

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

In the proceedings between

Gas Natural SDG, S.A.
(Claimant)

and

The Argentine Republic
(Respondent)

Case No. ARB/03/10

Decision of the Tribunal on Preliminary Questions on Jurisdiction

Members of the Tribunal:

Prof. Andreas F. Lowenfeld, President
Mr. Henri C. Álvarez, Arbitrator
Dr. Pedro Nikken, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Representing the Claimant:

Messrs. Nigel Blackaby, Lluís Paradell
and Felipe Ossa
Freshfields Bruckhaus Deringer
Paris – France
Messrs. Vicente Sierra and Rafael Murillo
Freshfields Bruckhaus Deringer
Madrid – Spain
Mr. Uriel Federico O’Farrell
Estudio O’Farrell
Buenos Aires – Argentina

Representing the Respondent:

Dr. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación
Argentina
Ms. Cintia Yaryura and Ms. María
Victoria Vitali
Procuración del Tesoro de la Nación
Argentina
Buenos Aires - Argentina

Date of Decision: June 17, 2005

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Introduction

1. This case is one of a large number of arbitrations brought by foreign investors against the Argentine Republic, arising from measures taken by the government of Argentina during its financial and economic crisis of 2001-2002. In each case, the claimant asserts that its investment has been damaged by one or more measures taken by the Argentine government; that the investment is covered by a Bilateral Investment Treaty between the country where it is incorporated and the Argentine Republic; that it has a claim for compensation or damages under that treaty; and that the treaty provides for arbitration of its claims pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). In the present case, the claimant, Gas Natural SDG S.A. (hereafter “Gas Natural” or “Claimant”), is a corporation organized and existing under the laws of the Kingdom of Spain, and the BIT in question is the Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic signed in Buenos Aires on October 3, 1991 and in force since September 28, 1992 (hereafter “the BIT”). Argentina contests the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) on various grounds, and asserts that the claims are not covered by the relevant BIT because (inter alia) the challenged measures were not directed at the investor or the investment, but rather were measures of general economic policy not subject to the BIT or the ICSID Convention.

Procedure

2. On April 7, 2003, Claimant submitted a request for arbitration under the ICSID Convention to the International Centre for Settlement of Investment Disputes (ICSID or the Centre), alleging breaches of the Bilateral Investment Treaty between the Kingdom of Spain

and the Argentine Republic. On April 11, 2003, in accordance with Rule 5 of ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules), the Centre acknowledged receipt of the request for arbitration and transmitted a copy of the request to Argentina and to the Argentine Embassy in Washington, D.C. On May 29, 2003, the Acting Secretary-General of ICSID registered the request for arbitration pursuant to Article 36(3) of the ICSID Convention. On the same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

3. In the absence of agreement between the parties, Claimant elected to submit the arbitration to a panel of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention. Claimant appointed Mr. Henri C. Álvarez, a national of Canada, and the Argentine Republic appointed Dr. Pedro Nikken, a national of Venezuela, as arbitrators. In the absence of agreement on the appointment of the third, presiding, arbitrator, on September 5, 2003, Claimant asked the Chairman of the Administrative Council of ICSID to make the missing appointment. With the agreement of the parties, the Chairman appointed Professor Andreas F. Lowenfeld, a national of the United States of America, as the President of the Tribunal.

4. On November 10, 2003, the Deputy Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID 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 be constituted and the proceedings to have begun on that date. The same letter informed the parties that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Tribunal.

5. The Tribunal held a first session with the parties at the seat of the Centre in Washington, D.C., on March 10, 2004, to establish a program for conduct of the arbitration. During the session both parties confirmed their agreement to the appropriate constitution of the Tribunal in accordance with the ICSID Convention and its Arbitration Rules, stating that they had no objections to the appointment of any of the members of the Tribunal. Counsel for Claimant referred to the objections to jurisdiction filed by Argentina in other pending ICSID cases, and urged the Tribunal to order Argentina to set out its objections to jurisdiction prior to submission by Claimant of its complete memorial on the merits. Counsel for Argentina responded that they could not do so until they had received the full memorial on the merits from Claimant. Referring to Rule 41(1) of the ICSID Arbitration Rules, which provides that any objection to the jurisdiction of the Centre shall be made as early as possible, and noting the detailed statement of Claimant's contentions in its Request for Arbitration, the Tribunal decided, after due deliberation, to pose to the parties three preliminary questions relating to the jurisdiction of the Centre without waiting for Claimant's submission of a complete memorial on the merits, it being understood that the response to these questions would not preclude a subsequent challenge to the jurisdiction of the Centre at the time of the filing of its counter-memorial.

6. The questions posed by the Tribunal were spelled out in Procedural Order No. 1 dated April 19, 2004, as follows:

- i. Whether the Argentine Republic has given its consent to the present arbitration;
- ii. Whether the Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment is applicable to the present case pursuant to Article VII (2) of the Agreement for the

Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic; and

- iii. Whether the claims presented by the Claimant in its Request for Arbitration constitute the kind of disputes that can be submitted to an international arbitral tribunal under the Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic.

7. The Argentine Republic was directed to submit its response within forty-five (45) days from its receipt of certified copies of Procedural Order No. 1, and Claimant was ordered to submit its response within forty-five (45) days from its receipt of the submission on behalf of the Argentine Republic. Argentina submitted its written response to the Preliminary Questions on Jurisdiction posed by the Tribunal on June 22, 2004; Claimant submitted its response on August 18, 2004. After consultation with the parties, the Tribunal decided that further written pleadings relating to the preliminary questions on jurisdiction were not required, but that it would give each party an opportunity to state its position in an oral hearing, in which the members of the Tribunal would be able to question counsel.

8. A hearing for purposes of oral argument concerning the preliminary questions on jurisdiction was held at the seat of the Centre in Washington, D.C. on January 10, 2005. Claimant was represented at the hearing by Messrs. Nigel Blackaby and Lluís Paradell from the law firm of Freshfields Bruckhaus Deringer and Mr. Uriel Federico O'Farrell, from the Buenos-Aires based law firm Estudio O'Farrell. Respondent was represented by Ms. Cintia Yaryura and Ms. María Victoria Vitali, from the Procuración del Tesoro de la Nación Argentina. It was agreed at the close of the hearing that the Tribunal would issue a reasoned

decision on the preliminary questions on the jurisdiction of the Centre. If the decision were negative, the case would be terminated; if the decision were affirmative, the Tribunal would issue a schedule for submission of memorials by the parties on the merits of the dispute.

The Investment

9. Gas Natural is a corporation organized and existing under the laws of Spain, with principal place of business in Barcelona. In 1992, shortly after the effective date of the BIT between Spain and Argentina, Gas Natural took part in a tender offer by the government of Argentina as part of its program to privatize state-owned enterprises and attract foreign investment. In particular, Gas Natural participated in a consortium that purchased seventy percent (70%) of the shares of Gas Natural BAN, S.A. (hereafter “BAN, S.A.”), a corporation organized pursuant to Argentine law which had succeeded to facilities previously owned by Gas del Estado, an Argentine state corporation dedicated to the production and distribution of natural gas for the northern parts of the Province of Buenos Aires (“Buenos Aires Norte”).

10. According to the Request for Arbitration, the members of the consortium formed an Argentine company, Invergas S.A., to hold the 70% of the shares of BAN, S.A. they had acquired pursuant to the public tender. The remaining 30% of the shares in BAN, S.A. were held by the Argentine Government, which distributed 10% pursuant to an employee share participation program. Subsequently, through a restructuring of shareholdings, Invergas S.A. held 51% of BAN, S.A.’s shares, and Gas Natural S.D.G. Argentina S.A. held a further 19%. The balance of the shares, originally held by the Argentine Government, is held by individual investors. Claimant states that it has invested US\$ 136 million, and owns indirectly through subsidiary corporations, including Invergas S.A., 50.4% of the shares of

BAN, S.A.

The Argentine Economic and Financial Crisis

11. 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.

12. 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 1990's. 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.

13. 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.

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

15. 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.

The Claim

16. According to its Request for Arbitration, Claimant made its investment in reliance on Law No. 23,928 and Decree 2/28 of 1991 establishing the parity and convertibility of the Argentine peso with the U.S. dollar, as well as on the protection offered by the BIT between Spain and Argentina concluded shortly before it submitted its bid and made the investment here at issue. Further, Claimant asserts that the privatization offer incorporated by reference a *Ley del Gas* and a *Decreto del Gas* (Gas Law and Gas Decree), as well as the *Reglas Básicas* (Basic Conditions) issued by the Ministry of the Economy as part of the privatization and tender process. The *Ley del Gas* and *Decreto del Gas* created a regulatory

agency, Ente Nacional Regulador del Gas (ENARGAS), whose principal mission was to implement the relevant legislation and oversee adequate supply of gas throughout the nation, including approval of the rates charged by the various license holders, (i.e., the private utility companies), including BAN, S.A. Claimant asserts that the respective promises and guarantees contained in these laws and decrees, as well as in the tender offer defining the terms of its investment, were breached by acts of the government of Argentina in the period December 2001-June 2002 and thereafter, and that these breaches, individually and taken together, constituted violations of the BIT between Spain and Argentina and are compensable in this arbitration.

17. In particular, Claimant alleges the following breaches of specific promises and guarantees given to Claimant in connection with its investment:

- a) The tariffs for the sale of natural gas agreed between ENARGAS and Gas Natural were calculated in U.S. dollars; though the consumers were to be billed by BAN, S.A. in pesos, the government guaranteed that the payments received by BAN, S.A. were to be automatically converted to U.S. dollars. The measures taken by the government of Argentina pursuant to the *Ley de Emergencia* breached that guarantee;
- b) According to the *Reglas Básicas* (paragraph 16 supra), the tariffs for the sale of natural gas were to be adjusted twice a year on the basis of the international market, specifically in accordance with the United States Producer Price Index (PPI), as well as with the price of gas and cost of transport, referred to as the “pass through,” free of any imposition of price control by the government. Notwithstanding a guarantee that the *Reglas Básicas* were not subject to modification by the government in the

absence of prior consent by the licensees (including BAN, S.A.), the measures taken by the government of Argentina prevented adjustment of the tariffs in accordance with the agreed formulas.

- c) Pursuant to further measures taken by the government in March and May 2002, loans denominated in U.S. dollars subject to the law of Argentina were made repayable in (now depreciated) pesos; loans denominated in U.S. dollars subject to foreign law, however, were not covered by these measures and remained U.S. dollar obligations. Thus BAN, S.A. as creditor would receive depreciated pesos, but as borrower would remain liable in dollars at face value.

Claimant asserts that these measures (plus other measures not necessary to spell out here) led to the reduction of the share value of BAN, S.A. of 70%, and to a corresponding impairment of Claimant's investment. Claimant points out that the price of shares of BAN, S.A. on the Buenos Aires Stock Exchange stood at 1.89 pesos (equal to U.S. \$1.89) in August of 2000. By November 2002 the share price stood at 0.189 pesos when the exchange rate was 3.59 pesos = 1 U.S. dollar, meaning that a share of BAN, S.A. was worth U.S. \$0.05 as of that time.

Response of the Argentine Republic

18. The government of Argentina does not deny that the economic crisis and the measures taken in response to the crisis affected Claimant, as they did all other participants in the Argentine economy. However, the government challenges the jurisdiction of the Centre and the competence of the Tribunal on three essential grounds:

- *First*, the government contends that the challenged laws and decrees were measures of general economic policy, and therefore do not come within Article 25(1)

of the ICSID Convention, which confers jurisdiction on the Centre and Tribunals established under its rules only on legal disputes arising directly out of an investment;

- *Second*, the government contends that it has not given its consent to arbitration as required under Article 25 of the ICSID Convention, because its consent to arbitration in Article X of the BIT is conditioned on prior resort by the investor to its national jurisdiction.

- *Third*, the government contends that Gas Natural, being merely an indirect shareholder of BAN, S.A., the licensee and holder of the franchises, does not qualify as an investor, and its shareholdings do not qualify as investments subject to the protections granted by the BIT.

19. The Tribunal addresses each of these challenges to its jurisdiction in turn.

Does the Dispute Come within the ICSID Convention?

20. Article 25(1) of the ICSID Convention reads as follows:

“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.”

It is clear, and was understood by the drafters of the Convention, as well by the all the Contracting Parties, that the Convention was not intended to provide a forum for purely political disputes. The dispute must meet two criteria to fall within the jurisdiction of the Centre *ratione materiae*: (i) it must be a *legal* dispute; and (ii) it must arise directly out of an *investment*. Neither italicized term is defined in the Convention itself, but the intent of the Convention is plain. As the Report of the World Bank’s Executive Directors, which was

submitted to governments along with the Convention, states:

“The expression “legal dispute” has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”¹

21. It is clear from the Request for Arbitration that Claimant asserts the existence of a right arising out of obligations that it alleges were undertaken by the Argentine Republic, and claims reparation for alleged breach of these obligations. Further, it is clear from the Request for Arbitration that the *claims* arise directly out of an investment, as described in paragraph 9 above, even if the *governmental measures*, as described in paragraphs 14-15 above, were not directed expressly at that investment. Whether the rights asserted by Claimant in the end are found to exist must await the proceedings on the merits. Subject to determination of whether Argentina has given its consent to this arbitration, as discussed hereafter, the Tribunal holds that the assertion of said rights has given rise to a dispute that comes within the jurisdiction of the Centre as set out in Article 25(1) of the ICSID Convention.

22. Further, Claimant asserts claims under Articles III, IV, and V of the BIT between Argentina and Spain, dealing respectively with Protection of Investments covered by the Treaty, Fair and Equitable Treatment of such investments, and Expropriation or Measures with Similar Characteristics or Effects. For its part, Argentina asserts that Claimant has not shown that the challenged measures were:

¹ Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para. 26 (1965); See also Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Hague Academy of International Law, Recueil des Cours 1972-II, pp. 361-64.

- unjustified or discriminatory,
- violated guarantees of fair and equitable treatment,
- or had characteristics or effects similar to expropriation, within the meaning of Articles III, IV, and V of the BIT.

Clearly, a dispute about the meaning of dispositive provisions in an international treaty constitutes a legal dispute, capable of being submitted to international arbitration if the parties have consented thereto.

Decision of the Tribunal with Respect to Article 25 of the ICSID Convention

23. The Tribunal does not at this stage express any opinion concerning the existence of the obligations on which Claimant relies, or on construction of Articles III, IV, and V of the BIT as applied to the facts of this case. The Tribunal is clear, however, that a dispute about the existence of these obligations or the meaning and scope of these provisions is a legal dispute, and that the dispute arises directly out of an investment. **Accordingly, the challenge to jurisdiction of the Centre and the competence of the Tribunal under Article 25(1) of the ICSID Convention is rejected.**

Was Claimant Required to Resort to Argentine Courts Before Initiating the Present Arbitration?

24. Argentina asserts that its consent to arbitration with a national of Spain is defined and limited by Article X of the BIT. Since Claimant did not comply with paragraph 2 and 3 of Article X, which call for resort to national jurisdiction as a condition precedent to commencing international arbitration, and since the parties to the dispute have not “otherwise agreed,” Argentina contends that the Centre lacks jurisdiction over the present

dispute.²

25. Article X of the BIT between Spain and Argentina reads in pertinent part as follows:

RESOLUTION OF DISPUTES BETWEEN A PARTY
AND INVESTORS OF THE OTHER PARTY

1. Any dispute concerning an investment which arises within the terms of this Agreement between an investor of one of the Contracting Parties and the other Contracting Party shall, if possible, be settled amicably.
2. If a dispute within the meaning of paragraph 1 cannot be settled within six months following the date on which the dispute has been raised by either party, it shall be submitted upon request of either Party to the national jurisdiction of the Party in whose territory the investment was made.
3. The dispute may be submitted to an international arbitral tribunal in any of the following circumstances:
 - a) a request of one of the disputing Parties when no decision on the merits of the dispute has been rendered within eighteen months of initiation of a proceeding provided for in paragraph 2 of this article, or
when such a decision has been rendered but the dispute between the Parties continues.
 - b) When both Parties to the dispute have so agreed.
4. In the cases contemplated in paragraph 3, the dispute shall unless otherwise agreed between the Parties be submitted to an arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965, or to an ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Claimant notified the government of the existence of the dispute by letter of May 7, 2002,

² Note that Article 26 of the ICSID Convention provides: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

and more than six months passed without resolution of the dispute. It did not, however, submit the dispute to the Argentine courts before filing its Request for Arbitration.

26. Claimant contends that it is not bound by the requirement of prior resort to national jurisdiction in Article X, by virtue of Article IV(2) of the BIT, the so-called Most-Favored-Nation clause. Article IV(2) provides as follows:

In all matters governed by the present Agreement, such treatment shall not be less favorable than that accorded by each Party to investments made in its territory by investors of Third States.³

Claimant asserts that Argentina has entered into more than 50 bilateral investment treaties, only ten of which contain a requirement of prior resort to national courts. In particular, Claimant relies on the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of November 1991, which both in its substantive provisions and in the provision on settlement of disputes between foreign investors and the host country is closely similar to the BIT between Spain and Argentina, but does not contain any requirement of prior resort to the national courts of the host country.⁴

³ The Spain-Argentina BIT actually contains two most favored nation provisions. Article VII(2) reads:

In case that one Party shall adopt laws, regulations, provisions, or specific contracts more favorable to investors of the other Party than those provided by the present Agreement, such treatment shall be applied to the investors of the other Party.

The parties have discussed both provisions; in the view of the Tribunal, Article IV(2) is more pertinent to the analysis, but there is no contradiction between the two provisions.

⁴ Article VII of the U.S. -Argentina Treaty provides in pertinent part as follows:

1. For purposes 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 that 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.

27. Argentina responds that the most-favored-nation clause of Article IV of the Argentina-Spain BIT relates to substantive measures of regulation by the host state of investments covered by the Treaty, whereas the requirement of prior resort to national courts is addressed to procedural matters concerning dispute settlement. Thus Argentina rejects reference to the Argentina-United States BIT, or to any other bilateral investment treaty to which it is a party, as bestowing any greater right on a national of Spain with respect to settlement of disputes than is provided in the treaty between Spain and Argentina. Further,

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:
 - a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
 - b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
 - 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) or (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:
 - 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 18, 1965 (“ICSID Convention”), provided that the Party is a party to such convention: or
 - ii. to the Additional Facility of the Centre, if the Centre is not available; or
 - iii. in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
 - iv. to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
 - b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.
4. 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
 - b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (New York Convention).

Argentina contends that the 18-month period provided for in Article X(3) constitutes a requirement of exhaustion of local remedies, which cannot be avoided by means of resort to a most-favored-nation clause. Finally, Argentina contends that to require it to engage in an arbitration with a national of Spain under conditions to which it did not consent (i.e., to arbitration without prior resort to its courts) would be against the public policy of Argentina.

28. For its part, Claimant asserts that the dispute settlement provisions of the Argentina-Spain BIT, and indeed of all BITs concluded in the last quarter century, are an essential element of investor protection, which cannot be carved out of a BIT. Thus, in Claimant's submission, the most-favored-nation clause of the Argentina-Spain BIT must be read as entitling a national of Spain to all of the investment protections of other BITs concluded by Argentina, including in particular, the right to resort to international arbitration without prior resort to national courts. Claimant asserts further that the fact that the large majority of BITs concluded by Argentina in the 1990s do not require prior resort to national courts demonstrates that there is no "public policy" reason not to give effect to the most-favored-nation provision with respect to the right to proceed directly to international arbitration once the six-month negotiation period has expired.

29. Summarizing this debate, the Tribunal considers that the critical issue is whether or not the dispute settlement provisions of bilateral investment treaties constitute part of the bundle of protections granted to foreign investors by host states. As the Tribunal sees the history, first of the ICSID Convention, which created the institution of investor-state arbitration, and subsequently of the wave of bilateral investment treaties between developed and developing countries (and in some instances between developing countries *inter se*), a crucial element – indeed perhaps the most crucial element – has been the provision for

independent international arbitration of disputes between investors and host states. The creation of ICSID and the adoption of bilateral investment treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts.⁵ Correspondingly, the prospect of international arbitration was designed to offer to host states freedom from political pressures by governments of the state of which the investor is a national.⁶ The vast majority of bilateral investment treaties, and nearly all the recent ones, provide for independent international arbitration of investor-state disputes, whether pursuant to the ICSID Convention, the ICSID Additional Facility, the UNCITRAL Arbitration Rules, or comparable arrangements, and such provisions are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment.

30. The Tribunal notes that the introductory phrase in Article IV(2) of the BIT speaks of “*all* matters governed by the present Agreement...” Certain matters are expressly excluded, but there is no exclusion for resolution of disputes. The Tribunal notes further that it does not find the public policy argument raised by Argentina to be persuasive, particularly in view of the many BITs concluded by Argentina (in addition to the United States-Argentina BIT) that do not require resort to national jurisdiction prior to access to international arbitration.

⁵ For development of this point by a member of this Tribunal, see Andreas F. Lowenfeld, *International Economic Law*, Ch 15, esp. pp. 456-61 (ICSID), 473-88 (BITs) (2002). See also, e.g., Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, (1995); Teresa McGhie, “Bilateral and Multilateral Investment Treaties,” in Daniel D. Bradlow and Alfred Escher, ed. *Legal Aspects of Foreign Direct Investment pp. 107-35* (1999).

⁶ See, e.g. Article 27 of the ICSID Convention, which provides as follows:
“(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic

As to the contention that the 18-month period provided for in Article X(3) of the BIT constitutes a requirement of exhaustion of local remedies from which no derogation is permitted, the Tribunal observes that under that provision it would be possible to have recourse to arbitration even if there were a decision in the case by the national courts, and *a fortiori* if no final decision had been rendered in the national courts. Accordingly, the 18-month provision does not come within the concept of prior exhaustion of local remedies as understood in international law. Furthermore, Article 26 of the ICSID Convention provides expressly that a state may require the exhaustion of local administrative or judicial remedies as a condition of consent to arbitration under the Convention, and this condition is not expressed in the BIT.

Decision of the Tribunal with Respect to Application of the Most Favored Nation Clause of the Argentina-Spain BIT

31. The Tribunal holds that provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors; further, that access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period. **Accordingly, Claimant is entitled to avail itself of the dispute settlement provision in the United States-Argentina BIT in reliance on Article IV(2) of the Bilateral Investment Treaty between Spain and Argentina.**

Does Gas Natural SDG S.A. Have Standing to Bring a Claim under the Argentina-Spain BIT?

32. Argentina contends that Claimant is not an investor within the meaning of the BIT,

exchanges for the sole purpose of facilitating a settlement of the dispute.

because it is only an indirect shareholder of the grantee of the license from the Argentine government that is the basis of the claim. Since under Argentine law, as under the law of most states, shareholders generally do not have standing to raise claims on behalf of a corporation, Argentina contends that Claimant does not qualify as an investor. Claimant responds that its claim is based on loss in value of the shares of BAN, S.A., and that those shares are clearly included in the definition of investment in the BIT. Thus in Claimant's submission, it is not an indirect claimant under a license issued pursuant to Argentine law, but rather a direct claimant pursuant to the Treaty as holder of shares in an Argentine company.

33. The Tribunal notes that while the ICSID Convention does not define the term "investment," the BIT clearly does so in an inclusive way. Article I(2) of the BIT reads in pertinent part as follows:

"The term 'investment' shall mean every kind of asset, including property and rights of any kind acquired or effected in accordance with the laws of the receiving state, including, although not exclusively:

- shares and other kinds of interest in companies;
- rights derived from any kind of contribution made with the purpose of creating economic value, including loans directly linked to a specific investment, whether or not capitalized;
- movable and immovable property as well as any other property rights, such as mortgage, lien, pledge, usufruct and similar rights;
- any type of right in the field of intellectual property, including patents, trade marks as well as manufacturing licenses and 'know how';
- business concessions conferred by law, administrative decisions or contracts, including concessions to search for, cultivate, extract or exploit natural resources.

The meaning and scope of the assets above mentioned shall be determined by the laws and regulations of the Party in whose territory the investment was made.

No alteration of the legal form under which the assets have been invested or

reinvested shall affect their qualification as investments according to this Agreement.”

34. This definition follows the almost universal practice of BITs to define the subject of the Treaty as comprehensively as possible.⁷ The Tribunal has no doubt that shares of an Argentine corporation – here BAN, S.A. – come within the quoted definition. The rights appertaining to shareholders under the law pursuant to which the corporation is organized are, as the second paragraph of Article I(2) states, subject to the law of Argentina. That law would determine, for example, how shareholders’ meetings are convened, how directors are elected, what accounts must be maintained, etc. But the shares themselves, when held by a national of a party to the Treaty, clearly constitute an “investment” as defined in the Treaty. Indeed, the standard mode of foreign direct investment, followed in the present case and in the vast majority of transnational transfers of private capital, is that a corporation is established pursuant to the laws of the host country and the shares of that corporation are purchased by the foreign investor, or alternatively, that the shares of an existing corporation established pursuant to the laws of the host country are acquired by the foreign investor. The scheme of both the ICSID Convention and the bilateral investment treaties is that in this circumstance, the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration.

Decision of the Tribunal on Standing of Claimant

35. It follows from the above, that a claim asserting the impairment of the value of the shares held by Claimant as a result of measures taken by the host government gives rise to an investment dispute within the meaning of Article X of the BIT, and that the investor (if it meets the other requirements of the Treaty) has standing to bring that claim before an arbitral

tribunal. **The Tribunal holds that Claimant Gas Natural SDG, S.A. has standing to bring its claim before the Tribunal pursuant to the ICSID Arbitration Rules and the Bilateral Investment Treaty between the Kingdom of Spain and the Argentine Republic.**

Checking the Tribunal's Conclusions

36. The Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion.

General Measures vs. Specific Commitments

37. *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/08, Decision on Jurisdiction of July 17, 2003⁸, like the instant case, involved a claim by a gas transmission company alleging breach by the Argentine Republic of a tariff adjustment formula applicable to an Argentine entity (TGN) in which the claimant had an investment. Claimant, a corporation incorporated in the United States, invoked the provisions of the 1991 Bilateral Investment Treaty between Argentina and the United States, both for purposes of jurisdiction of ICSID and the Tribunal established in accordance with the Centre's rules, and for purposes of defining the substantive rules governing its claim.

⁷ See Dolzer and Stevens, pp. 25-31.

⁸ Available at <http://www.asil.org/ilib/cms-argentina.pdf>.

38. Since *CMS* is a corporation incorporated in the United States, the applicability of the Argentina-United States treaty by virtue of a most-favored-nation clause (paragraphs 26-31 above) was not at issue. However, as in the present case, Argentina pleaded inadmissibility of the claim on the basis that the measures alleged to have violated Claimant's rights under the Treaty were not directed specifically to Claimant, but were measures of general application designed to respond to the economic crisis that confronted Argentina in the period December 2001-January 2002 and thereafter, as described in paragraphs 14-15 above. As in the instant case, Claimant did not deny that Argentina found itself in a fiscal and foreign exchange crisis and that the measures it took to end the equivalence of the Argentine peso and the U.S. dollar, and to suspend previously agreed tariff adjustment formulas, affected other enterprises as well, but it contended that this fact could not deprive it of the protection and remedies to which it was entitled under the BIT.

39. The Tribunal in the *CMS* case, like the Tribunal in this case, held that questions of general economic policy do not come within the jurisdiction of the Centre, which is limited by Article 25 of the ICSID Convention to legal disputes related to an investment. It further held, as we do here, that the Centre does have jurisdiction to determine whether measures of general economic policy violate specific legally binding commitments given to an investor covered by the Treaty. (See *CMS* Decision on Jurisdiction paragraph 33).

40. The Tribunal in the *CMS* case also stated, as we do here (paragraph 21), that whether the challenged measures in fact violate specific commitments given to claimant would be a major element in the plenary proceedings addressed to the merits.

Availment of the Most-Favored-Nation Clause

41. *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004,⁹ concerned a contract between a wholly owned subsidiary of Siemens and the government of Argentina for establishment and maintenance of a system of migration control and personal identification. Siemens, a company incorporated in Germany, claimed that the government of Argentina, acting pursuant to the Emergency Law of January 2002 (see paragraph 13 supra), had wrongfully terminated the contract, and claimed breach of the Bilateral Investment Treaty between Germany and Argentina of April 9, 1991. Siemens gave notice of the existence of a dispute as required by the BIT, and following unsuccessful negotiations and expiration of the six-month negotiation period it initiated an arbitration in accordance with the ICSID Arbitration Rules.

42. The Germany-Argentina BIT contains a requirement for prior resort to the national courts of Argentina and an 18-month waiting period, substantially identical to Article X of the Argentina-Spain BIT. As in the present case, however, Siemens did not invoke the national jurisdiction of Argentina, relying, as it contended, on the most favored nation provisions in the Germany-Argentina BIT and the BIT between Chile and Argentina, which does not contain any provision for first resort to the local courts or an 18-month waiting period.

43. The Germany-Argentina BIT contains three most-favored-nation provisions, all reading (with slight variation) in terms of “treatment.” Article 3(1) speaks of “treatment granted...to the investment of nationals or companies of third states; Article 3(2) speaks of “treatment of activities related to investments...granted to the nationals and companies of

third states”; and Article 4(4) speaks of “treatment of the most favored nation in all matters covered in this Article.”¹⁰ In its challenge to the jurisdiction of the Centre, Argentina asserted *inter alia* that the most-favored-nation provisions in the Germany-Argentina BIT were not applicable to dispute settlement, since they only applied to “substantive” matters. Further, Argentina contended that the most-favored-nation provision in Article 4 of the Germany-Argentina BIT – “treatment... in all matters covered in this Article” could not cover dispute settlement since that subject was addressed in another article of the Treaty.

44. After reviewing various marginally relevant cases that have come before the International Court of Justice well before the advent of BITs, the Tribunal in *Siemens* concluded that the term “treatment” in all three clauses and the phrase “activities related to the investments” are sufficiently wide to include settlement of disputes. (*Siemens* Decision on Jurisdiction paragraph 103).

45. *Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of January 25, 2000,¹¹ involved the same Spain-Argentina BIT that is at issue in the present arbitration, but with an Argentine national as foreign private investor/claimant and the Kingdom of Spain as respondent. As in the present case, the claimant gave notice of a dispute under the Treaty, negotiations took place over a six-month period, and thereafter the claimant initiated the arbitration under the ICSID Arbitration Rules without invoking the national jurisdiction of Spain or waiting 18 months. The claimant relied on the BIT between Chile and Spain, which does not contain these requirements. Spain made the same argument made by Argentina in the present case, i.e. that Article IV(2) of the Spain-Argentina treaty

⁹ Available at http://www.asil.org/ilib/Siemens_Argentina.pdf.

¹⁰ Article 3 is addressed to terms of admission, Article 4 to protection of investments.

referring to “all matters” (“*todas las materias*”) can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions. (Decision paragraph 41.)

46. The Tribunal responded as follows:

“Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad. It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.

International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred. The drafting history of the ICSID Convention provides ample evidence of the conflicting views of those favoring arbitration and those supporting policies akin to different versions of the Calvo Clause.

From the above considerations it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle. This operation of the most favored nation clause does, however, have some important limits arising from public policy considerations that will be discussed further below.

...

In light of the above considerations, the Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favorable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts. In the Tribunal's view, the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case in respect of this aspect of the challenge made by the Kingdom of Spain."

(Decision on Jurisdiction, paragraphs 54-56, 64)

47. It is plain that the reasoning and conclusion of the tribunal in the *Maffezini* case, which were in turn relied on by the tribunal in the *Siemens* case are in substantial agreement with the reasoning and conclusion of the present Tribunal.¹²

48. Reference was made in the oral hearing of January 10, 2005 to *Salini Costruttori S.p.A. and Italstrade v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 29, 2004, which was published well after the written pleadings in the instant arbitration were submitted. In that case, which grew out of a dispute between two Italian construction companies and the Kingdom of Jordan over claims under a construction contract, the tribunal drew a distinction between contractual claims and treaty claims, pointing to a detailed dispute settlement clause in the investment agreement and the general conditions of the construction contract. The tribunal held that only the treaty claims

¹² The Tribunal notes Argentina's argument that Spain's position in the *Maffezini* case reflects understanding of the Spain-Argentina BIT consistent with that of Argentina in this case. We do not believe, however, that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

were governed by the consent to ICSID arbitration in the Bilateral Investment Treaty between Italy and Jordan, and that accordingly it did not have jurisdiction over the contract claims. The claimants argued that the distinction between contractual and contract claims was superseded by the most favored nation provision in the BIT, and urged the tribunal to apply the precedent of the *Maffezini* case, but the tribunal rejected this argument. Distinguishing the *Maffezini* case, the tribunal in *Salini* pointed out that in the case before it there was no provision in the most favored nation article referring to “all matters governed by the agreement”, and there was strong indication that the parties intended to exclude contractual disputes from ICSID arbitration. (*Salini* decision paragraphs 118, 119).

49. This Tribunal understands that the issue of applying a general most-favored-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results. The Tribunal is satisfied, however, that the terms of the BIT between Spain and Argentina show that dispute resolution was included within the scope of most-favored-nation treatment, and that our analysis set out in paragraphs 28-30 above is consistent with the current thinking as expressed in other recent arbitral awards. We remain persuaded that assurance of independent international arbitration is an important – perhaps the most important – element in investor protection. Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.

Standing of Claimant

50. The assertion that a claimant under a bilateral investment treaty lacked standing

because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT has been made numerous times, never, so far as the Tribunal has been made aware, with success. The tribunal in the *CMS case*, discussed in paragraph 37 above, distinguished between the claim of TGN, a direct licensee under the Argentine privatization program, and the United States-based claimant, which had invested in shares of TGN. The tribunal's analysis was very close to the analysis of the present Tribunal:

Because, as noted above, the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License, and because the Claimant has a separate cause of action under the Treaty in connection with the protected investment, the Tribunal concludes that the present dispute arises directly from the investment made and that therefore there is no bar to the exercise of jurisdiction on this count.
(Decision on Jurisdiction, paragraph 68).

51. Similarly, in *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of December 8, 2003,¹³ the claimant Azurix, a United States-based company, asserted a claim under the United States-Argentina BIT based on a concession granted by the government to a subsidiary incorporated in Argentina. The Tribunal wrote:

The Tribunal is satisfied that the investment described by Claimant in its Rejoinder on Jurisdiction is an investment protected under the terms of the BIT and the Convention: (a) Azurix indirectly owns 90% of the shareholding in ABA, (b) Azurix indirectly controls ABA, and (c) ABA is party to the Concession Agreement and was established for the specific purpose of signing the Concession Agreement as required by the Bidding Terms.

Having determined that the Claimant's investment is an investment protected by the BIT, the Tribunal concludes that the dispute as presented by the Claimant is a dispute arising directly from that investment.
(Decision on Jurisdiction, paragraphs 65-66).

52. In sum, the Tribunal is satisfied that its analyses and decisions, independently arrived

at, are consistent with the conclusions of other arbitral tribunals faced with similar issues. It does not follow that the ultimate decisions of this Tribunal on the merits will be wholly consistent with those of other arbitral tribunals, because different claims have been based on different treaties and different factual situations. The Tribunal is confident, however, that an affirmative answer is called for to each of the questions presented in Procedural Order No. 1 and reproduced in paragraph 6 of this Decision. We repeat that in accordance with Article 41(1) of the ICSID Arbitration Rules the Respondent is not precluded from raising other challenges to the jurisdiction of the Centre or the competence of the Tribunal not addressed in this Decision.

Decision

53. For the reasons stated herein, the Tribunal decides to proceed to the next step in this arbitration, that is, to summon the parties to submit their Memorial and Counter-Memorial on the Merits, together with supporting evidence, in accordance with a Procedural Order that will follow this Decision.

Andreas F. Lowenfeld

President

Henri C. Alvarez

Arbitrator

Pedro Nikken

Arbitrator