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

DECISION ON JURISDICTION

ICSID Case No. ARB/03/15

El Paso Energy International Company
Claimant

v.

The Argentine Republic
Respondent

before the Arbitral Tribunal composed by:
Prof. Lucius Caflisch (President)

Prof. Brigitte Stern (Arbitrator)

Prof. Piero Bernardini (Arbitrator)

Secretary of the Tribunal

Gabriela Alvarez Avila

Washington, D.C., 27 April 2006

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I. PROCEDURAL HISTORY

1. On 6 June 2003, El Paso Energy International Company, incorporated in the State of Delaware of the United States of America (hereinafter "El Paso", "the Claimant"), filed a request for arbitration against the Republic of Argentine (hereinafter "the Government", "Argentina" or "the Respondent") with the International Centre for Settlement of Investment Disputes (hereinafter "the Centre" or "ICSID"). The Claimant alleges that Argentina has violated the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America (hereinafter "the BIT"; bilateral investment treaties in general will be referred to as BITs), other rules of international law, the Hydrocarbon Concessions and Contracts as well as the Argentine Constitution.

2. The Acting Secretary-General of the Centre registered the Claimant's request for arbitration on 12 June 2003. The parties agreed that the Tribunal would consist of three arbitrators, one to be appointed by each party, the third arbitrator and President of the Tribunal to be appointed by the Chairman of the Administrative Council of the Centre. Accordingly, the Claimant appointed Professor Piero Bernardini (Italian) as an arbitrator, whereas the Respondent appointed Professor Brigitte Stern (French) as an arbitrator. The Chairman, with the agreement of the parties, appointed Professor Lucius Caflisch (Swiss) as President of the Arbitral Tribunal. On 6 February 2004, the Tribunal was deemed to have been constituted, and the proceedings to have commenced. On the same date, in accordance with ICSID Administrative and Financial Regulation 25, the parties were notified that Ms. Gabriela Alvarez-Avila, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

3. Mr. R. Doak Bishop of King & Spalding and Mr. José A. Martinez de Hoz (Jr.) of Pérez Alati, Grondona Benites, Arntsen & Martínez de Hoz (Jr.) represent the Claimant. Dr. Osvaldo César Gugliemino, *Procurador del Tesoro de la Nación Argentina*, represents the Respondent.

4. The first session in this case was held on 21 April 2004 in Geneva, Switzerland. The Claimant was represented at that session by MM. R. Doak Bishop and José A. Martínez de Hoz (Jr.). Mr. Jorge Barraguirre and Ms. María Vallejos Meana of the *Procuración del Tesoro de la Nación*, Buenos Aires, acting on instructions from the then *Procurador del Tesoro de la Nación*, Dr. Horacio Daniel Rosatti, represented the Respondent at the first session.

5. At that session, the parties agreed that the Tribunal had been properly constituted and that they had no objection to any of the members of the Tribunal, and it was noted that the proceedings would be conducted under the ICSID Arbitration Rules in force since 1 January 2003 (hereinafter "the Arbitration Rules"). In respect of the pleadings to be filed by the parties, their number, sequence and timing, the Tribunal announced, after consultation with the parties, that the Claimant would file its Memorial within 90 days of the date of the first session, and the Respondent its Counter-Memorial within 90 days of the date of receipt of the Memorial; the Claimant's Reply would be submitted within 45 days of the date of receipt of the Counter-Memorial, and the Respondent's Rejoinder within 45 days of its receipt of the Reply. It was further agreed that the Respondent had the right to raise any objections it might have to jurisdiction not later than 45 days from its receipt of the

Claimant's Memorial. If such objections were made by the Respondent, the Claimant would be entitled to file a Counter-Memorial on jurisdiction within 45 days from its receipt of the Respondent's Memorial on jurisdiction. The Tribunal would decide at a later stage, after having consulted the parties, whether a second round of pleadings on jurisdiction would be necessary.

6. The Claimant filed its Memorial on the merits on 20 August 2004. The Respondent filed its Memorial on jurisdiction on 19 October 2004 and the Claimant its Counter-Memorial on jurisdiction on 13 December 2004. After having considered the views of the parties, the Tribunal decided on 3 February 2005 that a second round of pleadings on jurisdiction was not necessary and fixed the date for the hearings on jurisdiction on 7 April 2005. On 25 February 2005, the Tribunal re-scheduled the hearing on jurisdiction for 8 April 2005.

7. The hearing on jurisdiction took place in Paris, France, on 8 April 2005. The Claimant was represented by MM. R. Doak Bishop, José Alfredo Martínez de Hoz (Jr.), Tomasz J. Sikora and Craig S. Miles, and by Ms. Valeria Macchia and Angolie Singh on behalf of the Claimant. Mr. Jorge Barraguirre, Ms. Gisela Makowski, and Ms. Cintia Yaryura from the *Procuración del Tesoro de la Nación* represented the Respondent.

8. At the hearing, at the Respondent's request, Mr. Ed Sereno gave testimony. The Claimant briefly presented the witness; this was followed by cross-examination from the Respondent and re-direct from the Claimant. The Tribunal then asked the witness some questions. Transcriptions of the hearing were made in English and Spanish, and were distributed to the Tribunal and the parties.

9. During the hearing on jurisdiction, the Tribunal requested documents from both parties. By letter of 14 April 2005, the Claimant responded to a request regarding the sale of its shares in Compañias Asociadas Petroleras SA, CAPEX SA and Servicios El Paso SRL. On 6 May 2005, the Respondent asked for certain documents to the Tribunal regarding the financial structure of Transportadora Gas del Norte and Metrogas, as well as taxes imposed on the Gas sector. In the letter accompanying the request, the Respondent asked for the production by the Claimant of documents regarding its investment and the sale of its shares in the above-mentioned companies. On 10 June 2005, the Claimant objected to that request. The Respondent replied to the Claimant's objections by a letter of 27 June 2005. The Tribunal, by Procedural Order No. 1 of 28 July 2005, decided that

> "the information in possession of the Tribunal [was] sufficient to decide the jurisdictional issues raised by the Respondent and that, if the proceedings [would] reach the merits of the dispute, it [would] be open to the Respondent to reiterate the above request for production of documents."

II. GENERAL PRESENTATION OF THE CASE

1. The Background of the Case: The Argentine Economic and Financial Crisis

10. The global economic and financial situation forming the background of the present case has been aptly described by the ICSID Tribunal in *Natural Gas SDG, S.A.* v. *Argentina,* Decision on Preliminary Questions on Jurisdiction of 17 June 2005 (ICSID Case No. ARB/03/10, http://ita.law.uvic.ca/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf), as follows (§§ 11-15):

> "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 Rodriguez Saá, declared a default on Argentina's public debt, estimated at 132 billion U.S. dollars. President Rodriguez 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."

2. The Claimant's Position

11. El Paso is a company incorporated under the laws of the State of Delaware (United States). It owns a 99.92% indirect controlling shareholding in Servicios El Paso SRL ("Servicios") and indirect non-controlling shareholdings in Companías Asociadas Petroleras SA ("CAPSA"), CAPEX SA ("CAPEX"), Central Costanera SA

("Costanera") and Gasoducto del Pacífico SA ("Pacífico"). CAPSA, CAPEX, Costanera and Pacífico will hereafter be collectively referred to as the "Argentine Companies", all being incorporated under the laws of Argentina. El Paso owns a 45% interest in CAPSA, the latter having a 60% interest in CAPEX (for a graphic representation of the structure of the El Paso group, see Request for Arbitration, Exhibit 8).

12. CAPSA is engaged in the exploration, development and production of oil and, through CAPEX, in the generation of power. CAPSA is mainly in the business of generating electrical power and, accessorily, in the exploration, development and production of crude oil and gas as well as in the marketing of propane, butane and gasoline. According to the Claimant, a series of measures taken by the Government since December 2001 were in breach of fundamental undertakings by which it had induced El Paso and other foreign investors to invest in Argentina, replacing these undertakings by conditions which have proved devastating to the Claimant and have amounted to an expropriation of the Claimant's investment. Under the new scheme, CAPEX could no longer function independently; El Paso's investment in the latter and in CAPSA was rendered essentially worthless; and the new conditions have also adversely affected Servicios, Costanera and Pacífico. Under the Argentina-US Treaty Concerning the Reciprocal Encouragement and Protection of Investment concluded on 14 November 1991 and entered into force on 20 October 1994 (*ibid.*, Exhibit 1), the Government's actions, according to the Claimant, amount to expropriation.

13. From 1997 onward El Paso invested significant cash equity in CAPSA, thereby acquiring a 45% ownership interest in it. CAPSA in turn owns about 60% of CAPEX. The latter holds a hydrocarbon production concession ("the CAPEX concession") in two fields ("El Salitral" and "Agua del Cajón") and owns a thermo-electric power plant at the latter field in the Neuquén Province. CAPEX is a low-cost producer of thermoelectric energy thanks to ownership of both gas wells and modern production facilities.

14. Servicios, a subsidiary of the Claimant, was established in Argentina in March 1998. In late 1999, it entered into a contract with the Argentine branch of a foreign financial institution pursuant to which it leased a gas-processing plant at the Agua del Cajón field. Under a ten-year gas-processing agreement with CAPEX made on 23 November 1999 (the "Gas Processing Agreement"), Servicios processed gas produced at CAPEX's fields into liquid petroleum by-products which then were sold.

15. In April 1997, El Paso acquired, through KLT Power, Inc., a US company totally owned by it, an indirect shareholding of about 12% in Costanera, an entity generating and selling electricity in Argentina; Costanera is currently, according to the Claimant, the largest thermal generator of electricity in Argentina, its plant including two modern cycle units located in the city of Buenos Aires.

16. In January 1998, El Paso also acquired an indirect and non-controlling interest in Pacífico, an entity owning and operating a natural-gas pipeline linking Argentina with the Chilean city of Concepción. El Paso indirectly owns about 13.4% of Pacífico's preferred shares and 11.8% of its ordinary shares.

17. In short, El Paso possesses indirect and non-controlling shareholdings in CAPSA, CAPEX, Costanera and Pacífico, and an indirect controlling shareholding in Servicios (*ibid.*, §§ 2-8 and 17-23).

18. The regulatory environment in Argentina when El Paso made its investment shall be described next, beginning with the pre-1990 situation. Before 1990, the Argentine electricity services were dominated by the public sector. The Federal Government owned the production, transmission and distribution services. In addition, some of the Provinces ran their own electricity companies. According to the Claimant, these services were characterised by inefficiency of management and inadequate capital investment; this meant deteriorating facilities, poor service, high tariffs and recurrent financial crises. The same situation prevailed in the oil and gas sectors, the private sector playing a secondary role under contracts concluded with State oil and gas companies. To the 1989 recession the Government attempted to respond by a series of plans embodying various systems of exchange controls, but that strategy failed. It then turned to a strategy of investment incentives, promoting monetary and structural reforms to stabilise the economy and to induce foreign private investors to engage themselves in Argentina, promising stable laws and rules and "respect for investors' reasonable expectations" (*ibid.*, §§ 24-27).

19. In August 1989, Laws Nos. 23.696 and 23.697 (the "State Reform Law" and the "Economic Emergency Law") provided for the de-regulation of the economy and the privatisation of Government-owned companies, gave the Government authority to re-organise them, and put some State assets and most State companies up for privatisation. The next measures, provided for in 1991 by Law No. 23.928 and by Regulatory Decree No. 529/91 (referred to together as "Convertibility Law"), were aimed at inflation control and re-structuring of the economy. The Convertibility Law fixed the parity of the national currency at one peso to one US dollar, requiring the Central Bank to sell dollars in exchange for pesos at that rate, and prescribed that no increase in the domestic monetary mass could occur without an increase in the Bank's foreign holdings. As a result, inflation abated and the economy grew in the period from 1991 to 1997. In 1993, the Argentine Congress passed legislation to abolish the three-year waiting period for the repatriation of foreign capital, allowing foreign investors to proceed to repatriation at any time, and to organise themselves and to make use of domestic credit on a footing of equality with national investors. Finally, in yet another effort to attract foreign investors, Argentina concluded a series of bilateral investment treaties, including one with the United States. Those instruments assured foreign investors that their investments would be granted at all times "fair and equitable" treatment, and treatment in accordance with international law; and they provided that foreign investors would not be expropriated, in law or fact, without prompt, adequate and effective compensation. So much for the general framework in which El Paso's investments were embedded (*ibid.*, §§ 28-31).

20. It will now be convenient to introduce the Energy Regulatory Framework, which is made up of the Electricity Regulatory Framework and the Oil and Gas Regulatory Framework, and to assess its impact.

21. The Electricity Regulatory Framework, consisting of Law No. 24.065 ("the Electricity Law"), Decree No. 1398/92 ("the Electricity Decree") and related regulations, was intended to attract foreign indirect investment to the electricity sector, treating separately the production, transmission and distribution of electric

power. It aimed at achieving lower tariffs, better service and better management, and at generating competition by attracting investors, especially from abroad. Under this Framework, privatised *distribution companies* competed for long-term concession contracts under federal and provincial regulatory supervision. These contracts, together with the Electricity Regulatory Framework, ensured that the tariffs for end users would: (i) reflect reasonable distribution costs set in dollars, to be reviewed every five years (except for the city of Buenos Aires, where the first period was to be one of ten years) and, in the meantime, be adjusted bi-annually in accordance with the US Producer Price Index; and (ii) pass through the purchase price as set quarterly in the Wholesale Energy Market (WEM), regardless of whether or not the distributor actually bought energy directly from the generators. As far as *generators* such as CAPEX and Costanera were concerned, they could sell the power produced by them on the spot market and, under bilateral agreements, on the term market. Rules for the WEM were enacted in 1991. Under the rules on the spot market, generators would declare their variable production costs bi-annually in dollars, up to a ceiling of 115% of the relevant index price. Compañia Administradora del Mercado Mayorista Eléctrico SA ("CAMMESA") would draw up a list of producers in ascending order of their declared variable production cost until the supply thus listed was sufficient to meet the estimated consumption. The producers on the list would then be despatched, on an hourly basis, to meet the actual demand. The price, which was uniform, was established on the basis of the cost of the highest-cost despatched generator. Generators on the despatch list would also receive a "capacity payment" intended to cover generators' fixed costs not included in the declared variable costs of energy, such as dollar-denominated capital investment costs. This system encouraged producers to operate with maximum efficiency since the most efficient were despatched first and, accordingly, obtained the largest margin (the difference between the spot price and their own -- low -- cost), and since they also received capacity payments. CAPEX being among the lowest-cost generators, the capacity payments made to it amounted to about 31.5 million US dollars per year. Apart from the spot market pricing system, generators could freely negotiate sales contracts with distributors, marketers, other generators, or large-scale users at prices and on terms mutually agreed. At any given time, 10% to 30% of CAPEX's production was disposed of through such contracts.

22. In 1989 the Government, by a series of enactments, sought to expand foreign investment by de-regulating the oil and gas industry. These enactments entitled the holders of production concessions to generate and dispose of hydrocarbons unrestrictedly, both in Argentina and abroad. Indeed, the Hydrocarbons Law No. 17.319, the Oil Deregulation Decrees and the Law No. 12.161 ("Oil and Gas Regulatory Framework") -- pursuant to which the CAPEX and CAPSA concessions were granted -- provided: (i) that hydrocarbon producers could export crude oil without prior Government consent; (ii) that exports were exempt from existing or future fees, rights or withholdings; and (iii) that prices were de-regulated so that producers were free to negotiate the terms of the sale of hydrocarbons on the open market.

23. The two systems described in the two preceding paragraphs, which made up the Energy Regulatory Framework, proved successful. In the nineties, investments totalling more than 34 billion dollars were made in the energy sector, 22 billion of which went into the oil and gas business and 12 billion into the power business. The

sums borrowed by CAPEX on the international market supported an investment of 711 million dollars and those raised by CAPSA one of 568 million dollars. The funds were used to buy equipment, to procure engineering and construction services, to finance exploration and production activities, and to develop transportation and storage facilities. Between 1989 and 1999, momentous changes occurred, which are set out in detail in the Request for Arbitration (§§ 41-45) and which included increased power, oil and gas production, an increase in proved oil and gas reserves, a considerable rise in exports of energy, and an expansion of the natural gas transmission system, including the construction of additional infrastructure to support Argentina's natural gas exports. The Energy Regulatory Framework remained in operation for more than a decade before the Government began to withdraw fundamental rights and safeguards from investors in the energy sector (*ibid.*, §§ 32-45).

24. This withdrawal resulted in violations of the legal and contractual rights of El Paso and the Argentine Companies, as well as of international law, including the BIT, virtually destroying, according to the Claimant, its investments in CAPSA and CAPEX. Declaring an official default on foreign debt payments in December 2001, Argentina enacted Decree No. 1570/2001 ("the Transfer Restrictions Decree") restricting the withdrawal of bank deposits and exchange and transfers abroad, and according to which exporters were obligated to repatriate the proceeds of their sales abroad to the Argentine financial system. On 6 January 2002, the Government published Law No. 25.561 which: abolished the one-to-one exchange rate between dollar and peso set in 1991 by the Convertibility Law; re-denominated certain foreign-currency payment obligations in pesos; authorised the President of Argentina to re-negotiate certain government contracts; froze all electricity prices and related indexation mechanisms; converted all prices and tariffs into pesos at an exchange rate of one to one; and prohibited distribution companies from suspending the performance of their obligations despite the unilateral revision of their public contracts by the Government. Furthermore, the latter changed the spot price fixing mechanisms, which affected generators such as CAPEX and Costanera (*ibid.*, §§ 47-49).

25. Four further regulatory measures were taken by the Government on 4 February 2002: the "Pesification Decree" No. 214/2002 (amended twice in the same year by Decrees N°s 320/2002 and 410/2002), which transformed all foreign currency obligations outstanding on 6 January of that year, including contractual liabilities in dollars, into peso obligations and, thus, caused considerable losses to CAPEX and Costanera; Decree No. 310/2002 establishing a new 20% export duty on crude oil and one of 5% on refined products, which caused CAPSA a significant loss in export revenues; Decree No. 867/2002 enabling the Secretary of Energy to establish quotas for crude oil and liquid petroleum gas reserved to the domestic market, which annulled the free export assurances in Decrees Nos. 1589/1989 and 1212/1989; although the restrictions were lifted later on, the authority given to the Energy Secretary unilaterally to establish export restrictions remains, and so does the uncertainty connected with it; and Decree No. 1090/2002, of 25 June 2002, which excluded from the re-negotiation of concessions companies that would sue the Government on account of the new enactments (freezing and "pesifying" tariff rates). The Pesification Decree referred to above was furthermore applied by CAMMESA in a way that placed an additional burden on producers whose fixed costs were dollar-

denominated to a significant extent, including CAPEX and Costanera. The fuel reference price (which determines the maximum allowable cost to be used for establishing the spot price) was converted into pesos at the rate of one to one, thus imposing an arbitrary low maximum price when selling on the spot market (*ibid.*, §§ 50-54).

26. The Government's measures have, according to the Claimant, adversely affected the rights of electricity producers: (i) the right to have spot market prices set at a uniform rate based on the marginal production cost; (ii) the right to have spot prices calculated in dollars; and (iii) the right to collect payments for spot energy supplies in accordance with pre-established conditions. Regarding the two last points, CAPEX and Costanera were denied their profit owing to the artificial cap placed on the price of power in the spot market; they were also deprived of the opportunity to receive capacity payments sufficient to service the debts related to their investment because the Government "pesified" those payments, this measure resulting in a two-thirds drop. Thus the Claimant, after having committed substantial resources to acquire and develop assets, suffered from a series of unpredictable Government measures that were inconsistent with the legal framework on which it had relied (*ibid.*, §§ 55-61).

27. In addition, CAPEX had concluded dollar-denominated term contracts for the sale of energy and liquid petroleum gas by-products with third parties. Furthermore, the Government, despite the fact that CAPEX's contractual rights protected under the Argentine Constitution were thereby violated, restricted the possibility of generators to use the early-termination clauses in those contracts. The Pesification Decree also resulted in the pesification of the previously dollar-denominated operations and maintenance contracts between CAPEX and the plant's operator, Steag-Capime; the latter cancelled the contracts, which triggered a series of still outstanding claims and counter-claims.

28. These changes, and the failure of the Government to take preventive or mitigating measures against the impact of Law No. 25.561 on CAPEX's and Costanera's investments, have caused significant prejudice to these activities, affecting the investor's ability to write off for tax purposes their dollar investments at the same level as prior to the enactment of that Law. In addition, nothing was done to allow power investors to minimise losses under Law No. 25.561 in their tax returns. On the contrary, the Government placed higher restrictions on the deductions the investors could claim due to their losses under Law No. 25.561 (*ibid.*, §§ 62-65).

29. Under the Gas and Oil Regulatory Framework applicable to CAPSA, investors in the hydrocarbons sector were to benefit from: (i) a right to export crude oil without prior Government consent; (ii) an exemption from existing or future fees, duties, rights or withholdings; (iii) the de-regulation of the prices of crude oil, entitling producers freely to negotiate prices of hydrocarbons on the open market; (iv) a constitutional guarantee given to negotiated agreements, including those of CAPSA and CAPEX, for the sale of liquid hydrocarbons. Contrary to those rules, the Government took unilateral measures: (i) violating the exemption of hydrocarbons exports from export duties and withholdings; (ii) amending conditions previously established for each international shipment of liquid hydrocarbons in connexion with liquefied petroleum gas and diesel oil, and repealing them with respect to crude oil as

well as fixing export quotas; and (iii) ending the dollar-denominated sale and purchase agreements *via* pesification (*ibid.*, §§ 66-70).

30. The impact of the Government's measures on the investments of El Paso and the Argentine Companies is summed up by the Claimant in three points: (i) CAPEX no longer has the resources for working profitably and meeting its financial and contractual obligations. It owes more than 275 million dollars and has been forced to default on its foreign debts. (ii) CAPSA has lost CAPEX, its main asset, which is no longer commercially viable. The Government's acts of expropriation have caused CAPSA to default on its 120 million-dollar debt. (iii) The business of Costanera has been adversely affected by the pesification of capacity payments, spot market prices and term contracts, and by the fact that the spot market prices are no longer established at a uniform tariff based on the economic cost of supplementing the incremental unit of electricity demand. The business of Servicios was also affected by the fact that its substantial financial debt was with a foreign bank not subjected to mandatory pesification; that debt was incurred by leasing the gas-processing plant at the Agua del Cajón field. In addition, Servicios suffered from the Pesification Decree in that the latter brought about the pesification of dollar-denominated operations and of the maintenance contract between CAPEX and the operator of the plant, which was cancelled by the latter upon pesification. Finally, the revenues of Pacífico have decreased and have inhibited its ability to use freely its revenues resulting mainly from export sales, due to the forced repatriation and pesification and to the need for prior authorisation for the re-transfer abroad of export earnings (*ibid.*, §§ 71-74).

31. The Government's measures have prevented the Claimant and the Argentine Companies from exercising the rights flowing from their investments. These rights include those based on the conditions defined by the Energy Regulatory Framework, by the law of contracts and by constitutional law. According to the Claimant, these categories of rules have been violated by the Government's measures, as have the provisions of the BIT, especially the guarantees contained in Articles II (2) (a) to (c), IV, V and XII.

32. The Claimant contends that the measures in question were in breach of Article II (2) (a) of the BIT, which requires the host State to grant investors of the other State fair and equitable treatment, full protection and security, and treatment not less favourable that that required by international law. They were also arbitrary and discriminatory in that they adversely affected the Argentine Companies and El Paso's management of its investment, thus infringing Article II (2) (b) of the BIT. They were furthermore contrary to Articles II (2) (c) and XII, which require the host State to comply with all the obligations undertaken with regard to investments, including those related to tax matters. The measures taken were, moreover, tantamount to expropriation of El Paso's investment and its interest in the Argentine Companies, as well as of the latter's businesses, without ensuring prompt, adequate and effective compensation, contrary to Article IV. In addition, they were, according to the Claimant, contrary to the free transfer guarantee under Article V. Considering that the BIT was approved by a law of the Argentine Congress and pursuant to the Argentine Constitution, and hence forms part of the Respondent's domestic law, the measures taken in violation of the BIT are also contrary to the Argentine Constitution (*ibid.*, §§ 75-83).

33. In conclusion the Claimant asks the Tribunal for an award granting the following relief:

> "A finding and declaration that the Republic has violated the BIT, international law and Argentine law;
>
> A finding and declaration that the governmental actions and omissions at issue are illegal, arbitrary, discriminatory, unfair, and inequitable; constitute an expropriation without prompt, adequate and effective compensation; violate the obligation to allow the free transfer of funds without delay; and fail to comply with obligations undertaken towards the investment.
>
> An award of damages to the Claimant for all damages caused to its investments, in an amount to be determined, including damages that continue to accrue, plus compound interest from the date of breach until actual payment at a rate to be determined by the Arbitral Tribunal; and
>
> An award to the Claimant of all costs of this proceeding, including their attorneys' fees."

(Request for Arbitration, § 101)

3. The Jurisdictional Objections of Argentina

34. The jurisdictional objections presented by the Respondent have changed in their presentation. In the table of content of the Memorial on Jurisdiction, the following objections were made:

> "(A) The dispute submitted to the Tribunal does not meet the requirements set forth by Article 25(1) of the ICSID Convention to grant jurisdiction to ICSID and competence to the Tribunal;
>
> (B) Non-existence of a legal dispute;
>
> (C) The Claimant has no legitimate interest that authorizes it to file a claim with the ICSID;
>
> (D) The claim must be limited in respect to the tax measures."

(Memorial on Jurisdiction p. 1)

Then, when presenting the grounds for objection, Argentina objects to the jurisdiction of ICSID and to the competence of the present Tribunal on the following grounds:

> "(A) The dispute submitted to the Tribunal does not meet the requirements set forth by Article 25(1) of the ICSID Convention to grant jurisdiction to ICSID and competence to the Tribunal;
>
> (B) The dispute submitted to the Tribunal does not constitute an "investment dispute" according to the provisions of Article VII.1 of the BIT, since there is no evidence, even *prima facie,* of a violation of such Treaty;

> (C) The Claimant has no legitimate interest that authorizes to file a claim with the ICSID;
>
> (D) The claim must be limited in respect to the tax measures."

(Memorial on Jurisdiction p. 12)

The Tribunal will deal with the different objections in the order it deems appropriate.

III. COMPETENCE OF THE TRIBUNAL

1. General Observations

a. Relevant Texts

35. The Center can only have jurisdiction if there is mutual consent. It is now established beyond doubt that a general reference to ICSID arbitration in a BIT can be considered as being the written consent of the State, required by Article 25 to give jurisdiction to the Centre, and that the filing of a request by the investor is considered to be the latter's consent.

36. The Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (hereafter: "Washington Convention" or "ICSID Convention") came into force for the United States on 14 October 1966; Argentina became a Party thereto on 18 November 1994. The BIT entered into force between the two States on 20 October 1994. Its Article VII (4) provides:

> "Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:
>
> (a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules..."

And, pursuant to paragraph 3(i) of the same Article, the "national or company" concerned, *i.e.* the Claimant, may fulfil that requirement by choosing

> "to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) to the International Centre for the Settlement of Investment Disputes..."

Argentina has given her consent by becoming a Party to the BIT when the latter entered into force on 20 October 1994 (Article VII (4)). El Paso, on 23 August 2002, delivered a letter to the Government notifying it of the dispute and seeking to resolve the matter by consultation and negotiation pursuant to Article VII (2) of the BIT, and informing it that El Paso would seek international arbitration if consultation and negotiation were to be unfruitful. The six-month period prescribed by Article VII (3) elapsed on 23 February 2003 (not 2002, as suggested at § 91 of the Request for Arbitration). On 5 June 2003, El Paso notified in writing the Federal Executive

Branch of Argentina, the Ministry of Foreign Affairs and the *Procurador del Tesoro de la Nación*, as well as the Secretary-General of ICSID, of its acceptance of ICSID jurisdiction over the present dispute; and it did so again in its Request for Arbitration of 6 June 2003 (§ 102). According to Rule 2(3) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, the latter date qualifies as the "date of consent". It will be noted, furthermore, that El Paso has not submitted the dispute to either Argentine courts or administrative tribunals, nor to any other previously agreed settlement procedure, which, according to the Claimant, means that the requirements of Article VII (3) (a) of the BIT have been met (*ibid.*, §§ 84-91, 98-99, 101-103).

b. Scope of Examination

(i) Institution of Proceedings

37. The BIT entered into force on 20 October 1994 (see above, § 36) and, accordingly, Argentina accepted ICSID arbitration on that same date. The Claimant did so by letters of 5 and 6 June 2003 to the Government and to the Secretary-General of ICSID. The Request for Arbitration was registered by the latter on 12 June 2003. The institution of proceedings therefore occurred on 12 June 2003, which accordingly becomes the relevant date for the institution of proceedings (Institution Rule 6 (2)).

(ii) Prior Consultation and Negotiation

38. Under Article VII (2) of the BIT the parties to an investment dispute "should initially seek a resolution through consultation and negotiation". That provision goes on to say that, "if the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution", *inter alia* to ICSID arbitration. This text could, in truth, raise a question of interpretation: is it mandatory, in order to resort to arbitration, to have consulted and negotiated? The conditional "should" in the first phrase of Article VII (2), chapeau, suggests that it is not. The second phrase, however, seems to view consultation and negotiation as a condition for submitting a case, a view shared by the Respondent. The question is moot in our case, however, as the Claimant has in effect attempted to consult and negotiate, as is shown by the facts related above (§ 36).

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

39. ICSID arbitral tribunals are established *ad hoc*, from case to case, in the framework of the Washington Convention, and the present Tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis*. It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.

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

40. At this stage of the present proceedings, much turns around the question of which issues are of a jurisdictional character and which issues must be addressed at the stage of the merits. The question, therefore, deserves consideration.

41. In its pleadings and arguments, the Respondent has generally taken an extensive view of what belongs to the jurisdictional sphere. The Claimant, by contrast, has been restrictive in its views, often contending that this or that objection to jurisdiction, made by Argentina, belonged in fact to the merits of the case.

42. In the *Oil Platforms* case (Iran v. United States), jurisdiction, judgment of 12 December 1996 (*ICJ Reports* 1996, p. 803, § 16), the International Court of Justice (hereinafter "ICJ") defined its task at the jurisdictional level by pointing out that it

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

It is, in other words, a matter of whether the issues to be considered fall within the parameters of jurisdiction as defined by the enabling treaty. It is not one of examining whether the Claimant's allegations are well-founded on the merits.

43. As early as in *Amco* v. *Indonesia*, Decision on Jurisdiction of 25 September 1983 (ICSID case No. ARB 81/1, *ICSID Reports*, Vol. 1, p. 389, at p. 405), the ICSID Arbitral Tribunal dealing with the case had held that

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

Here again, the gist of the Tribunal's decision is that essentially the issue is not whether the claim is well-founded on the merits, but whether, in the way in which it is stated, it fits into the jurisdictional frame designed by the relevant treaty or treaties.

44. The question addressed here has also arisen in a recent case involving the Respondent. In *Siemens AG* v. *Argentina*, Decision on Jurisdiction of 3 August 2004 (ICSID case No. ARB/02/8, *ILM*, Vol. 44, 2005, p. 137), the Tribunal said (§ 180):

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

45. This means that as long as they are not frivolous or abusive the claims made in the present case must be taken as they are by the Tribunal whose only task it is, in the jurisdictional phase of the proceedings, to determine if those claims, as formulated, fit into the jurisdictional frame drawn by the relevant treaty instrument or instruments. This is so because in that early phase, tribunals deal with the nature of claims or contentions and not with their well-foundedness. If it were otherwise, jurisdictional matters would have to be addressed at the same time as, or even subsequently to, the

merits of the case. Accordingly, the question to be addressed here is whether the Claimant's allegations, if true - a problem to be examined at the merits stage -, denote violations of the BIT and therefore fall within this Tribunal's competence under Article 25 of the ICSID Convention. This is the perspective from which Argentina's objections must be viewed. It is not open to the Tribunal, contrary to what was suggested by counsel for the Respondent (Transcription of Hearings, 8 April 2005, p. 55),

> "to declare its jurisdiction conditionally expressing with particular emphasis the fact that the jurisdiction will apply in the event that the Claimant in the merits phase can prove the facts that clearly prove jurisdiction and competence of the Tribunal."

Rule 41 of the ICSID Arbitration Rules does not provide for deciding on a "conditional" jurisdiction of the Centre. All the Tribunal could do, under paragraph 4 of that Rule, is to join the Respondent's preliminary objections to the merits. There is not, however, any cogent reason for such a joinder.

46. The Tribunal shall deal with the substance of these objections by examining the following four points: (i) Is the dispute of a "legal" nature?; (ii) Does it "arise directly out of an investment"?; (iii) Is the claim to be limited with regard to tax measures? (iv) Is there a legitimate legal interest justifying the filing of a claim with the ICSID?

2. First Issue: Is the Dispute of a "Legal" Nature?

47. In fact, this preliminary objection which is in reality the first raised by the Respondent, presents different aspects. According to the Respondent, the dispute is not a legal one under the Washington Convention, for several reasons: first, the dispute is not about the determination of legal rights and duties; second, the dispute is purely contractual and commercial, because it only concerns rights and obligations based on agreements and contracts and merely is a dispute with respect to commercial flows; third, the existing contractual claims have not been transformed into treaty claims by the so-called "umbrella clause". The Tribunal will now examine these different contentions.

48. The first question to be addressed is whether legal rights or duties are involved in the dispute between the Claimant and the Respondent. According to the Respondent, the dispute, in order to come within the purview of ICSID jurisdiction as defined in Article 25 (1) of the Washington Convention, must be "legal" in nature: it has to relate to rights and duties, *i.e.* legal titles, not to "certain undesirable consequences" (Memorial on Jurisdiction, § 39). In this connexion, the Respondent cites a statement made by the President (recte: Vice-President) and General Counsel of the IBRD according to which the formula "any legal dispute arising directly out of an investment" found in Article 25 (1) was intended to encompass

> "those cases involving differences of opinion with respect to a legal right. This would exclude cases like, for example, if a company wanted to challenge a system of price control, this implying issues of equity and not of legal rights."

Later on the President added that "legal disputes" are those "referring to a legal right or obligation, or referring to a fact related to the determination of such legal right or obligation" (*ibid.*, § 40).

After this general statement on the inexistence of a legal dispute, the Respondent becomes more specific. Argentina denies indeed any legal character to the present claim under Article 25 (1) of the 1965 Convention, stating that the dispute is not a legal one in the sense of the Convention because it is purely contractual in nature and, subsidiarily, that it is not a legal dispute as it raises only commercial issues.

49. To conclude that there is jurisdiction of the Centre and competence of this Tribunal, there must be, according to the Respondent, a dispute over the sense and scope of provisions falling within this Tribunal's competence. In the present case, the disagreements are, however, related to power generation and hydrocarbons concessions, exploration and production contracts, natural gas export permits and the Electric Power and Hydrocarbon Regulatory Frameworks. For the Respondent, these disagreements do not amount to a "legal dispute" under Article 25 (1) of the Washington Convention, because all the claims arise out of concessions and contracts and must therefore be submitted to the consented forum, the national courts of Argentina, as freely agreed upon by the parties, and not to an ICSID tribunal. The fact that the Claimant makes generic statements as to breaches by the Respondent of its BIT obligations is not sufficient to turn the claims into "legal disputes" under Article 25 (1).

50. To this line of argument, Argentina adds another, related consideration. Under the above treaty provision, disputes (or, rather, "legal disputes") "are in relation to rights, not with respect to commercial flows". Yet the Claimant focuses the disputes on commercial flows, *i.e.* on the freedom of exercising production and trading activities, rather than on assets owned or controlled by it. But under Article 1(1) (a) of the BIT, the latter conceives protected investments as consisting of rights *in personam* and *in rem*, as becomes evident from sub-paragraphs (i), (iv) and (v) of that provision: tangible and intangible ownership rights, intellectual property, and rights, licenses and permits granted pursuant to law. The issue "is not what happened to such things, but what happened to the investor's rights on such things", that is, what happened to them pursuant to the protection provided by the applicable legal system, which includes the BIT.

51. Accordingly, the defendant State concludes that, assuming the existence of a dispute in the terms stated, that dispute pertains to the scope of obligations under the contracts and concessions referred to by the Claimant and that the dispute is purely commercial and therefore does not amount to violations by Argentina of rights specifically acknowledged in the BIT (Memorial on Jurisdiction, §§ 48-62).

52. The Respondent cites two precedents which bar jurisdictional access to ICSID tribunals for purely contractual claims. In the first instance -- *Generation Ukraine* v. *Ukraine* (Award of 16 September 2003, ICSID case No. ARB/00/9, *ILM*, Vol. 44, 2005, p. 404) -- it was held that contractual claims could not fall within the competence of ICSID arbitration panels even when expropriation was alleged. In the event, the Tribunal found that governmental action or inaction, or maladministration,

cannot be considered as expropriation, at least not without any previous attempt at correcting the administrative fault, *i.e.* at obtaining redress on the national level.

53. In *Waste Management II* (*Waste Management, Inc.* v. *Mexico*), Award of 30 April 2004 (ICSID case No. ARB (AF) 00/3), http://www.state.gov/documents/organization/34643.pdf), the Tribunal held that breach of contract and expropriation were two different things: the former can be committed by anyone, while the latter is inherently governmental in character. In the first case, unless the breach is the result of governmental prerogative such as a legislative decree, the answer will be the filing of a complaint on the domestic level. Only when this has been done will the path be cleared for action on the international level.

54. This means, according to the Respondent, that the Claimant has only contractual claims, which are not protected by the BIT.

55. The reasoning followed by the Claimant is not altogether easy to describe, as arguments relating to the Second (absence of a legal dispute) and First Preliminary Objections (no dispute arising directly from an investment) -- to refer to them in the order followed by the Respondent -- are presented together. The Tribunal will attempt, at this stage, to limit itself to arguments related to the Second Preliminary Objection, which it has decided to address first (see paragraph 46).

56. According to the Respondent, says the Claimant, the claims before the Tribunal do not meet the requirements of Article 25 (1) of the ICSID Convention because they fail to qualify as "legal claims", being contractual rights which do not amount to an "investment" under the BIT.

57. Regarding the first, general part of the Respondent's argument, the Claimant recalls that a legal dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties" (*East Timor* case, Portugal v. Australia, Jurisdiction, Judgment of 30 June 1995, *ICJ Reports* 1995, p. 89, at § 22). [This is, of course, not quite true since the definition just cited is that of a "dispute" *tout court rather than of a legal dispute.*] The Claimant, however, adds that a dispute is 'legal' if "legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed." (Ch. Schreuer, *The ICSID Convention: A Commentary,* Cambridge, Cambridge University Press, 2001, p. 105) (Counter-Memorial on Jurisdiction, § 28).

58. This is the case here, according to the Claimant, the fact that some of the claims involve contractual questions being irrelevant. The issue is whether the measures taken by Argentina were in violation of the latter's obligations under the BIT, including the question of whether those measures in effect amounted to the expropriation of specific legal and contractual rights and revenue, to unfair and inequitable treatment of the Claimant's investment, to unfair and discriminatory impairment of that investment, to a failure to provide full security and protection to the investment and to a violation of other rules of international law. The case also involves the amount of reparation due and, hence, clearly is a legal dispute. In this connexion, the Claimant invokes six precedents, all involving Argentina, among which *Azurix Corp.,* Decision on Jurisdiction of 8 December 2003 (ICSID case No. ARB/03/30, *ILM,* Vol. 43, 2004, p. 262, at § 58) and *LG&E* Decision on Jurisdiction of 30 April 2004, (ICSID case No. ARB/02/1, http://www.worldbank.org

/icsid/cases/lge-decision-en.pdf). As was the case in these precedents, the Claimant has sufficiently demonstrated, in its Memorial, that measures taken by the Respondent adversely affected its "legitimate legal and contract rights". There is therefore a controversy over the existence and scope of legal rights or obligations and over the extent of the reparation due, which means that there is a "legal dispute" under Article 25 (1) of the ICSID Convention (Counter-Memorial on Jurisdiction, §§ 25-31).

59. Regarding the Respondent's "commercial-flows" argument (see above, § 50), the Claimant replies that it has been amply shown in its Memorial that investments qualifying under the BIT were effected, and that the claims made are the result of measures taken by Argentina against those investments, consisting in shareholding interests in the Argentine Companies, capital contributions, legal and contractual rights under the Energy Regulatory Framework, concessions, oil, gas and energy supply agreements, and other legal rights (*ibid.*, § 20).

60. The Tribunal agrees with Argentina that the nature of the dispute must be determined on objective grounds and not only on the basis of statements made by one or the other side. As pointed out by the ICJ in its Advisory Opinion of 30 March 1950 on the *Interpretation of Peace Treaties* (*ICJ Reports* 1950, p. 65, at p. 74), "[w]hether there exists an international dispute is a matter for objective determination". [It will be noted, in passing, that the Court's *dictum* pertains to the term 'international dispute' rather than the expression 'legal dispute.']

61. For this Tribunal, the notion of dispute generally has been accurately defined by the Permanent Court of International Justice (PCIJ) in the *Mavrommatis* case (Greece v. Great Britain), Judgment of 30 August 1924, PCIJ, Series A, No. 2, where the Court said (p. 11) that "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons". The above definition was recently confirmed by the ICJ in the *East Timor* case (see above, § 57, *ICJ Reports* 1995, p. 89, at § 22). It covers all "disputes", legal or political, national or international. "Legal" disputes have generally been defined as "controversies in which the Parties are in disagreement over a right". On the domestic level, this can be a disagreement over contractual or other rights. Regarding the international level, one may recall, for example, Article 1 of the 1925 Locarno Arbitration Conventions between Germany, on the one hand, and Belgium, France, Poland and Czechoslovakia, on the other hand ("disputes with regard to which the parties are in conflict as to their respective rights"). What matters here is whether the pretensions of the Claimant (and the arguments of the Respondent) are formulated as being based on terms of existing law. The answer is, in the words of the ICJ (see above, § 60), "a matter for objective determination".

62. To this Tribunal, it seems evident that the Claimant has formulated its pretensions in legal terms and on the basis of existing law; and that the Respondent has answered in terms of law. According to what was recalled above (§§ 57-58), what matters at this stage, in order to determine if the dispute is a "legal" one pursuant to Article 25 (1) of the ICSID Convention, is whether the parties justify their claims by relying on law and whether legal remedies are being sought. Another question, to be decided at the merits stage, is whether those claims are well-founded in substance. This Tribunal finds that the present dispute is clearly of a legal character.

63. The Tribunal will now deal with the second aspect of the Respondent's contention, to the effect that the claims do not amount to a legal dispute as they involve purely contractual and commercial rights. It is here that a series of questions arise regarding the nature of the rights allegedly violated. For the Respondent, these rights are purely contractual, based on domestic law, subject to domestic jurisdiction, and not protected by the BIT; accordingly, the measures taken by the Respondent would be directed exclusively at contractual rights. By contrast, the Claimant views them as investments, protected as such by the BIT.

64. Whether the rights invoked do in fact exist, whether they are protected by international law, and whether they have effectively been violated are issues the determination of which must await the examination of the case on its merits. What matters at present is whether the claims, as formulated, fit into the categories of claims over which the ICSID has jurisdiction under the terms of the BIT and the Washington Convention. On the one hand, the Claimant contends that the measures taken by Argentina affected the direct or indirect ownership of shares and legal and contractual rights, that they afforded it a claim under the BIT and that the Claimant's rights qualify as "investments" under the broad provisions of the BIT. Hence, if there are any contractual claims in this specific case, they are also protected by the BIT, and in that sense the measures taken may amount to an expropriation of the Claimant's rights protected by that international instrument. In *Azurix* v. *Argentina* (above, § 58), the Tribunal held that a US company's indirect investment in a water concession in Argentina held through a local subsidiary was an "investment" in the sense of the BIT and that it had precisely been the intention of the Contracting Parties to cover that type of interests in order to protect the real party concerned. Accordingly, the Tribunal in *Azurix* concluded that the concession contract was an "investment" for the purpose of the BIT, given the wide meaning attributed to that term by the Treaty which includes "any right conferred by law or contract" (§§ 64-66). In other words, the Claimant's rights cannot be downgraded to mere contractual rights, transforming the controversy into a contractual dispute removed from ICSID jurisdiction.

65. It is the Tribunal's view that it will not be enough to assert that a dispute is of a contractual nature to disqualify it as a legal dispute. It is well known that ICSID tribunals have been dealing over the years with contractual as well as non-contractual disputes. The question here is, rather, the extent of the jurisdiction of this Tribunal, which is based on a BIT and not on an arbitration clause in a contract. The Tribunal finds that, at first sight, it has jurisdiction over treaty claims and cannot entertain purely contractual claims which do not amount to claims for violations of the BIT.

66. A last point to be examined here is whether the above view concerning the second aspect of the Preliminary Objection dealt with here has to be corrected on account of the presence of an "umbrella clause" in Article II(2)(c) of the BIT.

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

68. This Tribunal wishes to state clearly at the outset the standards of interpretation of a BIT, which is an international treaty between two States whose purpose it is to protect the investments made by the nationals of each of the two States on the territory of the other, as this question has often been settled through different approaches. On the one hand, some contend that the treaty should be interpreted so as to favour State sovereignty; on the other, it has been argued that the interpretation should favour the investor's protection. An example of the first approach is the position adopted by the United States in the *Methanex* case. As stated by the UNCITRAL Tribunal in its First Partial Award on Jurisdiction dated 7 August 2002 (UNCITRAL Arbitration, www.state.gov/documents/organization/12613.pdf):

> "The USA contends that a doctrine of restrictive interpretation should be applied in investor-state disputes. In other words, wherever there is any ambiguity in clauses granting jurisdiction over disputes between states and private persons, such ambiguity is always to be resolved in favour of maintaining state sovereignty" (§ 103).

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

69. The position as presented by Methanex, and more generally by investors, has sometimes been accepted by arbitral tribunals, such as the ICSID Tribunal in the case of *SGS v. Philippines*, Decision on Objections to Jurisdiction of 29 January, 2004 (ICSID case No. ARB/02/6, http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf), where it stated:

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

Other Tribunals have rejected this approach, as a general approach. One may mention here the Tribunal in *Noble Ventures Inc. v. Romania* which declared that "it is not *permissible, as is* too often done regarding BITs, to interpret clauses exclusively in favour of investors" (Award of 12 October 2005, ICSID case No. ARB/01/11, http://www.investmentclaims.com/decisions/Noble-Ventures-Final-Award.pdf, § 52, underlined in the Award), although it used this kind of interpretation in a specific instance.

70. This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow. It is bearing this in mind that the Tribunal will deal with the controversial question of the so-called "umbrella clause", which is still not moot: as stated recently by Emmanuel Gaillard, "[t]his question has divided practitioners and legal commentators and remains unsettled in the international arbitral case law", (*New York Law Journal*, Thursday, 6 October 2005). The question is whether, through an "umbrella clause", sometimes also called an "observance-of-undertakings clause", in a BIT, contractual claims of an investor having a contract either with the State or with an autonomous entity are automatically and *ipso jure* "transformed" into treaty claims benefiting from the dispute settlement mechanism provided for in the BIT. There is an ongoing debate on that question, as divergent positions have been adopted by different ICSID tribunals. Umbrella clauses are not always drafted in the same manner, and some decisions insist on the variations in the drafting to explain different analyses. This Tribunal is not convinced that the clauses analysed so far really should receive different interpretations. The broadest clauses read like that contained in the relevant clause of Article II(2)(c) in the U.S-Argentina BIT, which provides that:

> "Each Party shall observe any obligation it may have entered into with regard to investments."

71. The first tribunal to be faced with the interpretation of such a clause on the availability of international arbitration based on a BIT for purely contractual claims was the Tribunal, presided by Judge Feliciano, in *SGS v. Pakistan*; in the Tribunal's own words, "[i]t appears that this is the first international arbitral tribunal that has had to examine the legal effect of a clause such as Article 11 of the BIT. We have not been directed to the award of any ICSID or other tribunal in this regard, and so it appears we have here a case of first impression." (*SGS. Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* Decision on Jurisdiction, 27 August, 2003, § 164). Indeed, the "umbrella clause" in the Swiss-Pakistan BIT was its Article 11, which stated:

> "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

The Tribunal did not consider, as is well known, that this clause "elevates" all contract claims stemming from a contract with the State to the level of claims for a breach of the Treaty, in other words that it transforms any contract claim into a treaty

claim. The arguments put forward by the Tribunal are, in the view of this Tribunal, more than conclusive. These arguments can be summarised in the following manner.

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

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

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

> "[T]he Claimant's view of Article 11 tends to make Articles 3 to 7 of the BIT substantially superfluous. There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party" (Decision, § 168.).

74. A last point to be made, however, which brings some nuances to its findings in the *SGS v. Pakistan* case, is that the Tribunal does not exclude the possibility that States decide to consider, in a BIT, that the slightest violation of a contract between a State and a foreign investor amounts to a violation of the Treaty, but then this has to be stated clearly and unambiguously:

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

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

75. As is also well known, this analysis was strongly criticised by another ICSID Tribunal, presided by Dr. El-Kosheri, in a similar case, *SGS v. Philippines*, in its 2004 Decision on Jurisdiction (above, § 69), in which it had to deal with an "umbrella clause" embodied in Article X(2) of the BIT:

> "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."

Here too, it seems useful to this Tribunal to summarise the main steps of the reasoning followed. First, the Tribunal in *SGS v. Philippines* indeed considered that this general provision transformed any contractual obligation of the State into a treaty obligation:

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

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

76. This Tribunal should like to stress, on the contrary, that the interpretation given in *SGS v. Philippines* does not only deprive one single provision of far-reaching consequences but renders the whole Treaty completely useless : indeed, if this interpretation were to be followed – the violation of *any legal obligation* of a State, and not only of any contractual obligation with respect to investment, is a violation of the BIT, whatever the source of the obligation and whatever the seriousness of the breach – it would be sufficient to include a so-called "umbrella clause" and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT. If any violation of any legal obligation of a State is

ipso facto a violation of the treaty, then that violation needs not amount to a violation of the high standards of the treaty of "fair and equitable treatment" or "full protection and security". Apart from this general and very important remark, the Tribunal also wishes to point to the fact that quite contradictory conclusions have been drawn by the Tribunal in *SGS v. Philippines*: among other things, the Tribunal stated that, although the umbrella clause transforms the contract claims into treaty claims, first "it does not convert the issue of the *extent* or *content* of such obligations into an issue of international law" (Decision, § 128, original emphasis), which means that the "contract claims/treaty claims" should be assessed according to the national law of the contract and not the treaty standards, and, second, that the umbrella clause does not "override specific and exclusive dispute settlement arrangements made in the investment contract itself" (Decision, § 134), which explains that the Tribunal has suspended its proceedings until the "contract claims/treaty claims would be decided by the national courts in accordance with the dispute settlement provisions of the contract", stating that " the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively"(Decision, § 155). In other words, the Tribunal asserts that a treaty claim should not be analysed according to treaty standards, which seems quite strange, and that it has jurisdiction over the contract claims/treaty claims, but at the same time that it does not really have such jurisdiction – until the contract claims are decided. This controversy has been going on ever since these two contradictory decisions.

77. Some have adopted the *SGS v. Philippines* position but not drawn the same consequences from it. Thus, in *Eureko B.V. v. Poland* (Partial Award of 19 August, 2005), the Tribunal, presided by Mr. Yves Fortier, accepted the idea that, as a result of the umbrella clause in the BIT -- Article 3(5) of the BIT provided that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investors of the other Contracting Party" --, the smallest obligation of a State with regard to investments was protected by the BIT and could give rise to an ICSID obligation. This decision was, however, accompanied by a strong dissent of the arbitrator Rajski, who emphasised the systemic consequences a broad interpretation of so-called "umbrella clauses" could entail:

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

In *Noble Ventures Inc. v. Romania* (above, § 69), the Tribunal, presided by Professor Böckstiegel, followed the same line of reasoning, stating quite generally that "[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law" (Award, § 53). The Tribunal, while it considered the umbrella clause as an exception to the "well established rule of general international law that in normal circumstances *per se* a breach of a contract by

the State does not give rise to direct international responsibility on the part of the State", certainly did not interpret that exception restrictively, as exceptions should be interpreted, although it mentioned the necessity theoretically to adopt such an interpretation when it stated : "as with any other exception to established general rules of law, the identification of a provision as an umbrella clause can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms" (Decision, § 55). In the words used by the Tribunal in *Noble Ventures Inc. v. Romania,* the breach of a contract being assimilated by the umbrella clause to a breach of the BIT, is thus "internationalized" (Decision, § 54). Again, the problem faced by such reasoning, according to this Tribunal, is that, by necessary implication, *all municipal law commitments* must necessarily be as well "*internationalised*", as the so-called umbrella clause does not differentiate among obligations; it refers to *any* obligation and not specifically to *contractual* obligations, the consequence being that the division between the national legal order and the international legal order is completely blurred. One of the arguments presented by the ICSID Tribunal in *Noble Ventures* was that the "elevation" theory was prompted by the object and purpose of the BIT, and that "[a]n interpretation to the contrary would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host State" (Decision, § 52). In this Tribunal's opinion, this is not a good reason, and it can explain why. Either the foreign investor has a commercial contract with an autonomous State entity or it has an investment agreement with the State, in which some "clauses exorbitantes du droit commun" are inserted. In both cases, it is more than likely that the foreign investor will have managed to insert a dispute settlement mechanism into the contract; usually, in a purely commercial contract, that mechanism will be commercial arbitration or the national courts, while in an investment agreement it will generally be an international arbitration mechanism such as that of ICSID. In other words, in the so-called State contracts, there is usually an "internationally secured legal remedy", while in the mere commercial contracts governed by national law, there is no reason why such a mechanism should be available, as stated by Judge Schwebel, when he said that "it is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach... but involves an obviously arbitrary or tortious element ..." (*International Arbitration : Three Salient Problems*, Cambridge, Cambridge University Press, 1987, p. 111).

78. Some have adopted the *SGS v. Pakistan* position, either by insisting on certain specificities of the case, or by presenting a general approach. In *Salini v. Jordan*, decided in 2004 (*Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hachemite Kingdom of Jordan,* Decision on Jurisdiction, 29 November 2004, ICSID case No. ARB/02/13, http://www.worldbank.org/icsid/cases/salini-decision.pdf), the Tribunal, presided by Judge Gilbert Guillaume, answered in the negative the question of the "elevation" of contract claims into treaty claims, insisting on the generality of the language used in the so-called umbrella clause in Article 2(4)[1], which stated that "[e]ach Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of

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

all undertakings assumed with regard to each specific investor". In *Joy Machinery Limited v. Arab Republic of Egypt*, (Award of 6 August 2004, ICSID case No. ARB/02/11, http://www.worldbank.org/icsid/cases/joy-mining-award.pdf), the Tribunal, presided by Professor Orrego Vicuña, noted that a discussion of the "umbrella clause" was not necessary for the outcome of the case but, in order to "make certain clarifications", took a firm position against the transformation of all contractual claims into treaty claims in the specific case:

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

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

> "whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law -- in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts" (*Compañia de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic,* Decision on Annulment of 3 July 2002, *ILM*, Vol. 41, 2002, p. 1135, § 96).

80. The view that it is essentially from the State as a sovereign that the foreign investors have to be protected through the availability of international arbitration is confirmed, in the Tribunal's opinion, by the language in the new 2004 US Model BIT, which clearly elevates only the contract claims stemming from an investment agreement *stricto sensu*, that, is an agreement in which the State appears as a

sovereign, and not all contracts signed with the State or one of its entities to the level of treaty claims, as results from its Article 24(1)(a).

81. In view of the necessity to distinguish the State as a merchant, especially when it acts through instrumentalities, from the State as a sovereign, the Tribunal considers that the "umbrella clause" in the Argentine-US BIT, which prescribes that "[e]ach Party shall observe any obligation it may have entered into with regard to investments", can be interpreted in the light of Article VII (1), which clearly includes among the investment disputes under the Treaty all disputes resulting from a violation of a commitment given by the State as a sovereign State, either through an agreement, an authorisation, or the BIT:

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

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

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

> "Problems could ... arise if investors were to start using umbrella clauses for trivial disputes. It cannot be the function of an umbrella clause to turn every minor disagreement on a detail of a contract performance into an issue for which international arbitration is available [*but, in the view of this Tribunal, this is possible with a broad interpretation of the*

> *umbrella clause*]. For example, a small delay in a payment due to the investor and interest accruing from the delay would hardly justify arbitration under a BIT [*but, in the view of this Tribunal, nothing could prevent such an arbitration, if a broad interpretation of the umbrella clause is accepted*]. Equally a lease dispute with the host State that is peripherical to the investment will not be an appropriate basis for the institution of arbitral proceedings [*but, in the view of this Tribunal, the institution of such proceedings is possible with a broad interpretation of the umbrella clause*]. It is to be hoped that investors will invoke the umbrella clauses with appropriate restraint"("Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road", *Journal of World Investment & Trade*, Vol. 5, 2004, p. 255).

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

83. How does this apply to the present case? Both parties have discussed the so-called umbrella clause included in Article II(2)(c) of the U.S.-Argentina BIT which, as mentioned earlier, provides that:

> "Each Party shall observe any obligation it may have entered into with regard to investments."

The positions of the parties are contradictory as far as the interpretation of the so-called umbrella clause is concerned. On the one hand:

> "the Argentine Republic states that the best interpretation of contractual claims under the BIT with umbrella clauses is the interpretation made by the Tribunal in *SGS v. Pakistan*, which upheld several reasons according to which contractual claims cannot be submitted to international arbitration" (Memorial on Jurisdiction, § 71).

On the other hand, the Claimant considers that:

> "[t]his provision puts contracts between the host State and the investor as well as other commitments undertaken by the host State under the protection of the U.S.-Argentina BIT. It adds to the U.S.-Argentina BIT's substantive standards the observance of contracts or other obligations the host State has entered into with regard to specific investments. It follows that a breach of such a contract is in violation of Article II(2)(c) of the U.S.-Argentina BIT" (Counter-Memorial on Jurisdiction, § 83).

84. In the Tribunal's view, this umbrella clause does not extend its jurisdiction over any contract claims that the Claimants might present as stemming solely from

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

85. In other words, the Tribunal, endorsing the interpretation first given to the so-called "umbrella clause" in the Decision *SGS v. Pakistan*, confirms what it mentioned above (§ 65), namely, that it has jurisdiction over treaty claims and cannot entertain purely contractual claims, which do not amount to a violation of the standards of protection of the BIT. It adds that, in view of Article VII(1) of the US-Argentina BIT, a violation of an investment agreement entered into by the State as a sovereign and a national or company of the United States is deemed to be also a violation of the Treaty and can thus give rise to a treaty claim.

86. The answer to the question raised above (§ 66), that is, whether the existence of a so-called umbrella clause changes the Tribunals intermediary conclusion to the effect that it has no jurisdiction over purely contractual claims, and that it can only entertain treaty claims, is clearly in the negative. Indeed, the Tribunal has jurisdiction only over the treaty claims, the latter including, pursuant to the wording of Article VII(1), the claims based on the violation of an investment agreement entered into by the foreign investor with the State as a sovereign.

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

88. For the above reasons, the Tribunal finds that the dispute submitted to it is of a "legal" character under Article 25 (1) of the ICSID Convention. Accordingly, it rejects the Respondent's Preliminary Objection based on the absence of a legal claim.

3. Second Issue: Does the Dispute Arise Directly Out of an Investment?

89. The Respondent argues that, contrary to Article 25 (1) of the ICSID Convention, which requires a dispute to arise "directly out of an investment", this requirement being a jurisdictional one, the present claims do not fulfil that condition.

To bolster its objection, Argentina invokes the *travaux préparatoires* of Article 25 (1), which initially was intended to refer to "disputes arising *out of or in relation to* an investment" (emphasis added), a very wide formula that was subsequently reduced to the present language. The current text was approved with the evident objective of limiting the types of disputes falling under ICSID jurisdiction (Memorial on Jurisdiction, §§ 13-16).

90. Even assuming that the Claimant has provided evidence of its investment - the Respondent continues - none of the issues submitted "arises directly out of the investment" as required by Article 25 (1) of the ICSID Convention. More precisely, the alleged infringements of the BIT must be "directly", *i.e.* "specifically" aimed at the investment. Universal measures directed at everybody cannot be considered by ICSID tribunals, for if they could, these tribunals would be judging public policy rather than legal conflicts. Even at the jurisdictional stage, the Claimant must prove that the cause of the alleged prejudice is legal and not only factual in character.

91. It is true that general measures can, exceptionally, justify ICSID jurisdiction, but only when "those measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts", as the Arbitral Tribunal said in its Decision on Objections to Jurisdiction of 17 July 2003 in *CMS Gas Transmission Co.* v. *Argentina* (ICSID case No. ARB/01/8, *ILM*, Vol. 42, 2003, p. 788). "What is brought under the jurisdiction of the Centre", the Tribunal continues, "is not the general measures in themselves but the extent to which they may violate those specific commitments" (§ 27). According to Argentina, a "clear and reasonable interpretative line" on this would be that the Claimant must show specific commitments made to it, negotiated with it and "promised particularly, specifically and exclusively" to it. Such is not the case when the rights involved were contractual ones, held by a claimant as indirect foreign minority shareholder in local companies (Transcription of Hearings, 8 April 2005, pp. 18, 25). The Claimant must also show, at this early stage of the proceedings, that those specific commitments, specifically undertaken by Argentina, were violated by the latter's measures: devaluation of the peso, establishment of a new exchange parity, temporary conversion of obligations and tariffs into pesos, imposition of a new fiscal policy (Memorial on Jurisdiction, §§17-25).

92. The Respondent then turns to *Methanex* v. *United States*, (First Partial Award of 7 August 2002, above, § 68), where a NAFTA rule similar to that of Article 25 (1) of the 1965 Washington Convention was discussed, namely Article 1101 of NAFTA relating to protection against "measures adopted or maintained by a Party relating to (a) investors of another Party... (b) investments of investors of another Party, in the territory of a Party". As none of the measures taken by the defendant, the US, was expressly aimed at Methanex, the question was whether those measures were "related to" that company and, in particular, whether it was sufficient that they were susceptible of affecting the Claimant. On the last point, the Tribunal in its Partial Award, reached the conclusion that there had to be a significant threshold to NAFTA arbitration and that the criterion of any economic impact on the investor did not provide such a threshold. In other words, and to quote Argentina's Memorial on Jurisdiction (§ 36), "[s]imple affectation does not mean that there has been a legal affectation". The Claimant should have proved a direct, proximate and immediate

connexion between the measure and [the Claimant's] alleged investment (*ibid.*, §§ 26-38; see also Transcription of Hearings, 8 April 2005, p. 10).

93. The Claimant replies, firstly, that it did indeed make investments under the BIT consisting of shareholding interests in the Argentine Companies, capital contributions, legal and contractual rights under the Energy Regulatory Framework, concessions, private oil, gas and energy supply agreements, and other legal rights. These qualify as investments under the BIT, and the present claims are the consequence of measures taken by Argentina against those investments. The present dispute is an investment dispute within the meaning of Article 25 of the ICSID Convention (Counter-Memorial on Jurisdiction, § 35).

94. According to the Claimant, Argentina misinterprets the *Methanex* decision (above, § 68). when it contends that that decision stands for the proposition that a "general measure must be directed against specific commitments undertaken before the investor" and that the Claimant must establish "a direct, proximate and immediate connection between the measure and its alleged investment" (Counter-Memorial on Jurisdiction, § 51). The Claimant points out: (i) that the *Methanex* decision does not pertain to matters covered by the BIT; and (ii) that it actually supports the Claimant's views.

95. The Claimant might have found itself in a situation similar to that of Methanex, had it been a supplier, like the latter. But in the present case, the Respondent's measures have been aimed directly at the electricity and oil industries, including the Claimant's investment in the Argentine Companies, unlike what had happened in *Methanex* where the relevant California Executive Order did not even mention "methanol". By contrast, in the instant case, the Government issued orders which: (i) froze electricity prices; (ii) altered the spot-price setting mechanism; (iii) abolished both the concept of spot price *per se* and the uniformity of the spot price for all generators in the spot market; (iv) substantially reduced capacity payments; (v) pesified capacity payments at artificial and depressed rates of exchange; (vi) imposed caps on spot prices; (vii) imposed a ranking on the payment of energy sales; (viii) imposed withholdings on oil exports to compensate the banks for the impact suffered as a result of the asymmetrical pesification implemented in January 2002; and (ix) imposed restrictions on hydrocarbon exports.

96. Furthermore, in the *Methanex* case, the United States objected to the Tribunal's jurisdiction under Article 1001 of NAFTA, alleging that the measures taken by the State of California were not "related to" Methanex's investment. The Tribunal in that case saw a "relation" between a measure and an investment where there was a "legally significant connexion" between the former and the latter. The (Canadian) Claimant tried to prove such a connexion by alleging collusion between lobbyists of the (American) methanol industry and the Governor of California. The Tribunal concluded that the evidence tendered by the Claimant was insufficient; it did not, however, refuse to take jurisdiction but asked the Claimant to provide additional evidence. In the present instance, according to the Claimant, the relation between the investments and the measures complained of is a straightforward one: the latter were measures specifically aimed at the oil and gas industry; and, contrary to *Methanex*, the evidence in the case points to a clear "legally significant connexion" between Argentina's measures, the BIT and the Claimant's investments in the Argentine Companies.

97. In this Tribunal's view, general measures of economic policy taken by a host State are not within the jurisdiction of ICSID tribunals. In that sense, and even conceding that the legal context of the instant case differs from that of *Methanex*, it cannot be denied that such general measures do often not result in a dispute "arising directly out of an investment" in the sense of Article 25 (1) of the ICSID Convention. It may well be, however, that in the context of the commitments assumed by the host State, "general" measures have a "specific" effect in that they violate specific commitments. The expression "a dispute arising directly out of an investment" (Article 25 (1) of the ICSID Convention) cannot, therefore, be interpreted as meaning that the dispute can only result from a measure "directed to" the investment. The adverb "directly" is not related to the link between the measure and the investment but to that between the dispute and the investment.

98. In *CMS* (above, § 91), invoked by both parties, the Tribunal before which the case had been brought found that it was competent

> "to examine whether specific measures affecting the Claimant's investment or general measures of economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts" (§33).

99. In other words, the link required between the measure and the investment cannot be gauged simply by asserting that the measures taken are "general" or that the State's commitments are not "specific". Such measures, though "general" in appearance, may have highly specific effects, *e.g.*, the destruction of an investment through expropriation, as in *GAMI* v. *Mexico* (UNCITRAL arbitration, *ILM*, Vol. 44, 2005, p. 545).

100. Thus the Tribunal finds that the present dispute has arisen directly out of an investment in the sense of Article 25(1) of the ICSID Convention and, accordingly, rejects Argentina's Preliminary Objection based on the fact that the dispute did not arise directly out of an investment.

4. Third Issue: Does the Present Claim Have to Be Limited with Respect to Tax Measures?

101. Article XII of the BIT provides:

> "1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.
>
> 2. Nevertheless, the provisions of this Treaty, and in particular Articles 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),

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

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

103. Next Argentina notes that the Claimant has conceded that its claim, specifically inasmuch as it concerns rights to export hydrocarbons, relates to tax matters and, accordingly, is outside the limits set by Article XII of the BIT. On the one hand, the duty to grant fairness and equity alleged by the Claimant to have been violated is limited to "striving" and, accordingly, is not justiciable. On the other hand, the only claims that may be considered by the Tribunal, under paragraph 2 of Article XII, are those based on expropriation under Article IV of the BIT, on transfers pursuant to Article V, or on the observance and enforcement of terms of an investment agreement or authorisation as referred to in Article VII (1) (a) or (b). Everything else is beyond the competence of the Tribunal (Memorial on Jurisdiction, §§ 94-102).

104. In its Counter-Memorial on Jurisdiction (§§ 117-135) and its oral argument (Transcription of Hearings, 8 April 2005, pp. 103-107), the Claimant lengthily rebuts these arguments. It begins by noting that the Respondent fails to appreciate that the claim regarding export withholdings in fact concerns the expropriation of investments by Argentina, the compliance of that State with investment agreements and authorisations (such as the concessions) and, generally, the unfair and inequitable treatment of the Claimant's investment (Counter-Memorial on Jurisdiction, § 119).

105. The Claimant then points out that the present objection is one of inadmissibility and, as such, does not form part of the jurisdictional enquiry at this stage of the case. Moreover, Argentina's decision to impose export withholdings, by itself or in conjunction with other measures, may be "tantamount to expropriation" (Article IV (1) of the BIT). In addition, the claims made are not limited to a tax-related dispute (*ibid.*, §§ 120-121).

106. It is not true, according to the Claimant, that Article XII (1) eliminates the standard of "fair and equitable treatment". The commitment to strive is not the meaningless reference Argentina sees in it. This assertion is buttressed by a reference to *Occidental Exploration and Production Co. v. Ecuador*, UNCITRAL arbitration, Final Award of 1 July 2004 (LCIA case No. UN 3467, http://www.investmentclaims.com/decisions/Occidental-Ecuador-FinalAward-1Jul2004.pdf), where the Tribunal said, with reference to Article X (1) of the US-

Ecuador BIT, similar to Article XII (1) of the Argentina-US BIT relevant here, that that provision

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

The Claimant thus contends that the obligation enshrined in Article XII is enforceable, as is the duty to negotiate in good faith, and that the Respondent failed to discharge it by violating various commitments such as the express undertaking to abstain from levying export withholdings and by forcing CAPSA and CAPEX to sell their crude oil to local refiners at rates below the market price through threats such as that of further increases of the export withholdings, thus denying fair and equitable treatment to the Claimant's investments. In addition, the treatment of the Claimant, of CAPSA and of CAPEX was discriminatory in that the withholdings were earmarked for compensating the losses suffered by the banking sector on account of other Government measures and in that these taxes were targeted to the specific nature of the business pursued by the Claimant, despite the exclusion by the Hydrocarbon Regulatory Framework and the concessions of any "existing or future fees, duties and withholdings" and despite the prohibition of taxes other than royalties on the production of liquid hydrocarbons. What is more, the "soft" standard of Article XII (1) does not deprive the Claimant of its right to bring a claim. This flows from Article XII (2), taken together with Article IV, since what is at stake is an investment pursuant to that provision and since, contrary to Article II to which Article IV refers, that investment has not been treated fairly and equitably, turning the interference into an unlawful expropriation, which brings this aspect of the case - the export withholdings - into the purview of Article XII (2). In the words of the Tribunal in *Occidental Exploration and Production Co.*, the raising of an expropriation claim in relation to a tax matter "brings in the standards of treatment of Article II, including fair and equitable treatment" (see also *Enron Corp.* v. *Argentina,* Decision on Jurisdiction of 14 January 2004, ICSID case No. ARB/01/3, www.asil.org/ilib/Enron.pdf, at § 67) (Counter-Memorial on Jurisdiction, §§ 120-126).

107. According to the Claimant, the imposition of export withholdings was contrary to commitments undertaken by Argentina under the BIT, and this amounts to expropriation. Whenever the expropriation of specific legal rights is alleged, as in the present case, this should be sufficient for an ICSID tribunal to assert its competence. What matters is whether the Claimant has shown, *prima facie*, the existence of an expropriation claim. The merits of that claim are not an issue to be decided at this preliminary stage of the proceedings. Accordingly, the Respondent's thesis that this Tribunal's competence must, under Article XII of the BIT, be limited as regards the tax aspects of the claim should fail, for the measures complained of are alleged, under Article XII (2) (a), to amount to expropriations pursuant to Article IV and, consequently, to fall within the competence of this Tribunal (*ibid.*, §§ 127-129).

108. The concessions in issue qualify as investment agreements or authorizations under Article XII (2) (c) of the BIT. In *Occidental Exploration and Production Co.* (above, § 106), a tax matter associated with the performance of an investment agreement had arisen. The Tribunal pointed out that,

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

Accordingly, even though the claimant in the above case had related the dispute to its contract with Ecuador, the Tribunal considered it to be an investment agreement for the purposes of Article X of the BIT between the United States and Ecuador, which is the same as Article XII of the BIT involved here. And, in *Lanco International, Inc.* v. *Argentina*, Preliminary Decision on Jurisdiction of 8 December 1998 (ICSID case No. ARB/97/6, *ILM*, Vol. 40, 2001, p. 457, § 16), the Tribunal held that "insofar as Lanco is a party to [the concession agreement, the latter] can be characterised as an investment agreement". This conclusion was based on the fact that Lanco was not only a shareholder of the concession holder but also a party to the concession agreement. In the present case, each of the concessions can be characterised as an "investment agreement" under Article XII (2). While the BIT relevant here fails to define the notion of "investment agreement", there has been, since 1994, in BITs and free trade agreements concluded by the US, the following definition of that notion:

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

The Claimant finds that the concessions are on all fours with the above definition. They constitute agreements between CAPSA and CAPEX, and the host Government; they grant rights to natural resources belonging to the host State; and they set investment obligations for CAPSA and CAPEX which are monitored by the Government. Hence they qualify as "investment agreements" under Article XII (2) (c) of the BIT.

109. Confronted with these opposing views, this Tribunal feels bound to point out once again that what matters, at the present, jurisdictional stage of the proceedings is whether the claims submitted, if they were to prove well-founded, would fit into the jurisdictional parameters of the relevant treaties. If it were otherwise, one would have to await a decision on the merits prior to solving the issues of jurisdiction. It may be recalled, following the Tribunal in *Enron I* (above, § 106), that the Claimant's allegations must prove *prima facie* sufficient to justify the exercise of the right of action; for if everything were to depend on characterisations made by the Claimant alone, the limits to jurisdiction would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41 (1) of the ICSID Convention.

110. A first issue debated by the parties in this connexion is whether Article XII (1) of the BIT on tax matters ("each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party") is law, "softer law" or no law at all. The last-named hypothesis will certainly have to be ruled out, despite the use of the conditional "should": if the Parties to the BIT had intended to instill no meaning at all into Article XII (1), they should and would have said so.

Given their silence, the provision must be considered to carry some legal meaning on the basis of the rule *ut magis valeat quam pereat* ("effet utile"). But even the Claimant seems to concede that the legal force of the standard embodied in Article XII is perhaps not equal to that attributed to the similarly-worded rule of Article II (2) (a) of the BIT. How and in what exactly it is not, the Claimant does not say, and possibly cannot say. And even the embarrassment of the UNCITRAL Tribunal in *Occidental Exploration and Production Co.*, when confronted with a similar situation, is evident in the passage cited earlier (§ 106): on the one hand, it is asserted that the obligation imposed on the host State is "not different from the obligation of fair and equitable treatment embodied in Article II"; on the other hand, "admittedly the language of Article X [here: Article XII] is less mandatory". Nonetheless, the Claimant considers that the "fair and equitable treatment" clause in Article XII (1) is enforceable, though precisely on what basis one does not know. The issue may remain open, however, since in the view of the Tribunal the problem of the content of the applicable law is to be dealt with at the merits phase.

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

112. The Claimant contends that the claim raised by it is one of expropriation under Article IV and that, as a consequence, the measures taken by the Respondent, including the tax measures (export withholdings), are within ICSID jurisdiction, Article XII (2) notwithstanding. The Tribunal is of the view that, *prima facie*, the imposition of export withholdings, a tax measure, may amount to the expropriation of specific legal and contractual rights. Thus, the claims, inasmuch as they relate to tax matters, *i.e.* the export withholdings practiced by the Respondent, are within the "exception to the exception" provided for in Article XII (2) (a) and fall into this Tribunal's competence. This does not mean, however, that the well-foundedness of this aspect of the claims has been established; this is a matter to be determined in the proceedings on the merits.

113. The Claimant further contends that its concessions form part of the present dispute and qualify as an "investment agreement" under Article XII (2) (c) and, thereby, under Article VII (1) (a) of the BIT. The justification of this thesis is found in *Occidental Exploration and Production Co.*, the relevant passage of which is quoted above (§ 108), a case about a tax matter associated with the performance of hydrocarbon concessions and contracts which were characterised as an investment agreement. The UNCITRAL Tribunal held that there seemed indeed to be such an agreement in the framework of which the tax issue had arisen.

114. According to this Tribunal, the Claimant has made out a *prima facie* case that there is indeed an investment agreement as that notion may be generally understood -- the notion in question is not defined by the relevant BIT (see above, § 108). Accordingly, to establish the Tribunal's jurisdiction, the Claimant can also rely on the "exception to the exception" stated in Article XII (2) (c).

115. The Tribunal thus concludes that it has jurisdiction over the tax matter -- the export withholdings -- associated with the dispute. It is part and parcel of that dispute,

which relates to expropriation under Article IV of the BIT and to the observance and enforcement of an investment agreement under Article VII (1) (a). This being so, the tax matter falls under two out of the three exceptions made in Article XII (2), which removes tax issues from the purview of ICSID jurisdiction.

116. Therefore, Argentina's objection related to tax measures cannot be accepted in its generality. The Tribunal concludes that it has jurisdiction over tax matters, but only insofar as the tax measures complained of are linked with: (a) expropriation, pursuant to Article IV; (b) transfers, pursuant to Article V; or (c) the observance and enforcement of terms of an investment agreement or authorisation as referred to in Article VII(1)(a) or (b). In other words, the only claims that the Tribunal can consider at the merits stage are the tax claims based on the existence of an expropriation and on the violation of an investment agreement or authorisation. Everything else is beyond the competence of the Tribunal.

5. Fourth Issue: Does the Claimant Have a Legitimate Interest Authorising It to File a Claim with the Centre? The Question of *Jus Standi*

(a) Does the Claimant Have Jus Standi Although it no Longer Owns the Shares Constituting its Investment?

117. The Respondent alleges that El Paso has no *jus standi* because it no longer is a shareholder. The Claimant, says the Respondent, holds the latter responsible for having had to sell, in 2003, its investments in the Argentine Companies and, therefore, requests the reparation of the damage allegedly suffered as a result of Argentina's measures. These allegations of damage are not, however, within the Centre's jurisdiction.

118. The Respondent asks for "true evidence" that the Claimant was forced by it to sell its investments in the Argentine Companies, instead of mere "fallacious arguments" based on economic policy decisions which are sovereign acts of State and remain outside the ICSID's jurisdiction. In this connexion, Argentina draws attention to the link existing between the date of submission of the Request for Arbitration by the Claimant -- 6 June 2003 -- and that of the sale of all of its shares in CAPSA, CAPEX and Servicios, equally in June 2003. In October 2003, the Claimant also sold its share in Costanera. The Respondent criticises these operations, which occurred while the Claimant was already submitting a claim to the ICSID (Memorial on Jurisdiction, §§ 82-85).

119. If, as the Claimant says, it did not obtain optimal sales prices, this is exclusively due to the moment of sale freely chosen by it. There is no responsibility whatever on the part of Argentina, especially if the Claimant -- as is the case here -- presents no evidence of the allegedly forced nature of the sale. In addition, the argument of a forced sale must fail if the majority of the other foreign investors in the same area have kept their investments and have decided to continue them following proposals of the host State to re-negotiate and to increase tariffs.

120. If someone is willing to pay for an asset, the latter must have some economic value. The assertion that there are no incentives to continue with a company, given its indebtedness and the impossibility of paying dividends, is a good argument to sell out at a low price and to avoid management problems. But it is no argument for placing

any responsibility on Argentina's shoulders; the Claimant acted in full capacity and freedom.

121. For Argentina it is obvious, therefore, that the existence of a dispute was "invented" by the Claimant to obtain BIT protection and to attempt to secure a favourable ruling from an ICSID tribunal. Consequently, the Respondent: (i) asks the Tribunal to instruct the Claimant to submit to it the balance sheets and accounts for itself and the Argentine Companies, as of the date of the sale, as well as the balance sheets and accounts of the companies which bought the Claimant's investments; and (ii) contends that, as it sold its investment in Argentina in 2003, the Claimant has no longer any interest protected under the BIT, which means that the claim cannot be maintained (*ibid.*, §§ 86-93).

122. Another argument put forward by the Government is that, inasmuch as the investment consisted of shares, the Tribunal has no competence as Argentina did not confiscate the Claimant's shareholdings in the Argentine Companies, nor their deferred ownership rights to obtain part of these companies' assets in the event of their dissolution and after the payment of their debts. Moreover, the shares have been sold, and the Claimant can no longer be considered an investor. Indeed, says the Respondent.

> "El Paso should have been a legitimate party not only at the point in time when the claim was made, but during the whole procedure. A continuous state of nationality is required by international law, and the investor has to continue being an investor during the whole proceedings"

(Transcription of Hearings, 8 April 2005, pp. 36-37).

123. The Claimant begins its argument by pointing out that the Respondent's intention to discuss its responsibility in the sale of the Claimant's investment, the timing of the sale and the amount of damages claimed goes beyond the limits of jurisdictional issues. Argentina's liability and the quantum of damages are issues which belong to the merits and which are being raised, according to the Claimant, to distract the Tribunal from jurisdictional issues and to delay a decision on jurisdiction. Thus the Claimant submits that Argentina's requests for submission of balance sheets and accounting books should be dismissed.

124. The Respondent has contended that the Claimant cannot pursue its BIT claim because it has sold its investment in Argentina. According to the Claimant, the Respondent cites no case-law, nor does it present an interpretation of the BIT or the ICSID Convention which buttresses its objection. The Respondent also ignores the principle according to which jurisdiction is assessed in the light of the situation prevailing at the date of institution of the arbitral proceedings.

125. According to the Claimant, the two treaties nowhere require a claimant to continue to own an investment after the initiation of proceedings. Nowhere is there any question of "current", "ongoing" or "continuous" ownership of the investment. On the contrary, the BIT contemplates the absence of ownership of the investment at the moment at which the proceedings are brought; all it requires is that the protected investments were directly or indirectly owned or controlled by a protected person or entity when the claims arose.

126. Under Article 25 of the ICSID Convention there is, according to the Claimant, a temporal limitation on the ability of the nationals of one Contracting Party to present a claim: they must have the nationality of another Contracting State and may not acquire that of the respondent State. But no continuous ownership is required, as the ICSID Convention was meant, among other things, to protect against nationalisations and expropriations, *i.e.* in cases where the national no longer owns the investment but seeks compensation for having been deprived of it by the host State (Counter-Memorial, on Jurisdiction §§ 94-99).

127. The principle discussed in the preceding paragraphs has been applied by ICSID tribunals. This was the case in *CSOB* v. *Slovakia*, Decision on Jurisdiction of 24 May 1999 (ICSID case No. ARB/97/4, *ICSID Review*, Vol. 14, 1999, p. 251), where it was stated that (§ 31):

> "It is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the tribunal has jurisdiction to hear their case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case."

128. A second case in point is *Tradex Hellas* v. *Albania*, Decision on Jurisdiction of 24 December 1996 (ICSID case No. ARB/94/2, *ICSID Review*, Vol. 14, 1999, p. 161), where a Greek company involved in a joint venture in that country claimed that measures taken by the State amounted to an expropriation. In that case, the investment was liquidated in 1993, but the request for arbitration was made only in 1994, which led Albania to argue that the claimant was not a foreign investor at the time Albania consented to jurisdiction. The Tribunal found, however, that Albania's consent, though given in 1993, retroacted to investments made in 1990 and rejected Albania's objection. In so doing, it pointed out that Albania's consent "does (...) not require that the investment still exists at the time the law comes into force or the dispute arises" (p. 182).

129. A third relevant precedent, which arose under Chapter 11 of NAFTA, is *Mondev International, Ltd.* v. *United States,* Decision on Jurisdiction of 11 October 2002 (ICSID case No. ARB(AF)/99/2, www.state.gov/socuments/organization /14442.pdf). In that case, the investor lost ownership of its investment in 1991 as a result of the foreclosure of a mortgage due to delays in a real estate development project imputable to the City of Boston. Here the Tribunal found that the NAFTA dispute settlement procedures

> "will frequently have to be applied after the investment in question has failed. In most cases, the dispute will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its sale or other disposition" (§ 91).

130. El Paso sold its interests in CAPSA and CAPEX on 23 June 2003, two and one half weeks after bringing its claim, and its interest in Costanera on 3 October of the same year. Before the sale, the price of which amounted to less than 10% of the original investment, El Paso had suffered the negative effects of the Respondent's conduct (Counter-Memorial on Jurisdiction, §§ 101, 114).

131. The proceedings instituted by the Claimant were registered on 12 June 2003, while the sales mentioned in the preceding paragraph occurred on 23 June and 3 October 2003. They do not, therefore, affect the Claimant's standing and ICSID jurisdiction. What is more, the Claimant asserts that the sale was forced in the sense that the damage is alleged to be due to the measures taken by the Respondent. It was those measures which triggered the present dispute and the sale by El Paso of its investments in the Argentine Companies. That sale was, according to the Claimant, made "in order to mitigate the already devastating effects that the measures of the Government had on Claimant's investments in Argentina" (Counter-Memorial on Jurisdiction, § 113). Not only was there no obligation on the part of the Claimant, according to it, to retain its investment after the registration of the claim; it would also have been unreasonable to require it to do so as that would have resulted in increasing the damage (*ibid.*, §§ 105, 112-115).

132. To conclude, the Claimant asks the Tribunal to reject the Respondent's requests for the submission of the Claimant's and the Argentine Companies' financial records and for the communication of more information on the date of the sale (see above, § 121). It equally requests the Tribunal to dismiss Argentina's objection to ICSID jurisdiction based on the fact that the Claimant no longer owns its investment.

133. At the hearing of 8 April 2005, the Tribunal requested the Claimant to provide documents regarding the sale of its shares. These documents were duly provided. Another request was made by the Respondent on 6 May 2005 for the production of additional documents regarding the Claimant's investment and the sale thereof. This request was "strongly objected to" by the Claimant, while the Respondent explained why the request was relevant to the jurisdictional aspect of the proceedings. Argentina's request was, however, rejected by the Tribunal in its Procedural Order No. 1 in which it held that:

> "1. The information in possession of the Tribunal is sufficient to decide the jurisdictional issues raised by the Respondent.
>
> 2. If the proceedings reach the merits of the dispute, it will be open to the Respondent to reiterate the above request for the production of documents."

134. In its argument, the Respondent has contested the Claimant's assertion that the sale of the investments was "forced" by its conduct. According to this Tribunal, and on the strength of what it considers to be -- or not to be -- questions of jurisdiction, the points raised by the Respondent properly belong to the merits of the case.

135. Thus, the issue to be discussed here is the alleged lack of ICSID jurisdiction because the investments in question no longer are the Claimant's or, to put it differently, because the latter must retain its investor status during the examination of its international claims. An examination of the relevant texts – the BIT and the ICSID Convention – and of the case-law cited by the Claimant reveal, however, that there is

no such rule (above, §§ 125-129). In other words, there is no rule of continuous ownership of the investment. The reason for there not being such a rule in the ICSID/BIT context is that the issues addressed by those instruments are precisely those of confiscation, expropriation and nationalisation of foreign investments. Once the taking has occurred, there is nothing left except the possibility of using the ICSID/BIT mechanism. That purpose would be defeated if continuous ownership were required. Thus the claim continues to exist, *i.e.* the right to demand compensation for the injury suffered at the hands of the State remains -- unless, of course, it can be shown that it was sold with the investment.

136. In the instant case, the claim was submitted on 6 June 2003 and registered by the Secretary-General of ICSID on 12 June 2003, both dates at which El Paso still owned the investments. While the proximity of those dates especially for the first sale may appear disturbing -- preparation of the latter must have been well under way by 6 or 12 June --, it does in no way warrant the conclusion that *prima facie* there is no claim falling under ICSID jurisdiction.

(b) Does the Claimant Have Jus Standi Although it was Only an Indirect Minority Shareholder?

137. The Respondent alleges that the Claimant has no *jus standi* as it only has an indirect minority shareholding. The Claimant asks the Tribunal to disregard the arguments presented by the Respondent concerning the *jus standi* of foreign shareholders' claims, especially those relating to minority shareholdings, because they were presented for the first time at the Hearings, *i.e.* too late under Rule 41(1) of the Arbitration Rules according to which preliminary objections must be filed, at the latest, on the date fixed for the filing of the Counter-Memorial (Transcription of Hearings, 8 April 2005, pp. 56-57). The Respondent replied that no new issues were introduced and that "the shareholding matter, indirect shareholding in the case of Enron is mentioned in Paragraph (40) and in footnote (45) at page 13 as well" and that there are references also in the Claimant's Memorial (*ibid.*, pp. 150-151).

138. No references of the kind mentioned by the Respondent at the Hearings nor, more generally, references to minority shareholders' claims may be found in the Respondent's Memorial on Jurisdiction, while the references in Claimant's Memorial, if any, are clearly irrelevant. The Respondent's argument concerning the *jus standi* of minority shareholders is therefore inadmissible under Rule 41(1) of the Arbitration Rules. But even if it were admissible, it would not be of much help to the Respondent for reasons similar to those mentioned by the Decision on Jurisdiction in the *LG&E* case (see above, § 58), according to which (Decision, § 50) the shares owned by the claimants in local companies "are the investment within the meaning of Article 1 (1) (a)(ii) of the Bilateral Treaty" and it is irrelevant whether the shares are majority or minority shares".

139. The Tribunal therefore decides to reject the objection to its competence related to the fourth issue.

IV. DECISION

140. For the reasons stated above, the Tribunal decides that the present dispute is within the jurisdiction of the ICSID and within the competence of the Tribunal. The Order necessary for the pursuit of the procedure under Arbitration Rule 41 (4) has, accordingly, been made.

[*Signed*]
Lucius Caflisch
President of Tribunal

[*Signed*]
Brigitte Stern
Arbitrator

[*Signed*]
Piero Bernardini
Arbitrator