

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

DECISION ON PRELIMINARY OBJECTIONS

ICSID Case No. ARB/03/13

**Pan American Energy LLC, and
BP Argentina Exploration Company
Claimants**

v.

**The Argentine Republic
Respondent**

and

ICSID Case No. ARB/04/8

**BP America Production Company,
Pan American Sur SRL,
Pan American Fuegoina, SRL and
Pan American Continental SRL
Claimants**

v.

**The Argentine Republic
Respondent**

Before the Arbitral Tribunal composed by:

Prof. Lucius Caflisch (President)
Prof. Brigitte Stern (Arbitrator)
Prof. Albert Jan van den Berg (Arbitrator)

Secretary of the Tribunal:
Gabriela Alvarez-Avila

Washington, D.C., July 27, 2006

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I. PROCEDURAL HISTORY

1. On 23 May 2003, Pan American Energy LLC and BP Argentina Exploration Company, both companies incorporated in the State of Delaware of the United States of America (hereinafter “First Claimants”), filed a Request for Arbitration, dated 22 May 2003, against the Republic of Argentina (hereinafter “Government”, “Argentina” or “Respondent”) with the International Centre for Settlement of Investment Disputes (hereinafter “ICSID” or “Centre”). The First Claimants allege that Argentina, through its own actions and omissions and those of certain of its agencies, has violated several of its obligations under the Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America of 14 November 1991 (hereinafter the “BIT”),¹ as well as international law and Argentine law.

2. The Acting Secretary-General of the Centre registered the First Claimants’ Request for Arbitration on 6 June 2003. The parties agreed that the Tribunal would consist of three arbitrators, one to be appointed by each party, the third arbitrator and President of the Tribunal to be appointed by the Chairman of the Administrative Council of the Centre. Accordingly, the First Claimants appointed Professor Albert Jan van den Berg (Dutch) as arbitrator and the Respondent appointed Professor Brigitte Stern (French) as arbitrator. The Chairman of the Administrative Council of the Centre, with the agreement of the parties, appointed Professor Lucius Caflisch (Swiss) as President of the Arbitral Tribunal. On 6 February 2004, the Tribunal was deemed to have been constituted, and the proceedings to have commenced. On the same date, in accordance with ICSID Administrative and Financial Regulation 25, the parties were notified that Ms. Gabriela Alvarez-Avila, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

3. On 17 December 2003, BP America Production Company, a company incorporated under the laws of the State of Delaware, and Pan American Sur SRL, Pan American Fueguina SRL and Pan American Continental SRL, companies incorporated under the laws of Argentina (hereinafter “Second Claimants”), also submitted a Request for Arbitration against Argentina. The Second Claimants asked that their Request be considered jointly with the

¹ Bilateral investment treaties in general will be referred to as “BITs”.

Request for Arbitration dated 22 May 2003, filed by the First Claimants, arguing that the two cases were substantially identical and concerned investments in the hydrocarbon industry. They claimed also that the Respondent's actions and omissions and those of certain of its agencies violated the BIT, international law and Argentine law. The Acting Secretary-General registered the Second Claimants' Request for Arbitration on 27 February 2004.

4. By letters of 17 and 18 March 2004, the Respondent and the First and the Second Claimants (hereinafter collectively "the Claimants") agreed that the Tribunal should consist of the same members as the Tribunal in ICSID case No. ARB/03/13 and that both cases, *i.e.* ICSID case No. ARB/03/13 and ICSID case No. ARB/04/8 should be consolidated. Accordingly, the Tribunal was composed by Professor Albert Jan van den Berg, Professor Brigitte Stern, and Professor Lucius Caflisch as President of the Tribunal. On 25 March 2004, the Tribunal was deemed to have been constituted, and the proceedings to have commenced. On the same date, in accordance with ICSID Administrative and Financial Regulation 25, the parties were notified that Ms. Gabriela Alvarez-Avila, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

5. Mr. R. Doak Bishop of King & Spalding, Mr. José A. Martínez de Hoz (Jr.) of Pérez Alati, Grondona Benites, Arntsen & Martínez de Hoz (Jr.) and Mr. Richard J. Spies represent the Claimants. Dr. Osvaldo César Guglielmino, *Procurador del Tesoro de la Nación Argentina*, represents the Respondent.

6. The first session in both cases was held on 21 April 2004 in Geneva (the "First Session"). The Claimants were represented at that session by Messrs. R. Doak Bishop, Gary Paulson, José A. Martínez de Hoz (Jr.), Javier Vinokurov and Martin Stanway Mayers. Mr. Jorge Barraguirre and Ms. María Vallejos Meana of the *Procuración del Tesoro de la Nación*, Buenos Aires, acting on instructions from the then *Procurador del Tesoro de la Nación*, Dr. Horacio Daniel Rosatti, represented the Respondent.

7. At the First Session, the parties agreed that the Tribunal had been properly constituted and that they had no objection to any of the members of the Tribunal. It was also noted that the proceedings would be conducted under the ICSID Arbitration Rules in force since 1 January 2003 (hereinafter "the Arbitration Rules"). The parties further agreed that the two cases would be considered to form one set of proceedings and that the Tribunal would issue a single decision on jurisdiction for both proceedings. In respect of the pleadings of the parties,

their number, sequence and timing, the Tribunal announced, after consultation with the parties, that the Claimants would file their Memorial within 90 days of the date of the First Session, the Respondent its Counter-Memorial within 90 days of the date of receipt of the Memorial; the Claimants' Reply would be submitted within 45 days of the date of receipt of the Counter-Memorial, and the Respondent's Rejoinder within 45 days of its receipt of the Reply. It was further agreed that the Respondent had the right to raise any objections it might have to jurisdiction not later than 45 days from its receipt of the Claimants' Memorial. If such objections were made by the Respondent, the Claimants would be entitled to file a Counter-Memorial on Jurisdiction within 45 days from their receipt of the Respondent's Memorial on Jurisdiction. The Tribunal would decide at a later stage, after having consulted the parties, whether a second round of pleadings on jurisdiction would be necessary.

8. The Claimants filed their Memorial on the Merits on 21 July 2004. The Respondent filed its Memorial on Jurisdiction on 21 September 2004 and the Claimants their Counter-Memorial on Jurisdiction on 11 November 2004. After having considered the parties' views, the Tribunal decided on 2 February 2005 that a second round of pleadings on jurisdiction was not necessary and fixed the date for a hearing on jurisdiction on 18 March 2005.

9. The hearing on jurisdiction took place in Washington, D.C., on 18 March 2005. The Claimants were represented by Messrs. R. Doak Bishop, José Alfredo Martínez de Hoz (Jr.), Martin Sanway Mayers, Craig S. Miles, Ms. Valeria Macchia and Mr. Javier Vinokurov. Mr. Jorge Barraguirre and Ms. Gisela Makowski, from the *Procuración del Tesoro de la Nación*, represented the Respondent.

10. At the Respondent's request, Mr. Richard Spies testified at the hearing. The Claimants briefly presented the witness; this was followed by cross-examination from the Respondent and re-direct from the Claimants. The Tribunal also asked the witness some questions. Transcripts of the hearing were made in English and Spanish and were distributed to the Tribunal and the parties on 18 May 2005 (the "Transcript").

II. FACTS

1. Background: The Argentine Economic and Financial Crisis

11. The background of the present case is the Argentine economic and financial crisis at the end of the 1990s. The Arbitral Tribunal in the *Gas Natural*² case described it aptly as follows:

In 1991, Argentina embarked on a program of economic expansion to be carried out in significant part through privatization of state-owned enterprises and attraction of foreign direct investment. Argentina concluded more than fifty bilateral investment agreements, and undertook by law to guarantee the convertibility of the Argentine peso. A currency board was created to maintain the parity between the peso and the United States dollar, by limiting the local money supply to the amount of Argentina's foreign exchange reserves. A major part of the privatization program concerned selling previously state-owned public utilities, including the entity involved in the present arbitration.

For a variety of reasons beyond the scope of the present arbitration, the effort by the government of Argentina to maintain the parity of the peso and the U.S. dollar came under heavy pressure at the end of the decade of the 1990s. For a time Argentina was able to draw on foreign credits, but by December 2001 it had become clear that no further credits were available to Argentina in the near future, and that devaluation was inevitable.

On December 2, 2001, President Fernando de la Rúa issued a decree prohibiting transfers of foreign exchange abroad over a nominal amount. In the following days the government limited cash withdrawals from banks, a general strike and riots broke out, and President de la Rúa declared a state of siege. On December 20, 2001, President de la Rúa resigned. On December 23, 2001, his successor, Adolfo Rodríguez Saá, declared a default on Argentina's public debt, estimated at 132 billion U.S. dollars. President Rodríguez Saá resigned one week later, and (skipping one brief interim designation), the presidency was assumed on January 1, 2002 by Eduardo Duhalde. President Duhalde remained in office until an election in May 2003, and many of the measures relevant to the present arbitration were taken in his administration.

On January 6, 2002, with the consent of Congress in a Ley de Emergencia (Emergency Law), President Duhalde repealed the legal requirement that 1

² *Gas Natural SDG, S.A. v. Argentine Republic*, Decision of the Tribunal on Preliminary Questions on Jurisdiction, of 17 June 2005, ICSID case No. ARB/03/10, §§ 11-15, <http://ita.law.uvic.ca/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf>.

peso = 1 U.S. dollar and set a new rate at 1.40 pesos = 1 U.S. dollar. Banks, which had been closed on December 23, 2001, remained closed. The new rate did not hold, and by mid-January, the unofficial rate was close to 2 pesos = 1 U.S. dollar. The prohibition on remittances abroad remained in effect.

On February 2, 2002, the government ordered all banks to turn over their U.S. dollars to the Central Bank. The prohibition on transfers of foreign exchange abroad without authorization from the Central Bank was reconfirmed, with no indication as to how long the prohibition would last or whether any transfers might be authorized.

2. The Claimants' Position

12. Pan American Energy LLC ("PAE") is a company incorporated under the laws of the State of Delaware, United States of America, with a branch registered in the Republic of Argentina ("PAE Branch").

13. BP Argentina Exploration Company ("BP Argentina") is also a company incorporated under the laws of the State of Delaware.

14. BP America Production Company ("BP America") is an entity incorporated under the laws of the State of Delaware, as well; it owns and controls BP Argentina.

15. BP America and BP Argentina are hereafter collectively referred to as "BP".

16. BP America indirectly, and BP Argentina directly, own the majority of the equity interests of PAE.

17. PAE owns all of the equity interests of: Pan American Continental SRL ("PAE Continental"), Pan American Sur SRL ("PAE Sur") and Pan American Fueguina SRL ("PAE Fueguina"). Each of these entities is a limited liability company (*sociedad de responsabilidad limitada*) incorporated under Argentine law. Together with PAE Branch, the three companies will be referred to as the "Argentine Companies".

18. The Claimants own close to 20% of the shares of Central Dock Sud SA ("Dock Sud") and 16% of Gas Nea SA. PAE is also engaged in electric power generation by having acquired a non-controlling interest in Dock Sud, which had built and operated a thermal power plant in Buenos Aires.

19. The Claimants' claims have arisen from their investments in Argentina. The Argentine Companies were the second largest oil and gas producer in Argentina, and their production was sold domestically and abroad. The Argentine Companies are holders of a number of hydrocarbon (*i.e.* oil and gas) production concessions, exploration permits and production contracts in Argentina (the "Hydrocarbon Concessions and Contracts"), listed in Annex B to Claimants' Memorial on the Merits, as well as natural gas export permits, listed in Annex C to the Memorial. The Argentine Companies carry out operations in the Argentine Provinces of Tierra del Fuego (both on-shore and off-shore), Santa Cruz, Chubut, Neuquén and Salta, as well as off-shore Argentina in the South Atlantic.

20. The Claimants allege that the Respondent, through actions and omissions of the Government and its agencies, violated the BIT, general international law and Argentine law.

21. Among the standards set by the BIT, the following are alleged to have been infringed: (i) fair and equitable treatment of investments; (ii) full protection of and security for the latter; (iii) treatment not less favourable than that prescribed by international law; (iv) abstention from arbitrary or discriminatory interference with the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments; (v) compliance with all obligations undertaken towards investors, including those relating to tax matters; (vi) freedom of transfers of currency at the prevailing market rate of exchange; (vii) prohibition of nationalisation or expropriation, directly or indirectly, except in accordance with certain conditions (public purpose; absence of discrimination; payment of prompt, adequate and effective compensation; due process).

22. The BIT standards correspond to those resulting from general international law. In addition, the Claimants allege that Argentina, by not respecting BIT standards, infringed other rules of international law, such as *pacta sunt servanda*.

23. Finally, the Claimants maintain that Argentina, by its conduct, violated rules of its own law, such as those on: the inviolability of ownership except under certain conditions (Article 17 of the Constitution); the entitlement of all persons to work, trade, make use and dispose of property (Article 14 of the Constitution); the guarantee that the rights established by the Constitution will not be altered by laws governing their exercise (Article 28 of the Constitution); treaties forming part of Argentine law and prevailing over domestic legal enactments (Articles 31 and 75(22) of the Constitution). Similarly, the Claimants allege that

Argentina violated the Regulatory Frameworks for Oil and Gas and for Electricity, consisting of various laws, decrees, regulations and model licenses that were adopted in the early 1990s.

24. The Regulatory Framework for Oil and Gas provides, according to the Claimants, conditions for export by the producers; an exemption from existing or future fees, duties, rights or withholdings, as well as a prohibition of discriminatory taxes on them, their businesses and assets; a right freely to dispose of their production; maximum royalties on the sales proceeds; and protection against discriminatory taxes. These guarantees were incorporated, directly or by reference, into the production concessions, exploration permits and production contracts. Moreover, the prices of crude oil and natural gas were de-regulated in 1991 and 1994, respectively, thus ensuring the freedom to choose the terms of the transactions agreed upon by the producers. The contractual rights entered into by the exploration and production companies enjoyed the same protection by the Constitution as that extended to property rights. Tariffs for the distribution of natural gas were to be calculated in dollars and expressed in pesos, at the exchange rate applicable on the date of invoicing, adjustable periodically to ensure a reasonable return, and subject to review every five years. The aims of all these measures were to encourage competition, to open access to pipelines and distribution networks, and to induce foreign investors to participate in the oil and gas industry.

25. The Regulatory Framework for Electricity consisted of a series of laws, decrees and regulations to implement the privatisation of part of the State electricity sector, in particular with a view to reducing the public debt, to improving the efficiency of services and to increasing tax revenues. To achieve these aims, the Framework provided, notably, the regulations and standards according to which producers were to participate in the Wholesale Electricity Market (WEM), including the following: segregation of different types of activities (generation, transportation, distribution); promotion of competition in electricity production, and promotion of investments to guarantee long-term supply; and furtherance of competitiveness and cost efficiency.

26. The rights and guarantees established in the Oil and Gas Regulatory Framework and in the Electricity Framework were, according to the Claimants, part of the investment conditions and accepted as such by the Argentine Companies and the Claimants. They were, according to the latter, central to their investment decisions.

27. It is unnecessary, at this stage of the proceedings, to enter into the details of the measures taken in the hydrocarbons and electricity sector by the Government. According to the Claimants, the measures included a series of laws, decrees, resolutions and communications, listed in paragraph 32 of the Request for Arbitration and affecting: the exemption of hydrocarbon exports from export dues, with the express purpose to compensate the banking sector for asymmetrical “pesification”, *i.e.* the mandatory conversion of dollar obligations into peso-denominated ones at a rate of 1:1; the limitation of the royalty rate to 12%; the right freely to export hydrocarbons and to transfer funds abroad; the right to effect sales and purchases in dollars, terminated by “pesification”; the freedom to contract impeded by the elimination of adjustment mechanisms; the ability to depreciate, for tax purposes, investments funded in dollars at the same level as prior to “pesification”; and, more generally, the possibility to mitigate losses caused by that process through tax measures.

28. The measures taken by the Government and outlined above are alleged by the Claimants to have violated the BIT, general international law and Argentine law, as pointed out earlier (§ 20).

29. Regarding the BIT, the Government allegedly infringed its Article II(2)(a), which requires Argentina to grant investments made by US nationals fair and equitable treatment, full protection and security, and treatment not less favourable than that required by international law, the same rule applying to Argentine nationals in the US.

30. These measures were also, according to the Claimants, contrary to Article II(2)(b) in that were arbitrary or discriminatory and impaired the Claimants’ investments.

31. Article II(2)(c) of the BIT prescribes that each Contracting Party shall observe “any obligation it may have entered into with regard to investments” (so-called “umbrella clause”), and Article XII contains certain guarantees in tax matters. The Claimants contend that both provisions have been violated, as well as Article IV of the BIT, the measures taken by Argentina being equivalent to expropriation of the Claimants’ investments in Argentina and their equity interest in the Argentine Companies without prompt, adequate and effective compensation. The same is true of the measures of interference with contractual rights which, under Argentina’s Constitution, amount to a taking of property rights. Finally, those measures allegedly infringed Article V of the BIT guaranteeing the freedom of all transfers

related to an investment in and out of the territory of a State Party, including returns, compensation, payments made in settlement of an investment dispute, and so on.

32. The measures taken against vested legal and contractual rights of the Claimants are also, according to the latter, violations of property rights protected by Sections 14 and 17 of the Argentine Constitution. By the fact that the BIT was approved pursuant to that Constitution, and thus became part of domestic law though prevailing over the latter, the measures at issue are alleged to be in violation of Sections 31 and 75(22) of the Constitution as well.

III. COMPETENCE OF THE TRIBUNAL

1. Relevant Texts

33. The Centre can only have jurisdiction if there is mutual consent. It is now well established that a general reference to an ICSID arbitration in a bilateral investment treaty can be considered to form the written consent of a State, within the meaning of Article 25 of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (hereafter “Washington Convention” or “ICSID Convention”), to jurisdiction of the Centre, and the filing of a request by the investor is considered to form the investor’s consent.

34. The BIT came into force between the two States on 20 October 1994.

35. Article VII(4) of the BIT provides:

Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3, shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and . . .

36. Pursuant to paragraph 3 of the same Article, the national or company concerned, *i.e.* the Claimants, may fulfil that requirement by choosing to consent in writing to the submission of

the dispute for settlement by binding arbitration “(i) to the International Centre for the Settlement of Investment Disputes ...”.

37. Argentina has consented by becoming a Party to the BIT (Article VII(4)). Pursuant to Article VII(3)(a)(i), on 20 May 2003, PAE and BP Argentina delivered a letter to the Government, and on 21 May 2003 to the Secretary-General of ICSID, consenting to ICSID jurisdiction over the present dispute. On 27 November 2003, BP America, PAE Sur, PAE Fuegoina and PAE Continental delivered a letter to the Government, and on 4 December 2003 to the Secretary-General of ICSID, also consenting to ICSID jurisdiction over the present dispute.

38. Article VII(2) of the BIT provides:

In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute to resolution . . .

39. In the present case, initial consultation and negotiation were initiated by the Claimants, which advised the Government on 16 August 2002 formally of the dispute, informing it that they would solicit international arbitration under the BIT, and seeking settlement by consultation and negotiation. This communication was followed by several letters to the President of the Republic of Argentina and the President of its National Bank. The Claimants repeatedly requested the Argentine authorities, to no avail, to adopt measures preserving the Claimants’ investments. The six-month period of consultation and negotiation lapsed on 16 February 2003, more than three months before the institution of arbitration proceedings (Request for Arbitration, §§ 59-60, 62-64).

2. Scope of Examination

(a) Institution of the Proceedings

40. As mentioned, the BIT entered into force on 20 October 1994 (see above, §34) and, accordingly, Argentina consented to ICSID arbitration on that same date. The Claimants gave consent by the letters mentioned in § 37 above. The Secretary-General of ICSID registered the Requests for Arbitration dated 22 May 2003 and 4 December 2003, respectively, on 6 June 2003 and 27 February 2004. The proceedings were therefore instituted on 6 February

2004 and 25 March 2004, respectively, pursuant to Rule 6(2) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

(b) Prior Consultation and Negotiation

41. Under Article VII(2) of the BIT the parties to an investment dispute “should initially seek a resolution through consultation and negotiation”. The provision goes on to say that, “[i]f the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution”, *inter alia*, to ICSID arbitration. This text could give rise a question of interpretation: is it mandatory to have consulted and negotiated unsuccessfully prior to submitting a case to arbitration? The conditional “should” in the first phrase of Article VII(2) suggests that it is not, a view adhered to by the Claimants (Request for Arbitration, § 87). The second phrase, however, seems to view consultation and negotiation as a condition for submitting cases, a view supported by the Respondent. The question does not have to be answered in the present case, however, as the Claimants have made an adequate effort to consult and negotiate, as is shown by the facts related above (see above, § 39).

(c) Significance of the Case-law Developed by ICSID and Other Tribunals

42. ICSID arbitral tribunals are established *ad hoc*, from case to case, in the framework of the Washington Convention, and this Tribunal is not aware of any provision, either in that Convention or in the relevant BIT, establishing an obligation of *stare decisis*. It is nonetheless a reasonable assumption that international arbitral tribunals, including those set up within the ICSID, will generally take into account the precedents set by other international tribunals. The present Tribunal will follow that same approach, especially since Claimants and Respondent, in the written pleadings and oral arguments have heavily relied on those precedents.

(d) What Issues Are Deemed to Be of a Jurisdictional Nature?

43. The parties disagree as to which questions are to be addressed as jurisdictional ones at this stage of the present proceedings. The Respondent has generally taken an extensive view of what belongs to the jurisdictional sphere. The Claimants, by contrast, have been restrictive on that same point, often contending that certain objections to jurisdiction made by Argentina belong to the merits of the case.

44. In the *Oil Platforms* case, the International Court of Justice (hereafter “ICJ”) defined its task at the jurisdictional level by pointing out that it

must ascertain whether the violations ... pleaded do or do not fall within the provisions of the [1955] Treaty [of Amity] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain (§16).³

45. It is, in other words, a question of whether the issues to be considered fall within the parameters of jurisdiction as defined by the enabling treaty, and not one of examining whether the Claimants’ allegations should succeed on the merits.

46. As early as in *Amco v. Indonesia*,⁴ the ICSID Arbitral Tribunal had held that

[t]he Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that prima facie the claim, as stated by the Claimant when initiating the arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal (at p. 405).

47. Here again, the gist of the Tribunal’s decision is that essentially the issue is not whether the claim is well-founded on the merits, but whether, in the way in which it is stated, it fits into the jurisdictional framework designed by the relevant arbitration clause.

48. The question examined here has also come up in a recent case involving the Respondent. In *Siemens AG v. Argentina*⁵ the Tribunal observed:

At this stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty [between Germany and Argentina Concerning the Reciprocal Encouragement and Protection of Investments of 9 April 1991] made by Siemens are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if the Claimants’ allegations would be proven correct, then the Tribunal has jurisdiction to consider them (§180).

³ (Iran v. United States), Jurisdiction, Judgment of 12 December 1996, ICJ Reports 1996, pp. 809-810.

⁴ Decision on Jurisdiction of 25 September 1983, ICSID case No. ARB/81/1, ICSID Reports, Vol. 1, p. 390.

⁵ Decision on Jurisdiction of 3 August 2004, ICSID case No. ARB/02/8, *ILM*, Vol. 44, 2005, p. 137.

49. The question arises whether the Tribunal should go further in its inquiry at this stage of the proceedings. In *Enron I*,⁶ the Tribunal observed:

The fact that the Claimants have argued and demonstrated *prima facie* that they have been adversely affected by the tax measures complained of is sufficient for the Tribunal to consider that the claim, as far as this matter is concerned, is within its jurisdiction to examine such claim on the merits under the provisions of the Bilateral Investment Treaty (§ 99).

50. The present Tribunal does not retain the requirement that a claimant has the burden of proof that it has a *prima facie* claim against the respondent in the sense of such a requirement for, for example, obtaining interim measures. On the other hand, and that is the manner in which this Tribunal understands the above-quoted paragraph in *Enron I*, a claimant should demonstrate that *prima facie* its claims fall under the relevant provisions of the BIT for the purposes of jurisdiction of the Centre and competence of the tribunal (but not whether the claims are well founded). In that respect, labelling is not enough. For, if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41(1) of the ICSID Convention.

51. As a consequence, the claims made in the present case must be taken as they are by the Tribunal at this stage of the proceedings, whose only task it is, in the present phase of the proceedings, to determine whether, as formulated, they fit into the jurisdictional parameters set out by the relevant treaty instrument or instruments. This is so because in that phase, tribunals deal with the nature and scope of claims and not with the question of whether they are to succeed. If it were otherwise, questions of jurisdiction would have to be addressed at the same time as, or even subsequently to, the examination of the merits of the case. Accordingly, the question is here whether the Claimants' claims, if well founded, a matter to be examined at the following stage, may denote violations of the BIT and therefore fall within the Centre's jurisdiction and this Tribunal's competence under the relevant provisions of the BIT and Article 25 of the ICSID Convention. This is the perspective from which Argentina's objections must be viewed.

⁶ *Enron and Ponderosa Assets v. Argentine Republic*, Decision on Jurisdiction of 14 January 2004, ICSID case No. ARB/01/3, <http://ita.law.uvic.ca/documents/Enron-Jurisdiction.pdf>.

52. In theory, the inquiry by the Tribunal at the present stage of the proceedings would also extend to the question of whether they are not frivolous or abusive. As no objection has been raised by Argentina, the Tribunal need not engage in that type of inquiry.

53. Argentina has raised six preliminary objections: (i) the dispute does not, contrary to what is required by Article 25(1) of the ICSID Convention, “arise directly out of an investment”; (ii) it is not a “legal” dispute as prescribed by that same provision; (iii) the claim must be limited with regard to tax measures; (iv) the Claimants are estopped from addressing organs other than Argentine tribunals; (v) the claims relate to conjectural rather than real damages; and (vi) the Claimants have no right of action (*jus standi*).

54. As a matter of terminology, Rule 41(1) of the ICSID Arbitration Rules contains the following formulation: “Any objection that the dispute or any ancillary claim is not within the *jurisdiction* of the Centre or, for other reasons, is not within the *competence* of the Tribunal...” (emphasis added; see also Article 41(2) of the Washington Convention).⁷ In the present Decision, the terms “jurisdiction” and “competence” shall be used interchangeably, having regard to the preliminary objections raised by Respondent and debated between the parties. For the same reason, there is no need to go into the possible – and somewhat controversial – distinction between jurisdiction and admissibility. Whatever the labelling, the parties have presented their case on the basis of the six objections raised by the Respondent.

⁷ The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), Doc. ICSID/2 states at § 22: “The term ‘jurisdiction of the Centre’ is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The jurisdiction of the Center is dealt with in Chapter II of the Convention (Articles 25-27).” At § 38 the Report pursues: “Article 41 reiterates the well-established principle that international tribunal are to be the judges of their own competence . . . It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration . . . is so narrowly defined as not to encroach on the prerogative of the Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.”

3. First Preliminary Objection: The Dispute Does Not Arise Directly out of an Investment

(a) The Positions of the Parties

55. According to Article 25(1) of the ICSID Convention, “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment . . .”. The Respondent argues that the Claimants’ claims do not meet Article 25(1) in that they do not arise “directly” out of an investment.

56. To support its objection, Argentina invokes the *travaux préparatoires* of Article 25(1), which initially was intended to refer to “disputes arising *out of or in relation to* an investment” (emphasis added), a very wide formula that was subsequently reduced to the present language, proposed by the Central African Republic and commented on, first by the Portuguese delegation, according to which the changes made restricted ICSID jurisdiction to claims for damages suffered as a consequence of certain acts by the State that were *directed particularly* at the investor, and, second, by the delegation of Spain, which explained that the purpose of the new text was “to avoid the triumph of excesses, both of positions that would inappropriately close the Centre’s jurisdiction, and of positions that would open it excessively”. “Directly”, according to Argentina, may be equalled to “*specifically*” (Memorial on Jurisdiction, §§ 21-22; see also Transcript, p. 8).

57. According to Argentina, it is not enough for an investor to have been adversely affected by measures of the host State, even at the jurisdictional stage. The investor must also show that the adverse measures were directed against him and were not just mere general measures aimed at everybody: according to the Respondent, if universal measures were considered by ICSID tribunals, “[t]his would be judging a public policy and not a legal conflict” (Respondent’s Memorial on Jurisdiction, § 22). However, the Respondent admits that general measures can, exceptionally, justify ICSID jurisdiction – when “those ... measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts”, as the Arbitral Tribunal said in its Decision on Jurisdiction of 17 July 2003 in *CMS Gas Transmission Co. v. Argentina*:⁸ “What is brought under the jurisdiction of the Centre”,

⁸ ICSID case No. ARB/01/8, *ILM*, Vol. 42, 2003, p. 788.

the Tribunal continues, “is not the general measures in themselves but the extent to which they may violate those specific commitments” (§ 27). Thus, a “clear and reasonable interpretative line” on this would be, according to the Respondent, that Claimants must show specific commitments made to them, negotiated with them and “promised particularly, specifically and exclusively” to them, allegedly violated by Argentina’s measures: devaluation of the *peso*, establishment of a new exchange parity, temporary conversion of obligations and tariffs into pesos, new fiscal policy.

58. To illustrate its point, Argentina invokes *Methanex v. United States of America*,⁹ where a NAFTA rule similar to Article 25(1) of the ICSID Convention was discussed, namely, Article 1101 of the NAFTA relating to protection against “measures adopted or maintained by a Party relating to (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party”. As none of the measures taken by the defendant, the United States, were expressly aimed at *Methanex*, the question arose whether they were “related” to that company and, in particular, whether it was sufficient that they *were susceptible of affecting* the claimant. On that point the Tribunal, in its Partial Award of 7 August 2002, came to the conclusion that there had to be a significant threshold to NAFTA arbitration and that the criterion of any economic impact on the investor did not amount to such a threshold. In other words, and to quote Argentina’s Memorial on Jurisdiction (§ 34), “[s]imple impact does not mean legal impact”; the Claimants should have established a “direct, proximate and immediate connection between the measure and their alleged investment” (*ibid.*).

59. The Claimants respond that they do not complain of “general” measures, but of violations of specific commitments entered into by Argentina *vis-à-vis* the Claimants and subsequently violated by Argentina. These acts cannot, according to the Claimants, be hidden behind the label of “general” measures prompted by Argentina’s financial situation. The “general-measures” argument had been raised already by Argentina, and rejected by the Tribunal, in the above-mentioned and quoted *CMS* case (above, § 57). The Claimants contend that, contrary to the inferences made by Respondent, there have not been, in *CMS* or in any other instance, “specific commitments” negotiated directly with the State; nor was there a requirement to show the existence of such commitments, except if they resulted from treaty

⁹ UNCITRAL (NAFTA) Arbitration, First Partial Award of 7 August 2002, <http://www.state.gov/documents/organization/12613.pdf>.

provisions applicable to the States concerned. The Claimants then refer to the passages in *CMS* and contend that the measures resorted to violated legally binding commitments made to them as investors under the BIT, the Regulatory Frameworks, the hydrocarbon concessions and contracts, the export permits, the Argentine Constitution and Argentine law. These were general measures directly bearing on the Claimants' investments and contrary to the BIT; in the oil and gas sector, there were also a number of measures specifically addressed to that sector.

60. According to the Claimants, Argentina misinterprets the *Methanex* decision when it contends that it stands for the proposition that a "general measure must be directed against specific commitments undertaken with the investor" and that the Claimants must establish "a direct, proximate and immediate connection between the measure and the alleged investment" (Memorial on Jurisdiction, § 34). The Claimants point out; (i) that the *Methanex* decision does not pertain to matters covered by the BIT between Argentina and the United States; and (ii) that *Methanex* actually supports the Claimants' views.

61. According to the Claimants, in the *Methanex* case, the measures taken by the State of California were aimed at a methanol-based ingredient of gasoline, California having issued an executive order against using that ingredient. Methanex, the claimant, did not manufacture the ingredient in question, but produced, transported and marketed methanol, from which that ingredient was made. Thus California's Executive Order was not immediately directed at methanol and had but an indirect impact on Methanex's investment in methanol. By contrast, in the present case, the Respondent's measures were aimed directly at the oil and gas industry in Argentina. The Government specifically targeted that industry, whereas in *Methanex*, the contested Executive Order did not even mention "methanol".

62. Furthermore, the Claimants contend that, in the *Methanex* case, the United States objected to the Tribunal's jurisdiction under Article 1101 of the NAFTA, alleging that the measures taken by the State of California were not "related to" Methanex's investment. The Tribunal in that case saw a "relation" between a measure and an investment where there was a "legally significant connexion" between the former and the latter. The (Canadian) claimant tried to prove such a connexion by alleging collusion between the lobbyists of the (American) methanol industry and the Governor of California. The Tribunal found the evidence tendered by the claimant to be insufficient; it did not however refuse to take jurisdiction but asked the

claimant to adduce more evidence. In the present instance, according to the Claimants, the relation between the investments and the measures complained of is a straightforward one. The measures were open ones, specifically aimed at the oil and gas industry, and, contrary to *Methanex*, the evidence in the instant case points to a clear “legally significant connexion” between Argentina’s measures, the BIT and the Claimants’ investments in Argentina.

(b) The Tribunal’s Considerations

63. In this Tribunal’s judgment, general measures of economic policy taken by the host State are in principle not within the purview of Article 25(1) of the ICSID Convention. In that sense, and even if the present legal context differs from that of *Methanex*, it is obvious that general measures often do not result in a dispute “arising directly out of an investment” in the sense of Article 25(1).

64. It may well be, however, that, in the context of the commitments assumed by the host State, “general” measures have a “specific” effect if they appear to violate specific commitments – as pointed out by Argentina – or if they have a specific impact on the investment – as emphasised by the Claimants. The expression “arising directly out of an investment” (Article 25(1)) cannot, therefore, be interpreted as “directed to”.

65. In the *CMS* case (see above, § 57, cited by both parties), the Tribunal rightly observed that:

[I]t does not have jurisdiction over measures of a general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant’s investment or general measures of economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts (§ 33).

66. The “direct” relationship between the measure and the investment can be established, according to that Tribunal, “if those general measures are adopted in violation of specific commitments given to the investments in treaties, legislation or contracts” (§ 27).

67. In the Tribunal’s judgment, it is not enough for the Respondent to state that general measures are complained of to exclude the Centre’s jurisdiction: the core question is the existence of specific commitments that these general measures might violate.

68. At the present stage of the proceedings, which pertains to jurisdictional questions, the examination of the issues discussed above can only be of a preliminary character. In essence, it will be enough for the Claimants to contend that some specific commitments related to their investments were violated by specific or general measures.

69. The standard to be used, therefore, is whether the Claimants have made out, *prima facie*, a good case for there being a “dispute arising directly from an investment”. In the present instance, the Tribunal is of the view that they have. It is, indeed, in the nature of the mechanism of preliminary objections that, whenever the latter are somehow connected with the substance, as is the case here, the matter can only form the subject of a preliminary review.

70. Thus, the Tribunal finds that the present dispute has arisen directly from an investment in the sense of Article 25(1) of the ICSID Convention and, accordingly, rejects Argentina’s First Preliminary Objection.

4. Second Preliminary Objection: The Present Dispute Is Not of a “Legal” Nature

(a) Introduction

71. This objection aims at establishing that the present dispute is not of a “legal” nature as required by Article 25(1) of the ICSID Convention. In addition to the basic argument that the dispute is not about the determination of legal rights and duties, the Respondent contends that the claims are not related to rights but to “commercial flow” and that the rights claimed, being contractual in nature (see also Transcript, p. 15), are not of an international character and do not qualify as rights protected by Article I(1)(a) of the BIT; nor are they the object of an investment agreement under Article VII(1) of that Treaty. Instead, the claim is about the alleged non-performance of contractual obligations under Argentine law. And the BIT’s “umbrella clause” (Article II(2)(c)) cannot be reasonably interpreted as meaning that breaches of contract are automatically elevated from the domestic to the international level by the effect of that clause. Finally, the Respondent points to arbitral precedents which bar jurisdictional access to ICSID tribunals for purely contractual claims.

72. In fact, this Second Preliminary Objection is presented under different aspects. According to the Respondent, the dispute is not a legal dispute under the Washington Convention for

several reasons: the first is that the dispute is not about the determination of legal rights and duties, because it merely relates to commercial flows; the second is that it is not legal but purely contractual, because it only asserts rights and obligations based on agreements and contracts; the third reason for denying a legal character to the claims presented by the Claimants is that the existing contractual claims have not been transformed into treaty claims by the so-called “umbrella clause”. The Tribunal will now endeavour to examine these different contentions.

(b) Is the Dispute about Legal Rights?

(i) *The Positions of the Parties*

73. According to the Respondent, under Article 25(1) of the Washington Convention, the controversy has to be about rights and duties, *i.e.* legal titles, and not simply one “regarding certain undesirable consequences”. This, according to Argentina (Memorial on Jurisdiction, §§ 36-37), is meant to exclude from the Centre’s jurisdiction “mere commercial or political disputes”. In the framework of the Convention’s *travaux préparatoires*, the President (sic) of the IBRD explained that the expression “legal disputes” had the purpose of encompassing those cases involving differences of opinion with respect to a legal right. This would exclude cases like, for example, if a company wanted to challenge a system of price control, which implies issues of equity and not of legal rights.” And, later on, the President (sic) added that “legal disputes” were those “referring to a legal right or obligation, or referring to a fact related to the determination of such legal right or obligation”.

74. The Respondent concludes that the legal nature of a dispute cannot depend on the characterisation made by the Claimants but is, in the words of the ICJ, “a matter for objective determination” (Advisory Opinion of 30 March 1950 on the *Interpretation of Peace Treaties*).¹⁰ (Memorial on Jurisdiction, § 42; it will be noted, in passing, that the Court’s *dictum* pertains to the term “international dispute” rather than to the expression “legal dispute”). Accordingly, the Respondent alleges that this Tribunal has no competence, in the absence of a legal dispute, within the international framework established by Article 25(1) of the 1965 Convention, and that it is for the Tribunal to determine what is a legal dispute.

75. To this line of argument Argentina adds another, related consideration. Under the above treaty provision, disputes (or, rather, “legal” disputes) “are in relation to rights, not with respect to commercial flows”. Yet the Claimants focus the dispute on commercial flows, *i.e.* on the freedom of exercising their production and trading activities, rather than on assets owned or controlled by them. But under Article I(1)(a) of the BIT, protected investments are conceived as consisting in rights *in personam* and *in rem*, as becomes evident from subparagraphs (i), (iv) and (v) of that provision: tangible and intangible ownership rights, intellectual property, and rights, licences and permits granted pursuant to law. The issue “is not what happened to such things, but what happened to the investor’s rights on such things” (Memorial on Jurisdiction, §§ 45-47).

76. Regarding this first part of the Second Preliminary Objection, the Claimants recall that a legal dispute is “a disagreement on a point of law or fact, a conflict of legal view or interests between parties” (ICJ, *East Timor* case).¹¹ And the Claimants add that a dispute is legal if “legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed”(Counter Memorial on Jurisdiction, § 22).¹²

77. That is the case here, according to the Claimants, the issue being whether the measures taken by Argentina were in violation of the latter’s obligations under the BIT, including the question of whether those measures in effect amounted to the expropriation of specific legal and contractual rights and revenue, to unfair and inequitable treatment of the Claimants’ investment, to unfair and discriminatory impairment of that investment, to a failure to provide full security and protection to the investment, and to a violation of the BIT and other rules of international law. The case also involves the amount of reparations due and, hence, clearly is a legal dispute (Counter-Memorial on Jurisdiction, § 24). In this connexion, the Claimants invoke a series of six precedents, all involving Argentina, among which *Azurix Corp.*¹³ and

¹⁰ ICJ Reports 1950, p.65, at §74.

¹¹ (Portugal v. Australia), Jurisdiction, Judgment of 30 June 1995, ICJ Reports 1995, p. 89, at § 22.

¹² C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge, Cambridge University Press, 2001, p. 105); see also *Fedax v. Venezuela*, Decision on Jurisdiction of 11 June 1997, ICSID case No. ARB/96/3, *ILM*, Vol. 37, 1998, p. 1378.

¹³ Decision on Jurisdiction of 8 December 2003, ICSID case No. ARB/03/30, *ILM*, Vol. 43, 2004, p. 262, at § 58.

LG&E.¹⁴ As was the case in these precedents, the Claimants have sufficiently demonstrated, in their Memorial, that they were adversely affected by measures of the Respondent against their “legitimate legal and contract rights”, damaging the Claimants’ investment in Argentina. There is, accordingly, a controversy over the existence and scope of legal rights or obligations and over the extent of the reparation due, which means that there is a legal dispute under Article 25(1) of the ICSID Convention.

78. Regarding Argentina’s “commercial-flow” argument (see above, § 71), the Claimants’ reply is that it has been shown that genuine investments were made under the BIT, which consisted of interests in the Argentine Companies, capital contributions, legal and contractual rights under the Oil and Gas Regulatory Framework, concessions and contracts, private hydrocarbon supply contracts, exports permits, and so on. The Claimant Companies in the US allege that they made substantial capital contributions to allow the Argentine Companies to exploit the concession areas in Argentina and to export the products thereof. All these items constitute “investments” within the meaning of the BIT and the Washington Convention; thus the present instance is an “investment dispute” under Article 25(1) of the latter.

(ii) *The Tribunal’s Considerations*

79. The Tribunal agrees with the Respondent that it is for it and not for the parties to determine whether there is a legal dispute. It will now deal with the first argument at the basis of the Second Preliminary Objection against ICSID jurisdiction, to the effect that the present dispute is indeed not a “legal” one, as required by Article 25(1) of the Washington Convention, because it does not involve the determination of rights and obligations, and is merely a commercial dispute.

80. The Tribunal recalls that the notion of “dispute” generally has been accurately defined by the Permanent Court of International Justice (PCIJ) in the *Mavrommatis* case,¹⁵ where the Court said that “[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons” (p.11). This definition was more recently confirmed

¹⁴ Decision on Jurisdiction of 30 April 2004, ICSID case No. ARB/02/1, <http://www.worldbank.org/icsid/cases/lge-decision-en.pdf>.

¹⁵ (*Greece v. Great Britain*), Judgment of 30 August 1924, PCIJ, Series A, N° 2.

by the ICJ in the *East Timor case* (§ 22).¹⁶ It covers all “disputes”, legal or political, national or international. “Legal” disputes have generally been defined as “controversies in which the Parties are in disagreement over a right”, see for example Article 1 of the Locarno Arbitration Conventions between Germany, on the one hand, and Belgium, France, Poland and Czechoslovakia, on the other. What matters here is whether the pretensions of the Claimants and the arguments of the Respondent are formulated as being based on existing law. This is what is, in the words of the ICJ (see above, § 74), “a matter for objective determination”.

81. Although the Respondent in the present case has contended that the Claimants were concerned with “commercial flow” and that their claims were of an economic and political, rather than legal, nature, it seems evident to this Tribunal that the Claimants have framed their pretensions in legal terms and on the basis of law, and have been answered by Respondents in legal terms. According to what has been recalled above, what matters at this stage, to determine whether the dispute is “legal” under Article 25(1) of the 1965 Convention, is whether the Parties, to justify their claims, are basing themselves on law. Another question, to be decided at the merits stage, is whether those claims are well-founded in substance. This Tribunal finds that the present disagreement is clearly a legal dispute.

82. In conclusion, it is beyond doubt, in the Tribunal’s view, that the present dispute involves the determination of legal rights and obligations of the Claimants as well as of the Argentine Republic, and that it is not a mere political or commercial dispute.

(c) Can Rights Based on Contracts Be Considered Legal Rights?

83. The second question relates to the second contention of the Respondent, to the effect that the present dispute is excluded from the Centre’s jurisdiction because it involves only contractual rights.

(i) *The Position of the Parties*

84. According to Argentina, the opposition of legal theses and interests, to fit the definition provided for in Article 25(1) of the Washington Convention, should furthermore pertain to the

¹⁶ See above, § 76 and note 11.

“provisions establishing international obligations of the State receiving the investment” (Memorial on Jurisdiction, § 39). This is not the case here, for the rights claimed arise out of provisions of concessions, exploration permits, contracts and export permits. Disagreements of this type do not, for the Respondent, qualify as “legal disputes” under Article 25(1) of the ICSID Convention and must be brought before the national courts to the jurisdiction of which the “relevant parties” have “freely consented” (*ibid.*, § 40). The fact that the Claimants assert that Argentina has breached obligations established by the BIT is not enough to turn their contractual claims into “legal disputes” under Article 25(1) of the 1965 Convention.

85. Always according to the Respondent, the dispute brought by the Claimants pertains to alleged violations by Argentina of obligations under contracts and concessions, and not, as alleged by the Claimants, to violations under the BIT. Hence the appropriate jurisdiction is that open to the contracts and concessions. This is why the Respondent’s consent to ICSID jurisdiction under Article VII of the BIT is of no relevance.

86. Thus the Tribunal lacks jurisdiction, as the dispute does not pertain to a violation of the BIT but to the alleged non-performance of contractual obligations under Argentine law (*ibid.*, § 64).

87. To be protected under the BIT, contractual relationships must be in the form of an investment agreement, says the Respondent, and this is not the case here, for all the claims here are of a contractual nature and subject to general laws. The host State has not assumed obligations *vis-à-vis* a specific investment, so that, pursuant to the Decision on Jurisdiction of 29 January 2004 in *SGS v. Philippines*,¹⁷ there is no investment agreement in the sense of Article VII(1) of the BIT (p. 46).

88. Regarding the issue of whether their contractual rights qualify as “investments”, the Claimants refer to both *CMS* and *Azurix* (above, §§ 57 and 77), where it was found, despite Argentina’s objections, that direct or indirect ownership of shares, interests or concession gave the US investor a claim under the BIT for its proportionate share of the destruction of the value of the local company. The former case was about measures taken by the host State regarding the investment made by CMS in a license for the transportation of natural gas. In

¹⁷ ICSID case No. ARB/02/6, www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

Azurix, the issue was that company's indirect investment in a water concession through a local subsidiary. In both instances it was held that the US interests qualified as investments under the BIT. The passage extracted by the Claimants from the *Azurix* decision seems particularly noteworthy: "a concession contract, such as that entered by ABA [the *Azurix* subsidiary in Argentina], qualifies as an investment for purposes of the [Argentina-US] BIT given the wide meaning conferred upon this term in the BIT that includes 'any right conferred by law or contract' (§ 62).

89. Moreover, the Claimants do not simply invoke breach of contract, they invoke a breach of the BIT. As is shown in the above-cited passage, the right in issue is, in addition, protected by the BIT. Always in the *Azurix* decision, the Tribunal disagreed with Argentina's argument that that company's claim was a purely contractual nature:

The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent to Claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot *per se* transform the dispute under the BIT into a contractual dispute (§ 76).

90. This means, according to the Claimants, that in *Azurix*, as in the present case, there is, in addition to a contractual claim, a cause of action under the BIT because the measures taken in the host State amount to an expropriation of rights held by the Claimants and protected by that Treaty.

(ii) *The Tribunal's Considerations*

91. In this Tribunal's view, it is not enough to state that a dispute is a contractual one to disqualify it as a legal dispute. It is well known that ICSID tribunals have been dealing over the years with contractual as well as non-contractual disputes. The question here is, rather, the extent of the jurisdiction of this Tribunal, on the basis of the BIT and not of an arbitration clause in a contract. The Tribunal wishes to make it clear that, at first sight, it has only jurisdiction over treaty claim, and cannot entertain purely contractual claims which do not amount to a violation of the BIT.

92. In this connexion, it is necessary to decide whether this statement concerning the second aspect of the Second Preliminary Objection will have to be corrected on account of the existence of an “umbrella clause” in Article II(2)(c) of the BIT.

93. Article II(2)(c) of the BIT provides that “[e]ach Party shall observe any obligation it may have entered into with regard to the investments”. In *SGS v. Pakistan*,¹⁸ it had been alleged by the Claimant that that clause “elevated” breaches of contract from the municipal to the BIT level and brought them within the scope of that Treaty. This construction was rejected by the Tribunal, as it is by the Respondent in the instant case, for it would “entail the incorporation of many public contracts as well as other municipal law under the umbrella of BITs”. It would also render nugatory the other protection clauses in the BITs and do away with any forum-selection and dispute-settlement clauses that may have been agreed upon (Memorial on Jurisdiction, §§ 67-68).

(d) Does the Existence of an “Umbrella” Clause Modify the Tribunal’s Conclusions?

94. The next issue to be considered is therefore that of the “umbrella clause” contained in Article II(2)(c) of the BIT.

(i) *The Position of the Parties*

95. The effect of the umbrella clause is, according to the Claimants, to place contracts and other commitments between the investor and the host State under the protection of the Treaty; according to the Respondent, it cannot have such an effect. In *SGS v. Pakistan* (above, § 93), it was held that the umbrella clause of the BIT between Switzerland and Pakistan could not be taken to convert mere contractual claims into BIT-protected ones. But, according to the Claimants, the present case is different, involving as it does: the expropriation of legal and contractual rights; the failure to treat investments fairly and equitably and to comply with obligations assumed toward the Claimants’ investments; arbitrary and discriminatory measures taken by the Respondent and resulting in the impairment of the management and enjoyment of the investments; and the failure to provide full protection and security to those

¹⁸ Decision on Jurisdiction of August 27, 2003, ICSID case No ARB/01/13, *ILM*, Vol. 42, 2003, p. 1290, §§ 163 and 165.

investments. The Claimants further rely on the position of the umbrella clause within the Treaty which, unlike what was the case in the Swiss-Pakistani context, is placed among the “first-order standard obligations”. This proves, according to the Claimants, that it was the intention of the Contracting Parties to convert claims based on mere contractual relations between investors and the host State into treaty claims. This view would seem, in the Claimants’ view, to be confirmed by the *travaux préparatoires*. Accordingly, the above case-law cannot be applied to the present instance. Moreover, the interpretation given to the umbrella clause in *SGS v. Pakistan* has been strongly criticised in *SGS v. Philippines* (above, § 87) (Counter-Memorial on Jurisdiction, §§ 79-91).

(ii) *The Tribunal’s Considerations*

96. Considering that the Claimant’s case comprises some claims which concern breaches of contractual relationships purportedly existing between the foreign investor and the Respondent – whose existence will be determined at the merits level –, the question for the Tribunal is whether Article II(2)(c) of the U.S.-Argentina BIT is an umbrella clause whose effect would be, according to the Claimants, to transform all contractual undertakings into international law obligations and, accordingly, to turn breaches of the slightest such obligation by the Respondent into breaches of the BIT.

97. This Tribunal wishes to state clearly at the outset the standards of interpretation of a BIT, which is an international treaty between two States whose purpose it is to protect the investments made by the nationals of each of the two States on the territory of the other, as this question has often been settled through different approaches. On the one hand, some contend that the treaty should be interpreted so as to favour State sovereignty; on the other, it has been argued that the interpretation should favour the protection of investors. An example of the first approach is the position adopted by the United States in the *Methanex* case. As stated by the ICSID Tribunal in its Partial Award on Jurisdiction (above, § 58): “The USA contends that a doctrine of restrictive interpretation should be applied in investor-state disputes. In other words, wherever there is any ambiguity in clauses granting jurisdiction over disputes between states and private persons, such ambiguity is always to be resolved in favour of maintaining state sovereignty” (§ 103). The Tribunal did not accept this approach. Conversely, investors often contend that, as a BIT’s purpose is to protect them, the

interpretation of their treaties for the promotion and the protection of investments, viewed in their context and according to their object and purpose, leads to an interpretation in favour of the investors. For example, in the case just cited, the Tribunal underscored that “[f]or Methanex, the phrase ‘relating to’ should be interpreted in the context of a treaty chapter concerned with the protection of investors; and hence, a broad interpretation is appropriate” (§ 137), a broad interpretation being here in favour of the investor, as it opened more broadly the possibilities to present an international claim. The Tribunal also rejected that broad interpretation which imposed no limitation on the right of investors to sue the State. It stated that such an unbalanced interpretation cannot prevail, and adopted instead a balanced approach. In the Tribunal’s own words, “the provisions of Chapter 11 [of the NAFTA] should be interpreted in good faith in accordance with their ordinary meaning (in accordance with Article 31(1) of the Vienna Convention), without any one-sided doctrinal advantage built into their text to disadvantage procedurally an investor seeking arbitral relief” (§ 105).

98. The position as presented by Methanex, and more generally by investors, has sometimes been accepted by arbitral tribunals, such as the ICSID Tribunal in the case of *SGS v. Philippines* (above, § 87), which stated:

“The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other”. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments” (§ 116).

Other tribunals have rejected this approach, as a general approach. One may mention here the Tribunal in *Noble Ventures Inc. v. Romania*¹⁹ which declared that “it is not *permissible, as is* too often done regarding BITs, to interpret clauses exclusively in favour of investors”(§ 52, underlined in the Award), although it used this kind of interpretation in a specific instance.

99. This Tribunal considers that a balanced interpretation is needed, taking into account both the State’s sovereignty and its responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment

¹⁹ Award of 12 October 2005 ICSID, case No. ARB/01/11, <http://www.investmentclaims.com/decisions/Noble-Ventures-Final-Award.pdf>.

and its continuing flow. It is bearing this in mind that the Tribunal will deal with the controversial question of the so-called “umbrella clause”; as stated recently by Emmanuel Gaillard, “[t]his question has divided practitioners and legal commentators and remains unsettled in the international arbitral case law”.²⁰ The question is whether, through an “umbrella clause”, sometimes also called an “observance-of-undertakings clause”, in a BIT, contract claims of an investor having a contract either with the State or with an autonomous entity are automatically and *ipso jure* “transformed” in treaty claims benefiting from the dispute settlement mechanism provided for in the BIT. There is an ongoing debate on that question, as divergent positions have been adopted by different ICSID tribunals. Umbrella clauses are not always drafted in the same manner, and some decisions insist on the variations in the drafting in order to explain different analyses. This Tribunal is not convinced that the clauses analysed so far really should receive different interpretations. The broadest clauses read like the one contained in the relevant clause of Article II(2)(c) in the U.S-Argentina BIT, which provides: “Each Party shall observe any obligation it may have entered into with regard to investments.”

100. The first tribunal to be faced with the interpretation of such a clause on the availability of international arbitration based on the BIT for purely contractual claims was the Tribunal in *SGS v. Pakistan*; in the Tribunal’s own words, “[i]t appears that this is the first international arbitral tribunal that has had to examine the legal effect of a clause such as Article 11 of the BIT. We have not been directed to the award of any ICSID or other tribunal in this regard, and so it appears we have here a case of first impression” (§ 164). Indeed, the “umbrella clause” in the Swiss-Pakistan BIT was Article 11, which stated: “Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.” The Tribunal did not consider, as is well known, that this clause “elevates” all contract claims stemming from a contract with the State to the level of claims for a breach of the Treaty, in other words that it transforms any contract claim into a treaty claim. The arguments put forward by the *SGS v. Pakistan* Tribunal are, in the view of this Tribunal, more than conclusive. These arguments can be summarised in the following manner.

²⁰ *New York Law Journal*, Thursday, 6 October 2005.

101. Firstly, Article 11 refers to commitments in general and not only to contractual commitments. Therefore, if one considers that it elevates the contract claims to the status of treaty claims, it should result as an unavoidable consequence that all claims based on any commitment in legislative or administrative or other unilateral acts of the State or one of its entities or subdivisions are to be considered as treaty claims:

“The ‘commitments’ the observance of which a Contracting Party is to ‘constantly guarantee’ are not limited to *contractual* commitments. The commitments referred to may be embedded in, *e.g.*, the municipal legislative or administrative or other unilateral measures of a Contracting Party. The phrase ‘constantly [to] guarantee the observance’ of some statutory, administrative or contractual commitment simply does not to our mind, necessarily signal the creation and acceptance of a new international law obligation on the part of the Contracting Party, where clearly there was none before. Further, the ‘commitments’ subject matter of Article 11 may, without imposing excessive violence on the text itself, be commitments of the State itself as a legal person, or of any office, entity or subdivision (local government units) or legal representative thereof whose acts are, under the law on state responsibility, attributable to the State itself. As a matter of textuality therefore, the scope of Article 11 of the BIT, while consisting in its entirety of only one sentence, *appears susceptible of almost indefinite expansion*” (Decision, § 166, emphasis by this Tribunal).

102. Secondly, and consequently, if any violation of any commitment of the State is a violation of the Treaty, this renders useless all substantive standards of protection of the Treaty:

“Secondly, the Claimant’s view of Article 11 tends to make Articles 3 to 7 of the BIT substantially superfluous. There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party.” (Decision, § 168).

103. A last point to be made, however, which brings some nuances to its findings in the *SGS v. Pakistan* case, is that the Tribunal does not exclude the possibility that States decide to consider, in a BIT, that the slightest violation of a contract between a State and a foreign

investor amounts to a violation of the Treaty, but then this has to be stated clearly and unambiguously:

“The Tribunal is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State’s contracts with investors of the other State are forthwith converted into and to be treated as breaches of the BIT. What the Tribunal is stressing is that in this case, there is no clear and persuasive evidence that such was in fact the intention of both Switzerland and Pakistan in adopting Article 11 of the BIT” (Decision, § 173).

This general reasoning is quite convincing, keeping in mind that the words “contract” or “contractual obligations” do not even appear in the so-called umbrella clause.

104. As is also well known, this analysis was strongly criticised by another ICSID Tribunal, in a similar case, *SGS v. Philippines*, in its decision on jurisdiction in 2004 (above, § 87), in which it had also to deal with a so-called “umbrella clause” embodied in Article X(2) of the BIT: “Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.” Here too, it seems useful to this Tribunal to summarise the main steps of the reasoning followed. Firstly, the Tribunal *SGS v. Philippines* indeed considered that this general provision transformed any contractual obligation of the State into a treaty obligation:

“It uses the mandatory term ‘shall’, in the same way as substantive Articles III-VI. The term ‘any obligation’ is capable of applying to obligations arising under national law, e.g., those arising from a contract ... Interpreting the actual text of Article X(2), it would appear to say, and to say clearly, that each Contracting Party shall observe *any legal obligation* it has assumed, or will in the future assume, with regard to specific investments covered by the BIT (Decision, § 115, emphasis by this Tribunal).”

Second, after having underscored the difference in the language of the umbrella clauses in *SGS v. Pakistan* and *SGS v. Philippines*, the Tribunal criticised the reasoning of its predecessor and emphasised that if it does not elevate the contract claims into treaty claims the umbrella clause has no really such a far-reaching meaning.

105. This Tribunal should like to stress, on the contrary, that the interpretation given in *SGS v. Philippines* does not only deprive one single provision of far-reaching consequences, but renders the whole Treaty completely useless : indeed, if this interpretation were to be

followed – the violation of *any legal obligation* of a State, and not only any contractual obligation with respect to investment, is a violation of the BIT, whatever the source of the obligation and whatever the seriousness of the breach – it would be sufficient to have a so-called “umbrella clause” and a dispute settlement mechanism, and no other articles setting standards of protection of foreign investments in any BIT. If any violation of any legal obligation of a State is *ipso facto* a violation of the treaty, then that violation needs not amount to a violation of the high standards of the treaty of “fair and equitable treatment” or “full protection and security”. Apart from this general and important remark, the Tribunal also wishes to point to the fact that quite contradictory conclusions have been drawn by the Tribunal in *SGS v. Philippines* case: among other things, the Tribunal stated that, although the umbrella clause transforms the contract claims into treaty claims, first “it does not convert the issue of the *extent* or *content* of such obligations into an issue of international law” (Decision, § 128, original emphasis), which means that the “contract claims/treaty claims” should be assessed according to the national law of the contract and not the treaty standards and, second, that the umbrella clause does not “override specific and exclusive dispute settlement arrangements made in the investment contract itself” (Decision, § 134), which explains that the Tribunal has suspended its proceedings until the “contract claims/ treaty claims would be decided by the national courts in accordance with the dispute settlement provisions of the contract”, stating that “the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively”(Decision., § 155). In other words, the Tribunal asserts that a treaty claim should not be analysed according to treaty standards, which seems quite strange, and that it has jurisdiction over the contract claims/treaty claims, but at the same time that it does not really have such jurisdiction – until the contract claims are decided. This controversy has been going on ever since these two contradictory decisions.

106. Some have adopted the *SGS v. Philippines* position but not drawn the same consequences from it. Thus, in *Eureko B.V. v. Poland*, (Partial Award, 19 August, 2005), the Tribunal accepted the idea that, as a result of the umbrella clause of the BIT – Article 3(5) of the BIT provided that “[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investors of the other Contracting Party” – , the smallest obligation of a State with regard to investments is protected by the BIT and can give rise to an ICSID obligation. However, this decision was accompanied by a strong dissent of arbitrator Rajski

who emphasised the systemic consequences a broad interpretation of so-called “umbrella clauses” could entail:

“It is worth to note that by opening a wide door to foreign parties to commercial contracts concluded with a State owned company to switch their contractual disputes from normal jurisdiction of international commercial arbitration tribunals or state courts to BIT Tribunals, the majority of this Tribunal has created a potentially dangerous precedent capable of producing negative effects on the further development of foreign capital participation in privatizations of State owned companies (Dissenting opinion, § 11).

In *Noble Ventures Inc. v. Romania* (above, § 98), the Tribunal followed the same line of reasoning, stating quite generally that “[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law” (§ 53). The Tribunal, while it considered the umbrella clause as an exception to the “well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State”, certainly did not interpret that exception restrictively, as exceptions should be interpreted, although it mentioned the necessity theoretically to adopt such an interpretation when it stated : «as with any other exception to established general rules of law, the identification of a provision as an ‘umbrella clause’ can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms” (Decision, § 55). In the Tribunal’s words in the *Noble Ventures Inc. v. Romania* case, the breach of a contract being assimilated by the umbrella clause to a breach of the BIT is thus “internationalized” (Decision, § 54). Again, the problem met by such reasoning, according to this Tribunal, is that, by necessary implication, *all municipal law commitments* must necessarily be “*internationalised*”, as the so-called umbrella clause does not differentiate among the obligations; it refers to *any* obligation and not specifically to *contractual* obligations, the consequence being that the division between the national legal order and the international legal order is completely blurred. One of the arguments presented by the ICSID Tribunal in *Noble Ventures* was that the “elevation” theory was compelled by the object and purpose of the BIT and that “[a]n interpretation to the contrary would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host State.” (Decision, § 52). In this Tribunal’s opinion, this is not a good reason and it can explain why. Either the foreign investor has a commercial contract with an autonomous State entity or it has an investment agreement with the State in which some “clauses exorbitantes du droit commun” are inserted.

In both cases, it is more than likely that the foreign investor will have managed to insert a dispute settlement mechanism in the contract; usually, in a purely commercial contract, this mechanism will be commercial arbitration or the national courts, while in an investment agreement it will generally be an international arbitration mechanism such as that of ICSID. In other words, in the so-called State contracts, there is usually an “internationally secured legal remedy”, while in the mere commercial contracts governed by national law, there is no reason why such a mechanism should be available, as stated by Judge Schwebel, when he said that “it is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach... but involves an obviously arbitrary or tortious element ...”²¹

107. Some have adopted the *SGS v. Pakistan* position, either in insisting on certain specificities of the case, or in presenting a general approach. In *Salini v. Jordan*,²² decided in 2004 (*Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hachemite Kingdom of Jordan*, Decision on Jurisdiction, 15 November 2004), the Tribunal, answered in the negative the question of the “elevation” of the contract claims into treaty claims, insisting on the generality of the language used by the so-called umbrella clause in Article 2(4),²³ which stated that “[e]ach Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor”. In *Joy Machinery Limited v. Arab Republic of Egypt*²⁴, the Tribunal noted that a discussion of the “umbrella clause” was not necessary for the outcome of the case but, in order to “make certain clarifications”, took a firm position against the transformation of all contractual claims in treaty claims in the specific case:

²¹ *International Arbitration: Three Salient Problems*, Cambridge, Cambridge University Press, 1987, p. 111.

²² *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hachemite Kingdom of Jordan*, Decision on Jurisdiction of 29 November 2004, ICSID case No. ARB/02/13, <http://www.worldbank.org/icsid/cases/salini-decision.pdf>.

²³ “The Tribunal notes that Article 2(4) of the BIT between Italy and Jordan is couched in terms that are appreciably different from the provisions applied in the arbitral decisions and awards cited by the Parties” (Decision on Jurisdiction, § 126).

²⁴ Decision on Jurisdiction of 6 August 2004, ICSID case No. ARB/02/11, <http://www.worldbank.org/icsid/cases/joy-mining-award.pdf>.

“In this context, it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection ” (§ 81).

108. In this Tribunal’s view, it is necessary to distinguish the State as a merchant from the State as a sovereign. This is not new: in the above case of *Joy Machinery Limited v. Arab Republic of Egypt*, the ICSID Tribunal stated: “A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved” (Decision, § 72). The same approach was taken by the *ad hoc* Committee on annulment presided by Mr. Yves Fortier, in the *Vivendi II*²⁵ case, where the distinction between contract claims and treaty claims was clearly stated:

“whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts” (§ 96).

The view that it is essentially from the State as a sovereign that the foreign investors have to be protected through the availability of international arbitration is confirmed, in the Tribunal’s opinion, by the language in the new 2004 US Model BIT, which clearly elevates only the contract claims stemming from an investment agreement *stricto sensu*, that is, an agreement in which the State appears as a sovereign, and not all contracts signed with the State or one of its entities, to the level of treaty claims, as results from its Article 24(1)(a).

²⁵ *Compañía de Aguas del Aconquia S.A. and Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic*, Decision on Annulment of 3 July 2002, *ILM*, Vol. 41, 2002, p. 1135.

109. In view of the necessity to distinguish the State as a merchant, especially when it acts through instrumentalities, from the State as a sovereign, the Tribunal considers that the “umbrella clause” in the Argentine-US BIT, which states that “[e]ach Party shall observe any obligation it may have entered into with regard to investments”, does not elevate any contract claim into a treaty claim – this does not mean that some contract claims based on commitments made by the State as a Sovereign give rise to a treaty claim - this results from Article VII, which clearly includes among the investment disputes under the Treaty all disputes resulting from a violation of a commitment given by the State as a sovereign State, either through an agreement, an authorisation, or the BIT:

“an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Parties foreign investment authority (if any such authorization exists); or, (c) an alleged breach of any right conferred and created by this Treaty with respect to an investment”.

Interpreted in this way, the umbrella clause of the BIT in Article II, read in conjunction with Article VII, will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign inserted in an investment agreement.

110. In conclusion, in this Tribunal’s view, following important precedents decided by previous Tribunals, an umbrella clause cannot transform any contract claims into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims. These far-reaching consequences of a broad interpretation of the so-called umbrella clauses, quite destructive of the distinction between the national legal orders and the international legal order, have been well understood and clearly explained by the first Tribunal which dealt with the issue of the so-called “umbrella clause” in the *SGS v. Pakistan* case (above, § 93) and which insisted on the theoretical problems faced. It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law “with regard to investments”. A well-known specialist of ICSID, Christoph Schreuer, has strikingly

described what some of the practical consequences of a broad interpretation of the umbrella clauses could be:

“Problems could ... arise if investors were to start using umbrella clauses for trivial disputes. It cannot be the function of an umbrella clause to turn every minor disagreement on a detail of a contract performance into an issue for which international arbitration is available [*but, in the view of the Tribunal, this is possible with a broad interpretation of the umbrella clause*]. For example, a small delay in a payment due to the investor and interest accruing from the delay would hardly justify arbitration under a BIT [*but, in the view of the Tribunal, nothing could prevent such an arbitration, if a broad interpretation of the umbrella clause is accepted*]. Equally a lease dispute with the host State that is peripheral to the investment will not be an appropriate basis for the institution of arbitral proceedings [*but, in the view of the Tribunal, the institution of such proceedings is possible with a broad interpretation of the umbrella clause*]. It is to be hoped that investors will invoke the umbrella clauses with appropriate restraint.”²⁶

It is the firm conviction of this Tribunal that the investors will not use appropriate restraint and why should they? if the ICSID tribunals offer to them unexpected remedies. The responsibility to show appropriate restraint rests rather in the hands of the ICSID tribunals.

111. How does this apply in the present case? Both Parties have discussed the so-called umbrella clause included in Article II(2)(c) in the U.S.-Argentina BIT, which, as mentioned earlier, provides: “Each Party shall observe any obligation it may have entered into with regard to investments. The positions of the Parties are contradictory as far as the interpretation of the so-called umbrella clause is concerned. On the one hand, “the Argentine Republic states that the best interpretation of contractual claims under the BIT with umbrella clauses is the interpretation made by the Tribunal in *SGS v. Pakistan*, which upheld several reasons according to which contractual claims cannot be submitted to international arbitration” (Memorial on Jurisdiction, § 67). On the other hand, the Claimants consider that “[t]his provision puts contracts between the host State and the investor as well as other commitments undertaken by the host State under the protection of the US-Argentina BIT. It adds to the US-Argentina BIT’s substantive standards the observance of contracts or other

²⁶ “Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road”, *Journal of World Investment & Trade*, Vol. 5, 2004, p. 255.

obligations the host State has entered into with regard to specific investments. It follows that a breach of such a contract is in violation of Article II(2)(c) of the US-Argentina BIT” (Counter-Memorial on Jurisdiction, § 81).

112. In the Tribunal’s view, this umbrella clause does not extend its jurisdiction over any contract claims that the Claimants might present as stemming solely from the breach of a contract between the investor and the Argentina State or an Argentine autonomous entity. Moreover, in the Tribunal’s view, it is especially clear that the umbrella clause does not extend its jurisdiction over any contract claims when such claims do not rely on a violation of the standards of protection of the BIT, national treatment, MNF clause, fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory measures, protection against expropriation or nationalisation either directly or indirectly, unless some requirements are respected. However, there is no doubt that if the State interferes with contractual rights by a unilateral act, whether these contractual rights stem from a contract entered into by a foreign investor with a private party, a State autonomous entity or the State itself, in such a way that the State’s action can be analysed as a violation of the standards of protection embodied in a BIT, the treaty-based arbitration tribunal has jurisdiction over all the claims of the foreign investor, including the claims arising from a violation of its contractual rights. Moreover, Article II, read in conjunction with Article VII(1), also considers as treaty claims the breaches of an investment agreement between Argentina and a national or company of the United States.

113. In other words, the Tribunal, endorsing the interpretation of the so-called “umbrella clause” in the Decision *SGS v. Pakistan*, confirms what it mentioned above (§ 91), namely, that it has jurisdiction over treaty claims and cannot entertain purely contractual claims, which do not amount to a violation of the standards of protection of the BIT. It adds that, in view of Article VII of the US-Argentina BIT, a violation of an investment agreement entered into by the State as a sovereign and an American national or company is also deemed to be a violation of the Treaty and can thus give rise to a treaty claim.

114. In Summary, if and to the extent that the contracts in question can be characterized as “investment agreement”, the “umbrella clause” does not add anything in terms of the Tribunal’s competence since they are already expressly provided for in Article VII(1) under

(a). If, on the other hand, the contracts in question cannot be characterized as “investment agreement, the “umbrella clause” does not extend to those contracts between an investor and a host State that cannot be characterized as an investment agreement.

115. The answer to the question raised in § 92, that is, whether the existence of a so-called “umbrella clause” changes the Tribunal’s intermediary conclusion to the effect that it has no jurisdiction over purely contractual claims, and that it can only entertain treaty claims, is clearly in the negative. Indeed, the Tribunal has jurisdiction only over treaty claims, the latter including, pursuant to the wording of Article VII(1), the claims based on the violation of an investment agreement entered into by the foreign investor with the State as a sovereign.

116. The distribution of the numerous claims of the Claimant between the two categories – purely contract claims which are outside the jurisdiction of the Tribunal, and contract claims that amount to treaty claims that which are inside its jurisdiction – will naturally be decided when dealing with the merits, but it was necessary for the Tribunal to ascertain the theoretical scope of its competence at the jurisdictional phase.

5. Third Preliminary Objection: The Claim Must Be Limited with Respect to Tax Measures

(a) The Positions of the Parties

117. Article XII of the BIT provides:

(1) With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

(2) Nevertheless, the provisions of this Treaty and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article IV;

(b) transfers, pursuant to Article V; or

(c) the observance and enforcement of terms of an investment agreement or authorisation as referred to in Article VII(1)(a) or (b),

to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

118. For the Respondent, this provision limits the scope of the protection granted by the BIT in tax matters in two ways. First, under paragraph [1], the standard of fairness and equity in the treatment of investments established by Article II(2)(a) of the BIT is restricted by using the formula “each Party should strive to accord”. This “modified” or “softened” duty of fair and equitable treatment in the field of taxation excludes recourse to the Treaty’s dispute settlement system in tax matters, unless the taxation measure complained of: (i) amounts to expropriation; (ii) pertains to transfers related to an investment under Article V; or (iii) concerns the observance and enforcement of investment agreements or authorisations under Article VII(1)(a) or (b).

119. Next Argentina notes that the Claimants have conceded that their claims, specifically as it pertains to rights to export hydrocarbons, relate to tax matters and, accordingly, are outside the limits set by Article XII of the BIT. On the one hand, tribunals established under Article VII of the BIT can examine no claim regarding a tax issue unless that claim is about a breach of the prohibition of expropriation “for which no compensation is given” (Memorial on Jurisdiction, § 83). The Claimants’ assertions do not qualify. Nor do they qualify under paragraph 1 of Article II, because the standard of “fair and equal treatment” set by that provision for tax issues is not a legal obligation.

120. Accordingly, the only issues this Tribunal may consider under Article XII are those based on expropriation and those regarding the violation of investment agreements or authorisations (Memorial on Jurisdiction, §§ 77-85). None of the contracts or permits involved qualify as “investment” under Article VII(1)(a) of the BIT (Transcript, p. 120).

121. In their Counter-Memorial on Jurisdiction (§§ 92-110), the Claimants rebut the above arguments. They begin by noting that the Respondent fails to appreciate that their claim regarding export withholdings concerns the expropriation by the Government of specific legal and contractual rights and revenues, the compliance of that Government with investment agreements (such as concessions and contracts), and, generally, unfair and inequitable treatment towards the Claimants’ investment (*ibid.*, § 94).

122. The Claimants then point out that Argentina’s decision to impose export withholdings, by itself or in conjunction with other measures, may be “tantamount to expropriation” (Article IV(1) of the BIT). The claims made, however, go far beyond tax-related issues (*ibid.*, § 95).

123. Even in the latter, limited context, there is a standard of striving for “fair and equitable treatment” set by Article XII(1) which, according to the Claimants, is more than the “meaningless reference” Argentina sees in it. This assertion is buttressed by a reference to *Occidental Exploration and Production Co. v. Ecuador*,²⁷ where the Tribunal, with reference to Article X(1) of the Ecuador-US BIT, similar to Article XII(1) of the Treaty relevant here, noted that that provision

[i]s not devoid of legal significance. It imposes an obligation on the host State that is not different from the obligation of fair and equitable treatment embodied in Article II [which is the same as Article II of the present BIT], even though admittedly the language of Article X is less mandatory (§ 70).

124. The Claimants thus contend that the obligation enshrined in Article XII is enforceable and that the Respondent failed to discharge it by violating various commitments such as the express undertaking to abstain from levying export withholdings, by treating the Claimants in a discriminatory way by earmarking those withholdings to compensate the banking sector for losses suffered on account of other Government measures, and by targeting the latter to the specific nature of the business pursued by the Claimants and in defiance of the Oil and Gas Regulatory Framework and of the hydrocarbon concessions contracts.

125. What is more, according to the Claimants, the “soft” standard of Article XII(1) does not deprive them of their right, even in tax matters, flowing from Article XII(2) combined with Article IV, since what is at stake is an investment pursuant to that provision, and since, contrary to Article II to which Article IV refers, the investment has not been treated fairly and equitably, turning the interference into an unlawful expropriation, which brings this aspect of the case – the export withholdings – into the purview of Article XII(2). In the words of the Tribunal in *Occidental Exploration and Production Co.* (above, § 122, Final Award (§§ 75-77)), the raising of an expropriation claim in relation to a tax matter “brings in the standards

²⁷ UNCITRAL Arbitration, Final Award of 1 July 2004, LCIA case N° UN 3467, http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf.

of treatment of Article II, including fair and equitable treatment” (Counter-Memorial on Jurisdiction, §§ 96-100).

126. For the Claimants, the imposition of export withholdings was contrary to commitments undertaken by Argentina under the BIT, and this amounts to expropriation. Whenever the expropriation of specific legal rights is alleged, as in the present case, this should be sufficient for an ICSID tribunal to assert its competence. What matters is whether the Claimants have shown, *prima facie*, the existence of an expropriation claim. Whether there has indeed been an expropriation of specific legal and contractual rights and revenues is an issue pertaining to the merits and should be decided at that stage. As the Tribunal stated in *Enron I* (see above, § 49),

[t]he Claimants have satisfied the requirements of having a present interest to bring action under the Treaty, particularly in view of the fact that it has been alleged that the tax assessments resulted in the violation of specific provision standards of treatment established in the treaty [BIT]. These allegations can only be considered at the merits phase of the case, but *prima facie* they are sufficient to justify the exercise of the right of action by Claimants (Decision on jurisdiction, § 67).

127. Accordingly, the Respondent’s thesis that this Tribunal’s competence should, under Article XII of the BIT, be limited as regards the tax aspects of the claims should fail, for the measures complained of are alleged, under Article XII(2)(a), to amount to expropriations pursuant to Article IV and, consequently, fall within the competence of this Tribunal (*ibid.*, §§ 101-103).

128. According to the Claimants, the hydrocarbon concessions and contracts form part of the dispute and qualify as an investment agreement under Article XII(2)(c) of the BIT. In *Occidental Exploration and Production Co.* (see above, § 122), a tax matter associated with the performance of an investment agreement had arisen. Although the claimant in that case had not characterised the dispute as one concerning its contract with the defendant State, the Tribunal pointed out that

[b]ecause of the relationship of the dispute with the observance and enforcement of the investment contract involved in this case, it [had] jurisdiction to consider the dispute in connection with the merits insofar as a tax matter covered by Article X [in the present instance Article XII] may be concerned, without prejudice to the fact that jurisdiction can also be affirmed on other grounds as respects Article X (Final Award, § 77).

129. Accordingly, the Tribunal considered that there was an investment agreement for the purposes of Article X of the BIT between the United States and Ecuador, which is the same as Article XII of the BIT involved here. In the present case, too, each hydrocarbon concession and contract can be characterised as an “investment agreement” under Article XII(2) (and, by reference, Article VII(1)(a)). While the BIT involved here fails to define the notion of “investment agreement”, there has been, since 1994, in BITs and free trade agreements concluded by the US, the following definition of that notion:

a written agreement between the national authorities of a Party and a covered investment of a national or company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities and (ii) the investment, national or company relies upon in establishing or acquiring a covered investment.

130. The Claimants find that their hydrocarbon concessions and contracts fall within the above definition: they constitute written agreements between the Argentine Companies and the Government; they grant the Companies rights to natural resources belonging to the host State; and they establish investment obligations for the Companies towards the Government. Hence they qualify as “investment agreements” under Article XII(2)(c) of the BIT.

(b) The Tribunal’s Considerations

131. Confronted with these opposing views, this Tribunal feels bound to point out once again that what matters, at the present jurisdictional stage of the proceedings, is whether the claims submitted, if they were to proven well-founded, would fit into the jurisdictional parameters of the relevant treaties (see above, §§43-54).

132. Article XII(1) of the BIT provides: “With respect to tax policies, each [State] Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.” The issue is whether this provision constitutes law, law of a lesser stringency (“softer” law), or no law at all. The last hypothesis will have to be ruled out, despite the use of the conditional “should”: if the Parties to the BIT had intended to instill no meaning at all into Article XII(1), they should and would have said so. Given their silence, the provision must be considered to carry some legal meaning on account of the rule *ut magis valeat quam pereat* (“*effet utile*”).

133. The legal force of the notion embodied in Article XII(1) is not equal to that attributed to the similarly-worded rule found in Article II(2)(a) of the BIT (“Investment shall at all times be accorded fair and equitable treatment . . .”). In what manner and to what extent it is not, the Claimants do not say, and possibly cannot say. The embarrassment of the UNCITRAL Tribunal in *Occidental Exploration and Production Co.* (see above, § 22), when confronted with a similar situation, is evident in the passage cited earlier: on the one hand, it is stated that the obligation imposed on the host State is “not different from the obligation of fair and equitable treatment embodied in Article II”; on the other hand, “admittedly the language of Article X [in the instant case: Article XII(1)] is less mandatory.”

134. Nonetheless, the Claimants consider that the “fair and equitable treatment” clause in Article XII(1) is enforceable, though precisely on what basis and to what extent one does not know. The issue may remain open, however, since, in the view of this Tribunal the question can be solved on the basis of Article XII(2) of the BIT.

135. According to Article XII(2), the provisions of the BIT, in particular those of its Articles VII and VIII (dispute settlement), do not apply to matters of taxation, except: (i) if the matter is connected with, or amounts to, an expropriation under Article IV; (ii) if it is related to the compliance with an investment agreement or authorisation; or (iii) if it pertains to transfers pursuant to Article V. Thus, the Tribunal’s competence with respect to taxation is limited to those instances.

136. The Claimants contend that the claims raised are claims of expropriation under Article IV and that, as a consequence, the measures taken by the Respondent, including the tax measures (export withholdings), are within ICSID jurisdiction and the competence of the Tribunal, Article XII(2) notwithstanding. The Tribunal is of the view that the Claimants have shown *prima facie* that the imposition of export withholdings, a tax measure, could possibly amount to the expropriation of specific legal and contractual rights. In light of the case-law cited (*Enron I*, *Occidental Exploration and Production Co.* (above §§ 49 and 122), an expropriation claim linked to a tax matter brings in, *via* Article IV, the standards of treatment of Article II, including that of fair and equitable treatment, provided that there is direct or indirect expropriation, which comprises measures tantamount to expropriation.

137. This being the case, the claims, inasmuch as they relate to tax matters, *i.e.* the export withholdings practiced by the Respondent, are within the “exception to the exception”

provided for in Article XII(2)(a) and fall into this Tribunal's competence. This does not mean, however, that the well-foundedness of this aspect of the claims has been established; this is a matter to be determined in the proceedings on the merits.

138. For the purposes of the present stage of the proceedings, the Tribunal is satisfied that the Claimants have demonstrated *prima facie* that the Hydrocarbon Concession and Contracts could be "investment agreements" within the meaning of Article VII(1)(a) and Article XII(2)(c) of the BIT and that their claims could possibly fall under those agreements as well. However, here again, that matter needs to be decided when considering the merits of the case.

139. The Tribunal concludes that it has jurisdiction over tax matters in the present case, but only insofar as the tax measures complained of are linked to: (a) expropriation, pursuant to Article IV; (b) transfers, pursuant to Article V; or (c) the observance and enforcement of terms of an investment agreement or authorisation as referred to in Article VII(1)(a) or (b). Therefore, Argentina's Third Preliminary Objection is rejected.

6. Fourth Preliminary Objection: According to the Doctrine of Estoppel, the Claimants Cannot Refuse to accept the Courts of Argentina as the Exclusive Forum

(a) The Positions of the Parties

140. The Respondent claims that PAE, through its Argentine instrumentality PAE Branch, initiated proceedings against Forestal Santa Bárbara SRL (hereinafter Santa Bárbara), a Delaware company, before the Supreme Court of Argentina. The claim, brought in answer to a claim lodged by Santa Bárbara against PAE in the State of Delaware, related to concessions for hydrocarbon exploitation, respectively hydrocarbon transportation, granted in Argentina. The issue was compensation for work done in the areas of PAE's concession, and the Delaware court was asked to issue orders with respect to PAE's activities in those areas (Memorial on Jurisdiction, §§ 86-89).

141. According to the Respondent, PAE's action was intended to prevent the Delaware court's interference and to establish that conflicts over hydrocarbon concessions "must be submitted to Argentine tribunals". The Respondent then cited large extracts from PAE's claims in which the plaintiff submitted the matter to the Supreme Court's original jurisdiction and argued that the matter was directly and exclusively one of Argentine federal jurisdiction

and was governed by the Argentina-US BIT, the Washington Convention and the 1969 American Human Rights Convention, as well as the National Constitution and federal laws and regulations.

142. The action filed before the Supreme Court of Justice was, according to the Respondent, “about a dispute related to hydrocarbon concessions where... the BIT and the ICSID Convention are, *inter alia*, applicable”; “[t]he strict similarity with the dispute the Claimants want to bring to this tribunal is undeniable, and therefore the jurisdiction principles to be applied are identical” (*ibid.*, § 94).

143. The Republic of Argentina was requested by the Supreme Court to express its views on PAE’s request, which it did by agreeing with PAE that the matter was one of federal jurisdiction, the reason being that the scope and characteristics of the legal relation arising from the hydrocarbon concession in issue were governed by rules the conflicts over which had to be solved by the federal national tribunals, including the Mining Code and Law No. 17’319. Regarding the latter, the Government asserted that “[t]he disputes arising from the relationships originat[ing] in Law No. 17’319 do not constitute a case giving way to international jurisdiction”. As all these assertions were consented to by PAE and even made at its request, PAE

stated that the jurisdiction competent over the disputes arising from the hydrocarbon concessions is the Argentine jurisdiction exclusively, and also requested and consented that the Argentine Republic confirmed that assertion (*ibid.*, § 98).

144. According to the Respondent, the Claimants therefore made a choice in favour of the host State’s federal court. That choice has created an estoppel: the Claimants made an assertion on which the other party – the Respondent – subsequently relied to carry out its activity. It is not open to the Claimants, under general international law (as well as Argentine law), to change now their position to the Respondent’s detriment. Accordingly, the Claimants are estopped from presenting their case to this Tribunal (*ibid.*, §§ 86 and 99).

145. The Claimants reply (Counter-Memorial on Jurisdiction, §§ 111-139) that the action brought by PAE before Argentina’s Supreme Court (the local claim) did not amount to a forum selection for the present claims and did not constitute a forum selection for the purpose of Article VII(2) and (3) of the BIT. In order to activate what is – somewhat inelegantly –

referred to as the BIT's "fork-in-the-road" provision, the two proceedings must, according to the Claimants, concern the same dispute and causes of action and involve the same parties. It is true that, in the course of an investment activity, investors can be drawn into all sorts of disputes related in some way to the investment, but these disputes will not necessarily be "investment disputes" for the purposes of Article VII and for making applicable the forum provision selection of that Article (*ibid.*, §§ 113-115).

146. Pursuant to the Claimants, in the present case, the local claim submitted by PAE to the Supreme Court aimed at obtaining a declaration from that Court that the action brought by Santa Bárbara before a US court was to be dealt with exclusively by Argentine courts. In that respect, the case before the Supreme Court is not an investment dispute similar to the present one before this Tribunal (*ibid.*, § 116).

147. The Claimants contend further that PAE Branch holds a hydrocarbon production concession and a transportation concession over the Acambuco block in the Argentine Province of Salta, granted by Argentina pursuant to its Hydrocarbons Law. PAE extracts hydrocarbons from the block in the framework of a joint venture and is also the operator of the block. Santa Bárbara is a private party not affiliated with the Argentine Government and owns some of the land on which extraction work takes place. Under the Hydrocarbons Law and the concession, PAE Branch may perform certain operations on Santa Bárbara's land on the basis of an easement over the latter in favour of PAE Branch. That easement is evidently governed by Argentine law. When Santa Bárbara, joined by others, went to court in the State of Delaware, it did so to obtain from the PAE Branch compensation allegedly due on account of some operations that it had conducted. What PAE Branch sought from the Argentine Supreme Court was a declaration that the courts of Argentina, not those of Delaware, were competent to deal with the matter (*ibid.*, §§ 117-118).

148. According to the Claimants, the differences between this local claim before Argentina's Supreme Court and the claim brought before this Tribunal under the BIT and the Washington Convention are substantial:

- The local claim involved private parties. The Government participated in the procedure without being a party, because it had granted the concession. In the present instance, Argentina is a direct party and a subject of international law

allegedly responsible for violations, *vis-à-vis* US nationals, of the BIT, the ICSID Convention and general international law.

- The action instituted by PAE Branch in Argentina had nothing to do with the “investment dispute” under Article VII(1) and (3)(a) of the BIT; there is no alleged violation of the BIT or of an investment agreement. Its sole object was to have the Argentine Supreme Court declare that it was up to Argentine courts, and no one else, to settle the dispute between Santa Bárbara, the landowner, and PAE Branch, the operator of the oil and gas field. The international claim, by contrast, serves to determine whether there has been a violation of the BIT and, if so, to provide an appropriate remedy.
- The issues to be decided by the Supreme Court of Argentina are related to private real property and jurisdictional issues governed exclusively by domestic law. The BIT and the ICSID Convention were mentioned by PAE Branch, before the Supreme Court, only to show that if Santa Bárbara had a claim for unfair treatment of its investment, it should have invoked those two instruments rather than have turned to a Delaware court.

149. This, according to the Claimants, means that the mention of the two treaties was in no way intended to trigger a forum selection under Article VII of the BIT, and that it did not ask the Supreme Court of Argentina to decide an investment dispute under the BIT. What is more, to provoke a forum selection under Article VII of the BIT, there must be identity of the parties and of claims in the local action and in that before the ICSID, as is borne out by the international case-law (*ibid.*, §§ 125-130). Claimants rely on *Genin v. Estonia*,²⁸ *CMS* (above, § 57), *Azurix* (above, § 77) and *Enron I* (above § 49).

150. According to the Claimants, the conclusion drawn from the above is that the strict similarity of claims alleged by the Respondent does not exist: the parties, the facts, the claims and the causes of action differ, which is why PAE Branch’s local claim cannot be viewed as a choice of forum under the BIT’s Article VII (Counter-Memorial on Jurisdiction, § 131).

²⁸ Award of 25 June 2001, ICSID case No. ARB/99/2, ICSID Reports, Vol.17, p. 395, <http://ita.law.uvic.ca/documents/Genin-Award.pdf>.

151. Turning to Argentina's argument of estoppel, the Claimants do not challenge the applicability of that principle in international law. Referring to the judgment on the merits rendered by the ICJ on 15 June 1962 in the *Temple of Preah Vihear* case,²⁹ the ICJ laid out the conditions for an estoppel: (i) a clear statement of fact by one party which (ii) is voluntary, unconditional and authorised; and (iii) reliance in good faith by another party on that statement to that party's detriment or to the advantage of the first party. In the Claimants' opinion, none of these conditions is met in the instant case (Counter-Memorial on Jurisdiction, §§ 133-134).

152. In the first place, it has not been established that PAE Branch made before the Supreme Court of Argentina any statement amounting to a choice under Article VII of the BIT. The passing reference, in a private dispute over damages due to operations in an oil field in Argentina, to the BIT and to the ICSID Convention, was only intended to show that it was up to the Argentine courts rather than those of Delaware to decide the specific easement dispute opposing Santa Bárbara to PAE Branch, and that if Santa Bárbara had a claim based on unfair treatment, it should go before an ICSID jurisdiction rather than a Delaware court. Clearly the local claim did not result in the submission of the BIT dispute to the Argentine courts (*ibid.*, § 136).

153. Second, Argentina has not shown how it could have relied on the Claimants' alleged statement and, hereby, changed its position to its detriment or to the advantage of PAE Branch – if only because, not being a party to the local dispute, it had no say in the matter. The local dispute was about alleged damages from the operation of an oil field between two private actors, to the exclusion of the Respondent, pertaining to the performance of a contract between them, to the payment of damages and to an environmental issue, all questions patently outside the investment dispute placed before the present Tribunal. The mention of the BIT and the ICSID Convention in a specific litigation between two private parties, which is exclusively governed by Argentine law, could not have “reasonably and effectively”, in good faith, generated a conviction on the part of Argentina that its own courts rather than the present Tribunal would have jurisdiction over an investment treaty claim involving different parties and facts. Moreover, Argentina admitted, in the presentation made by it in the

²⁹ (Cambodia v. Thailand), ICJ Reports 1962, p. 6.

framework of the local claim, that the BIT guarantees did not apply to the local dispute between the concession holder and the landowner (*ibid.*, § 137-139).

(b) The Tribunal's Considerations

154. Argentina's Fourth Preliminary Objection appears to rest on two premises: that the Claimants, having brought, through a local company, a private dispute before the Argentine courts and, having mentioned the BIT and the ICSID, have opted, in the framework of their international investment dispute, in favour of those courts pursuant to Article VII of the BIT; and that, independently of that provision, they are estopped, on account of having done so, from resorting to dispute settlement under the BIT.

155. The first question to be examined, therefore, is whether the action of PAE Branch in its local dispute against Santa Bárbara, including the reference made by it to the BIT and the ICSID Convention, amounts to a forum selection, pursuant to Article VII of that Treaty, for its investment dispute against Argentina. Judging from the case law cited by the Claimants – the *Genin*, *CMS* and *Enron I* cases (above, §§ 148, 57 and 49) – tribunals do not assume lightly that choices of forum have been made by claimant parties in favour of the host State's judicial system. They are undoubtedly right. If the contrary were true, there would be little use in setting up international arbitral procedures for investment disputes. To assume that such a choice was made, it is necessary, first, that the parties to the dispute brought before a national court be the same as those of the investment dispute. The existing case law – *CMS*, *Enron I* and *Azurix* (see above, §§ 57, 49 and 77) – shows that this is not often the case.

156. A second condition is the identity of the causes of action. As is shown by the decisions cited in § 148, this, too, is often not the case.

157. In the present case, there is neither identity of the parties nor identity of the cause of action. In the local claim, the Government of Argentina is not a party (although it appeared as an *amicus curiae*). The cause of action is also different. The local claim is not based on an alleged violation of the BIT, even though the BIT was referred to in passing.

158. Regarding estoppel – the second leg of Respondent's argument in favour of its Fourth Preliminary Objection – this Tribunal can also be brief.

159. Estoppel is a recognised general principle of law that has been applied by many international tribunals.³⁰ Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.³¹ None of that has been shown by Argentina in this case.

160. Furthermore, if the three conditions identified by the ICJ in the *Temple of Preah Vihear* case (see above, § 150) are relied upon, the conclusion is: (i) that one can scarcely speak of a clear statement of fact by one party (if indeed a statement was made at all “by one party”); (ii) that, there being no such statement, the latter could not possibly be characterised as “voluntary, unconditional and authorised”; and that (iii) Argentina, which was not a party to the local dispute, cannot be said to have relied on the choice supposedly made by the Claimants under Article VII of the BIT and, even less, to have suffered a disadvantage from this supposed choice.

161. On the basis of the above considerations, this Tribunal rejects Argentina’s Fourth Preliminary Objection.

7. **Fifth Preliminary Objection: The Claim Is Hypothetical**

(a) The Positions of the Parties

162. The Respondent contends that an international tribunal can exercise jurisdiction over a dispute if the latter exists, and that that is the case if the dispute is about compensation. According to the Respondent, where there is no damage, there is no dispute: proof must be given of true and actual harm as well as of the latter’s causal relationship with the alleged breach (Memorial on Jurisdiction, §§ 102-104).

163. Conjectural, hypothetical or expected damage is not, according to the Respondent, sufficient to establish the Centre’s jurisdiction and the Tribunal’s competence. A first

³⁰ See, e.g., *Pope & Talbot, Inc. v. Canada*, NAFTA–UNCITRAL, Interim Award of 26 June 2000, at pp. 39-41, <http://www.investmentclaims.com/decisions/Pope-Canada-InterimAward-26June2000.pdf>.

³¹ See D.W. Bowett, “Estoppel before International Tribunals and Its Relation to Acquiescence”, *British Year Book of International Law*, Vol. 33, 1957, pp. 176-202, at pp. 183-184.

category of conjectural damage is that resulting from export withholdings, as no one can say with certainty what its effect on the Claimants will be, if any. What is more, the damage forecast by LECG, the Claimants' valuation expert, does not match the Claimants' affirmations, which show that the damage alleged is based on mere speculation.

164. According to the Respondent, another, even more conjectural type of damage consists of "contingencies", *i.e.* damage which does not have a factual basis, such as possible claims of some Argentine provinces that have not even been brought before a court. The consequences of the "pesification and intervention of the Government in the determination of Pithead Natural Gas Prices", of "withholdings" and of "contingencies due to restrictions on natural gas exports" fall into this category.

165. Moreover, according to the Respondent, restrictions on oil and liquefied petroleum gas exploitation are clearly identified as hypothetical items in the Claimants' Memorial (§ 135), where it is said that despite then lifted restrictions, the delegation of powers to the Energy Secretariat to impose unilateral restrictions was still valid, thus causing continued uncertainty among oil-exporting entities such as the Argentine Companies.

166. Compensatory damages can hence not be claimed if the prejudice is uncertain and hypothetical. A declaratory action should therefore have been formulated by the Claimants (Memorial on Jurisdiction, §§ 105-110).

167. In the Deed Additional to the Agreement for the Implementation of a Normalisation Schedule of the Natural Gas Prices at the Transportation System Income Point provided by Argentine Decree 181/2004, which is an exhibit to Resolution 208/2004, PAE undertook

not to bring new legal actions and if necessary, to stop, within the scope established in these presents, all actions and/or proceedings it would have brought against the Gas Network Distribution Licensees with reference to financial complaints corresponding to price pesification established by Law 25'561, Decree 214/2002 and Law 25'820; and if necessary the non-application of the adjustment system established in the mentioned rule and its decrees, to the natural gas sale agreements.

168. To the Respondent this shows that "the claimed damages were not such damages", that the damage expected was absurd and non-existent, and that the above express waiver made by

the investor gives the latter no right to transfer the damage to the Government (Memorial on Jurisdiction, §§ 111-112).

169. While admitting that the present Tribunal has no jurisdiction over purely hypothetical claims, the Claimants argue that the nature of the damage is a matter for the merits phase (Transcript, p. 53). They also disagree with the contention that their claims are “hypothetical”, “conjectural” or “speculative”. The conduct of the Respondent criticised by the Claimants has violated the former’s commitments and severely affected the latter’s investments. What is more, the Claimants, in their Memorial, have distinguished between damage that has already occurred and damage that will necessarily accrue in the immediate future, on the basis of existing laws and regulations, and have distinguished it from contingencies that may or may not materialise. Some of the damage that is considered to be “future” in the Claimants’ Memorial has already materialised in the meantime because the measures causing it have continued in force (Counter-Memorial on Jurisdiction, §§ 141-143).

170. According to the Claimants, contrary to the Respondent’s assertion that no one can be certain whether export withholdings will continue and, if so, for how long, and what will be their final impact (Memorial on Jurisdiction, § 106), the existence and impact of such withholdings can easily be determined. This measure is based on laws, decrees and regulations enacted by the Government that are currently in effect. It already has adversely affected Claimants’ investment by removing part of its revenues. The amount taken away is easy to calculate based on the rate of the withholdings and the exports made. Regarding the duration of the measure, it is impossible to say how long it will last. Article 6 of the relevant Law (No. 25’561) states that export withholdings will continue for five years, *i.e.* at least until February 2007. The rate of withholding, which increases with the passage of time, is known (see the chart in note 143 to § 146 of the Counter-Memorial on Jurisdiction), as are the exports committed by the Claimants up to 2007 (*ibid.*, §§ 144-146).

171. In addition, and as explained in their Memorial (§ 182), the Claimants have suffered losses as a consequence of the “pesification” of hydrocarbon sales agreements, which were dollar-denominated. This damage is not hypothetical; it has occurred.

172. Regarding the export of natural gas, that same Memorial (Section VI.3) shows how the restrictions imposed by the Respondent have affected the Claimants. The LECG Report

explains the consequences of those restrictions, distinguishing between the damage which has already occurred and the contingencies (Counter-Memorial on Jurisdiction, § 148).

173. Generally speaking, the Claimants assert that they have distinguished throughout between damage accrued and contingencies, and that the latter have been calculated objectively on the basis of the parameters used by LECG. The Claimants at no point have presented contingencies as damage accrued. For example, regarding royalty payments claimed from Argentine provinces, they are contingencies which have a reasonable basis in fact and have been treated as such. If the Claimants have included contingencies, clearly earmarked as such, they have done so to be able to file additional claims if those contingencies materialise (Claimants' Memorial, § 457).

174. In *Enron I* (above, § 49), where Argentina had raised the same objection, arguing that the claim was “purely hypothetical”, the object of the claim were provincial stamp tax assessments which had not yet been collected and were under review by the Supreme Court of Argentina. On this point, the ICSID Tribunal said the following (§74):

[M]indful of the fact that once the taxes have been assessed and the payment ordered there is a liability of the investor irrespective of the actual collection of those amounts. This means that a claim seeking protection under the Treaty is not hypothetical but relates to a very specific dispute between the parties. Whether there has been a violation of the terms of the Treaty and its eventual extent is an aspect that belongs to the merits. The eventuality of an expropriation and its conditions is still more so. The Tribunal cannot decline its jurisdiction to examine these various points of fact and law. Jurisdiction is accordingly affirmed on this point too.

175. The Respondent argues next that, in the Gas Agreement with Argentina, PAE undertook not to bring new legal actions against gas distribution companies and producers of electricity with reference to price “pesification” by Law No. 25'561, Decree No. 214/2002 and Law No. 25'820; and that, as a consequence, the Claimants' claims are “absurd” and “non-existent”. According to the Claimants, this argument is wrong. First, the only waiver included in a side letter to the above Agreement related to claims of natural gas producers against gas distribution and electricity companies for damage caused to them by the “pesification”. It does not extend to BIT claims against Argentina. Moreover, the Agreement does not compensate the Claimants for the expropriation of their legal and contractual rights. Second, the side letter in question provides that the waiver it contains cannot be invoked by the parties (which includes the Respondent) in connexion with other claims outside the Gas Agreement.

176. The Respondent also contends that their acceptance of the Gas Agreement shows that no damage has occurred and, hence, prevents the Claimants from demanding compensation. However, according to Claimants, there has been damage. While the Agreement may have mitigated some future damage, it compensates the Claimants in no way for damage suffered on account of the measures taken by the Government.

(b) The Tribunal's Considerations

177. It is, according to this Tribunal, in the nature of disputes such as the present one that some of the damage is concrete and specific in that it has occurred already, while some, which may occur later, is not yet specified but is more or less foreseeable under the circumstances. As shown in *Enron I* (above, § 49), the threshold of certainty in that respect is relatively low.

178. This fact is easily explained. Many investment disputes arise from situations with continuing adverse effects on the claimants and these will have to be taken into account by the arbitral tribunal called upon to deal with those disputes, at least regarding damage that was uncertain at the jurisdictional phase but crystallised at the merits stage. This is one of the reasons why the present Tribunal, at this point, dismisses the present objection, all the more so because the Claimants, *prima facie*, have demonstrated their assertion that some damage *has* occurred. The final amount of damages will of course have to be determined during the proceedings on the merits if the Respondent is held liable. At that stage, a final assessment will have to be made, and damage that remains contingent or hypothetical at that moment will have to be ruled out.

179. It is not possible to limit this Tribunal's competence to damage that is real and averred at the time at which the issue of jurisdiction is being examined. If it were otherwise, the part of the case related to damage that has not materialised yet but may have done so at the merits stage, would never be decided, save for an unnecessary new arbitration. Doubts are permitted only in respect of claims patently and entirely based on conjecture, which could be considered abusive. But this, clearly, is not the case here.

180. On the basis of the foregoing considerations, the Tribunal dismisses the Fifth Preliminary Objection.

8. Sixth Preliminary Objection: The Claimants Have No *Jus Standi*

(a) The Positions of the Parties

181. The Respondents open their argument by asking whether the Claimants did make investments between 1991 and 2001 amounting to more than two billion U.S. dollars for exploration and exploitation activities. The Claimants describe their investments in terms of contracts and concessions, associations, joint venture contracts and exploitation permits. A further characterisation given by them is that of legal and contractual rights, and of rights to specific performance. Finally, the Claimants contend that PAE “is the indirect owner of two strategic assets involving the transport, deposit and load of crude oil” and that it “invested in the natural gas transportation business activity” (Memorial on Jurisdiction, §§ 113-116, referring to the Claimants’ Memorial, §§ 125, 126, 129 and 130). This, according to the Respondent, makes for vagueness and confusion and “significantly [affects] the Respondent’s right to due process” in that it is not possible: (i) effectively to determine who has made the investment; (ii) which is the party bringing legal action to enforce the legal rights acquired by the capital expenditure; and (iii) what is the scope of the property rights under the relevant laws, *i.e.* the legal system of the host State. It is argued next by the Respondent that the issue of *jus standi* in this case – if it pertains to the merits – is governed by Argentine law as the law applicable to the merits (Memorial on Jurisdiction, § 117).

182. The Respondent then invokes Article I(2) of the BIT to show that PAE, as a company established in Delaware, does not enjoy the advantages of the BIT because it has “no substantial business activities” in Argentina (*ibid.*, §§ 118-120).

183. Both the BP America Production Company and the BP Argentina Exploration Company are incorporated under the laws of Delaware, the former owning and controlling the latter. Having been incorporated on 31 December 2001 and in 2002, respectively, they cannot possibly have made the investments alleged.

184. After distinguishing direct claims from “derivative” ones, making reference to NAFTA (Memorial on Jurisdiction, §§ 123-125), the Respondent defines the former as claims made by a shareholder in his own right to redress a “special injury”, that is, an injury suffered by him directly, for instance the refusal of permission to consult the company’s books. The latter are claims made by shareholders – if the company itself is unwilling to do so – to enforce the

company's cause of action, for instance if a director converts corporate assets. In that case, the shareholder's injury is an indirect one: a decrease in his shares' book value, the direct injury being inflicted to the company through the loss of the converted assets. Any amount recovered by the shareholders' derivative action should, therefore, be added to the assets of the company. But there is, in this field, a blurred area where both the company and its shareholders may have been significantly injured (Memorial on Jurisdiction, §§ 126-132).

185. At any rate, allowing shareholders' claims amounts to piercing the corporate veil, and such piercing may be disallowed or allowed on the basis of policy considerations, such as safeguarding the integrity of the entity, protecting the interests of all stakeholders – shareholders, to be sure, but also creditors, workers and clients – by allowing only corporate claims and avoiding premature liquidation. Letting the product of derivative actions flow into shareholders' pockets would amount to privileging those shareholders over both the company itself and all other interested parties (*ibid.*, §§ 134-139).

186. In the cases of BP America and BP Argentina, alleged majority shareholders in the Argentine Companies, it has not been established so far that they have suffered a special injury by the allegedly detrimental measures. While there is, here, an issue of double recovery, to be solved in a timely manner, the present Tribunal will also have to consider, according to the Respondent, whether, by compensating the shareholders, not the company, it will not bring about the premature liquidation of the company. If compensation were to go straight to the shareholders, the creditors of the injured companies, including the federal Government, "would be mocked" (*ibid.*, §§ 140-141).

187. Allowing this case to proceed to the merits stage will imply that the Tribunal has the power to order the liquidation of the service companies. According to the Respondent, the present Tribunal is not competent to determine now the outcome for all interested parties, which is why the cases of BP America and BP Argentina should not be heard unless they come up with a genuine claim other than the present one, which is a "derivative claim" in disguise. In other words, the Respondent asks the Tribunal to decline jurisdiction over the purely derivative indirect claims of BP America and BP Argentina

188. Finally, regarding PAE Sur, Pan American Fueguina and Pan American Continental, the Respondent considers that they have not proven their investment and are unable to do so since their existence only dates back to 1998. Nor are they controlled by an investor because PAE

does not qualify as such. Since they have not shown that they are investments in themselves, and there is no way for the Claimants to modify their position, the Argentine Companies lack *jus standi* (*ibid.*, §§ 143-145), and the Tribunal should also decline jurisdiction as far as the claims of the Argentine Companies are concerned.

189. The Claimants reject the thesis of the Respondent according to which this case is based on an action by shareholders – BP America and BP Argentina – regarding measures directly affecting the Argentine Companies and only indirectly themselves. According to the Respondent, the shareholders have no *jus standi* to present “indirect” claims in the context of this arbitration because those claims arise out of breaches of the rights of third parties – the Argentine Companies – and the measures on which the claim is based were in no way directed at the investors. This objection, which Argentina advanced in several recent cases before ICSID tribunals, was rejected every time.

190. In the instant case, the three US entities – PAE, BP America and BP Argentina – are not bringing claims on behalf of the Argentine Companies, which are themselves claimants as well, but on their own behalf as US investors with investments qualifying as such under the BIT. According to the Claimants, “[i]nternational law recognises claims by shareholders” in the position of the three entities (Counter-Memorial on Jurisdiction, § 161).

191. The Claimants’ next contention is that the Respondent’s argument, apart from the issue of its well-foundedness, is one that goes to the merits of the case, whereas, under the rules of the ICSID Convention (Article 25), the only issues to be dealt with at the present stage of the proceedings are the jurisdictional ones; *jus standi* is a point to be debated at the merits phase, and the Tribunal should decline to examine it at this juncture.

192. The two parties also disagree on the law applicable to the determination of the existence of *jus standi* for the different Claimants. Argentina contends that *jus standi* is determined by its own laws, which are those governing the merits. The Claimants reply that the law applicable to the merits is the BIT and international law, not the law of Argentina, which is why the alleged inability of BP America, BP Argentina and PAE to put forward indirect claims under Argentine law is irrelevant when examining *jus standi*; nor is US law or the NAFTA (*ibid.*, §§ 163-165).

193. For the Claimants, the governing law is the BIT, its language and its purpose. The object and purpose of that Treaty, according to its preamble, is to “stimulate the flow of private capital” into Argentina. This is accomplished *via* shareholdings or other types of investments, without making any distinction between the two. The inclusion of shareholders is confirmed by Article I(1)(a) of the BIT, which defines the term “investment” as follows:

“investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by national s or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

(i)

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof

194. The above text expressly covers “shares of stock or other interests in a company or interests in the assets thereof”, thus including PAE’s, BP Americas’s and BP Argentina’s indirect and direct controlling ownership of interests in the Argentine Companies, and this means that these entities may bring a claim in respect of them. The same BIT provision determines which investments are regarded as belonging to a protected investor: those “owned or controlled directly or indirectly by nationals or companies of the other Party”. The meaning of “investment” in the framework of the above BIT provision was commented upon by the ICSID Tribunal in *Lanco International, Inc. v. Argentina*, (Decision on Jurisdiction of 8 December 1998):³²

The Tribunal finds that the definition of [investment] in the Argentina-U.S. Treaty is very broad and allows for many meanings. For example, as regards shareholder equity, the Argentina-U.S. Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share; thus the fact that Lanco holds an equity share of 18.3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I of the Argentina-U.S. Treaty (§ 10).

195. Moreover, add the Claimants, “claims by shareholders are well recognized in international law”, which makes sense since the aim of investment protection treaties is to

³² ICSID case No. ARB/97/6, *ILM*, Vol. 40, 2001, p. 457.

encourage foreign investment by offering protection to foreign investors who, for example, buy shares or interests in local companies of the host State or register a subsidiary in that State because the host State requires it, as is for instance the case of Argentina, or because this is the only way to invest. If shareholders such as BP America, BP Argentina and PAE were not protected by the BIT, the latter could easily be reduced to naught by governments (*ibid.*, §§ 167-172).

196. In response to Respondent's argument that BP America, BP Argentina and PAE are presenting indirect claims for which they have no *jus standi*, the Claimants contend that the rights claimed are not those of the Argentine Companies but their own, namely, those arising out of the BIT. Thus, all the present Tribunal has to do is to assess whether the Respondent's alleged conduct would amount to a violation of that Treaty. The difference between local and other causes of action and the cause of action resulting from the BIT was stressed by the ICSID Annulment Committee in *Vivendi I*.³³ That case is particularly relevant for the present arbitration. It concerned interference by the Argentine authorities with the operation of a concession agreement. The Claimants were the local concession holder, Compañía de Aguas del Aconquija (CAA), and one of its shareholders, the French Compagnie Générale des Eaux (CGE). The Annulment Committee found that the latter could bring its own claims, which related to issues under the concession contract, on the basis of the Argentinean-French BIT because it was a shareholder in CAA. In so doing, the Committee said (§ 50):

In common with other BITs, Article I clearly distinguishes between foreign shareholders in local companies and those companies themselves. While the foreign shareholding is by definition an "investment" and its holder an "investor", the local company only falls within the scope of Article I if it is "effectively controlled, directly or indirectly, by nationals of one Contracting Party" or by corporations established under its laws . . . It cannot be argued that CGE did not have an "investment" in CAA from the date of the conclusion of the Concession Contract, or that it was not an "investor" in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5 [*i.e.* fair and equitable treatment, full protection and security and no expropriation without compensation].

³³ *Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentina*, ICSID case No. ARB/97/3, Decision of the Annulment Committee of 3 July 2002, *ILM*, Vol. 41, 2002, p. 1135, §§ 112-113, <http://ita.law.uvic.ca/documents/Eaux-Annulment.pdf>.

197. According to the Claimants, this means that BP America, BP Argentina and PAE may make claims under the BIT even if the Respondent's conduct also breaches Argentine domestic law or specific legal and contractual rights thereunder.

198. Next, the Claimants contend that "claims of shareholders are well recognised in international law". To this end, and without addressing the situation under the rules of general international law, they argue that a long series of decisions by international investment tribunals have admitted the presentation of "indirect" claims by foreign shareholders, especially in cases against Argentina (Counter-Memorial on Jurisdiction, §§ 180-190). These decisions concern the following cases: *Maffezini v. Spain*;³⁴ *Vivendi I* (above, § 196); *Goetz v. Burundi*;³⁵ *Asian Agricultural Products, Ltd. v. Sri Lanka*,³⁶ *Genin* (above, § 148); *CMS* (above, § 57; *Azurix* (above, § 77); *Enron I* (above, § 49); and *Siemens* (above, § 48).

199. In connexion with *Maffezini* and *Siemens*, the Claimants note that the ICSID tribunals made it clear that the investor has to make only a *prima facie* case that it has standing to file its claim; that in *CMS* the claim was one of a minority investor in a local company and that the Tribunal held that it does not matter whether the investor protected by the BIT is also a party to a concession agreement or a license agreement with the host State to find that there is jurisdiction under the provisions of that Treaty, as there is a direct right of action of the investor as a shareholder; and that, in *Siemens*, the German investor indirectly owned the local (Argentine) company.

200. As in *Azurix*, *Enron* and *Siemens*, conclude the Claimants, in the present case the foreign investors directly and indirectly own interests in the Argentine Companies and, thus, directly or indirectly, own protected investments. It was decided in *CMS*, *Azurix*, *Enron*, *LG&E* (above, § 57, 77, 49 and 77) and *Siemens* (above, § 48) that there was, in the circumstances, a direct right of action for the American shareholding companies. This

³⁴ Decision on Jurisdiction of 25 January 2000, ICSID case No. ARB/97/7, *ICSID Review-FILJ*, Vol. 16, 2001 p. 212, §§ 236-238, http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf.

³⁵ Award (embodying the parties' settlement agreement) 10 of February 1999, ICSID case No. ARB/95/3, *ICSID Review-FILJ*, Vol. 15, 2000 p. 454; *Yearbook of Commercial Arbitration*, Vol. 26, 2001, p. 21 at pp. 35 and 24, <http://ita.law.uvic.ca/documents/Goetz-Award.pdf>.

³⁶ Final Award of 27 June 1990, ICSID case No. ARB/87/3, *ICSID Review-FILJ*, Vol. 6, 1991, p. 526; *ICSID Reports*, Vol. 4, 1989, p. 246, §§ 20-21, <http://ita.law.uvic.ca/documents/AsianAgriculture-Award.pdf>.

conclusion is supported by the intention of the drafters of the Argentina-US BIT, which was based on a US model draft and in connexion with which one of its authors, Kenneth Vandeveld, noted that the definition of investments in its Article 1 was, in part, a reaction to the Judgment of 5 February 1970 in the *Barcelona Traction, Light and Power Co., Ltd.* case, second phase,³⁷ where the Court held that a company incorporated in Canada but owned by Belgians could not be protected by Belgium, the State whose nationality the shareholders possessed, *vis-à-vis* Spain. It did not rule on the question of whether a State could protect its nationals shareholders of a company having the nationality of the defendant State (Judgment, § 92). The BIT definition of “own or control” renders the *Barcelona Traction* ruling inapplicable, and, as long as there is such ownership or control, it does not matter how many layers separate the national or company from the investment.³⁸ This analysis is borne out by other writers and persons involved with the US BIT Programme. One writer, P.B. Gann,³⁹ went even further by holding that any interest, however minor, was protected (Counter-Memorial on Jurisdiction, §§ 189-198).

201. The Claimants point out further that Argentina heavily relies on US law and the Free Trade Agreement between Chile and the United States of America to argue that what they really submit are “derivative” claims disguised as “direct” ones. This is not the case, according to them, for under the Argentina-US BIT these claims are direct; neither Argentine nor US law applies to them. The Treaty sets an independent standard against which Argentina’s conduct must be measured, as pointed out by the Annulment Committee in *Vivendi* (above, § 196). It follows, for the Claimants, that the Respondent labours under a fundamental misconception regarding the claims of the three US companies: these claims arise directly out of the BIT and cannot be regarded as indirect claims. Accordingly, all three have *jus standi* before this Tribunal (Counter-Memorial on Jurisdiction §§ 199-202).

202. The next point made by the Claimants is that the Respondent also questions their status as investors under the BIT, especially by alleging that the two BP companies, having been incorporated in 2001 and 2002, respectively, could not have made their investments in

³⁷ (Belgium v. Spain), ICJ Reports 1970, p. 3.

³⁸ *United States Investment Treaties: Policy and Practice*, Deventer, Kluwer, 1992, pp. 45-46.

³⁹ “The U.S. Bilateral Investment Treaty Program”, *Stanford Law Review*, Vol. 21, 1985, p. 373, at pp. 404-405.

Argentina. The Claimants recall the evidence submitted in their Memorial (§§ 124-130) and address this point by showing: (i) that they qualify as investors; and (ii) that their investment is protected by the BIT.

203. Regarding BP America, the written testimony of D.B. Pinkert shows, according to the Claimants, that that company was incorporated in Delaware in 1930 under a different name; it changed names several times and, on 31 December 2001, was renamed BP American Production Co. That entity has vast business activities in the United States, its outside activities being performed through subsidiaries. It is therefore a “company” duly organised and incorporated in the US since 1930. BP Argentina was originally incorporated in 1958 as Pan American Argentina Oil Co. Its registered office is in Delaware, and it has an operating office in Buenos Aires. Until 2002, when it acquired its present name, it underwent several name changes. PAE is also a “company” within the meaning of the BIT, formed in 1977 under Delaware law; it is indirectly and directly controlled by the two BP companies (*ibid.*, §§ 203-211).

204. In its Memorial on Jurisdiction (§§ 118-120), the Respondent invokes Article I(2) of the BIT which entitles each Party to deny the advantages of that Treaty to any company of the other Party if the latter is controlled by nationals of any third country or by nationals of that other Party and “has no substantial business activities in the territory of the other Party”. This provision does not apply here as PAE is directly and indirectly controlled by two US companies – BP Argentina and BP America – which do have substantial business activities in the US. In addition, the Claimants point out, the positive declaration of denial to be made by the host State under Article I(2) of the BIT only applies prospectively from the date on which it is made (Transcript, pp. 60-63; *Plama Consortium, Ltd. v. Bulgaria*, Decision on Jurisdiction of 8 February 2005, §§ 159-165⁴⁰).

205. Contrary to the Respondent’s assertion, the Argentine Companies – PAE Sur, PAE Fuegoina and PAE Continental – are owned and controlled by US companies and, for that reason, can bring claims under Article 25(2)(b) of the ICSID Convention and Article VII(3)(a)(i) and (8) of the BIT (Counter-Memorial on Jurisdiction, §§ 212-213).

⁴⁰ ICSID case No. ARB/03/24, *ILM*, Vol. 44, 2005, p. 721.

206. The Claimants do qualify as investors; their claims relate, not to “cash flows”, but to different categories of legal and contractual rights protected by the BIT and falling within ICSID jurisdiction, contrary to the Respondent’s allegations. Further, also contrary to those allegations, the Claimants could make their investments in Argentina, having been incorporated in 1930, 1958, and 1977, respectively (see above, § 203).

207. BP Argentina has substantially and directly participated in the exploration and production activities in Argentina. This participation was, in 1997, transferred to PAE Branch. After 1997, investments were substantially increased, especially in the period from 1998 to 2001, and channelled through three wholly owned subsidiaries, Pan American Sur, Pan American Fueguina and Pan American Continental. In sum, the Claimants believe that they have submitted more than sufficient evidence on each of their investments, all protected by the BIT and, thus, subject to ICSID jurisdiction.

208. With respect to the Respondent’s argument that the assertions made in the Claimants’ Memorial (§§ 107-108) are false, it was stated that the guarantees of the BIT were an incentive to invest, yet the investment were made in 1991 and 1997, whereas the BIT became effective only in 1994. First, the Claimants reply, the Treaty was signed already on 14 November 1991. Second, the BIT does not distinguish between investments prior to the Treaty’s coming into force and those made subsequently; both are protected. What is more, reliance on the signed BIT was not the only reason to make the investments, as is shown by the witness statement of Mr. Spies.

(b) The Tribunal’s Considerations

209. The present Tribunal notes that the Respondent’s arguments on *jus standi* are, according to the Claimants, an issue belonging to the merits and should, therefore, be rejected at this stage of the proceedings. But the Claimants also presented detailed arguments to show that the Sixth Preliminary Objection is unfounded. Indeed, there is, under general international law, some doubt on the subject. In *Barcelona Traction Light and Power Co., Ltd.*,⁴¹ Spain’s preliminary objection on the *jus standi* of the Belgian shareholders was joined to the merits (Judgement, pp. 44-45), although the Court admitted that “the objection clearly has certain

⁴¹ New application: 1962, Belgium v. Spain, Judgment of 24 July 1964, ICJ Reports 1964, p. 6.

aspects which are of a preliminary character, or involves elements which have hitherto tended to be regarded in that light” (*ibid.*, p. 45); some even thought that it belonged entirely to the merits.⁴² Yet it would seem that, in the rich ICSID case-law – more precisely the precedents cited by the Claimants – the issue was, in principle, considered as having to be examined when dealing with jurisdiction, which is what this Tribunal will do as well. Accordingly, the Tribunal rejects the Claimants’ submission, presented in their Counter-Memorial on Jurisdiction (§§ 163-164), that the *jus standi* objection should not be addressed during the present phase of this arbitration.

210. The Claimants established their investor status under the BIT and their standing to file a claim (*Maffezini* and *Siemens*, see above §§ 198 and 48) in Annex B (production concessions, exploration permits and production contracts), Annex C (gas export contracts and permits), F (crude oil supply contracts) and Annex G (natural gas contracts) to their Memorial on the Merits.

211. The Claimants have also shown that PAE and BP are US companies existing since 1930, 1958 and 1977, respectively, and that they control the Argentine Companies directly or indirectly. For this reason, they can, *ratione temporis*, be considered as investors, all the more as the BIT covers the investments existing at the time of its coming into force (1994) as well as those made subsequently (Article XIV(1)).

212. Furthermore, the expansion of the investments occurring between 1991 and 1997 was, at least partly, motivated by the perspective of that Treaty’s entering into force. Thus the Claimants have shown that they are investors under the BIT, either as shareholders (U.S. companies) or as holders of contracts, concessions and permits (Argentine Companies). This being the case, they would seem to have *jus standi* before this Tribunal.

213. With respect to the *jus standi* of the Argentine Companies (PAE Sur, PAE Fueguina and PAE Continental),⁴³ they are owned and controlled by US companies and, for that reason, can

⁴² Dissenting Opinion of Judge Morelli, *ibid.*, p.85, at pp. 110-114.

⁴³ The Tribunal also includes PAE Branch, although it can be said with equal force that it is to be identified with the US company PAE.

also bring claims under Article 25(2)(b) of the ICSID Convention and Article VII(3)(a)(i) and (8) of the BIT.

214. The Tribunal should like to add the following observations regarding Respondent's objection to the *jus standi* of foreign shareholders in the present case. This problem has a long but uncertain past in international practice. According to that practice, the home States of foreign shareholders with direct claims (*e.g.*, concerning the payment of dividends) clearly had *jus standi* regardless of the quantity or value of the shares held. Regarding indirect rights, the situation was more complex. Generally, it was thought that, as long as the company's "national" State could claim on the international level, the home State of the shareholders could not; or, to be more precise, it could do so only if the shareholders' indirect rights had become direct ones as a result of the winding up of the company.

215. There was, however, a tendency to allow for an exception in situations, such as the present one, where the company itself was a "national" of the defendant State: in such cases the possibility of protecting foreign shareholders was thought desirable – at least if the shareholdings were of some importance (see for example the *El Triunfo* case decided by an *ad hoc* arbitration commission⁴⁴) since otherwise there would be no protection at all.

216. By contrast, in *Barcelona Traction*, the situation was a triangular one: the company was Canadian, the majority shareholders were Belgian, and the host State was Spain. The "national" State of the shareholders was considered to have no *jus standi* on the basis of a preliminary objection made by Spain and joined to the merits of the case. This was the scope of the ICJ's ruling in *Barcelona Traction*; the Court did not deal with the situation of foreign shareholders in domestic companies, which was that of *El Triunfo* and is that of the present case (Judgment, § 92). This hypothesis was in fact left open, although the Court's Judgment was considered by many as ruling out, at the level of general international law, claims made on behalf of foreign shareholders' indirect interests.

217. But the instant case is not situated at the level of general international law but at that of treaty law – the BIT and the ICSID Convention – and the Claimants have established that the

⁴⁴ *United States v. El Salvador*, Award of 8 May 1902, United Nations Reports of International Arbitral Awards, Vol. X, p. 467.

applicable Treaty deviates from *Barcelona Traction*, allowing, *inter alia*, claims based on direct or indirect shareholdings of nationals of one Contracting State in companies of another Contracting State. It appears that the BITs concluded by the United States were meant to deviate from the *Barcelona Traction* rule as perceived (see above, § 200).

218. There is, therefore, no doubt on this question, and an impressive string of decisions on jurisdiction by ICSID tribunals confirm this conclusion. Whether it can be said, as was suggested by the ICSID Tribunal in *CMS* (above, § 57), “that the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule” (Decision on Jurisdiction, § 48), is a question which will be left open by the Tribunal. Another question which may remain open – because it does not arise here – is whether the BITs protect any shareholding or only shareholdings of a certain importance; there seems to be a widespread tendency on the part of ICSID tribunals to allow the protection of any foreign shareholding (see, *e.g.*, *LG&E*, above, § 77, Decision, at § 63).

219. The situation to be faced here is similar to that dealt with by the Annulment Committee in *Vivendi* (above, § 196). In *Vivendi*, the claim had been presented by both the foreign company, Compagnie Générale des Eaux (CGE), and the local company controlled by it, Compañía de Aguas del Aconquija (CAA). The Committee saw no problem in this, because CGE could have presented its claim for its shareholding in CAA, which was itself an investment protected by the BIT, whereas CAA, a foreign-controlled company, had suffered an encroachment upon its contractual rights, which was the main cause of action. But the Committee recognised CGE’s *jus standi* to make claims relating to acts prejudicial to both its shareholding and to the contractual rights of the company of which it was a shareholder. It is evident, of course, that damages may be claimed only once; but this is an issue to be considered at the merits phase. The danger of double recovery by the Claimants, and, conversely, double jeopardy for the Respondent may be rather real. Actually, in the present case, there may even be triple recovery/jeopardy. The Tribunal expects the parties to address that issue during the merits phase.

220. Another point raised by the Respondent in its Memorial on Jurisdiction (§§ 135-139) in connexion with foreign shareholders’ claims is that the latter, in recovering their investment, do so to the prejudice of other domestic or foreign shareholders, creditors and employees.

This may be true; but it does not empower this Tribunal to stray from the path traced by the Contracting Parties in their BIT, which unquestionably protects shareholdings.

221. With respect to Argentina's invocation of the "denial of benefits" clause in Article I(2) of the BIT with respect to PAE – that entity, though being a US company, would not have substantial business contacts with the United States and is controlled by nationals of a third country –, the Claimants have convincingly shown that, as a matter of fact, PAE is controlled by BP America and BP Argentina, which are both US companies and have both substantial business contacts in the United States.

222. On the basis of the foregoing considerations, the Tribunal also dismisses the Sixth Preliminary Objection.

9. Respondent's Request for Further Evidence

223. In its Memorial on Jurisdiction (§ 147), the Respondent complains about the lack of sufficient evidence regarding ownership of the three US companies, investments made in Argentina and damages, these matters being addressed only in witness statements. According to the Claimants (Counter-Memorial on Jurisdiction, §§ 228-229), they did file the necessary corporate documentation and testimony to provide the information required in the Requests for Arbitration and the Memorial on the Merits; they also provided supplementary evidence and offered to submit additional evidence if required by the Tribunal.

224. In its Memorial on Jurisdiction (§§ 146-152) the Government first notes that neither the ownership of the US companies nor the losses allegedly sustained are substantiated, except by witness statements. This omission cannot now be cured, according to Argentina, "for that would entail the violation of important procedural standards" (§ 147). The Respondent does not however develop this assertion. Argentina requests the Tribunal to order the Claimants: (i) to examine Mr. Richard Spies about the time at which the investments were made – between 1991 and 2001 according to the Claimants' Memorial – and about the inconsistency of this assertion with his own statement according to which the companies concerned (PAE, BP Argentina, BP America, PAE Sur, PAE Continental and PAE Fueguina) were not incorporated until between 1997 and 2002; (ii) to provide financial statements showing their losses since they started up to date; (iii) to instruct Serial de la Torre-Capitación, Selección y Desarrollo, to produce and to transmit to the Respondent all requests for the selection and

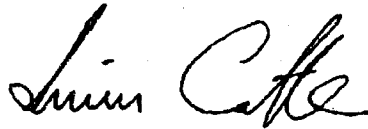
hiring of personnel of any of the Claimants between January 2002 and October 2004, and to report to this Tribunal and to Argentina's Legal Counsel the instructions given by the Claimants to promise "attractive possibilities for development in the framework of excellent working conditions"; and (iv) to produce, and to notify the Respondent of, "the personnel hired, working conditions offered and remuneration agreed upon, during the same period".

225. Claimants oppose these demands, qualifying them as a "thinly disguised challenge to the merits". The "confusing alchemy of merit-based and jurisdictional issues" practiced by Argentina has, according to the Claimants, forced them to respond at length to merit-based arguments put forward by Argentina. Allegedly, this technique is meant to harass the Claimants, to distract the Tribunal from the issues at hand and to delay the discussion on the merits (Counter-Memorial on Jurisdiction, §§ 231-232). Moreover, Argentina's request is not in tune with the ICSID Arbitration Rules (Rule 33). It is possibly belated, not precise, does not indicate "the points to which [the] evidence will be directed" and is not "necessary". These allegations are dealt with at some length in the Claimants' Counter-Memorial on Jurisdiction (§§ 234-238) and culminate in the conclusion that Argentina's request is abusive, designed to harass the Claimants and intended to delay for months a decision on jurisdiction and a discussion of the merits (*ibid.*, § 239), and thus should be denied.

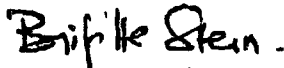
226. In the Tribunal's judgment, Claimants have sufficiently shown corporate ownership and identity for the purposes of the Preliminary Objections. For the remainder, the elements referred to in Argentina's Request for Further Evidence are not necessary for reaching a decision on jurisdiction. Rather, they concern the merits of the case. As a result, the Tribunal shall not rule on Respondent's Request at this stage of the proceedings, except regarding corporate ownership and identity.

DECISION

1. For the foregoing reasons, the Arbitral Tribunal:
 - (1) REJECTS all the Preliminary Objections raised by the Respondent;
 - (2) HOLDS that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal;
 - (3) DETERMINES that Claimants have shown corporate ownership and identity for the purposes of the Preliminary Objections, and REJECTS Respondent's request for further evidence at this stage of the proceedings in all other respects;
 - (4) DETERMINES that the further conduct of the arbitration will be determined by the Tribunal after consultation with the parties;
 - (5) RESERVES all issues (including costs) that are not resolved in the present Decision for a later stage of the proceedings.



Lucius Caflisch
President of the Tribunal



Brigitte Stern
Arbitrator



Albert Jan van den Berg
Arbitrator