entities were created in different regions of the country. Only four such entities were related to the private sector. All others, including SODIGA, were closely related to the *Instituto Nacional de Industria* and to the respective *Comunidades Autonomas* which, in the case of SODIGA, was the *Xunta de Galicia*.<sup>13</sup>

54. Just as in the case of EAMSA, the policy pursued by these entities was implemented by investing in newly created companies, by the grant of loans and the conclusion of contracts for the repurchase of shares, which in a sense also amounted to a deferred loan. Most of these ventures were not quite successful from a financial point of view, although they contributed to the development of the industrial and business base of the region concerned. Important shortcomings that have been identified in this policy were the lack of a specific legal and fiscal framework, difficulties in recovering the investments made and the lack of professional expertise. These shortcomings were aggravated by political pressures to support investments of doubtful viability.<sup>14</sup>

55. Because of the problems that were encountered under the original approach, the entities here in question embarked on a reorientation of their functions. Beginning in the late 1980's, they started to adopt a more business-oriented approach, particularly in order to be able to confront the growing competition from European financial institutions that came to Spain following its incorporation into the European Economic Community. As a result of this new orientation, investments in newly formed companies diminished significantly. Later the number of companies in which investments were made also diminished, and capital was invested in consolidated companies, generally by means of leveraged buy-outs, management buy-outs or management buy-ins.<sup>15</sup> At the same time, small investments gradually diminished. They were replaced by larger volume investments in each operation and company.

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<sup>13</sup> Ibid., at 39-40.

<sup>14</sup> Ibid., at 40.

<sup>15</sup> Ibid., at 45-46.

56. The end result of this reorientation was that in the 1990's these entities became active participants in a flourishing market economy. A number of investment projects were discontinued and some recovery of capital took place, either directly or by means of the sale of shares in the stock market.<sup>16</sup> A Spanish Association of Investment Capital, formerly the Spanish Association of Capital-Risk Entities, was created in 1986. It and the corresponding association of comparable European entities, in which SODIGA also participated, have been instrumental in bringing about this transformation. Some of the changes and resulting developments were most helpfully explained to the Tribunal by the President of SODIGA and now President of "XesGALICIA S.G.E.C.R., S.A.", Mr. Luis Fernández García, during the oral hearings in these proceedings.

57. At the time EAMSA was established, SODIGA was in the process of transforming itself from a State-oriented to a market-oriented entity. While originally a number of SODIGA's functions were closer to being governmental in nature, they must today be considered commercial in nature. But at the time of transition, there was in fact a combination of both, some to be regarded as functions essentially governmental in nature and others essentially commercial in character. As mentioned above, this is the dividing line between those acts or omissions that can be attributed to the Spanish State and those that cannot. The Tribunal must accordingly categorize the various acts or omissions giving rise to the instant dispute.

*Responsibility for mistaken advice.*

58. The second main contention by the Claimant, as noted above, is that the project failed because SODIGA provided faulty advice regarding the cost of the project, which turned out to be significantly higher than originally estimated. According to the Claimant, the first draft investment project was based on a report by SODIGA, dated May 1989, which was made in order to determine the viability of the project. Claimant submits that the final cost of the investment would have been 300% higher had the project been completed.

59. The Tribunal has already noted that Spain rejected this contention. It argued that Mr. Maffezini was responsible for the commissioning of a

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<sup>16</sup> Ibid., at 30-31.

feasibility study for the project, and that SODIGA's estimates were designed solely for its own internal purposes to enable it to decide whether to participate in the new company. Spain also submitted that the investor was an experienced businessman and that he and his team of professionals prepared the project. SODIGA's advice was never requested and EAMSA was not induced to invest. Furthermore, the technical study regarding costs was prepared at the request of EAMSA by a consulting firm—COTECNO. Spain contended, furthermore, that the increased cost amounted to no more than 21% and that it was due to specification changes ordered by Mr. Maffezini. According to Spain, once the increase in cost attributable to the changed specifications is deducted from the original estimate, the cost per square meter constructed does not differ significantly from the estimated figure.

60. According to Spain, what really went wrong was that the project was ill conceived. No market studies were undertaken, Spain's public services provided free information but were not supposed to provide professional advice, the plot of land was not appropriately examined and required additional work, and the specifications were changed with regard to both the quality and quantity of the construction that had been envisaged. Mr. Maffezini was responsible for all these problems, and it was he who eventually decided to stop the work and dismiss all EAMSA's employees.

61. The Tribunal has carefully examined all of these contentions. In doing so, it has taken account of the fact that one of the functions of SODIGA and her sister institutions in Spain was to provide information to investors and businessmen in order to promote the industrialization of the region concerned. In this connection, it is apparent that SODIGA did more than merely provide EAMSA with information. It made available to EAMSA a number of other services. SODIGA provided EAMSA with office space during the start-up period and accounting services that included assistance with the disbursement for the payment of bills and other expenditures. There was, as a result, considerable interaction between SODIGA's officials and EAMSA employees, in the course of which the project, its costs and returns, and the viability and prospects of the proposed investment were explored by them at some length.

62. The Tribunal is satisfied, however, that SODIGA was not discharging any public functions in providing the aforesaid information assistance to EAMSA. This type of activity does not ordinarily go beyond

the commercial assistance that many financial and commercial entities provide to their prospective customers. Some of the other services provided, however, do have a connection with other aspects of the claim.

63. The Tribunal is also satisfied, after hearing expert and witness testimony on these issues, that the feasibility study made by SODIGA, whether faulty or not, was intended solely for SODIGA's internal purposes of deciding on its own participation in the capital of EAMSA and that it was not intended to serve as a substitute for the study the investor commissioned by hiring COTECNO. Hence, SODIGA cannot be held responsible for cost overruns, whatever their real amount might have been. Moreover, SODIGA's membership on the board of EAMSA, an aspect that has also been raised by the claimant so as to justify an attribution of responsibility in this connection, was also consistent with normal business arrangements. Subsidies were granted by the Spanish State and the *Xunta de Galicia* at the request of EAMSA and not by SODIGA, thus neither providing a link to potential attribution of responsibility to the latter. Even the preferential rates applied to SODIGA's loans were paid for by the *Xunta de Galicia* by way of reimbursement.

64. In this connection, the Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments. While it is probably true that there were shortcomings in the policies and practices that SODIGA and its sister entities pursued in the here relevant period in Spain, they cannot be deemed to relieve investors of the business risks inherent in any investment. To that extent, it is clear that Spain cannot be held responsible for the losses Mr. Maffezini may have sustained any more than would any private entity under similar circumstances.

*Responsibility for Environmental Impact Assessment.*

65. The Claimant also contends that SODIGA is responsible for the additional costs resulting from the EIA because EAMSA was pressured to go ahead with the investment before that process was finalized and its implications were known. This pressure, according to Claimant, was exercised for political reasons by the authorities of the *Xunta de Galicia* and the local municipality. Claimant's decision to stop the construction work was directly related to this additional increase in the costs of the project.

66. The Kingdom of Spain is of the view that Mr. Maffezini was fully aware of the requirements of the EIA and decided to acquire the land and proceed with the construction before its approval, and that he did so against the advice of his own employees and consultants. The Claimant was specifically informed of the applicable legal requirements in Spain and under the European Economic Community, particularly as the project involved the highly toxic chemical industry. The initial EIA study prepared by EAMSA was insufficient and the *Xunta de Galicia* had to request supplemental information. Once this information was submitted, the approval of the EIA proceeded expeditiously. No pressure was applied on EAMSA and the decision to discontinue the project was entirely unrelated to the EIA.

67. The Tribunal has carefully examined these contentions, since the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also increasingly so under international law.<sup>17</sup>

68. The Tribunal notes that in Spain there is a Constitutional mandate relating to the protection of the environment, which finds expression in Article 45 of the Constitution of 1978.<sup>18</sup> Paragraph 2 of this Article states that “[t]he public authorities, relying on the necessary public solidarity, shall ensure that all natural resources are used rationally, with a view to safeguarding and improving the quality of life and protecting and restoring the environment.”<sup>19</sup> This mandate applies not only to the General Administration of the State but also to the Autonomous Communities and Municipalities.<sup>20</sup> Specific legislation has been enacted to fulfill this

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<sup>17</sup> See for example the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, February 25, 1991, and see generally Philippe Sands: *Principles of International Environmental Law*, Vol. 1, 1995, Chapter 15: “Environmental Impact Assessment”, 579-595.

<sup>18</sup> Constitución Española, December 27, 1978, *Boletín Oficial del Estado*, No. 311. December 29, 1978, Article 45.

<sup>19</sup> As translated in European Court of Human Rights, Case *López Ostra v. Spain*, Case No. 41/1993/436/515, December 9, 1994, paragraph 23.

<sup>20</sup> Ramón Martín Mateo: “The Environmental Law System”, in N. S. J. Koeman: *Environmental Law in Europe*, 1999, Chapter 15: “Environmental Law in Spain”, 497, at 497-499.

mandate, including the Law on Toxic and Hazardous Waste<sup>21</sup> and other instruments.<sup>22</sup>

69. Particularly noteworthy is the legislation on EIA. Strict procedures in this respect are provided in EEC Directive 85/337 of June 27, 1985<sup>23</sup> and in Spain's Royal Legislative Decree No. 1302/1986 of June 28, 1986.<sup>24</sup> Chemical industries are specifically required under both measures to undertake an EIA. Public information, consultation with pertinent authorities, licensing and other procedures are also a part thereof.<sup>25</sup> The EEC Directive, like the one that later came to amend it,<sup>26</sup> requires "that an EIA is undertaken before consent is given to certain public and private projects considered to have significant environmental implications."<sup>27</sup> Suspension of projects can be ordered under Spanish law, particularly if work thereon is begun before the EIA is approved.<sup>28</sup>

70. There can be no doubt that EAMSA's project required an EIA and that both Mr. Maffezini and his employees were aware that this was so. The record is abundantly clear with regard to the exchange of correspondence and other communications on the issue of environmental requirements. Apart from the general principle that ignorance of the law is no defense, there is evidence in this case that the Claimant was informed of these requirements. That was why COTECNO was also asked to prepare the initial EIA study as part of its broader study on costs. It appears to the Tribunal that the investor, as happens so often, tried to minimize this requirement so as to avoid additional costs or technical difficulties. Moreover, the Claimant has also not

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<sup>21</sup> Law No. 20, May 14, 1986, as discussed in Martín Mateo, loc. cit., supra note 20, at 504.

<sup>22</sup> On the Spanish environmental legislation see generally Martín Mateo, loc. cit., supra note 20, and Carlos de Miguel Perales: "Practical Questions of Environmental Law", in Koeman, op. cit. and chapter cit., supra note 20, 508.

<sup>23</sup> EEC Directive 85/337, June 27, 1985, *Official Journal of the European Community*, No. L175/40, July 5, 1985.

<sup>24</sup> Real Decreto Legislativo No. 1302/1986, June 28, 1986, *Boletín Oficial del Estado*, No. 155, June 30, 1986, 23733.

<sup>25</sup> De Miguel Perales, loc. cit., supra note 22, at 508-511.

<sup>26</sup> EEC Directive 97/11, *Official Journal of the European Community*, L73/5, 1997.

<sup>27</sup> Laurens Jan Brinkhorst: "European Environmental Law: an Introduction", in Koeman, op. cit., supra note 20, 1, at 15.

<sup>28</sup> Decree No. 1302, cit., supra note 24, Article 9. 1.

substantiated, much less proved, the costs or damages attributable to the handling of the EIA by the Spanish authorities.

71. The Kingdom of Spain and SODIGA have done no more in this respect than insist on the strict observance of the EEC and Spanish law applicable to the industry in question. It follows that Spain cannot be held responsible for the decisions taken by the Claimant with regard to the EIA. Furthermore, the Kingdom of Spain's action is fully consistent with Article 2(1) of the Argentine-Spain Bilateral Investment Treaty, which calls for the promotion of investment in compliance with national legislation. The Tribunal accordingly also dismisses this contention by the Claimant.

*The transfer of funds.*

72. The Claimant also contends that 30 million Spanish Pesetas were transferred from his personal account as a loan to EAMSA, despite the fact that he had not consented to the loan. The Claimant also complains of a number of irregularities attributable to the private banks that managed his accounts, and that these acts also engage the responsibility of the *Banco de España*, Spain's Central Bank.

73. The Kingdom of Spain denies these allegations on the grounds that Mr. Maffezini had consented to the loan, had authorized the transfer of funds and had mandated Mr. Luis Soto Baños, SODIGA's representative in EAMSA, to undertake these operations. Since Mr. Soto Baños was for these purposes acting as the personal representative of Mr. Maffezini, Spain submits that his acts cannot be attributed to SODIGA. Moreover, according to Spain, alleged irregularities on the part of private banks are not the responsibility of the *Banco de España* nor of the Spanish State. Besides, Spanish courts are open to decide on any complaints Mr. Maffezini might have against these banks.

74. In late 1991, when EAMSA was experiencing financial difficulties, discussions were held on how to overcome these problems. In that context, it appears that Mr. Maffezini offered to make available the amount of 30 million pesetas. It is an established fact that on November 14, 1991, Mr. Maffezini authorized his bank to transfer such an amount to the account of EAMSA whenever requested to do so by Mr. Soto Baños. While it is true that the order was not conditioned on other events, it is clear that at that time neither the terms of the financial arrangements nor the details relating

to the eventual loan had been fully negotiated. The specific cash requirements of EAMSA were also not known at the time.

75. The order to transfer was given by Mr. Soto Baños on February 4, 1992. The underlying financial commitment, however, never came to be formalized in a contract binding on Mr. Maffezini, nor was the loan approved by the board of EAMSA, either before or after the transfer of the funds. In this respect the Claimant has convincingly made a distinction between the authorization to the transfer of funds, which was indeed given by him, and the translation of that transaction into a contract, which was never concluded or consented by Mr. Maffezini. The transfer authorization was apparently given on the assumption that it would be preceded by a contract, but no such contract was concluded. Mr. Soto Baños' testimony at the oral hearing confirmed that the loan was never formalized. While this kind of financial arrangement is not uncommon in emergency situations, the lack of a prior or later legally binding contract formalizing the transaction compels the conclusion that this *de facto* arrangement cannot be opposed to the Claimant against his consent.

76. The Tribunal also finds that Mr. Soto Baños was not acting in this operation as the personal representative of Mr. Maffezini but as an official of SODIGA. The oral hearings confirmed that Mr. Soto Baños discussed the transfer of these funds with the President of SODIGA and that the latter authorized him to proceed as he thought best. Similar authorization was not sought from Mr. Maffezini, even though there was time to do so. This further authorization was necessary since, although Mr. Soto Baños was authorized to transfer the funds, no agreement had been reached on the use to which the funds were to be put and on the terms of the loan. The fact that Mr. Soto Baños failed to consult with Mr. Maffezini, but sought and obtained authorization to act from the President of SODIGA, compels the conclusion that Mr. Soto Baños' action, whether within the terms of the mandate or *ultra vires*, is attributable to SODIGA.

77. It must therefore be asked whether that action is purely commercial in nature or whether it was performed in the exercise of SODIGA's public or government functions. In the latter case, it would be attributable to the Spanish State.

78. It is here that the public functions of SODIGA, discussed above, acquire special relevance. Because SODIGA was an entity charged with the

implementation of governmental policies relating to industrial promotion, it performed a number of functions not normally open to ordinary commercial companies. Handling the accounts of EAMSA as a participating company, managing its payments and finances and generally intervening on its behalf before the Spanish authorities without being paid for these services, are all elements that responded to SODIGA's public nature and responsibility. Moreover, the manner in which the private banks conducted themselves in this case with regard to the loan, can be explained in large measure only because of their recognition that SODIGA's orders and instructions were entitled to be honored because of the public functions it performed in Galicia.

79. In addition, it must be noted that although the transfer was labeled a loan, in fact it amounted to an increase of the investment. This explains the inquiries made with the Ministry of Economics about whether the loan should be registered as a part of the investment. The rejoinder by the Kingdom of Spain also describes the investments made by the Claimant as comprising 35 million pesetas as a capital subscription and 30 million as a loan to EAMSA, both being submitted for registration with the Ministry of Economy.<sup>29</sup> A decision to increase the investment taken not by Mr. Maffezini but by the entity entrusted by the State to promote the industrialization of Galicia, cannot be considered a commercial activity. Rather, it grew out of the public functions of SODIGA.

80. While it has been argued by Spain that the transfer resulted in the protection of the investment and thus ultimately benefited Mr. Maffezini by strengthening the financial condition of EAMSA, this is not a tenable proposition in view of the fact that the investor himself did not think that these steps were appropriate. Neither the fact that a credit was entered in favor of Mr. Maffezini on EAMSA's accounts, nor the argument that he could at any time recover the 30 million pesetas that had been transferred change the situation since the funds were largely spent and, hence, not really available to Mr. Maffezini.

81. The Kingdom of Spain has convincingly argued that neither the Spanish State nor the *Banco de España* is responsible for the alleged irregu-

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<sup>29</sup> Memorial de Dúplica del Reino de España, May 3, 2000, at 36-37.

larities attributed to the private banks since the Central Bank only has supervising authority over general financial and monetary operation of private banks and not over their relations with clients.

82. In accordance with Article 1214 of the Spanish Civil Code the burden of proof of the existence of an obligation rests with him who claims its fulfillment.<sup>30</sup> In this case, no written or other proof has been offered regarding the existence of a loan binding on Mr. Maffezini. On the contrary, the evidence presented to the Tribunal indicates that no legal obligation existed with regard to the loan.

83. Because the acts of SODIGA relating to the loan cannot be considered commercial in nature and involve its public functions, responsibility for them should be attributed to the Kingdom of Spain. In particular, these acts amounted to a breach by Spain of its obligation to protect the investment as provided for in Article 3(1) of the Argentine-Spain Bilateral Investment Treaty. Moreover, the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with Article 4(1) of the same treaty. Accordingly, the Tribunal finds that, with regard to this contention, the Claimant has substantiated his claim and is entitled to compensation in the manner spelled out below.

*Desinvestment negotiations.*

84. The Tribunal must now examine the question of the desinvestment negotiations that took place in the period 1994-1996 and their meaning. The Tribunal is mindful of the fact that one of the difficult issues arising from the experience of industrial promotion in Spain relates to the desinvestment and recovery of the capital contributions and loans made by the risk-capital entities to the newly created companies.

85. On June 13, 1994, a meeting was held between Mr. Héctor Rodríguez Molnar, an attorney working for Mr. Maffezini, and officials of SODIGA. The meeting was specifically requested by the attorney in order to discuss a final settlement of the obligations that both EAMSA and Mr. Maffezini had with SODIGA. As it was later summarized in a letter by

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<sup>30</sup> Código Civil, Article 1214, and notes by Francisco Javier Fernández-Urzaínqui, 1999, at 318.

SODIGA's President dated June 23, 1994, Mr. Rodríguez Molnar proposed an arrangement at this meeting that would have had the effect of cancelling all EAMSA's and Mr. Maffezini's obligations in exchange for the assets of EAMSA, amounting to 23,604,168 pesetas. This discussion was confirmed by Mr. Rodríguez Molnar at the oral hearings of this Tribunal at which he appeared as a witness for the Claimant.

86. It has also been demonstrated that SODIGA countered this offer by demanding an additional 2 million pesetas from Mr. Maffezini. This proposal was rejected by Mr. Maffezini. After the first demarches by the Argentine embassy in Madrid, SODIGA's President wrote to Mr. Maffezini on June 13, 1996, stating that in the spirit of reaching an amicable solution SODIGA was prepared to accept the settlement discussed two years earlier with Mr. Rodríguez Molnar, that is, SODIGA waived payment of the additional 2 million pesetas. At this time, however, Mr. Maffezini was already embarked on preparations to submit the matter to ICSID, and the settlement negotiations were not pursued further.

87. The Kingdom of Spain has argued that the proposal made by Mr. Rodríguez Molnar in 1994 constitutes an offer that was never withdrawn, and that its acceptance by SODIGA two years later resulted in a legally binding contract which the Claimant could not now ignore. In Spain's view, this desinvestment settlement was the only question that could be brought before this Tribunal.

88. The Tribunal considers that at the time these negotiations were taking place, the parties did not believe that they were concluding a contract. Instead, the evidence suggests that they assumed that they were engaging in negotiations that might produce an eventual settlement. Negotiation with banks and financial entities are commonly resorted to in order to resolve questions concerning the payment of loans, capital contributions and other aspects of a business; in essence, these are negotiations designed to reach agreement on the amounts involved. The President of SODIGA confirmed this understanding in his letter of June 13, 1996, when he stated that SODIGA was prepared to settle "in terms similar to the negotiations undertaken at its time with Mr. Rodríguez Molnar." There is no reference to any contract or its finalization by this acceptance.

89. The Tribunal has also examined this matter from the point of view of Spanish law. Article 1262 of the Spanish Civil Code simply provides that

“Consent is expressed by the concurrence of the offer on the object and cause that will constitute the contract and its acceptance.”<sup>31</sup> Article 54 of the Spanish Commercial Code elaborates the point further by providing that “Contracts made by correspondence shall be perfected when there is a reply accepting the offer or the conditions with which the offer was modified.”<sup>32</sup> These provisions assume that there was an intention to make an offer with a view to concluding a contract, which was not true of the negotiations described above. Here it is not relevant that the original “offer” was not withdrawn.

90. Even if the offer was likely to lead to the conclusion of the contract, its acceptance would have to be unconditional. A conditional acceptance amounts to a counter-offer that must be accepted by the original offeror.<sup>33</sup> SODIGA’s acceptance was conditioned on the payment of an additional 2 million pesetas and was thus a counter-offer. It was expressly rejected by Mr. Maffezini. From a legal point of view then the original offer lapsed and there was no consent, no contract and no liability. Moreover, the letter from SODIGA’s President of June 13, 1996 cannot consequently be considered an acceptance of the original offer. It was a new offer in similar terms that would require Mr. Maffezini’s acceptance, which he did not give. It is well established under the Spanish Civil Code and the writing of eminent commentators that courts may treat an offer as withdrawn or lapsed if acceptance is not timely, that is, when it does not take place within a reasonable period of time.<sup>34</sup> Hence, even if one were to assume, *arguendo*,

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<sup>31</sup> Código Civil, Article 1262, and notes by Fernández-Urzaínqui, *cit.*, supra note 30, at 327. See in particular Manuel Albaladejo: *Derecho Civil*, II, Vol. 1, Tenth edition, 1997, at 374-375, with reference to a judicial decision of December 14, 1964, relating the offer and acceptance to the intention of producing legal effects.

<sup>32</sup> Código de Comercio, Article 54.

<sup>33</sup> Albaladejo, *op. cit.*, supra note 31, at 385, describing the counter-offer as a second offer that follows the rejection of the first and with reference to a judicial decision of March 14, 1973.

<sup>34</sup> See, for example, Calixto Valverde y Valverde: *Tratado de Derecho Civil Español*, 1926, at 241, with reference to a judicial decision of October 2, 1867. This author comments in particular: “Estimamos también, que de si las circunstancias se dedujere que ha transcurrido con exceso un plazo prudencial para que el aceptante haya podido recoger la oferta, los tribunales podrán considerar en ese caso retirada, o mejor dicho, caducada la oferta”, at 241. See also Federico Puig Peña: *Tratado de Derecho Civil Español*, Tomo IV, Vol. II, 1951, at 53 and Albaladejo, *op. cit.*, supra note 31, at 390 with reference to the circumstances of the case and the nature of the matter.

that there had been offer, its acceptance two years later would certainly not be timely.

91. It follows from what has been said above that no contract was concluded regarding the desinvestment and that neither party had assumed a legally binding commitment with regard thereto.

*Limitation period.*

92. The Kingdom of Spain has also argued that even if it were found to have incurred some liability in this case, the claim against it was barred by a one-year statute of limitation that applies to claims for compensatory damages against the State, as provided in Article 142.2 of Law 30/92.

93. Although it is true that this statute of limitation exists, it cannot apply to claims filed under the ICSID Convention.

*Compensation and interest.*

94. The Tribunal now turns to the question of compensation for the claim that has been upheld.

95. The parties have not disputed the sum that was transferred, which amounts to 30 million Spanish Pesetas.

96. This sum is subject to the payment of interest. Since the funds were withdrawn from a time-deposit account of Mr. Maffezini, it is appropriate in this case to order the payment of interest compounded on an annual basis from February 4, 1992 until the date of the Award. The Tribunal considers reasonable to fix as interest rate the LIBOR rate for the Spanish peseta for each annual period since February 4, 1992 and for the proportion that corresponds to the period between February 4, 2000 and the date of the Award.<sup>35</sup> The interests therefore amount to ESP 27,641,265.28 (twenty-seven million six hundred forty one thousand two hundred and sixty-five Spanish pesetas and 28 cents).

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<sup>35</sup> In accordance with British Bankers Association Financial Data.

97. Accordingly, the Tribunal finds that the total amount of compensation, including interest, that the Kingdom of Spain is to pay the Claimant is ESP 57,641,265.28 (fifty-seven million six hundred forty one thousand two hundred and sixty-five Spanish pesetas and 28 cents). The Kingdom of Spain shall make such payment within a period of 60 days as of the date of this Award. Should the payment of this amount not be made within the period specified above, the amount shall accrue interests at a rate of 6% per annum, compounded monthly, as of the date of the Award to the date of payment.

98. As for the expenses incurred in these proceedings, including the charges for the use of the facilities of the Centre and the fees and expenses of the Tribunal, it holds that these institutional expenses shall be borne equally by the parties.

99. As for the expenses and legal costs of counsel for the parties, the Tribunal decides that each party shall bear the entirety of its own expenses and legal fees for its own counsel, considering that each party has been successful on the key points of their respective positions.

100. The Tribunal expresses its appreciation to counsel for both parties, distinguished Argentine and Spanish lawyers, for the outstanding professionalism and cooperation which they demonstrated in this case.

#### **E. Decisions**

For the reasons stated above the Tribunal unanimously decides that:

(1) The Kingdom of Spain shall pay the Claimant the amount of ESP 57,641,265.28 (fifty-seven million six hundred forty one thousand two hundred and sixty-five Spanish pesetas and 28 cents).

(2) Each of the parties shall bear the entirety of its own expenses and legal fees for its own counsel.

(3) All other claims are dismissed.

So Decided.

Signed in Washington D. C. on November 9, 2000

[signature and date]  
Francisco Orrego Vicuña  
President of the Tribunal

[signature and date]  
Thomas Buergenthal  
Arbitrator

[signature and date]  
Maurice Wolf  
Arbitrator