INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

DECISION ON JURISDICTION

ICSID CASE No. ARB/01/3

ENRON CORPORATION AND PONDEROSA ASSETS, L.P.

Claimants

v.

THE ARGENTINE REPUBLIC

Respondent

Before the Arbitral Tribunal composed of:

Professor Francisco Orrego Vicuña (President)
Dr. Héctor Gros Espiell (Arbitrator)
Mr. Pierre-Yves Tschanz (Arbitrator)

Secretary of the Tribunal
Claudia Frutos-Peterson

Washington, D.C., January 14, 2004

A. Procedure

1. On February 26, 2001, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from Enron Corporation and Ponderosa Assets L.P., a Request for Arbitration against the Argentine Republic. On February 27, 2001, the Centre acknowledged receipt and transmitted a copy of the Request to the Argentine Republic and to the Argentine Embassy in Washington, D.C., in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules). The Request concerns certain tax assessments allegedly imposed by some Argentinean provinces in respect to a gas transportation company in which the Claimants participated through investments in various corporate arrangements that will be described below. In the Request, the Claimants invoke the provisions of the 1991 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments ("the Bilateral Investment Treaty" or "Bilateral Treaty").[1]
2. On April 5, 2001, the Centre requested the Claimants to explain how each of the two Claimants in the present case would meet the conditions for registration of its request. On April 6, 2003, the Claimants satisfied this request.
3. Pursuant to Article 36(3) of the ICSID Convention, on April 11, 2001, the Secretary-General of the Centre registered the Request. On the same date, in accordance with Institution Rule 7, the Secretary-General notified the parties of the registration of the Request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4. On April 12, 2001, the Claimants submitted a proposal for the number of arbitrators and the method of their appointment. Under the Claimants' proposal, the Tribunal would consist of three arbitrators, one arbitrator to be appointed by each party and the third, who would be the President of the Tribunal, to be appointed by agreement of the parties.

5. On April 25, 2001, the Argentine Republic notified the Centre of its agreement to the Claimants' proposal concerning the number of arbitrators and the method of their appointment. In those circumstances, on April 27, 2001, the Centre confirmed that the Arbitral Tribunal in the present case would consist of three arbitrators, one arbitrator appointed by each party and the third, who would serve as the President of the Tribunal, to be appointed by agreement of the parties.

6. On May 11, 2001, the Claimants appointed Mr. Pierre-Yves Tschanz, a Swiss national. On July 10, 2001, the Argentine Republic appointed Dr. Héctor Gros Espiell, a national of Uruguay. The parties, however, failed to agree on the appointment of the third, presiding, arbitrator. By letter dated August 30, 2001, the Claimants requested that the third, presiding, arbitrator be appointed pursuant to Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules").

7. In those circumstances, and after consulting the parties, Professor Francisco Orrego Vicuña, a Chilean national, was appointed by the Centre as the third presiding arbitrator. Pursuant to Rule 6(1) of the Arbitration Rules, on November 1, 2001, the Secretary-General notified the parties that all three arbitrators had accepted their appointment and the Arbitral Tribunal was therefore deemed to

have been constituted on that date. On the same date, in accordance with ICSID Administrative and Financial Regulation 25, the parties were informed that Ms. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

8. The first session of the Tribunal with the parties was held on December 5, 2001, in Washington, D.C. During the first session, the parties agreed that the Tribunal was properly constituted in accordance with the ICSID Convention and the Arbitration Rules and that they did not have any objections to any members of the Tribunal.

9. During the first session, the parties also agreed on several procedural issues, which were later reproduced in the written minutes signed by the President and the Secretary of the Tribunal. Regarding the written phase of the proceedings, the Tribunal, after consulting with the parties in this respect, fixed the following time limits for the presentation of the parties' pleadings: The Claimants would file a memorial within 90 days from the date of the first session; the Respondent would file a counter-memorial within 90 days from its receipt of the Claimants' memorial; the Claimants would file a reply within 60 days from their receipt of the Respondent's counter-memorial and the Respondent would file a rejoinder within 60 days from its receipt of the Claimants' reply. It was further agreed that if the Respondent raised any objections to jurisdiction the following alternative tentative schedule would apply: The Respondent would file a memorial on jurisdiction within 45 days from the receipt of the Claimants' memorial on the merits; the Claimants would file a counter-memorial on jurisdiction within 45

days from their receipt of the Respondent's memorial on jurisdiction; the Respondent would file a reply on jurisdiction within 30 days from its receipt of the Claimants' counter-memorial on jurisdiction, and the Claimants would file a rejoinder within 30 days from their receipt of the Respondent's reply on jurisdiction.

10. On January 14, 2002, the Claimants requested a suspension of the proceedings for six months in order to explore the possibility of settling the dispute through direct consultations with the authorities appointed by a new government of the Argentine Republic. By a letter dated January 30, 2002, the Argentine Republic informed the Centre that it did not consider it necessary that the proceedings be suspended at this stage.

11. On January 31, 2002, the Claimants requested the suspension of the proceedings for a period of six months in order to obtain certain internal authorizations to continue with the arbitration. On February 5, 2002, the Tribunal requested the Argentine Republic to present any observations in this respect. The Argentine Republic presented its observations on February 18, 2002, agreeing to an extension of only three months. On February 25, 2002, the Tribunal issued Procedural Order No. 1, granting an extension of 90 days, from the date of the procedural order, for the Claimants to obtain the relevant authorization to continue with the proceeding.

12. On May 22, 2002, the Claimants informed the Tribunal that they had been authorized to proceed with the arbitration and requested an extension until August 1, 2002 to file their memorial on the merits. On May 29, 2002, the Tribunal

granted the extension sought by the Claimants. In its communication, the Tribunal noted that the Argentine Republic would, if it requested, be entitled to the same time extension granted to the Claimants to file its counter-memorial on the merits.

13. On August 1, 2002, the Claimants filed their memorial on the merits and accompanying documentation. On December 13, 2002, the Argentine Republic notified the Tribunal that it would be using part of the extension granted by the Tribunal in its letter of May 29, 2002 to file its memorial on January 15, 2003. Pursuant to ICSID Arbitration Rule 41(1), on January 15, 2003, the Argentine Republic filed a memorial raising objections to the jurisdiction of the Centre and the competence of the Tribunal.

14. On January 21, 2003, in accordance with ICSID Arbitration Rule 41(3), the proceedings on the merits were suspended.

15. On March 5, 2003, the Claimants requested an extension of time to file their counter-memorial on jurisdiction. On the same date, the Tribunal invited the Argentine Republic to provide its observations to the Claimants' request. The Argentine Republic presented its observations on March 7, 2003. On March 11, 2003, the Tribunal granted the extension sought by the Claimants and informed the parties that the Argentine Republic would be granted an extension on the same terms to file its reply on jurisdiction if it so requested.

16. On March 25, 2003, the Claimants filed before the Centre a new request for arbitration against the Argentine Republic. On the same date, the Claimants requested the Tribunal to suspend the jurisdictional proceedings in the present

case until the Tribunal renders a decision concerning their new request for arbitration. On March 28, 2003, pursuant to Article 46 of the ICSID Convention, the Centre forwarded the request to the Arbitral Tribunal to determine whether to receive it as an additional claim to the present case. On the same date, the Tribunal requested the Argentine Republic to submit any observations that it may have in this respect and decided not to grant the suspension requested by the Claimants, asking them to file their counter-memorial on jurisdiction on the date previously decided. On April 15, 2003, the Argentine Republic presented its observations concerning the Claimants' new request for arbitration.

17. On April 25, 2003, after having examined the Claimants' new request for arbitration and the observations submitted by both parties in this respect, the Tribunal decided to accept the new request for arbitration as a claim ancillary to the present case and to have both cases proceed on separate tracks until the Tribunal has decided on jurisdiction in respect of both claims. In its communication, the Tribunal also proposed an expeditious procedure to the parties for filing their written submissions on the ancillary claim. According to this proposal, there would be no memorial on the merits submitted by the Claimants at this stage and the Argentine Republic would file a memorial on jurisdiction within 60 days. The Claimant would file a counter-memorial on jurisdiction within 60 days from the receipt of the Respondent's memorial on jurisdiction. The Argentine Republic would file a reply on jurisdiction within 30 days from the receipt of the Claimants' counter memorial on jurisdiction and the Claimants would file a rejoinder on jurisdiction within 60 days from the receipt of

the Respondent's reply. The Claimants accepted the Tribunal's proposal on April 29, 2003 and the Respondent did the same on May 6, 2003.

18. On March 31, 2003, the Claimants filed their counter-memorial on jurisdiction, concerning the first claim here addressed by the Tribunal. Thereafter, on May 20, 2003, the Argentine Republic filed its reply on jurisdiction and on June 26, 2003 the Claimants filed their rejoinder on jurisdiction.

19. The hearing on jurisdiction took place in Paris on September 3-4, 2003. At the hearing the Claimants were represented by Messrs. R. Doak Bishop (King & Spalding, Houston), Guido Santiago Tawil (M. & M. Bomchil, Buenos Aires), Craig S. Miles (King & Spalding, Houston) and Ignacio Minorini Lima (M. & M. Bomchil, Buenos Aires); all of whom addressed the Tribunal on behalf of the Claimants. The Respondent was represented by Mr. Carlos Ignacio Suárez Anzorena, Mr. Jorge Barraguirre and Ms. Beatriz Pallarés, all of them from the office of the Procuración del Tesoro de la Nación Argentina. Mr. Suárez addressed the Tribunal on behalf of the Argentine Republic. During the hearing, the Tribunal also put questions to the parties in accordance with ICSID Arbitration Rule 32(3).

B. Considerations

The Claimants' participation in Argentina's privatization program

20. The Claimants in this dispute, like other companies that have brought to ICSID their differences with the Government of the Argentine Republic, is a participant in the privatization program that that government undertook beginning in 1989. The investments the Claimants seek to protect were made in the important gas industry of Argentina, the privatization of which was carried out under the terms of the Gas Law and related instruments.[2] The Claimants satisfy the requirements of the Argentina-United States Bilateral Investment Treaty as to having substantial business activities in the United States and not being controlled by nationals of a third country, a matter in respect of which Argentina had requested a clarification.

21. Claimants' participation concerns the privatization of *Transportadora de Gas del Sur* ("TGS"), one of the major networks for the transportation and distribution of gas produced in the provinces of the South of Argentina. The Claimants own 50% of the shares of CIESA, an Argentine incorporated company that controls TGS by owning 55.30% of its shares; the Claimants' participation in CIESA is held by two wholly-owned companies, EPCA and EACH. The Claimants, through EPCA, EACH and ECIL, another corporation controlled by the Claimants, also own 75.93% of EDIDESCA, another Argentine corporation that owns 10% of the shares of TGS; and they also have acquired an additional 0.02% of TGS through EPCA. The investment as a whole, it is explained, amounts to 35.263% of TGS.

22. This part of the Claimants' dispute before ICSID concerns only a question of tax assessments by some Argentine provinces. An auxiliary claim has been introduced for disputes concerning tariffs, devaluation and other financial

measures adopted by the Government of the Argentine Republic. Jurisdictional issues as to the additional claim will be dealt with in due course by this Tribunal in a separate decision.

23. A number of questions introduced in the context of objections to jurisdiction are closely related to the merits of the dispute. The Tribunal at this stage will only deal with those issues that are strictly jurisdictional.

ICSID's case law concerning the Argentine Republic

24. A number of prior decisions adopted by other ICSID tribunals concerning disputes between foreign investors and the Argentine Republic have dealt with a number of relevant issues in the context of international law, the use of its sources and treaty interpretation.[3] This Tribunal bears in mind those decisions but will not discuss their findings here, except insofar they are necessary for disposing of specific issues raised in this case.

Tax assessments by Argentine provinces

25. Several Southern Argentine provinces, which will be identified further below, have assessed stamp taxes on various operations of TGS, which together with interest and fines amount to approximately AR$ 800 million. The contracts underlying these operations include transportation and distribution of gas, technical assistance, the Transfer Agreement and some other contracts. The

Claimants argue that this tax assessment is illegal under Argentine law and tantamount to an expropriation, resulting in a violation of international law, the Bilateral Investment Treaty and other commitments and guarantees undertaken by the Argentine Republic in connection with the privatization process and the investments therein.

26. The Argentine Republic opposes such arguments and believes that the question cannot be submitted to this arbitration. A provisional stay for the collection of taxes has been granted by the Argentine Supreme Court on the basis of actions brought before it by TGS. As a result, the taxes have not been paid as of this date and no final decision has been taken by the Argentine courts. The Federal Government has supported before the courts TGS's arguments in respect of the illegality or inapplicability of the taxes assessed, including the view that some taxes violate the Law of Federal Co-participation that governs the relationship between the Federal Government and the Provinces, but is of the opinion that the actions of the Provinces do not amount to a violation of the Treaty.

27. In the view of the Argentine Republic the taxes assessed are within the range of 1%-2% of the contracts value, and are thus not confiscatory. The additional amounts owed by the Claimants, it is further explained, are the result of penalties and interests and this is not to be attributed to the Respondent. In the Claimants' view, however, the taxes are confiscatory and expropriatory as applied, including penalties and interests, their retroactive assessment for a five-year period and the fact that to an important extent the taxes levied by the different Provinces overlap each other.

28. The Argentine Republic has also made the argument that the Claimants' petitions to this Tribunal, if accepted, would disrupt the conditions of competition within the Argentine market as foreign investors would be exempt from taxes assessed on other business entities. The Claimants believe in this connection that if the taxes are illegal they should not be paid by any economic agent, national or foreign, and thus there is no discrimination involved in their petitions.

29. This Tribunal will not sit in judgement over the general tax policies pursued by the Argentine Republic or the Provinces, nor for that matter of the arrangements the provinces have with the Federal Government of the Argentine Republic. This is a matter exclusively appurtenant to the sovereignty of the Argentine Republic.

30. The Tribunal, however, has the duty to establish in connection with the merits of the case whether such assessments violate the rights accorded to foreign investors under treaties, legislation, contracts and other commitments. As decided by an ICSID Tribunal in an earlier case with reference to the role of bilateral investment treaties,

> "…these treaties cannot entirely isolate foreign investments from the general economic situation of a country. They do provide for standards of fair and equitable treatment, non-discrimination, guarantees in respect of expropriation and other matters, but they cannot prevent a country from pursuing its own economic choices. These choices are not under the Centre's jurisdiction and ICSID tribunals cannot pass judgement on whether such policies are right or wrong. Judgement can only be made in respect of whether the rights of investors have been violated." [4]

31. The line separating general tax measures from measures that affect the investor's rights is conceptually clear, but in practice what falls within or without the Tribunal's competence can only be established in the light of the evidence that the parties will produce in connection with the merits of the case.

32. The Argentine Republic has expressed the view that because the taxes have been assessed by the Argentine Provinces, and irrespective of whether this is a lawful or unlawful action or whether it violates the federal arrangements in force, the responsibility and liability of the Argentine Republic cannot be engaged. The Tribunal is mindful in this respect that under international law the State incurs international responsibility and liability for unlawful acts of its various agencies and subdivisions.[5] The same holds true under Article XIII of the Bilateral Investment Treaty when providing that this "…Treaty shall apply to the political subdivisions of the Parties".

Admissibility and Jus Standi

33. The Argentine Republic submits that the Tribunal must establish whether, as a matter separate from jurisdiction, the claim is admissible in the instant case. The distinction between admissibility and jurisdiction does not appear to be necessary in the context of the ICSID Convention, which deals only with jurisdiction and competence. A successful admissibility objection would normally result in rejecting a claim for reasons connected with the merits. In the light of the Bilateral Investment Treaty the essential question is whether the claimant

invoking the benefit of its provisions qualifies as a protected investor. The right to claim will arise from this determination. This is the situation that specifically needs to be discussed under the Treaty irrespective of whether it is labelled a question of admissibility or otherwise.

34. The Argentine Republic has objected to the admissibility of the claim on the ground that the Claimants do not have the rights upon which they base such claim. The measures adopted, as the argument goes, directly affect only TGS, a corporation incorporated in Argentina. The Claimants are only indirectly affected as they are minority shareholders in TGS and they do not control CIESA, an entity which as explained controls TGS. Neither TGS nor CIESA qualify in the Respondent's view as an investment or as an investor under the Bilateral Investment Treaty. Indirect damages in this view are not included within the scope of the Treaty.

35. The Argentine Republic accepts that an investment in shares qualifies for protection under the Bilateral Investment Treaty, but in such a case claims can only be made in respect of measures affecting the shares *qua* shares, as in the event of expropriation of the shares or other measures affecting directly the economic rights of the shareholders. Claims by minority shareholders concerning measures that affect the corporation as a separate legal entity cannot be admissible in the context of the Treaty.

36. The Claimants oppose such views on the ground that they are not claiming for or on behalf of TGS, but in their own right as United States investors with investments qualifying under the Treaty. Their claim, according to the argument,

is independent of any claim that TGS might have under Argentine law as it concerns an alleged violation of the Treaty. Claims that are treaty claims can, in the Claimants' view, stand on their own irrespective of whether they may further constitute a breach of TGS's rights under municipal law. Thus, the claims are in that opinion direct and not indirect.

37. The question of *jus standi* thus becomes inseparable from the determination of the Claimant's status as a protected investor. This determination involves, first, whether a shareholder can claim for its rights in a foreign company independently from the latter's rights. If so, then the inquiry must determine whether these rights refer only to the Claimants' status as shareholders or also to substantive rights connected with the legal and economic performance of the investment made. These various questions will be addressed next.

Argentine legislation, international law and ICSID's decisions

38. As noted above, the Tribunal does not intend to discuss again questions that have been amply considered in recent decisions and which have been also extensively argued by the parties in this case. These questions are mainly the following:

    - The role of Argentine legislation in a determination concerning corporate personality for the purpose of an international claim. It has been concluded in this respect that the applicable provisions in respect of jurisdiction and admissibility are only those of the ICSID Convention and the Bilateral Investment Treaty. This same

conclusion stands for the argument that Argentine legislation would be the applicable law under Article 42 of the Convention, as this Article is designed to govern the applicable law in connection with the merits but not in respect of questions of jurisdiction.

- The meaning and effect of international law in respect of the rights of minority and non-controlling shareholders to claim independently of a separate corporate entity for the measures that affect their investment. This right has been upheld both under international law and the ICSID Convention.
- The meaning of the *Barcelona Traction* decision,[6] which has been held not to be controlling in investment claims such as the present one, as it deals with the separate question of diplomatic protection in a particular setting.
- The meaning of a number of decisions issued by ICSID tribunals that have upheld the right of shareholders to claim independently from the affected corporation, but have not considered the question of minority or non-controlling shareholders in itself,[7] with few exceptions.[8] This Tribunal also notes that the Argentine Republic disagrees with the conclusions of those tribunals or with the relevance of their decisions to the present case.

39. The reasoning supporting the above holdings will not be repeated for the sake of brevity. It is sufficient for the purpose of the present case to emphasize that there is nothing contrary to international law or the ICSID Convention in upholding the

concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company.

40. The Tribunal is of course mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules. The citations of and references to those decisions respond to the fact that the Tribunal in examining the claim and arguments of this case under international law, believes that in essence the conclusions and reasons of those decisions are correct.

41. The Tribunal will accordingly discuss with particular attention the situation of these claims under the Bilateral Investment Treaty in view of the existence of facts that are specific to this particular case. This is mainly the case of the foreign investment having been made in CIESA and related companies, all being separate Argentine corporations, and only indirectly in TGS.

Shareholders' rights under the Bilateral Investment Treaty

42. As the ICSID Convention did not attempt to define "investment", this task was left largely to the parties to bilateral investment treaties or other expressions of consent. It has been aptly commented that there is, however, a limit to this discretion of the parties because they could not validly define as investment in connection with the Convention something absurd or entirely incompatible with its object and purpose.[9] The definition of investment relevant to this case is set out in Article I (1) of the Bilateral Investment Treaty, which provides in part:

> "(a) 'investment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:
>
> (…)
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof…"

43. As noted above, in the view of the Argentine Republic neither TGS nor CIESA qualify as an investment or as investor under the Bilateral Investment Treaty. While it is admitted that the investment made by the Claimants is protected under the Treaty this would only allow for claims affecting their rights *qua* shareholders. This view, as also noted, is contested by the Claimants.

44. The Tribunal notes, as did the Tribunal in *Lanco* and also the Committee on Annulment in *Compañía de Aguas del Aconquija* or *Vivendi*, the latter in respect of a different but comparable bilateral investment treaty, that the definition of investment set out above is broad indeed. It is apparent that this definition does not exclude claims by minority or non-controlling shareholders. Neither is there anything unreasonable in this definition that would make it incompatible with the object and purpose of the ICSID Convention.

45. The Argentine Republic has made in this context the argument that when treaties have wished to include within their scope indirect damages of the sort claimed in this case, they have done so expressly. The North American Free Trade Agreement (NAFTA) and the Algiers Claims Settlement Declaration establishing

the jurisdiction of the Iran-United States Claims Tribunal have been invoked as examples of this express reference. This, it is further explained, is also the case of the Argentina-United Kingdom Bilateral Investment Treaty. Most treaties, in the Respondent's view, allow for claims of locally incorporated companies only when controlled by foreign nationals, a situation not given in the instant case. The silence of the Bilateral Investment Treaty on the question of claims for indirect damage cannot be held, in the Respondent's argument, against the principles established in the legislation of Argentina or international law.

46. The fact that a treaty may have provided expressly for certain rights of shareholders does not mean that a treaty not so providing has meant to exclude such rights if this can be reasonably inferred from the provisions of such treaty. Each instrument must be interpreted autonomously in the light of its own context and in the light of its interconnections with international law. Moreover, the United States model investment treaties are based on a rather broad interpretation of investment that was included with the express intention of overriding the eventual restrictive effects that could result from the *Barcelona Traction* decision.

47. The rules governing the interpretation of treaties under the Vienna Convention on the Law of Treaties lead to a similar conclusion in so far as the parties to the treaties concerned are different.[10] Indeed, the interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties will normally be the same, unless the parties express a different intention in accordance with international law. A similar logic is found in Article 31 of the Vienna Convention in so far as subsequent agreement or practice between the

parties to the same treaty is taken into account regarding the interpretation of the treaty. There is no evidence in this case that the intention of the parties to the Argentina-United States Bilateral Treaty might be different from that expressed in other investment treaties invoked.

48. The parties in this case have also discussed the meaning and extent of the *Mondev* case[11] where, as indicated by the Argentine Republic, the United States held the view that shareholders cannot claim for injury to a corporation and can claim only for direct injuries suffered in their capacity as shareholders. The Claimants have argued that what matters is the conclusion of the tribunal in that case, which dismissed the United States' arguments and upheld the claimant's standing. The Tribunal must note in this connection that what the State of nationality of the investor might argue in a given case to which it is a party cannot be held against the rights of the investor in a separate case to which the investor is a party. This is precisely the merit of the ICSID Convention in that it overcame the deficiencies of diplomatic protection where the investor was subject to whatever political or legal determination the State of nationality would make in respect of its claim.

49. This Tribunal must accordingly conclude that under the provisions of the Bilateral Investment Treaty, broad as they are, claims made by investors that are not in the majority or in the control of the affected corporation when claiming for violations of their rights under such treaty are admissible. Whether the locally incorporated company may further claim for the violation of its rights under contracts, licences or other instruments, does not affect the direct right of action of foreign

shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying investment.

50. But this conclusion is not the end of the matter. It was explained above that the Claimants made their investment in various companies participating in CIESA and only marginally in TGS. That is, they invested in a string of locally incorporated companies that in turn made the investment in TGS. The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.

51. Counsel for the Argentine Republic have addressed this issue by describing the case as one in which "certain investor who is the owner of the shares in certain corporations which, in turn, own shares of an Argentine corporation, that does not qualify either as investor or as an investment, alleges that the treaty was breached as a consequence of certain tax claims over the latter corporation".[12]

52. The Tribunal notes that while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such

investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.

53. This issue was discussed, but not actually decided, in the ICSID case of *Gruslin* v. *Malaysia*,[13] where the respondent government raised as an objection to jurisdiction the question that "…the Claimant has made no investment in Malaysia, and has no legal relationship with Malaysia that falls within the scope of the investment treaty".[14] The Tribunal in that case ruled that it lacked jurisdiction on another ground, namely that the investment was not made in an approved project as required under the pertinent bilateral investment treaty, thus making unnecessary a determination of the first issue. It is also interesting to note that the objection raised relied on the argument that the claimant was not the "owner" of the investment and that its rights in respect of the management company involved were no more than rights of a contractual nature.[15]

54. At the hearing on jurisdiction held in the present case, the Tribunal put a question to the parties as to whether the Claimants had been invited by the Government of Argentina to participate in the investment connected to the privatization of TGS. It turned out that this had been precisely the case.

55. In fact, the Information Memorandum issued in 1992[16] and other instruments related to the privatization of the gas industry had specifically invited foreign investors to participate in this process. A "road show" followed in key cities around the world and specific meetings with the Claimants were held in this

context. Successful bidders were required to establish an investment company in Argentina "which will hold their interest in the licensed operating company". Moreover, the technical expertise of the Claimants was one of the elements required to materialize their participation in the process. This explains why EPCA was required to execute the Transfer Agreement and to enter into a Technical Assistance Agreement with TGS. The requirements of the Technical Assistance Agreement referred not only to the Technical Operator but also to the "company participating in the same Economic Group providing the necessary technical support". The investors also had certain decision-making power in the management of TGS. The pertinent officials of the Argentine Government were kept abreast of the various corporate arrangements organized to materialize the investment sought.

56. The conclusion that follows is that in the present case the participation of the Claimants was specifically sought and that they are thus included within the consent to arbitration given by the Argentine Republic. The Claimants cannot be considered to be only remotely connected to the legal arrangements governing the privatization, they are beyond any doubt the owners of the investment made and their rights are protected under the Treaty as clearly established treaty-rights and not merely contractual rights related to some intermediary. The fact that the investment was made through CIESA and related companies does not in any way alter this conclusion.

57. The Tribunal accordingly decides that the claim in the present case is admissible under the Bilateral Investment Treaty or, stated in another way, that the Claimants have *jus standi* under this Treaty in their capacity as protected investors.

Jurisdictional objection concerning the lack of direct connection between the dispute and the investment

58. As a question separate from, but related to, the discussion examined above, the Argentine Republic has raised a jurisdictional objection on the ground that the dispute does not arise directly out of an investment as required by the ICSID Convention. In the Respondent's view, as neither TGS nor CIESA qualify as investments or investors under the Treaty, and the dispute concerns only tax obligations of TGS, the claims in this case do not arise directly out of an investment made by the Claimants. The investment in shares is recognized by the Argentine Republic as an investment protected under the Treaty, but only in respect of rights that might be invoked by the Claimants *qua* shareholders, a matter discussed above.
59. The Claimants have explained in this connection that they do not consider the TGS Share Transfer Agreement as an investment agreement or as an investment in and of itself, but that the investment they have made in shares of CIESA and TGS does qualify as an investment under the Treaty. Their right of action, the argument goes on, is related to the protection the Treaty gives to their investment in those shares and, accordingly, the dispute arises directly out of an investment.

60. The Tribunal has noted above that the rights of the Claimants can be asserted independently from the rights of TGS or CIESA. As the Claimants have a separate cause of action under the Treaty in connection with the investment made, the Tribunal concludes that the present dispute arises directly out of the investment made and that accordingly there is no obstacle to a finding of jurisdiction on this count.

Jurisdictional objection as to the consent to arbitration excluding tax matters

61. Article XII of the Bilateral Investment Treaty governs tax matters. Paragraph 1 of this Article states the overall policy on taxation, the Parties undertaking to "strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party". Paragraph 2 of the Article concerns the application of the Treaty to tax matters in the following terms:

> "Nevertheless, the provisions of this Treaty, and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following:
>
> (a) expropriation, pursuant to Article IV;
>
> (b) transfers, pursuant to Article V; or
>
> (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII (1) (a) or (b),
>
> …"

62. The Argentine Republic has argued that the claim made in this case exceeds the limits set out in Article XII, first because the Claimants complain about the violation of the "transparency principle" in tax matters and about the lack of effective means available in Argentina for the protection of their rights. None of these questions, in the Respondent's view, allow for the application of the Treaty in accordance with Article XII. Moreover, the Respondent further argues, not even the complaint about violation of fair and equitable treatment could be brought in connection with tax matters as the Treaty only requires the parties to "strive" in this respect.

63. The Respondent is also of the view that the Claimants cannot invoke expropriation or the violation of an investment agreement or authorization as these questions are unrelated to the tax assessments affecting TGS and, furthermore, there is no investment agreement or authorization. The Treaty, it is concluded, does not apply to the present claim under Article XII as it concerns only tax matters; nor are the remedies sought by the Claimants allowed for under this Article or the Treaty.

64. The Claimants hold a different view. First, in their opinion fairness and equity as invoked in paragraph 1 of the Article are not meaningless, and "to strive" involves a commitment that cannot be ignored in the implementation of tax policies. Second, the Claimants argue that they are specifically invoking expropriation as part of their claim on the merits, as the tax assessed constitutes a measure tantamount to expropriation. And third, the Claimants believe that fair and

equitable treatment and other standards set out in Article II (2) of the Treaty do apply as they are conditions for legal expropriation under Article IV of the Treaty.

65. The Tribunal notes that there is no disagreement about the fact that the dispute concerns a tax matter. However, it is also quite apparent that in the Claimants' submissions expropriation is a prominent cause for action under the Treaty. The Treaty builds in this connection a chain of linkages between the pertinent provisions. First, it is quite true that to strive under paragraph 1 of Article XII is not a meaningless reference. It is even less so in the present case, where the Federal Government of the Argentine Republic shares the concerns of the Claimants about the tax assessments by the Provinces. Second, if expropriation is invoked and there is a finding upholding this allegation, then the Treaty becomes applicable without question. This finding is of course a matter that can only be considered on the merits.

66. It is also important to note that once expropriation is invoked, as indeed it has been, then the connection between Article IV and the standards of treatment under Article II (2) of the Treaty becomes operational, including fair and equitable treatment, full protection and security and treatment not less than that required by international law. In turn, this brings in the meaning of paragraph 1 of Article XII. It is in this context, and not in isolation, that the questions of transparency and the availability of effective remedies also become relevant. And, above all, the whole discussion is then governed by Article VII of the Treaty on the settlement of disputes.

67. The Claimants have satisfied the requirement of having a present interest to bring action under the Treaty, particularly in view of the fact that is has been alleged that the tax assessments resulted in the violation of specific provisions and standards of treatment established in the Treaty. These allegations can only be considered at the merits phase of the case, but *prima facie* they are sufficient to justify the exercise of the right of action by the Claimants. Accordingly, the Tribunal upholds jurisdiction to consider the matter on the merits as far as this objection is concerned.

Jurisdictional objection related to the absence of investment agreement or authorization

68. The Argentine Republic has raised another jurisdictional objection related to the question of absence of an investment agreement or authorization, another possibility foreseen by Article XII to trigger the application of the Treaty to tax matters and in particular the operation of the dispute settlement mechanism of Article VII. A part of the Claimants' complaint concerns the duty of the Argentine Republic to indemnify the investors for taxes assessed in respect of periods prior to the privatization of TGS as provided for under the Transfer Agreement. In the argument of the Respondent the Transfer Agreement does not qualify as an investment agreement or authorization because it only concerns TGS and not the Claimants. Moreover, it is argued that the conditions for the indemnification have not been satisfied.

69. The Claimants have explained, as noted above, that they consider the Transfer Agreement not as an investment agreement or authorization in itself, but that certainly it is a part of the overall elements involved in the privatization and the investment in shares which cannot now be ignored. In their view, the investment is a process that was manifested in several instruments, not just one agreement or authorization, and the claim concerns their rights as investors in the process as a whole. In particular the Claimants invoke the fact that EPCA, as noted, was required to execute the Transfer Agreement and, moreover, it executed a Technical Assistance Agreement with TGS in its capacity as technical operator. The Claimants have expressly stated that they have not desisted of their claim in connection with the existence of an investment agreement thus conceived. Accordingly, the argument continues, both Article XII and VII are applicable in this context.

70. The Tribunal notes in this context that an investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty. This particular aspect was explained by an ICSID tribunal as "the general unity of an investment operation" [17] and by one other tribunal considering an investment based on several instruments as constituting "an indivisible whole".[18]

71. The Tribunal must examine these various aspects to reach a conclusion about the claim and particularly about the manner in which tax measures might have affected the protected investment. Such a determination again belongs to the

merits, particularly in so far there is a need to establish whether the requirements of indemnification have or have not been met. Accordingly, jurisdiction to consider these other aspects of the claim must also be upheld.

Jurisdictional objection concerning a hypothetical dispute

72. The parties have different views concerning the nature of the dispute. While for the Argentine Republic the dispute is purely hypothetical, for the Claimants it is quite actual and specific. The Respondent argues that because the taxes assessed have not been collected and might never be, or be collected only in a small amount, the dispute is hypothetical and not actual. As a result, according to the argument, expropriation has not occurred and cannot be invoked in the context of the present claim.
73. The Claimants believe otherwise. About AR$ 800 million have been assessed in taxes, enough to wipe out the entire value of the investment and lead to the Claimants' bankruptcy, cancellation of the licence and other consequences. This amount has not been collected only because there is an injunction ordered by the Supreme Court suspending judicial collection of those amounts. Expropriation, it is further argued, can occur much earlier than the actual taking of the investors' property or funds, as many times this is also a process gradual in time. All of it, the argument continues, results in the specific violation of the Bilateral Investment Treaty.

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

Jurisdictional objection concerning injunctive relief and other remedies

75. The Argentine Republic has made two objections to the jurisdiction of this Tribunal concerning the remedies requested by the Claimants. The first objection relates to the question that any remedy would really have its effect on TGS, which cannot benefit from the claim as not being in the Respondent's view an investment or an investor under the Treaty. This part of the objection has been dealt with above in the context of the determination that the Claimants are exercising a right in their own capacity under the Treaty which is separate from any rights appurtenant to TGS. Whether a remedy, in addition to protecting the investors' rights, benefits a separate but related corporate entity is not a ground for objection to jurisdiction.

76. The second objection to jurisdiction made under this heading is more complex. It concerns the power of the Tribunal to order injunctive relief. In the Respondent's view the Tribunal lacks such a power under the Convention and the Treaty, and it could only either issue a declaratory statement that might satisfy the investor or else determine the payment of compensation based on a finding that a certain measure is wrongful. In particular it is argued that an ICSID tribunal cannot impede an expropriation that falls exclusively within the ambit of State sovereignty; that tribunal could only establish whether there has been an expropriation, its legality or illegality and the corresponding compensation.

77. The Claimants agree on the point that a tribunal has the power to issue a declaratory statement, but in addition they believe that it can order injunctive relief concerning the performance or non-performance of certain acts. To this end, an award can deal both with pecuniary and non-pecuniary determinations, including specific performance and an injunction. In the present case the Claimants have indeed requested that the taxes assessed be declared expropriatory and in breach of the Treaty and unlawful, and that they be annulled and their collection permanently enjoined.

78. The parties have discussed in this context the decisions of ICSID Tribunals and other courts and tribunals. For the Claimants, the ICSID case of *Goetz* v. *Burundi*,[19] like the cases decided by other tribunals in *Martini* (Italy v. Venezuela),[20] the *Trail Smelter* (United States v. Canada),[21] the *La Grand* (Germany v. United States)[22] and the *Arrest Warrant* (Democratic Republic of Congo v. Belgium),[23] amply support their view about tribunals having a broad

power to order injunctive relief and other non-pecuniary measures. The Respondent argues that these various cases are not relevant here, either because they involve inter-State disputes or because they are based on the agreement of the parties, concern contractual relations or the tribunals have been specifically empowered to adopt measures of the kind requested. Neither is the subject matter of this case, the Respondent further argues, in any way related to recent decisions of the International Court of Justice.

79. An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available. The Claimants have convincingly invoked the authority of the *Rainbow Warrior*, where it was held:

> "The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[24]

80. The same holds true under the ICSID Convention. In *Goetz* v. *Burundi* such a power was indeed resorted to by the Tribunal, and the fact that it was based on a settlement agreement between the parties does not deprive the decision of the

Tribunal of its own legal force and standing. A scholarly opinion invoked by the Claimants is also relevant in this context, having an author concluding that it is

> "…entirely possible that future cases will involve disputes arising from ongoing relationships in which awards providing for specific performance or injunctions become relevant".[25]

81. The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts. Jurisdiction is therefore also affirmed on this ground. What kind of measures might or might not be justified, whether the acts complained of meet the standards set out in the *Rainbow Warrior*, and how the issue of implementation that the parties have also discussed would be handled, if appropriate, are all matters that belong to the merits.

Jurisdictional objection concerning the absence of notification in respect of the Provinces of La Pampa and Chubut

82. The Argentine Republic has raised yet another jurisdictional objection on the ground that the claims against the Provinces of La Pampa and Chubut, unlike those concerning Neuquén and Rio Negro, were not notified to the Respondent in accordance with the Treaty requirements and hence neither was the six-month consultation period observed.
83. The Claimants oppose such objection arguing that there is a single continuing dispute about the tax assessments of various Provinces of the Argentine Republic

that stems from the same factual background and involves the same causes of action under the Treaty. Moreover, the Claimants believe that they can update the Request for Arbitration in their Memorial and that, in any event, they are entitled to submit such disputes as an ancillary or additional claim under Article 46 of the Convention and ICSID Arbitration Rule 40. As in the view of the Claimants the issues at stake relate to the same dispute, there is no need to register a second dispute when the relevant issues arise out of the same subject matter as that of a dispute already registered.

84. There can be no doubt in the present case about the fact that the dispute relates in identical terms to various Provinces. It is the same tax that has been assessed by the Provinces in respect of several operations of TGS, involving exactly the same legal issues both under Argentine law and the Bilateral Investment Treaty. Moreover, the Request for Arbitration expressly indicated that other Provinces could seek to assess those taxes on the same type of instruments, a matter that was spelled out in connection with La Pampa and Chubut in the Claimants' memorial. At some point the Province of Santa Cruz was also mentioned in the context of this dispute, but this particular Province has not been named in the submissions before this Tribunal.

85. Even more so than the situation discussed in the *Metalclad*,[26] *Pope & Talbot Inc.*[27] and *Ethyl*[28] cases, the filing of multiple, subsequent and related actions in this case would lead to a superlative degree of inefficiency and inequity. This would be particularly unjustified in view of the many efforts by ICSID to avoid the multiplicity of proceedings concerning the Argentine Republic.

86. In this context, the question that this Tribunal must answer is not even whether the claims in respect of La Pampa and Chubut can be considered as ancillary or additional claims. It is the much simpler question whether the action of other Provinces further extending the same dispute already registered requires a separate registration and procedure. It certainly does not.

87. The issue concerning the observance of the six-month consultation period becomes therefore moot. If the Argentine Republic had the opportunity to consider negotiations with the investors on the occasion of the first claims, and the claims that followed did not involve any new element, the observance of this requirement is evidently fulfilled. This is particularly so in view of the fact that the Argentine Republic did not take advantage of the possibility of defusing the dispute during that start-up period.

88. The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals.[29] Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction. In the present case, as noted, the requirement was complied with in view of the identical nature and scope of the dispute with the Argentine Provinces; the same holds true if a dispute is ruled to be ancillary or additional to an earlier claim.

Jurisdictional objection concerning the dispute on indemnity under the Transfer Agreement

89. The Argentine Republic has also objected to the jurisdiction of this Tribunal in respect of the indemnity dispute under the Transfer Agreement on the ground that this Agreement provides for the submission of disputes to the Argentine courts. This aspect of the dispute, it is argued, should be considered as a purely contractual dispute and hence it is not subject to the jurisdiction of an ICSID tribunal under the Convention. The Respondent explains that in its view this situation is different from that relating to a contractual dispute which in turn becomes an investment dispute under the Treaty.

90. The Claimants again believe otherwise. In their view, even if the Transfer Agreement had a choice of forum clause they still have an option under the Treaty to resort to arbitration because the actual claim does not relate to contractual performance but to the violation of the investors' rights under the Treaty.

91. The Tribunal is mindful of the various ICSID decisions that have recently discussed this very issue, particularly those in *Lanco*, *Compañía de Aguas del Aconquija* (Award and Annulment), *Wena*,[30] *CMS* and *Salini*.[31] In all these cases the tribunals have upheld jurisdiction under the Convention to address violations of contracts which, at the same time, constitute a breach of the pertinent bilateral investment treaty. The Tribunal will not repeat those considerations.

92. The issue for the Tribunal is then a narrower one, namely whether the indemnity clause of the Transfer Agreement is just a contractual provision subject to the jurisdiction of the courts of the Argentine Republic, or if it is in addition a clause

that concerns the rights of the investors under the Treaty. In the latter case the Tribunal has jurisdiction in so far as those rights are concerned.

93. The indemnity clause is no doubt a contractual provision that relates to tax indemnification of the investors, together with other parties to the Transfer Agreement, if certain conditions are met. The present dispute concerns tax assessments by the Provinces that in the opinion of the Claimants trigger the operation of that clause. Should this be so, then the breach of the clause becomes instantly a violation of the Treaty rights. This effect is independent of whether the investors alone can benefit by resorting to ICSID jurisdiction or others might benefit from such action as well, just as it is independent of whether TGS might benefit from a certain action brought about by the investors. There is no practical way in this context to separate the operation of the indemnity clause from the treaty rights, particularly in so far as it has been noted above that Article XII of the Treaty is intertwined with both Article VII on dispute settlement and with Article II on the substantive treatment owed to the investors.

94. The Tribunal accordingly concludes that it also has jurisdiction to consider this matter on the merits.

Jurisdictional objection concerning the triggering of the "fork in the road"

95. The Argentine Republic has made a jurisdictional objection in the alternative on the ground that TGS has applied to various courts of the Argentine Republic seeking remedies in respect of the tax measures affecting it. This, it is affirmed,

amounts to the choice of local courts under the Treaty and hence the "fork in the road" provision has been triggered. In that argument the jurisdiction of an ICSID tribunal would thus be precluded.

96. The Claimants are of the view that the claimants, the respondents and the subject matter of the actions before Argentine courts being different from those involved in the present arbitration, there could be no triggering of the "fork in the road". They explain to this end that before local courts it is TGS and not the investors who is claiming, that the Respondents are the Provinces and not the government of the Argentine Republic, and that the subject matter concerns a violation of the legislation of Argentina and not a violation of treaty rights.

97. This Tribunal is mindful of various decisions of ICSID Tribunals also discussing this very issue, particularly *Compañía de Aguas del Aconquija*, *Genin*, and *Olguín*.[32] In all these cases the difference between the violation of a contract and the violation of a treaty, as well as the different effects that such violations might entail, have been admitted, not ignoring of course that the violation of a legal rule will always have similar negative effects irrespective of its nature. It has accordingly been held that even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights, or that in any event, as held in *Benvenuti & Bonfant*, any situation of *lis pendens* would require identity of the parties.[33] Neither will these considerations be repeated here.

98. The Tribunal notes that in the present case the Claimants have not made submissions before local courts and those made by TGS are separate and distinct.

Moreover, the actions by TGS itself have been mainly in the defensive so as to oppose the tax measures imposed, and the decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector. The conditions for the operation of the principle *electa una via* or "fork in the road" are thus simply not present. The Tribunal accordingly dismisses the objection to jurisdiction on this other ground.

Jurisdiction affirmed

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

100. The Tribunal must note in concluding that counsel for both parties have performed their duties with outstanding professionalism and have at all times fully cooperated with the work of the Tribunal.

C. Decision

101. 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 Order necessary for the continuation of the procedure pursuant to Arbitration Rule 41(4) has, accordingly, been made.

So decided.

Francisco Orrego Vicuña
President of the Tribunal

Héctor Gros Espiell
Arbitrator

Pierre-Yves Tschanz
Arbitrator

[1] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of November 14, 1991, in force from October 20, 1994.
[2] Law 24.076 of 1992 on the Privatisation of the Gas Sector; Decree 1738/92 of 1992 on the implementation of the Gas Law.
[3] *Lanco v. Argentina*, Preliminary Decision of the ICSID Tribunal of December 8, 1998; *Compañía de Aguas del Aconquija et al. v. Argentina*, ICSID Award of November 21, 2000; *Vivendi v. Argentina,* ICSID Annulment Decision of July 3, 2002; *CMS v. Argentina*, Decision on Objections to Jurisdiction of July 17, 2003.
[4] *CMS*, paragraph 29.
[5] James Crawford: The International Law Commission's Articles on State Responsibility, 2002, Comments on Article 4 at 94-99.
[6] *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, Judgment of February 5, 1970, ICJ Reports 1970, 3.
[7] *AAPL v. Sri Lanka*, ICSID Award of June 27, 1990; *AMT v. Zaire*, ICSID Award of February 21, 1997; *Antoine Goetz et consorts v. République du Burundi*, Sentence du CIRDI du 10 Février 1999 ; *Lanco; Genin et al .v. Estonia*, ICSID Award of June 25, 2001; *Compañía de Aguas del Aconquija*; *Vivendi*. Also, *CME v. Czech Republic*, Partial Award of September 13, 2001.
[8] *Goetz*; *CMS*.
[9] Christoph H. Schreuer: The ICSID Convention: A Commentary, 2001, paragraph 89.
[10] Convention on the Law of Treaties, May 23, 1969, Article 31.
[11] *Mondev International Limited v. United States of America*, ICSID Award of October 11, 2002, International Legal Materials, Vol. 42, 2003, p. 85.
[12] Reply on Jurisdiction by the Argentine Republic, paragraph 115.
[13] *Philippe Gruslin v. Malaysia*, ICSID Award of November 27, 2000, ICSID Reports, Vol. 5, p. 483.
[14] *Gruslin*, paragraph 15.1.
[15] *Gruslin*, paragraph 10.3.
[16] Information Memorandum on the Initial Public Tender Offer, 1992.
[17] Pierre Lalive: "The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) - Some Legal Problems", British Year Book of International Law, Vol. 51, 1980, p. 123.
[18] *Klöckner v. Cameroon*, ICSID Award of October 21, 1983, ICSID Reports, Vol. 2, p. 3.
[19] *Goetz*, op. cit.
[20] *Martini case* (Italy v. Venezuela), American Journal of International Law, Vol. 25, 1931, p. 554, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 102.
[21] *Trail Smelter case* (United States v. Canada), U.N.R.I.A.A., Vol. 3, 1941, p. 1905, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 104.
[22] International Court of Justice, *La Grand case* (Germany v. United States), June 27, 2001, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 105.
[23] International Court of Justice, *Arrest Warrant case* (Democratic Republic of Congo v. Belgium), February 14, 2002, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 106.
[24] *Rainbow Warrior*, R.I.A.A., Vol. XX, 1990, p. 217, at 270, paragraph 114, as cited in James Crawford: The International Law Commission's Articles on State Responsibility, 2002, p. 196, note 457 and associated text, and in Claimants' Counter-Memorial on Jurisdiction, footnote 107.
[25] Schreuer, op. cit, at 1126, paragraph 73, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 100.
[26] *Metalclad v. Mexico*, Case No. ARB(AF)/97/1, Award, (August 30, 2000), International Legal Materials, Vol. 40, 2001, at 36.
[27] *Pope & Talbot Inc. v. Canada* (Award Concerning the Motion by the Government of Canada Respecting the Claim Based upon the Imposition of the "Super Fee" (August 7, 2000)).
[28] *Ethyl Corp. v. Canada*, Award on Jurisdiction of June 24, 1998, International Legal Materials, Vol. 38, 1999, at 700, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 120.

[29] *Lauder v. Czech Republic*, Final Award of the UNCITRAL Tribunal of September 3, 2001; *Ethyl*, op. cit.
[30] *Wena Hotels Ltd. v. Egypt*, ICSID Decision of the Annulment Committee, February 5, 2002.
[31] *Salini v. Morocco*, ICSID Decision on Jurisdiction of July 23, 2001, International Legal Materials, Vol. 42, 2003, at 609.
[32] *Olguín v. Paraguay*, ICSID Decision on Jurisdiction of August 8, 2000.
[33] *Benvenuti & Bonfant v. Congo*, ICSID Award of August 8, 1980, International Legal Materials, Vol. 21, 1982, p. 740, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 142.