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

In the proceedings between

AES Corporation
(Claimant)

and

The Argentine Republic
(Respondent)

ICSID Case No. ARB/02/17

DECISION ON JURISDICTION

Members of the Tribunal
Professor Pierre-Marie Dupuy, President
Professor Karl-Heinz Böckstiegel, Arbitrator
Professor Domingo Bello Janeiro, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Representing the Claimant
Messrs. David M. Lindsey and
James M. Hosking
Clifford Chance U.S. LLP
New York, NY

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

Date of Decision: April 26, 2005

I. Procedure

1. On November 5, 2002, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received a Request for Arbitration against the Argentine Republic ("the Respondent" or "Argentina") from the AES Corporation ("the Claimant" or "AES"), a company incorporated in the State of Delaware, with headquarters in Arlington, Virginia, United States of America. The Request concerns AES' investment in eight electricity generation companies and three major electricity distribution companies in Argentina, and Argentina's alleged refusal to apply previously agreed tariff calculation and adjustment mechanisms.

2. In its request, AES invoked the provisions of the 1991 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (the "Argentina–US Bilateral Investment Treaty" or the "BIT").[1]

3. On November 6, 2002, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt and transmitted a copy of the request to the Argentine Republic and to the Argentine Embassy in Washington D.C.

4. On December 19, 2002, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or "the Convention"). On the same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

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[1] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, done in Washington, D.C. on November 14, 1991, in force since October 20, 1994.

5. Pursuant to the parties' agreement, the Tribunal in this case would comprise one arbitrator appointed by the Claimant, one arbitrator appointed by the Respondent, and a third, presiding, arbitrator, to be appointed by the Secretary-General of ICSID.

6. On February 18, 2003, the Claimant appointed Professor Karl-Heinz Böckstiegel, a German national, as an arbitrator. On April 3, 2003, Argentina appointed Professor Domingo Bello Janeiro, a national of the Kingdom of Spain, as an arbitrator.

7. With the agreement of both parties, the Secretary-General of ICSID appointed Professor Pierre-Marie Dupuy, a French national, as the President of the Arbitral Tribunal. On June 3, 2003, the Acting Secretary-General, in accordance with Rule 6(1) of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

8. The first session of the Tribunal with the parties was held on July 8, 2003, at the seat of the Centre in Washington, D.C. During the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections in this respect.

9. During the first session the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. The Tribunal, after consultation with the parties, fixed the following schedule for the written phase of the proceedings: The Claimant would file a memorial on the merits within forty five (45) to ninety (90) days from the date of the first session; the Respondent would file a counter memorial on the merits within ninety (90) days from its receipt of the Claimant's memorial; the Claimant would file a reply within sixty (60) days

from its receipt of the counter memorial; and the Respondent would file a rejoinder within sixty (60)days from its receipt of the Claimant's reply.

10. During the first session it was noted that consideration of eventual objections to jurisdiction from the Argentine Republic would be premature. It was thus agreed to leave the matter open for further discussion in due course.

11. On October 7, 2003, the Claimant filed its Memorial on the Merits with accompanying documentation. On December 31, 2003 Argentina filed a Memorial with objections to jurisdiction.

12. By letter of January 12, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with ICSID Arbitration Rule 41(3), and invited the parties to file their views on a schedule for their presentations on jurisdiction. Both parties submitted their views on January 16, 2004, with the Claimant also requesting the Tribunal to join the questions of jurisdiction raised by Argentina to the merits of the dispute. Argentina, upon invitation of the Tribunal, filed a response to the Claimant's request on January 27, 2004.

13. On February 18, 2004, the Tribunal, having carefully considered the positions of the parties, confirmed the suspension of the proceedings on the merits and fixed the following timetable for the filing of the parties' submissions on the question of jurisdiction: the Claimant would file a counter memorial on jurisdiction within thirty (30) days from the date of the Tribunal's decision; the Respondent would file a reply on jurisdiction within thirty (30) days from its receipt of the Claimant's counter memorial; and the Claimant would file a rejoinder on jurisdiction within thirty (30) days from its receipt of the Respondent's reply. The Tribunal would thereafter, decide, whether oral arguments on the question of jurisdiction would be necessary, and, if so, fix a date for a hearing on jurisdiction.

14. In accordance with the timetable fixed by the Tribunal, the Claimant filed its Counter-Memorial on Jurisdiction on February 20, 2004. Argentina filed its Reply on Jurisdiction on March 26, 2004 and the Claimant filed its Rejoinder on Jurisdiction on April 26, 2004.

15. By letter of May 13, 2004, the Tribunal informed the parties its desire to hold a hearing on jurisdiction and proposed dates for such hearing. The hearing was held, with the agreement of the parties, on October 23 and 24, 2004 in Paris, France. Messrs. David M. Lindsay, James H. Hosking and Stephen Kantor and Ms. Andrea Goldbarg, from the law firm of Clifford Chance US LLP and Mr. Mark Sandy, from the AES Corporation, attended the hearing on behalf of the Claimant. Ms. Luz Moglia, Ms. María Soledad Vallejos Meana and Mr. Ignacio Torterola, from the Procuración del Tesoro de la Nación Argentina, attended the hearing on behalf of the Respondent. During the hearing Messrs. Lindsay and Hosking and Ms. Goldbarg addressed the Tribunal on behalf of the AES Corporation. Mr. Torterola, Ms. Moglia and Ms. Vallejos Meana addressed the Tribunal on behalf of the Argentine Republic. The Tribunal posed questions to the parties, as provided in Rule 32(3) of the Arbitration Rules.

16. The Tribunal has deliberated and considered thoroughly the parties' written submissions on the question of jurisdiction and the oral arguments delivered in the course of the October 23, 24, 2004 hearing. As indicated in paragraphs 12 and 13 above, the consideration of the merits has been suspended until the issue of the Centre's jurisdiction and the Tribunal's competence has been decided by the Tribunal. Having considered the basic facts of the dispute, the ICSID Convention and the 1991 Argentina–US BIT, as well as the written and oral arguments of the parties' representatives, the Tribunal has reached the following decision on the question of jurisdiction.

II. Opening Considerations

A. Relevance of other ICSID Arbitral Tribunal's Decisions on Jurisdiction

17. Prior to establishing its position with regard to the five objections made by the Argentine Republic to its jurisdiction, the Tribunal shall address some preliminary considerations made by both parties in their respective argumentations. All of them were raised in relation with an opinion expressed by the Claimant in its Counter-Memorial on Jurisdiction.[2] In reaction to the objections filed by Argentina to the jurisdiction of this Tribunal, AES argued that:

> "Each of Argentina's five objections are based on similar or identical arguments presented by it in other factually similar arbitrations in which Argentina is the respondent. In every instance, the same arguments have either been rejected or the corresponding ICSID tribunal has decided to join this objection to the merits."

18. In its Counter-Memorial, AES further referred to several ICSID tribunal decisions on jurisdiction, including the *Vivendi* decisions I[3] and II[4], together with the *CMS* [5] and the *Azurix* decisions on jurisdiction[6]. Later, and in particular during the hearing, AES further referred to other decisions which, in the meantime, had become available, such as

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[2] See The AES Corporation Counter-Memorial on Jurisdiction, February 20, 2004 at 8-12, §§ 18-30.

[3] *Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux v. Argentine Republic*, ICSID Case N° ARB/97/3, Award, November 21, 2000, 40 I.L.M. 426 (2001). Also available at http://www.worldbank.org/icsid/cases/ada_AwardoftheTribunal.pdf

[4] Ibid., Decision on Annulment, July 3, 2002, 41 I.L.M. 1135 (2002). Also available at http://www.worldbank.org/icsid/cases/vivendi_annul.pdf

[5] *CMS Gas Transmission Company. v. Argentine Republic*, ICSID Case N° ARB/01/8, Decision on Jurisdiction, July 17, 2003, 42 I.L.M. 788 (2003).

[6] *Azurix Corp. v. Argentine Republic*, ICSID Case N° ARB/01/12, Decision on Jurisdiction, December 8, 2003, 43 I.L.M. 262 (2004)

the *LG&E v. Argentina*[7], the *ENRON v. Argentina*[8] and the *SIEMENS A.G. v. Argentina*[9] decisions on jurisdiction. The argument made by the Claimant on the basis of these decisions, treated more or less as if they were precedents, tends to say that Argentina's objections to the jurisdiction of this Tribunal are moot if not even useless since these tribunals have already determined the answer to be given to identical or similar objections to jurisdiction.

19. In response, Argentina raises a series of issues. They deal respectively with the legal basis for the jurisdiction of the Tribunal and with the way in which, according to the Respondent, the Tribunal should interpret them for determining whether it has or has not jurisdiction on this case. These arguments must indeed be considered in relation with the delimitation of the task of the Tribunal at this stage of the proceedings.

20. After having recalled that the jurisdiction of ICSID arbitral tribunals is based upon the ICSID Convention (Art. 25), in conjunction with the bilateral treaty for the protection of investments in force between Argentina and the national State of the foreign investor, Respondent insists upon the specificity of each bilateral agreement as compared to others. Argentina says in particular that:

"Each bilateral Treaty for the protection of investments has a different and defined scope of application. It is not a uniform text"[10].

21. Argentina further contends that:

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[7] *LG&E Energy Corp.,LG&E Capital Corp. and LG&E International, Inc v. Argentine Republic*, ICSID Case N° ARB/02/1, Decision on Jurisdiction, April 30, 2004.

[8] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case N° ARB/01/3, Decision of Jurisdiction (Ancillary Claim), August 2, 2004.

[9] *Siemens A.G. v. Argentine Republic*, ICSID Case N° ARB/02/8, Decision on Jurisdiction of August 3, 2004.

[10] See Argentine Republic's Reply on Jurisdiction, April 2, 2004 at 2-3, § 9.

> "The consent granted by signatory States of bilateral treaties shall not be extended by means of presumptions and analogies, or by attempting to turn the *lex specialis* into *lex general* (sic)."[11]

22. In addition, Argentina states that:

> "The reading of some awards may lead to believe that the tribunal has forgotten that it is acting in a sphere ruled by a *lex specialis* where generalizations are not usually wrong, but, what is worst, are illegitimate. Repeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments".[12]

23. For this Tribunal, Argentina is right to insist on the limits imposed on it as on any other arbitral ICSID tribunal. The provisions of Article 25 of the ICSID Convention together with fundamental principles of public international law dictate, among others, that the Tribunal respects:

a) the autonomy of the will of the Parties to the ICSID Convention as well as that of the Parties to the pertinent bilateral treaty on the protection of investments;
b) the rule according to which "*specialia generalibus derogant*", from which it derives that treaty obligations prevail over rules of customary international law under the condition that the latter are not of a peremptory character;
c) the fact that the extent of the jurisdiction of each tribunal is determined by the combination of the pertinent provisions of two "*leges specialia*": on the one hand, the ICSID Convention and, on the other hand, the BIT in force between the two concerned States; as the case may be, the arbitration clause

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[11] Ibid. at 8, § 27

[12] Ibid.

in contracts between the private investor and the State or its emanation may also interfere with the two previous ones for determination of the scope of the tribunal's jurisdiction.

d) the rule according to which each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award.[13] There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party. This was in particular illustrated by diverging positions respectively taken by two ICSID tribunals on issues dealing with the interpretation of arguably similar language in two different BITs.[14]. As rightly stated by the Tribunal in SGS v. Philippines:

> "…although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State."[15]

The same position was echoed by the *ENRON* Tribunal on jurisdiction:

> "The Tribunal agrees with the view expressed by the Argentine Republic in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding

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13 Article 53 of the ICSID Convention

14 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case N° ARB/01/13 and *SGS Société Générale de Surveillance S.A v. Republic of the Philippines*, ICSID Case N° ARB/02/6.

15 *SGS Société Générale de Surveillance S.A v. Republic of the Philippines*, ICSID Case N° ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, available at http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf

> precedents and that every case must be examined in the light of its own circumstances."[16]

24. The present Tribunal indeed agrees with Argentina that each BIT has its own identity; its very terms should consequently be carefully analyzed for determining the exact scope of consent expressed by its two Parties.

25. This is in particular the case if one considers that striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of "investments" or for the precise definition of rights and obligations for each party.

26. From the above derive at least two consequences: the *first* is that the findings of law made by one ICSID tribunal in one case in consideration, among others, of the terms of a determined BIT, are not necessarily relevant for other ICSID tribunals, which were constituted for other cases; the *second* is that, although Argentina had already submitted similar objections to the jurisdiction of other tribunals prior to those raised in the present case before this Tribunal, Argentina has a valid and legitimate right to raise the objections it has chosen for opposing the jurisdiction of this Tribunal. According to Article 41(2) of the ICSID Convention:

> "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

27. Under the benefit of the foregoing observations, the Tribunal would nevertheless reject the excessive assertion which would consist in pretending that, due to the

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[16] *ENRON v. Argentina*, Decision on Jurisdiction (Ancillary Claim), August 2, 2004, at 8, § 25.

specificity of each case and the identity of each decision on jurisdiction or award, absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases.

28. In particular, if the basis of jurisdiction for these other tribunals and/or the underlying legal dispute in analysis present either a high level of similarity or, even more, an identity with those met in the present case, this Tribunal does not consider that it is barred, as a matter of principle, from considering the position taken or the opinion expressed by these other tribunals.

29. In that respect, it should be noted that the US-Argentina BIT, in conjunction with the ICSID Convention, provides the very same basis for the jurisdiction in this case and in some previous ones, as, in particular, those in which Argentina faced or is still facing a dispute with *ENRON Corp.*, *CMS*, *AZURIX Corp*, or *LG&E and others*; in each and every of these cases the tribunals respectively constituted have already delivered their decisions on jurisdiction.

30. An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.

31. One may even find situations in which, although seized on the basis of another BIT as combined with the pertinent provisions of the ICSID Convention, a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the

specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.

32. The same may be said for the interpretation given by a precedent decision or award to some relevant facts which are basically at the origin of two or several different disputes, keeping carefully in mind the actual specificities still featuring each case. If the present Tribunal concurs with the analysis and interpretation of these facts as they generated certain special consequences for the parties to this case as well as for those of another case, it may consider this earlier interpretation as relevant.

33. From a more general point of view, one can hardly deny that the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or *jurisprudence constante*, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features.

B. The Law Applicable for this Tribunal's Jurisdiction.

34. There seems to be a substantial agreement among the parties as to the identification of the law applicable by this Tribunal to assess whether it has jurisdiction in the present case.

35. The requirements for ICSID jurisdiction are set forth in Article 25 of the ICSID Convention, which provides as follows:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) 'National of another Contracting State' means : (…)

b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

36. In addition to the jurisdictional requirements under the ICSID Convention, Article VII of the US-Argentina BIT requires the following before an arbitration may be brought:

"1. For the purpose of this Article, 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 the Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. 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 for resolution (…)

c) in accordance with the terms of paragraph 3.

3. a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) and (b) and that six months

> have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration :
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> > i.) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 16, 1965 ('ICSID Convention'), provided that the Party is a party to such convention."

37. It is in the light of these provisions that the objections raised to the jurisdiction of this Tribunal by Argentina will be hereafter considered.

38. As rightly asserted by Argentina, the BIT establishes in which conditions and events Respondent consented to the ICSID jurisdiction. Article 25 of the ICSID Convention, in turn, provides the requirements for jurisdiction.[17].

39. Although some of the views expressed by the parties concern aspects relating to the merits of the dispute, the Tribunal, at this stage, has only to decide on the issue of jurisdiction.

III. Objections to Jurisdiction.

A. First objection: absence of a legal dispute.

40. Argentina's first objection to jurisdiction is based on the purported absence of a legal dispute. This objection deals basically with the definition of what is to be understood under "legal dispute" in the sense in which it is used by Article 25 (1) of the

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[17] See Argentina's Reply on Jurisdiction, April 2nd, 2004, at 17, § 61.

ICSID Convention. This is an issue that has been abundantly considered by a number of commentators.[18]

41. AES for its part answers by asserting first, that it is "the proper claimant"[19] and second, that there is a legal dispute[20]. From this second point of view, AES rebuffs in particular the way in which Respondent tends to interpret and use in its own argumentation the *Methanex* decision.[21]

42. The Tribunal considers that only the second out of the two points made by Claimant in response to Argentina's arguments is at this stage appropriate. The issue of whether a parent company can bring claims for the losses it has suffered as a result of its investment in a host State whether or not that investment is made in or through a subsidiary, discussed by AES in its Counter-Memorial on Jurisdiction,[22] shall be considered later in this decision, in relation with the fourth objection to jurisdiction articulated by Argentina.

43. The Tribunal wants to stress that in the present case there are, in substance, two elements to be met for a dispute to be considered as a *legal* one in conformity with the

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18 See for instance Amerasinghe, CF, The Jurisdiction of the International Centre for the Settlement of Investment Disputes, p. 170-172; R. Kovar, La compétence du Centre International pour le règlement des différends relatifs aux investissements, in Investissements Etrangers et Arbitrage entre Etats et Personnes Privées, La Convention B.I.R.D. du 18 mars 1965 (Centre de Recherche sur le Droit des Marchés et des Investissements Internationaux de la Faculté de Droit et des Sciences Economiques de Dijon, ed. 25 (1969), p. 29; G.R. Delaume, La Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, 93 Journal du droit international, 26, 35 (1966); Ch. Schreuer, The ICSID Convention: A Commentary, Cambridge Univ. Press, 2001, 103-106.

19 See AES Counter-Memorial on Jurisdiction at 13, §§ 33-40.

20 Ibid. at 16, §§ 41-47.

21 Methanex Corporation v. United States of America, NAFTA/UNCITRAL Arbitration Proceedings, Preliminary Award on Jurisdiction of August 7, 2002. Respondent's Memorial on Jurisdiction, Exhibit ALRA2.

22 At 13, §§ 33-40.

requirement set forth in Article 25 (1) of the ICSID Convention. The first deals with the intrinsic definition of what is a legal dispute; the second deals with the inherent logic which presided over the creation of ICSID.

a. In general terms, as it is also more generally the case in international law, and according to the definition recalled by the International Court of Justice in the Case concerning East Timor, a dispute in the legal sense is:

> "a disagreement on a point of law or fact, a conflict of legal views or interests between parties"[23]

b. Within the specific context of the ICSID Convention, as rightly commented by Professor Ch. Schreuer with regard to Article 25 (1):

> "It is submitted that the disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of the Centre to clarify legal questions *in abstracto*."[24]

44. The Tribunal consequently considers that the true test of jurisdiction consists in determining

(a) whether, in its claim, AES raises some *legal* issues in relation with a concrete situation, and

(b) if the Tribunal's determination of the answer to be given to these issues would have some practical and concrete consequences.

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[23] 1995 ICJ Reports 89, § 99 with reference to earlier cases.

[24] Ch. Schreuer, The ICSID Convention, op.cit. at 102, § 36.

It is enough, here, to state that, considering the very features of AES' claims the Tribunal be also *prima facie* convinced that AES' interest may have not only been "merely affected" but hurt.

45. Yet, on the basis of the elements already brought by the Memorial filed by AES together with a number of supporting evidence, AES' claim seems *prima facie* a substantial one. It deals with a series of legal issues which manifest an evident disagreement among the parties.

46. AES declares to have invested 1 billion US dollars in the sector of electricity in Argentina; AES alleges to be in control of 6 generators and 3 distributors of electricity in Argentina; AES invokes the breach by Argentina of articles II(2)(a), II(2)(b), II(2)(c) and IV(1) of the Treaty binding upon Argentina and the United States of America on the protection of investments.[25] It is precisely the substantial interest constituted by the importance of AES investment that the Claimant argues to have been affected by a determined Argentine legislation. AES depicts in particular some Argentine legislation including the Executive Decree N° 570/01, the National Emergency Law N° 25.561 and posterior decrees of application as being at the origin of the breach by Argentina of its international obligations. AES further provided the Tribunal with a detailed estimation of the cost of damages produced to its investment in Argentina by the enforcement of this legislation. Claimant has also articulated a documented claim for compensation.

47. All these elements are *prima facie* convincing evidence for considering that the AES' claims involve a legal dispute in the terms of Article 25 of the ICSID Convention, therefore falling within the ICSID jurisdiction.

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[25] See The AES Corporation Memorial on the Merits, October 6, 2003, at 84, §§ 218-376.

B. Second Objection: the legal dispute does not arise directly out of an investment.

48. Article 25 (1) of the ICSID Convention not only retains that the jurisdiction of the Centre shall extend to any legal dispute. It also says that such a legal dispute must arise "*directly* out of an investment". On the basis of this supplementary condition, a second objection to jurisdiction was raised by Argentina. This objection is that the measures alleged by AES are not specifically related to AES investments. They were measures of general bearing, which aimed at restoring the economy of the country at the national level; they did not target AES in particular.

49. According to Argentina, AES must "demonstrate a direct, proximate and immediate causation between the measure and its alleged investment."[26]

50. AES response to this is that "it is sufficient that AES has made a *prima facie* showing that the measures instituted by Argentina directly affected its investments."[27] In relation with this point, AES further refutes the interpretation and use made by Argentina of the *Methanex* decision.[28]

51. In connection with these allegations, the Tribunal notes that the factual and legal elements at the origin of the present dispute are basically the same as those considered by other tribunals which, at the same time, share the same sources of jurisdiction (ICSID Convention and US-Argentina BIT). So was it, among others, in the *CMS*, the *Azurix* and the *ENRON* cases.

52. It is then of real interest to look at the way in which these tribunals considered the measures reputed by claimants to be at the origin of the damage directly produced on their respective investments.

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[26] Argentina's Memorial on Jurisdiction, at 16, § 43.

[27] AES' Counter-Memorial on Jurisdiction, at 18, §§ 50-53.

[28] Ibid., §§ 54-58.

53. In particular, the Argentinean legislation which brought to an end the regime of convertibility and parity of the Argentine peso with the United States dollar[29] is, due to its concrete consequences on the interests of claimants invested in Argentina prior to December 2001, at the source of the respective claims filed before ICSID in the cases already mentioned above.

54. In the decision on jurisdiction issued by the ICSID Tribunal in the *CMS* case, in particular, the Tribunal referred to the legislation referred to above in paragraph 53 and said pertinently that it should make:

> "a clear distinction between measures of a general economic nature, particularly in the context of the economic and financial emergency discussed above, and measures specifically directed to the investment's operation."[30]

55. The same tribunal further observed:

> "What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments."[31]

56. In the present case, the situation seems *prima facie* to be the same. At this stage, the Tribunal notes that AES' claims are not broadly based on Argentina's general economic policies. Their ground is provided by the fact that the regulatory and legal framework AES relied upon in making its investments was dismantled by the Argentinean legislative measures here at stake. It is, in particular, Argentina's alleged refusal to apply a previously agreed tariff calculation and adjustment regime which is at the core of AES' claims. It is also the impact of the legislative and regulatory measures

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29 National Emergency Act N°25.561 in particular

30 *CMS* , Decision on Jurisdiction, at § 25

31 Ibid. at § 27

taken by Argentina which is reputed by the Claimant to have breached the commitment made to it by the host State through the US-Argentina BIT.

57. This Tribunal shares consequently the views earlier expressed by the Tribunal in the *CMS* decision on jurisdiction. What is at stake in the present case, as it was in the *CMS* one, are not the measures of a general economic nature taken by Argentina in 2001 and 2002 but their specific negative impact on the investments made by AES. As a sovereign State, the Argentine Republic had a right to adopt its economic policies; but this does not mean that the foreign investors under a system of guarantee and protection could be deprived of their respective rights under the instruments providing them with these guarantees and protection. Without anticipating, at this stage, on the consideration of the issue, whether this delicate balance between the respective rights of the host State and those of the investor were respected in substance, the present Tribunal states that it has jurisdiction for considering this issue.

58. It should be further noted that reliance by Respondent on the *Methanex* case is inaccurate. As stated above, and in conformity with what has been strongly asserted from the outset by Argentina itself, one should take each agreement on its term and avoid drawing out of other treaties which are *not* applicable to this case, any conclusion neglecting the substantial difference of terminology, scope and meaning existing between these instruments.

59. Now, it is well known that *Methanex* relied on the NAFTA. In that multilateral treaty, only binding upon the United States, Canada and Mexico, the definition of "investors" and of "investments" used in Chapter 11 (Investment) is quite specific in terms and substance. This definition is all the way narrower than the definition of "investment" provided by Article VII(1) of the US-Argentina BIT. The latter states that "an investment dispute is a dispute…arising out of or relating to (a) an investment agreement between the Party and such national or company;…or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment". This definition is much larger than the one at stake in *Methanex*, since NAFTA Article

1101(1) provides that Chapter 11 "applies to measures adopted or maintained by a Party to: a) investors of another Party [or] b) investments of investors of another Party in the territory of a Party." It should be stressed that the element of "directness" under NAFTA Chapter 11 deals with the way in which the measures at stake affect the investor or the investment. The measure must directly affect the investment. "Directness" in ICSID Convention (Art. 25) is something different.

60. As to the interpretation of the terms "any legal dispute arising directly out of an investment" used in Article 25 of the ICSID Convention, it is well established by commentators relying on constant practice that it should not be given a restrictive interpretation.[32] Under this provision, directness has to do with the relationship between the dispute and the investment rather than between the measure and the investment.

61. As a result, in the light both of Article VII of the US-Argentina BIT and of the interpretation to be given to Article 25 (1) of the ICSID Convention this Tribunal rejects the second objection to its jurisdiction raised by Argentina.

C. Third objection : AES' Claim is not Ripe.

62. Argentina contends that, due to ongoing negotiations still taking place between AES' local subsidiaries and Argentine authorities, either at the national or at the local level, AES has prematurely brought its claim before ICSID. In relation with this assertion, Respondent further argues that the damages claimed in the electricity generation companies are not quantifiable.

63. AES reacts by asserting first that "any 'negotiations' by distribution companies do not strip ICSID of jurisdiction"[33] and that, in fact, no real progress has been made with

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[32] See in particular Ch. Schreuer, op.cit.supra at 116, § 71, quoting *Holiday Inns v. Morocco*, ICSID Case N° ARB/72/. See also the *Amco* and *Kaiser Bauxite v. Jamaica* cases, as referred to by Ch. Schreuer at 119-120, § 76.

[33] AES' Counter-Memorial on Jurisdiction, at 23 §§ 60-67.

the renegotiation process in Argentina (sic at the October 23-24, 2004 hearing). AES also argues that electricity generation damages are quantifiable and recoverable[34].

64. In respect to the first aspect of Argentina's objection, according to which ongoing negotiations would prevent the claim from being legitimately filed, the Tribunal recalls what it has already said with regard to the basis and scope of its jurisdiction. This basis, as insisted upon by Argentina itself in its Memorial on Jurisdiction, is predominantly defined by the specific instruments binding upon the Argentine Republic i.e. the BIT and the ICSID Convention. This does not mean that the Tribunal could not apply, as the case may be, any customary rule of international law which it would consider compatible with the pertinent provisions of these two "*leges specialia.*"

65. The Tribunal recognizes that a negotiation process, being a diplomatic or political means of settlement of disputes and not a judicial one, presents some specific features. Consequently, negotiation should not be assimilated to *judicial* remedies. Still, there is no rule relevant in this procedure, either in the ICSID Convention or in the US-Argentina BIT, which would subordinate recourse to the ICSID system of settlement to any "prior exhaustion of local negotiations."

66. In its Memorial on Jurisdiction, the Argentine Republic did not rely on any specific or general source of international law for supporting its argument. Argentina only referred to the case law of the US Supreme Court,[35] which, as such, is irrelevant for the present case. There is no need here for having recourse to any "general principle of law" as mentioned in Article 38 of the Statute of the International Court of Justice. It is enough to concentrate on the two treaties mentioned above, the US-Argentina BIT and the ICSID Convention.

67. In the US-Argentina BIT, Article VII (2) provides:

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[34] Ibid. §§ 68-69.

[35] Argentina's Memorial on Jurisdiction, op.cit.supra, at § 48. Abbott Laboratories v. Gardner, 387 US 136 (1967).

> "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 for resolution (…).

68. In the present case, the Tribunal notes that it is only following the established fact that the parties had been unable to resolve the dispute within six month that AES filed its Request for Arbitration with ICSID; and it did so pursuant to Article VII(3) of the US-Argentina BIT.[36]

69. As for Article 25 of the ICSID Convention, the Tribunal reiterates that there is no rule according to which a "legal dispute" should only be brought to ICSID subject to prior exhaustion of local remedies, including negotiations between the investor and the authorities of the host State. On the contrary, the ICSID system has been established on the basis of a reversed rule of exhaustion of local remedies. Under Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be expressly required as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction. What is only needed is that the claimant prima facie demonstrates that there is a "legal dispute arising directly out of an investment between a Contracting State (…) and a national of another Contracting State" and that both disputing parties have consented in writing to dispute settlement through ICSID arbitration. The conditions set forth in Article 25 of the ICSID Convention are cumulative but do not give room for further conditions.

70. International practice confirms the interpretation given above. Without even considering here the numerous decisions that rejected recourse to local judicial remedies as a condition for jurisdiction, no ICSID Tribunal so far has subordinated its jurisdiction

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[36] See Request for Arbitration dated November 5, 2002.

to the demonstration of prior ending of negotiations between the parties to the dispute. On the contrary, confronted with a very similar argument by Argentina, the Tribunal in *CMS* declared that:

> "… it is not for the Tribunal to rule on the perspectives of the negotiation process or on what TGN might do in respect of its shareholders, as these are matters between Argentina and TGN or between TGN and its shareholders."[37]

71. In the present case, equally, negotiations are reputed to go on in particular between two distributors, EDELAP and EDEN on the one side, the Argentinean authorities, respectively at the federal and at the local level, on the other side. But, even if the taking into account of such negotiations were relevant, it is impossible for this Tribunal to assess whether there is any reasonable prospect for any settlement to be reached at one stage or the other throughout negotiations.

72. With respect to the second aspect of the objection raised by Respondent, which consists in saying that the damages claimed by AES in relation with electricity generation are not quantifiable, the Tribunal recalls that AES has provided the Tribunal on December 2003 with an expert report on damages. This document sets out in detail the quantification of AES' claim as it relates to electricity generation.[38]

73. Furthermore, as rightly stated by the *Azurix* tribunal:

> "the question before the Tribunal at this stage is whether it has jurisdiction; whether the Claimant can prove loss is a matter to be considered as part of the merits."[39]

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37 *CMS*, Decision on Jurisdiction at § 86.

38 See AES' Counter-Memorial on Jurisdiction at § 67, referring to LECG Report at 91-92

39 *Azurix* Decision on Jurisdiction, at § 101

74. This Tribunal shares this view and finds accordingly no ground for accepting the third objection raised by Argentina to its jurisdiction.

D. Fourth Objection: AES is not the investor.

75. The Argentine Republic argues that AES has failed to prove its status as an investor for the purposes of the US-Argentina BIT. According to Argentina:

> "a) in view that the BIT with USA includes no specific provision on the applicable law, pursuant to article 42 of the ICSID Convention the law of the State that is a party to the dispute should apply, including its international private law rules and those international law rules that may be applicable, b) therefore, the determination of the rules applicable to the nationality of the parties under the BIT with USA shall be judged by the Argentine international private law, c) consequently, AES should have proven its lawful creation. This is so pursuant to Argentine international private law."[40]

76. AES answers by saying that it has efficiently proven to be a US corporate citizen[41] as well as it has demonstrated that it owns and controls the AES' entities by providing the Tribunal with sworn witness statements by top managers from AES and its subsidiaries.[42]

77. For the Tribunal, the Respondent's position does not start from the right assumption as to the law applicable to the determination of the nationality of the private investor. *First*, as rightly contended by Claimant, the clear terms of the US-Argentina BIT, which define a company, should be taken into account. Pursuant to Article I(1)(b) of this treaty:

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40 See the Argentine Republic Reply on Jurisdiction § 88

41 AES' Counter-Memorial on Jurisdiction, §§ 71-76

42 Ibid. §§ 77-80.

> "Company' of a Party means any kind of corporation, company, association, state enterprise, or other organization, legally constituted under the laws and regulations of a Party or political subdivision thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned."

78. *Second*, Argentina wrongly considers that Article 42 of the ICSID Convention is applicable to this issue of nationality. This is not correct. As rightly pointed out by Professor Ch. Schreuer:

> "[An] issue that is not governed by the rule of Art. 42 is the nationality of the investor. The nationality of a natural person is determined primarily by the law of the State whose nationality is claimed (…). The nationality of a juridical person is determined by the criteria of incorporation or seat of the company in question subject to pertinent agreements, treaties and legislation."[43]

79. The same author indicates also that:

> "During the Convention's preparatory work, it was generally acknowledged that nationality would be determined by reference to the law of the State whose nationality is claimed subject, where appropriate, to the applicable rules of international law (History, Vol. II, pp. 67, 286, 321, 448, 580, 705, 839)."[44]

80. In the present case, the Tribunal is satisfied that AES, already at the stage of its Request for Arbitration, has indicated, and convincingly proved, to be incorporated in the State of Delaware with headquarters in Arlington, Virginia (USA). This was in particular evidenced by the production of a certificate signed by Mr. Leith Mann, AES' Assistant Secretary, attaching a true copy of AES' Certificate of Incorporation authenticated by Delaware's Secretary of State, in conformity with Delaware legislation. Mr. Mann also

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[43] Ch. Schreuer, The ICSID Convention: A Commentary, p.cit.supra, at 554-555, § 5.

[44] Ibid. at 267, § 430.

confirmed that at the time the Request for Arbitration was submitted the Certificate had not subsequently been modified and remained in force.[45].

81. Still under the same fourth objection, Argentina contends that AES has not "proven to have acquired the shares that allegedly give it a majority interest in the [operation] companies" because the evidence "appear[s] exclusively on information issued by claimant" rather than being "proven in a certifying way". Respondent further stated that:

> "Ownership of or control over national are merely claimed and appear exclusively on information issued by claimant. For the purpose of determining the jurisdiction, AES should have proven in a certifying way the above mentioned requirements."[46]

82. The Tribunal takes note of the fact that the Argentine Republic does not really seem to substantially challenge that AES actually became the majority shareholder of the operating companies. Neither does Argentina raise some doubts as to the true ownership or control by AES of the companies concerned. Argentina's argument remains basically of a formal or procedural nature. What is questioned by Respondent is "the probative value" of the material submitted by Claimant for evidencing its control as a majority shareholder of the said companies.[47] This material consists of a sworn witness statement by Mr. Robert Venerus (Vice-President, AES Business Development Group) together with other witness statements by other managers in particular of EDELAP, EDEN and EDES, or AES Andes Generation Assets.[48] These witness statements refer to corporate charts showing in detail the ownership structure of each of the AES' operating companies.[49] In addition, AES provides a summary of the percentage it owns in each of

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45 AES' Request for Arbitration at § 2 and Exhibit B

46 Argentina's Reply on Jurisdiction, at 22-23, § 90

47 Argentina's Reply on Jurisdiction, at § 94

48 See AES' Counter-Memorial on Jurisdiction, at 30, § 78-80

49 See witness statements of Messrs. Banderet, Pujals, Giorgio, Dutrey

the subsidiaries.[50] In its Rejoinder on Jurisdiction, AES recognized that there had been a minor miscalculation in percentage ownership and further filed an erratum, which substantially did not alter the fact that AES is the majority shareholder in each and every one of the companies concerned.[51]

83. It is consequently for the Tribunal to appreciate whether it is satisfied at this stage that the material and information provided by AES is accurate for evidencing its ownership and control of all the companies concerned. In this respect, the Tribunal notes that production of expert and witnesses reports is common practice in international arbitration. In consideration of this practice, the Tribunal itself, at its first session, had specifically requested that Claimant file such documentary evidence.[52] This is in conformity with Arbitration Rule 34, which states that the Tribunal shall be the judge of the "admissibility of any evidence adduced and of its probative value."[53]

84. Without excluding the possibility of requiring Claimant, later in the course of proceedings, to produce further evidence of ownership and control of its subsidiaries in Argentina, pursuant to Rule 34 mentioned above as well as to Article 1 of the Protocol of the US-Argentina BIT, the Tribunal considers that it was so far sufficiently informed and has no reason to consider in essence the kind of material produced by AES in this respect to be inaccurate.

85. As a further related issue, the Tribunal wants to raise briefly the question of the actual protection of shareholders and that of their *jus standi* before an ICSID Tribunal.

86. Without any need to look at the actual evolution of general international law on this matter, which, as such, was convincingly analyzed by the Tribunal in *CMS*,[54] it

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50 AES' Memorial on the Merits, Exhibit 52

51 AES' Rejoinder on Jurisdiction of, April 26, 2004 at § 55

52 Summary Minutes of the First Session of the Tribunal, Washington D.C, July 8, 2003

53 See ICSID Basic Documents, ICSID/15, January 1985 at 77.

54 See *CMS* Decision on jurisdiction, at §§ 43-48, 49-56, 57-65

suffice here to recall that the very terms in which the US-Argentina BIT defines an "investment" provide a solid ground for recognizing AES' legal interest as a claimant for alleged losses suffered as a result of its investment in Argentina.

87. As stated in Article I(1)(a) of the BIT, a claim may be filed in relation to an "investment" as it consists in:

> "…every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party…"

88. This definition is a very wide one and it makes no doubt that AES' economic involvement in the concerned companies generating and distributing electricity in Argentina falls under the definition provided by this provision of the BIT. This involvement equally satisfies the requirements for recognizing an international investment. They realize contribution in capital over a reasonably lengthy period of time for the economic development of the host State, an operation AES has accepted to share the inherent risks which it presents.

89. The Tribunal meets the views expressed on the same basis by other ICSID tribunals dealing with the same BIT; in particular tribunals' decisions on jurisdiction, respectively, in the *Lanco*[55], the *CMS* [56] and the *Azurix* cases[57]. AES' *jus standi* in the present case is not subject to doubt, not only, as seen earlier, because AES has a legal dispute with the Argentine Republic but also because AES is the proper claimant.

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[55] Lanco International, Inc.v. Argentine Republic, ICSID Case N° ARB/97/6, Preliminary Decision Jurisdiction of the Arbitral Tribunal, December 18, 1998, printed at 40 I.L.M. 457 at §10 (2001)

[56] *CMS* Decision on Jurisdiction at § 68

[57] *Azurix* Decision on Jurisdiction at § 74

E. Fifth Objection: Forum Selection Clause Precludes ICSID Arbitration

90. According to Argentina, the "Argentine Companies AES claims to control have executed national forum selection clauses, with express waiver of all other authority and jurisdiction. That circumstance prevents this arbitration from proceeding."[58]

91. Claimant first observes that Argentina makes reference only to the concession contracts and related documents pertaining to some entities (EDES, EDELAP, Alicurá and Hidroeléctrica San Juan) but to none of the other AES Entities.[59] AES also relies on the case law of recent ICSID tribunals which rejected the same argument in several other ICSID arbitrations in which Argentina is the respondent as well as in some other cases involving other countries[60]. AES contends that, as a national of the US, it is entitled to have Argentina's breach of international law determined by this Tribunal, as is expressly contemplated by the US-Argentina BIT.[61]

92. As a matter of fact, Argentina's argumentation is inaccurate inasmuch as it establishes confusion between two distinct legal orders: the international and the national one. What is at stake is an alleged breach of Argentina's obligations in international law as set out in the US-Argentina BIT, of which AES, as a national company of the United States, may seek immediate reparation through the special ICSID system of settlement of disputes; this is in exception to the classical and ordinary means provided under general international law by the display of diplomatic protection exercise by the national State of the company alleging to have suffered damage.

93. As for them, the Entities concerned have consented to a forum selection clause electing Administrative Argentine law and exclusive jurisdiction of Argentine administrative tribunals in the concession contracts and related documents. But this

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58 Argentina' Memorial on Jurisdiction at § 65

59 AES' Counter-Memorial on Jurisdiction at § 82

60 Ibid. § 83ff

61 Ibid. at § 90

exclusivity only plays within the Argentinean legal order, for matters in relation with the execution of these concession contracts. They do not preclude AES from exercising its rights as resulting, within the international legal order from two international treaties, namely the US-Argentina BIT and the ICSID Convention.

94. In other terms, the present Tribunal has jurisdiction over any alleged breach by Argentina of its obligations under the US-Argentina BIT. As such, it has no jurisdiction over any breach of the concession contracts binding upon the companies controlled by AES and the Argentine public authorities under administrative Argentine law, unless such breach would at the same time result in a violation by the host State of its obligations towards the US private investors under the BIT.

95. The Tribunal concurs with a position already adopted by previous tribunals confronted with the same argument raised by Argentina. In *CMS*, the Tribunal took note of the decisions already rendered in *Lanco*, *Vivendi I* and *Vivendi II*, which had rejected the very same argument. It said:

> "The Tribunal shares the views expressed in those precedents. It therefore holds that the clauses in the License or its Terms referring certain kinds of disputes to the local courts of the Argentine Republic are not a bar to the assertion of jurisdiction by an ICSID tribunal under the [US-Argentina BIT], as the functions of these various instruments are different."[62]

96. Further to this decision, the *Azurix* Tribunal maintained the same analysis. It also rejected the Argentinean argument in the following terms:

> "The tribunals in the cases cited concluded that such forum selection clauses did not exclude their jurisdiction because the subject-matter of any proceeding before the domestic courts under the contractual agreements in question and

[62] *CMS* Decision on Jurisdiction at § 76

> the dispute before the ICSID tribunal was different and therefore the forum selection clauses did not apply. This reasoning applies equally to the waiver of jurisdiction clause in this case."[63]

97. The present Tribunal cannot but share the views already expressed by these tribunals, dealing with the same argument, repeated again and again by Argentina. In particular, this Tribunal wants to stress that the comparison raised by Respondent in its Reply on Jurisdiction[64] between the waiver of jurisdiction met in this case and the famous "Calvo Clause" is inaccurate.

98. This is so simply because this very clause only made sense by reference to the general international law rule of diplomatic protection; the "Calvo Clause" was in essence a clause by which private persons mistakenly pretended to renounce to a right which in law did not belong to them but to their national State: the right for this State to exercise in favor of its nationals its diplomatic protection.

99. Since under the ICSID system of settlement of disputes, exercise of diplomatic protection is per *definition* put aside, it is irrelevant to compare it with a clause the rationale of which is inseparable from diplomatic protection. As a consequence, the Tribunal cannot but reject Argentina's fifth objection.

IV. Conclusion.

100. For the reasons stated above the Tribunal decides that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has, accordingly, made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

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63 *Azurix* Decision on Jurisdiction at § 79

64 Argentina's Reply on Jurisdiction at § 144-155

Prof. Pierre-Marie Dupuy
President
[signature]

Prof. Karl-Heinz Böckstiegel
Arbitrator
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Prof. Domingo Bello-Janeiro
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