

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

Case No. ARB/02/1

LG&E ENERGY CORP.,
LG&E CAPITAL CORP., AND
LG&E INTERNATIONAL, INC.
(Claimants)

v.

ARGENTINE REPUBLIC
(Respondent)

Decision of the Arbitral Tribunal on
Objections to Jurisdiction

Members of the Tribunal:

Tatiana B. de Maekelt, President
Francisco Rezek, Arbitrator
Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal:

Claudia Frutos-Peterson

Washington, D.C., April 30, 2004

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I. PROCEDURAL BACKGROUND

1. On December 28, 2001, the International Centre for Settlement of Investment Disputes (“ICSID” or “Centre”) received from LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc., juridical persons constituted under the laws of the Commonwealth of Kentucky, United States of America (“Claimants” or “LG&E”), a Request for Arbitration dated December 21, 2001, against the Argentine Republic (“Respondent”).

2. In the Request Claimants assert that they hold investments in gas-distribution licensees in Argentina and that Respondent unilaterally decided to freeze certain automatic semi-annual adjustments, based on changes in the U.S. Producer Price Index (“PPI”), to the tariffs for distribution of natural gas in Argentina. Claimants further assert that in taking these actions, Respondent breached its obligations under the Treaty between the Argentine Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment (“Bilateral Treaty”): (i) by failing to honor commitments made by Respondent when it induced the Claimants (and their predecessors in interest) to make investments in the Argentine gas industry; (ii) by failing to accord fair and equitable treatment to Claimants’ investment; (iii) by taking arbitrary measures that discriminate against the Claimants on the basis of their foreign nationality and ownership and that impair the use enjoyment of the Claimants’ investment; and (iv) by indirectly expropriating the Claimants’ investment without complying with the requirements of the Bilateral Treaty, including due process of law and payment of prompt, adequate, and effective compensation. The Claimants rely in particular on Article II(1), (2) and (6) and Article IV of the Bilateral Treaty. They seek corresponding relief.

3. As regards the jurisdiction of ICSID, the Claimants refer in their Request to Article VII of the Bilateral Treaty and Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention” or “Convention”) to which both Argentina and the United States of America are a Party.

4. On January 24, 2002, the Claimants submitted to the Centre a letter supplementing their Request for Arbitration of December 21, 2001. In that letter, the Claimants assert that the Respondent had broadened its breach of the Bilateral Treaty by abolishing the tariff adjustments altogether and other changes implemented in the Public Emergency and Exchange Regime Reform Law, Law No. 25 561 of 7 January 2002 (the “Emergency Law”).

5. On January 31, 2002, the Secretary-General of the Centre registered the Request, in accordance with Article 36(3) of the ICSID Convention, and, pursuant to Rule 7 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”), notified the parties of the registration of the request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

6. The parties then agreed that the Arbitral Tribunal was to be constituted by three (3) arbitrators, one appointed by the Claimants, the second appointed by the Argentine Republic, and the third, who would preside over the Tribunal, appointed by the Secretary-General of the Centre in accordance with the procedure adopted by the parties. On June 20, 2002, the Claimants appointed Professor Albert Jan van den Berg, a national of the Netherlands, as an arbitrator for the present case. This appointment was confirmed by the Claimants through their letters to the Centre dated August 15 and 28, 2002. The Argentine Republic, through a letter received on August 26, 2002, appointed Judge Francisco Rezek, a national of Brazil, as an arbitrator. On November 7, 2002, the Secretary-General of the Centre appointed, with the agreement of the parties, Dr. Tatiana B. de Maekelt, a national of Venezuela, as President of the Arbitral Tribunal.

7. On November 13, 2002, the Acting Secretary-General of ICSID, in accordance with Rule 6(1) of the Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”), notified the parties that all arbitrators had accepted their appointment and that the Tribunal was deemed to be constituted on November 13, 2002. On the same date, in accordance with Regulation 25 of the ICSID Administrative and Financial Regulations, he informed the parties that Ms. Claudia Frutos-Peterson was to serve as Secretary of the Tribunal.

8. In accordance with Rule 13(1) of the Arbitration Rules, the First Session of the Tribunal with the parties was held, after consultation with them, on December 19, 2002, at ICSID seat in Washington, D.C. At that session, the parties expressed their agreement that the Tribunal had been properly constituted and stated that they had no objection to the appointment, under the provisions of the ICSID Convention and the Arbitration Rules, of any of the members of the Tribunal. It was put on record that the proceedings were to be carried out in accordance with the provisions of Article 44 of the ICSID Convention and under the Arbitration Rules in force since September 26, 1984.

9. The Claimants were represented at the First Session by the following persons:

Oscar M. Garibaldi, counsel, Covington & Burlington, Washington, D.C.; Eugene D. Gulland, counsel, Covington & Burlington, Washington, D.C.; Horacio J. Ruiz Moreno, Hope, Duggan & Silva, Buenos Aires;

Also attending on behalf of the Claimants: Dorothy O'Brien, Deputy Corporate Counsel, LG&E Energy Corp.

10. The Respondent was represented at the First Session by the following persons:

Ignacio Suárez Anzorena, Procuración del Tesoro de la Nación, Buenos Aires; Carlos Lo Turco, Procuración del Tesoro de la Nación, Buenos Aires;

Acting on the instruction of Rubén Miguel Citara, Procurador del Tesoro de la Nación, Buenos Aires.

11. At the First Session, the parties expressed their agreement on various procedural aspects, as recorded in the minutes of the session, signed by the President and the Secretary of the Tribunal. During the First Session, after hearing both parties, the Arbitral Tribunal established the following schedule for the written submissions relating to the case. The Claimants were to file a Memorial on May 31, 2003. Once the Memorial had been received from the Claimants, the Respondent could choose one of the following schedules: submit an answer within 60 days or, alternatively, submit an answer within 90 days. In its answer, the Respondent could file an objection to jurisdiction and include, if appropriate, a pleading on the merits. If the Respondent filed a Memorial on Jurisdiction, the Claimants were required to submit a Counter-Memorial on Jurisdiction within 30 days following receipt of the relevant Memorial submitted by the Respondent; subsequently, the Respondent were to file its Reply within 20 days from the receipt of the Counter-Memorial on Jurisdiction; and the Claimants were to file their Rejoinder within 20 days from receipt of the Reply submitted by the Respondent.

12. The following schedule was also established: If the Respondent chose the 60-day time limit for its answer, and if the Tribunal agreed, a hearing on jurisdiction could be held on September 22–23, 2003. If the Respondent chose the 90-day time limit for its answer, the hearing on jurisdiction could be held on October 20–21, 2003, if the Tribunal agreed. The hearing on the merits would be held on March 8–12, 2004.

13. On March 31, 2003, the Claimants filed their Memorial on the merits. The Memorial sets forth the following relief sought by the Claimants:

- (i) Declaring that the Respondent has breached its obligations under Article II(2)(c) of the Treaty by failing to observe obligations that it entered into with regard to the Claimants' investment;
- (ii) Declaring that the Respondent has breached its obligations under Article II(2)(a) of the Treaty by failing to accord to the Claimant's investment fair and equitable treatment and by according treatment less than that required by international law;
- (iii) Declaring that the Respondent has breached its obligations under Article II(2)(b) of the Treaty by taking arbitrary and discriminatory measures that impair the use and enjoyment of the Claimants' investment;
- (iv) Declaring that the Respondent has breached Article IV(1) of the Treaty by indirectly expropriating the Claimants' investment without complying with the requirements of the Treaty, including observance of due process of law and payment of prompt, adequate, and effective compensation;
- (v) Ordering the Respondent to pay the Claimants full compensation in the amounts set forth in this Memorial, plus pre- and post-award compound interest;
- (vi) Ordering the Respondent to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Claimants' legal representation, plus interest thereon in accordance with the Treaty; and
- (vii) Such other or additional relief as may be appropriate under the Treaty or may otherwise be just and proper.

14. Subsequently, the parties decided by mutual agreement to modify the schedule of proceedings on the objection to jurisdiction, and the Respondent so notified the Secretariat of the Centre on July 1, 2003, as did the Claimants on July 2, 2003. The time limits were thus fixed as follows: Memorial on Jurisdiction, July 21, 2003; Counter-Memorial on Jurisdiction, August 29, 2003; Reply on Jurisdiction, September 22, 2003; and Rejoinder on Jurisdiction, October 13, 2003.

15. It was also agreed that the hearing on jurisdiction was to be held on October 20–21, 2003. The Tribunal, in agreement with the parties, subsequently decided that the hearing on jurisdiction was to be held on November 20–21, 2003, at The Hague, Netherlands.

16. On July 21, 2003, in accordance with the agreed time limits, the Respondent formally raised an objection to the jurisdiction of ICSID in its Memorial on

Jurisdiction, setting forth the arguments on which it based that objection, and attaching documentation supporting its contentions. On August 29, 2003, the Claimants filed their Counter-Memorial on Jurisdiction. On September 22, 2003, the Argentine Republic submitted its Reply to the Claimants' Counter-Memorial, and on October 14, 2003, the Claimants filed their Rejoinder.

17. On October 30, 2003, the Respondent addressed a request for suspension of the proceedings in the present case, and requested in the alternative that the hearing on jurisdiction be postponed. On October 31, the President of the Arbitral Tribunal invited the Claimants to file their observations on this request by November 3, 2003. On November 3, 2003, the Claimants objected to the requested suspension. On November 5, 2003, the members of the Arbitral Tribunal deliberated on the Argentine Republic's request. The same day, both parties were notified of the Tribunal's decision not to suspend the present proceeding and of its refusal to postpone the hearing on jurisdiction scheduled for November 20–21, 2003.

18. The hearing on jurisdiction was held on the above-mentioned date at the headquarters of the Permanent Court of Arbitration in The Hague, Netherlands. Eugene D. Gulland and Oscar M. Garibaldi, of the law firm Covington & Burling, Washington, D.C., addressed the Tribunal as representatives of the Claimants. Also present at the hearing was Dorothy O'Brien, Deputy General Counsel of LG&E, and S. Bradford Rives, Chief Financial Officer of LG&E Energy Corp. Carlos Ignacio Suárez Anzorena and Ignacio Pérez Cortés, Procuración del Tesoro de la Nación, acting on the instruction of Horacio Daniel Rosatti, Procurador del Tesoro de la Nación, addressed the Tribunal as representatives of the Argentine Republic. Likewise, the Claimant's side presented its oral arguments in response to the Respondent's side, and the Respondent's side stated its pleas in response to the Claimant's side. The Tribunal put questions to the parties in accordance with Rule 32(3) of the Arbitration Rules.

II. FACTS AND CONTENTIONS OF THE PARTIES REGARDING JURISDICTION

19. In the present case, claims were submitted by LG&E, companies constituted in the United States of America that operate in that country and others, against the Argentine Republic to ICSID under the Bilateral Treaty. LG&E holds shares in three gas distribution licensees constituted in Argentina: Distribuidora de Gas del Centro ("Centro"), Distribuidora de Gas Cuyana S.A. ("Cuyana"), and Gas Natural BAN S.A. ("GasBan"), hereinafter collectively referred to as "Licensees."

20. Both the Argentine Republic and the United States of America are parties to the ICSID Convention, which was ratified by the Argentine Republic in 1994 and by the United States of America in 1966.
21. Likewise, both States signed the Bilateral Treaty in Washington, DC, on November 14, 1991, which has been in force since October 20, 1994.
22. The dispute from which the claims in the present proceedings arise is related to the privatization process by the Argentine Republic, started in 1989, of the national gas monopoly, Gas del Estado. Its equipment and facilities were transferred to newly created local companies (amongst whom Centro, Cuyana and GasBan) that were granted licenses for the transport and distribution of natural gas. The shares in the local companies were sold to private investors.
23. The Claimants allege that the Respondent has discontinued the guaranteed PPI (U.S. Producer Price Index) adjustments and other tariff increases since 1999. Moreover, the so-called Emergency Law of January 2002 eliminated the currency protection (computation of tariffs in U.S. dollars before conversion in pesos) and inflation protection (the automatic PPI conversion). Furthermore, the Respondent devalued the peso by amending the Convertibility Law which had established a fixed 1:1 relationship between the peso and the U.S. dollar. These and other measures of the Respondent amounted, according to the Claimants, to breaches by the Respondent of its obligations under the Bilateral Treaty.
24. The Government announced the opening of the renegotiation process for public service contracts on February 12, 2002, and, by Decree 293/02, the Minister of the Economy was made responsible for this process, for which a Renegotiation Commission was established.
25. With regard to jurisdiction, the Claimants assert that ICSID arbitration is their chosen option under the Bilateral Treaty, since the present case deals with an investment dispute and, in accordance with Article VII of the Bilateral Treaty, the Argentine Republic had consented to submit investment disputes to ICSID arbitration. Moreover, the Claimants allege that they have tried without success to resolve this dispute through consultations and negotiation on many occasions before resorting to arbitration, and that the Argentine Republic chose not to respond, stating, through the Attorney General of Argentina, that the Government was not in a position to resolve such a dispute amicably. According to the Claimants, the present dispute arose on August 30, 2000; hence, at the time of the submission of the Request for Arbitration on December 21, 2001, more than six months had elapsed since the date on which the dispute arose, as required in Article VII(3)(a) of the Bilateral Treaty.

26. The Claimants contend that they have complied with Article 25(1) of the ICSID Convention, since their claims arise directly from their investments in Argentina. This is a dispute, they contend, between the Argentine Republic, which is a State party to the Convention, and LG&E, a national of the United States, another State party.

27. In its Memorial on Jurisdiction, the Respondent seeks the following relief:

277. The Argentine requests the Tribunal to issue an award declaring that LG&E's claims are inadmissible or that the [T]ribunal lacks jurisdiction over LG&E's claim.

278. It is also requested that LG&E be ordered to pay all the costs of these proceedings, including the Tribunal's fees and expenses, and the costs of the Argentine Republic legal counsel, as well as any other cost incurred in by the Argentine Republic as a result of LG&E's claim.

28. In support of the relief sought, the Respondent raises six objections:

29. First, LG&E lacks standing or *jus standi* in respect of all the disputes it raises:

- LG&E's claims can only be brought by the Licensees.
- Argentine law establishes that shareholders and corporations have a distinct legal personality and does not allow shareholders to file claims for indirect damages.
- International law recognizes that the shareholders and the company have a distinct personality, and, as a general rule, it precludes claims for indirect damages raised by shareholders.
- The lack of an express provision in a Treaty cannot be construed as allowing a *jus standi* that is clearly in opposition to national law and incompatible with international law.

30. Second, the disputes submitted by LG&E do not arise directly out of an investment as required by Article 25 of the ICSID Convention since they are not related to the investment described by LG&E and concern general measures taken by the Argentine Government.

31. Third, admitting an indirect claim as the one filed by LG&E constitutes a violation of Article 25(2)(b) of the ICSID Convention regarding nationality and does not qualify under Article VII(8) of the Bilateral Treaty.

32. Fourth, the six months period has not elapsed from the moment the additional dispute was brought and its submission to ICSID arbitration, as provided in the Bilateral Treaty.

33. Fifth, the disputes submitted by LG&E involve the performance or breach of the licenses and belong therefore in the sphere of jurisdictional commitments between the Federal Government and the Licensees.

34. Sixth, the original dispute has already been submitted to the federal courts, and this precludes international arbitration according to the Bilateral Treaty.

35. In their Counter-Memorial on Jurisdiction, Claimants request the following relief in the form of a Decision on Jurisdiction:

- (a) An order that the dispute is within the jurisdiction of ICSID and the competence of this Tribunal;
- (b) An order dismissing all of the Respondent's objections to the admissibility of the dispute and all of the Respondent's objections to the jurisdiction of ICSID and the competence of this Tribunal;
- (c) An order that the Respondent pay all costs of the proceedings on jurisdiction, including the Tribunal's fees and expenses and the costs of Claimant's legal representation, subject to interest; and
- (d) Such other relief as might be right and proper.

36. In support of the relief sought, the Claimants make the following submissions:

37. First, the Claimants are asserting international investment claims under the Bilateral Treaty which are independent of contract claims that might be asserted by the Licensees.

38. Second, the Claimants have *jus standi*:

- The issues in this case are governed by the Bilateral Treaty and general international law.
- The Treaty expressly authorizes an investment claim by a shareholder such as LG&E.
- International jurisprudence upholds the *jus standi* of shareholder investors under BITs.
- There is no restriction on the *jus standi* of investors that are minority shareholders.
- The Respondent's policy arguments against the Claimants' *jus standi* have no merit.
- Each of the Claimants is entitled to the protection of the Treaty.

39. Third, the present dispute arises directly out of an investment.

40. Fourth, Article 25(2)(b) of the ICSID Convention is irrelevant to the present proceeding.

41. Fifth, this Tribunal has jurisdiction and competence in respect of the entire proceeding:

- The so-called “Original Dispute” and “Additional Dispute” are aspects of a single, continuous dispute.
- All temporal conditions have been satisfied and the Respondent has suffered no prejudice.
- The Centre has jurisdiction and the Tribunal has competence to hear the so-called “Additional Dispute” as an incidental or additional claim under the ICSID Convention and the Arbitration Rules.
- Policy considerations favor the Centre’s jurisdiction over the so-called “Additional Dispute”.

42. Sixth, the jurisdictional provisions of the Licenses are irrelevant to ICSID jurisdiction of this dispute.

43. Seventh, no aspect of the dispute has been submitted to Argentine jurisdiction.

44. In its Reply on Jurisdiction, the Respondent argues:

- (a) The privatization process in the gas industry was carried out in the form of “national and international biddings.” In other words, investors were called in general, notwithstanding their nationality. None of the major instruments in the privatization process (public tenders, licenses, transfer contracts) indicates that any kind of recognition of a different “foreign status” was ever given to those taking part in the privatization process. The framework of rights and obligations was exactly the same, without any distinction between nationals and foreigners.
- (b) It is irrelevant whether the privatization process promoted the use of local holding companies or the use of intermediaries between the Licensees and those aspiring to acquire shares. What the Tribunal must analyze is how the Bilateral Treaty resolves this situation, limiting its scope of operation *ratione personae* and *ratione materiae*, through the definition of the terms “investor” and “investment.” Neither the Licensees nor the licenses can be included in the scope of application of the Bilateral Treaty.
- (c) It is evident that the Tribunal cannot resolve the dispute without first determining the existence and scope of the rights of the Licensees, in accordance with the licenses. A local company may qualify as a foreign investment only if it is owned, or directly or indirectly controlled, by a foreign company. LG&E is only an indirect shareholder, and its

direct holdings in the Licensees do not allow it to exercise direct and substantial control over them.

- (d) It is true that the privatization process is protected by investment treaties and, in particular, that the investment of LG&E is protected by the Bilateral Treaty, which implies that LG&E is entitled to assert claims for any act attributable to the Argentine Republic that affects its shareholder status. However, it cannot assert rights relating to a license belonging to a third party that does not qualify either as an investment or as an investor under the Treaty.
- (e) LG&E invested in a local company that signed an administrative contract governed by Argentine law for the provision of a public service. They are not only trying to use the Bilateral Treaty as an insurance policy against the general economic crisis, but also desire to enrich themselves illegitimately in such a context.
- (f) The issue of *jus standi* is not merely a jurisdictional issue, and therefore should not be exclusively decided under the ICSID Convention and the Bilateral Treaty. The law applicable to the merits of the dispute should also be applied. Thus, Argentine domestic law is a source that should be taken into account, pursuant to Article 42 of the ICSID Convention. The distinction established under Argentine law between shareholders and corporations, as well as their consequent legal status, has therefore not been modified by the Bilateral Treaty.
- (g) The Bilateral Treaty provides that a dispute may be submitted to ICSID for arbitration after six months have elapsed from the date on which the dispute arose and may not have been submitted as part of a previously agreed dispute-settlement procedure. Ignoring this rule, LG&E submitted its request without even reporting the existence of an investment dispute related to the additional dispute, since the Argentine Republic was negotiating the rights relative to the license with its holders, i.e., Centro, Cuyana, and GasBan.
- (h) Article 46 of the ICSID Convention and Rule 40 of the Arbitration Rules require that the dispute be within the scope of the consent of the parties to submit to ICSID arbitration. LG&E is not in compliance with the time limit established in the Bilateral Treaty. The arbitral jurisdiction established in the Bilateral Treaty is exceptional, and strict respect for this time limit is the *quid pro quo* of a dispute settlement mechanism that does not require investors to exhaust domestic remedies.
- (i) The danger of the claims asserted by LG&E is that they might lead not only to an increase in the number of proceedings on the same

facts and rights (those of the Licensees), but also to a multiplication of remedies and awards.

45. In their Rejoinder on Jurisdiction, the Claimants allege that they have demonstrated that their claims, under the Bilateral Treaty, cannot be separated into two different disputes. Likewise, they contend to have shown that the temporal requirements for resorting to ICSID arbitration under the Bilateral Treaty, in relation to the additional request, have been met. They also state that Article 46 of the ICSID Convention and Rule 40 of the Arbitration Rules require that claims should arise directly out of the subject-matter of the dispute and not simply that one should depend on the other.

III. CONSIDERATIONS ON THE OBJECTIONS TO JURISDICTION

46. As agreed by the parties, the objections of the Respondent to the jurisdiction of the Centre or, for other reasons, the competence of the Tribunal, are to be decided as a preliminary question (Article 41 of the ICSID Convention and Rule 41 of the Arbitration Rules). Whilst the parties have advanced many arguments, including those pertaining to the merits, the Tribunal will consider hereafter only those that are relevant to its decision regarding the objections of Respondent to admissibility and jurisdiction.

47. This being the case, the Tribunal must, for the sole purposes of determining its competence under the ICSID Convention and the Bilateral Treaty, examine the following criteria:

- (a) That the dispute is between a Contracting State and a national of another Contracting State and that the Claimants have the standing (*jus standi*) to act in the present proceedings.
- (b) That the dispute is a legal dispute arising directly from an investment.
- (c) That the parties have expressed their consent in writing to submit to arbitration and, specifically, to ICSID arbitration.
- (d) That the other requirements under the Convention and the Bilateral Treaty for submission to arbitration have been met.

A. Jus standi

48. In determining *jus standi*, consideration is to be given to the scope *ratione personae* of the ICSID Convention, which, as its name indicates, involves the presence of a Contracting State and a national of another Contracting State.

There is no doubt about the status of the Argentine Republic. The question arises, however, with the Claimants. They are companies with United States nationality that have made investments in Argentina through local (Argentine) companies, and whose participation in this process has been questioned by the Respondent, because the Argentine companies were directly responsible for operating the activity covered by the license agreements.

49. Pursuant to Article 25(2)(b) of the ICSID Convention:

‘National of another Contracting State’ means:

. . .

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

50. In the present case there is no need of determining what type of control the parent company exercises. Article 25(2)(b) of the ICSID Convention refers to “foreign control” in the context of who may qualify as an investor with a right to ICSID arbitration (it includes local companies in the host State subject to foreign control). A companion provision can be found in Article VII(8) of the Bilateral Treaty (without the express requirement of control). The present case, however, is concerned with shares held by the Claimants in local companies which the Claimants allege to have been affected by breaches of the Respondent of its obligations under the Bilateral Treaty. Those shares are the investment within the meaning of Article I(1)(a)(ii) of the Bilateral Treaty. The Respondent has not disputed that those shares are “owned or controlled directly or indirectly” by the Claimants. In that connection, it is irrelevant whether the shares are majority or minority shares.

51. It is also to be noted that the arbitral tribunal in the *CMS Gas Transmission Company v. The Argentine Republic* case stated that the Convention does not really make control a central tenet of ICSID jurisdiction, but only as an alternative for very specific purposes (§ 58).¹

¹ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction, July 17, 2003.

52. On the other hand, the reliance by the Respondent on the *Barcelona Traction* case² is misplaced. Whatever may be the merits of that case, it concerned diplomatic protection by a State to its nationals whilst the present case involves the contemporary concept of direct access to dispute settlement by an investor in investor-State arbitration.

53. The Respondent argues that the license was granted to Argentine companies and not to the Claimants, and therefore the latter alleged that they were shareholders in the Licensees. This argument appears to be incorrect since Article I(1)(a)(ii) of the Bilateral Treaty provides:

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

...

(ii) a company or *shares of stock* or other interests in a company or interests in the assets thereof. (emphasis added)³.

54. Article VII(8) of the Bilateral Treaty, invoked by the Respondent, is not applicable to this case. It refers to the situation in which a company, legally constituted under the applicable laws and regulation of a State Party, is deemed to be “an investment of nationals or companies of the other [State] Party” and, as such, it may resort to international arbitration and “shall be treated as a national or company of such other [State] Party in accordance with Article 25 (2) (b) of the ICSID Convention.” Rather, Article VII(8) reinforces the Tribunal’s analysis in the sense that it refers to “a national or company” without setting any limit, such as “foreign control” as mentioned by Article 25(2)(b) of the ICSID Convention.

55. With respect to Argentine domestic law, the situation is similar to that established by Article I (1)(a)(ii) of the Bilateral Treaty. Article 2(1) of Act 21.382, adopted through Decree No. 1853/1993 (B.O. 08/09/1993) on the regulation of foreign investment, defines such investment as “any contribution of capital belonging to foreign investors, applied to economic activities carried out in the country;” it also includes “the acquisition of shares of capital in an existing local company by foreign investors.” In turn, a foreign investor means

² *Barcelona Traction, Light & Power Co. Ltd. (Belgium v. Spain)*, Judgment of February 5, 1970, ICJ Reports 1970, 3.

³ In this sense, see the Arbitral Tribunal in *Azurix Corp. v. Argentina* (ICSID Case ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 73.

“any natural or juridical person domiciled outside the national territory who owns an investment in foreign capital”

56. The Respondent also refers to Article X of the Bilateral Treaty. That Article does not appear to be relevant either. It merely provides that the Bilateral Treaty shall not derogate from laws and regulations, etc., “that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.” That is a right addressed to the investor and not the host State.

57. As regards the position of the Licensees, on December 17, 1992, National Executive Decree No. 1189/92 ordered the constitution of the Licensees (i.e., *Distribuidora de Gas del Centro*, *Distribuidora de Gas Cuyana* and *Gas Natural Ban*) which were empowered to receive foreign investments for their operations, in order to implement the privatization process. This power is shown in Resolution No. 874/92, which, pursuant to Decree No. 1189/92 of July 10, 1992, ordered the opening of public international bidding for the privatization of the companies referred to therein, including the Licensees. Thus, the investment received by the latter included, among others, capital from LG&E Energy Corp., through LG&E Capital Corp., of which it owns 100%, and LG&E International Corp., wholly owned by LG&E Capital Corp., according to the unrebutted expert report by Bradford Rives, First Vice-President of Finances and Controller of LG&E Energy Corp., dated March 31, 2003.

58. This affirmation also supports the inapplicability of the Basic Rules of the License (Dec. 2255/92 of December 2, 1992, published on December 7, 1992, and annexed to the License Decrees issued by the National Executive of the Argentine Republic: Nos. 2453/92, of December 16, 1992; 2454/92 of December 18, 1992; 2460/92 of December 21, 1992 (all published on December 22, 1992). It applies especially in relation to Rule 16(2), according to which:

[t]he Licensee agrees to submit to the jurisdiction of the administrative courts of the city of Buenos Aires with regard to all the effects derived from this License and concerning the relation with the Licensor. In those disputes involving other parties that are related to the License, the federal courts shall have jurisdiction.

59. Considering that these rules are intended to regulate the license, the purpose of which, in accordance with Rule 2(1), “is to grant to the Licensee the authorization to exploit the licensed service,” they cannot be considered binding on foreign investors, for whom legal protection is provided by the special rules

on the subject, as recognized by the Respondent in Decree 669/00, issued by the National Executive on July 17, 2000, which although of a later date than that on which the licenses were granted, is sufficient evidence of the Argentine Republic's attitude towards treaty law, in recognizing the special application of bilateral treaties on encouragement and protection of investments to gas privatization.

60. The proper distinction between a national company having the license and the investors is reaffirmed in the decision on jurisdiction cited above in the *CMS Gas Transmission Company* case, according to which:

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

61. This principle was also accepted in the *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic*,⁴ especially in relation to Article 16(4) of the concession contract between Compañía de Aguas del Aconquija and the province of Tucumán. In this decision, which is apposite to the present case, it is stated that the provision: “does not divest this Tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver by CGE of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic.” As formulated, “these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT” (§ 53). That decision was affirmed in the *CMS Gas Transmission Company* case, as follows: “[T]he clauses in the License or its Terms referring certain kinds of disputes to the local courts of the Republic of Argentina are not a bar to the assertion of jurisdiction by an ICSID tribunal under the Treaty, as the functions of these various instruments are different” (§ 76).

62. Similarly, in the case of *Lanco International Inc. v. Argentine Republic*,⁵ it is affirmed that in the case where an investor is also party to a concession

⁴ *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of the Tribunal, November 21, 2000.

⁵ *Lanco International Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6), Preliminary Decision of the Tribunal, December 8, 1998, in *International Legal Materials*, vol. 40, 2001, p. 457.

contract or license agreement with the host State, this situation does not affect the jurisdiction arising from the provisions of the BIT, since it provides a direct right of action to shareholders (§15).

63. In view of the foregoing, the Tribunal must reject Respondent's submissions with respect to the question of *jus standi* and conclude that, for the purposes of the ICSID Convention and the Bilateral Treaty, the Claimants should be considered foreign investors, even though they did not directly operate the investment in the Argentine Republic but acted through companies constituted for that purpose in its territory.

B. Investment dispute

64. Within the framework of ICSID jurisdiction, it is necessary to determine how the term "dispute" is to be understood in the proper context. This term is defined in Article 25(1) of the ICSID Convention as being any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State. This provision again stresses the foreign status of the natural or juridical person making the investment, an aspect which is even more important in the present case. It should be recalled that even though the obligations stipulated in the license agreements are fulfilled by an Argentine company, the investment is effectively made by a group of United States companies, a fact which qualifies this investment as being foreign.

65. Article VII of the Bilateral Treaty, for its part, lists the criteria for defining an "investment dispute." The most relevant of these is found in subparagraph (c), according to which: "an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to . . . an alleged breach of any right conferred or created by this Treaty with respect to an investment."

66. Respondent repeatedly emphasizes that Claimants' claims are to be equated to claims under the license agreement and that the bringing of such claims is impermissible in the present case. However, it appears that Claimants' claims are based on alleged breaches of the Bilateral Treaty with respect to their investment. Consequently, the present case constitutes an investment dispute within the meaning of the ICSID Convention and the Bilateral Treaty.

67. Finally, Respondent's argument that the disputes submitted by the Claimants concern general measures taken by the Argentine Government, the

Tribunal shares the analysis and conclusion of the Arbitral Tribunal in *CMS Gas Transmission Company v. The Argentine Republic*:⁶

On the basis of the above considerations the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general 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)

68. The Tribunal also concludes in the present case that the fact that the Claimants have demonstrated *prima facie* that they have been adversely affected by measures adopted by the Respondent is sufficient for the Tribunal to consider that the dispute, as far as this matter is concerned, is admissible and that it has jurisdiction to examine it on the merits.

C. Consent to submit to ICSID arbitration

69. For the attribution of jurisdiction to the Centre, Article 25(1) of the ICSID Convention requires, in addition to the necessary participation of a Contracting State and a national of another Contracting State and the existence of a dispute arising directly out of an investment, the written consent of the parties to submit to the jurisdiction of the Centre.

70. It is necessary, then, to determine whether both parties have expressed their consent to submit to the Centre, since consent of the parties is "the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally."⁷

71. In relation to the expression of consent by the Contracting States, it is necessary to consider, first, the affirmation in the preamble to the ICSID Convention "that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."

⁶ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction, July 17, 2003.

⁷ Report of the Executive Directors of ICSID, Doc. ICSID/2, para. 31.

72. The Bilateral Treaty contains a multiple clause under which resort can be made to ICSID arbitration or to the Additional Facility of ICSID; to an ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties (Article VII(3)).

73. The system for establishing consent is clearly set forth in the Bilateral Treaty. The investor, on his part, has to make a choice under the multiple clause by giving consent in writing, subject to a number of conditions (Article VII(3)). The host State, on its part, has already given its consent. In that respect Article VII(4) provides: “Each Party [i.e., the Argentine Republic and the United States of America] 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.” The mutuality of consent is completed by the provision: “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 the purposes of Chapter II [i.e., Articles 25–27] of the ICSID Convention . . .” (Article VII(4) *in fine*). Thus, in accordance with Article 25(1) *in fine*, “When the parties have given their consent, no party may withdraw its consent unilaterally.” This system is, for example, confirmed by the Arbitral Tribunal in the *Azurix v. Argentina* case.⁸

74. It may be added that the multiple clause has been interpreted on other occasions by ICSID tribunals. One of these is the decision in the *Lanco* case, in which it is stated:

the Argentina-US Treaty establishes the possibility of the investor choosing between the local courts (recourse to the courts which in any event are available to natural and legal persons by virtue of the basic principle of the right to effective judicial protection) and other means of dispute settlement, such as arbitration, which requires the previous agreement of the parties. In addition, the Argentina-US Treaty, once certain requirements are met, allows the investor to submit the dispute to ICSID arbitration. The Argentina-US Treaty therefore gives the investor the power to choose among several methods of dispute settlement: consequently, once the investor has expressed its consent in choosing ICSID arbitration, the only means of dispute settlement available is ICSID arbitration (§ 31).

⁸ *Azurix v. Argentina* (ICSID Case ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 73., para. 42.

75. In the present case, the Claimants chose to submit their investment disputes to ICSID and are therefore not restricted by the fact that the Licensees have resorted to local tribunals.

76. Since the investor has the power to choose one of the four forums established in Article VII(3) of the Bilateral Treaty, it is noteworthy in this case that Claimants did not submit the dispute to the Argentine courts or to any other dispute settlement mechanism mentioned in Article VII(2) or (3). Thus, no question regarding the “fork in the road” provision arises in the present case.

77. It is also important to consider the possibility of exhausting Argentine local remedies as a prerequisite for resorting to ICSID. Thus, Article 26 of the ICSID Convention provides that: “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.” Interpreting this rule, and in application of the multiple clause of the Argentina-United States Bilateral Treaty, the Tribunal held in the *Lanco* case:

Article 26 is merely a standard for interpretation, a presumption that arbitration is the exclusive remedy, but that the parties may require exhaustion of domestic remedies. The stipulation to the contrary, if any, would merely eliminate the presumption as to the exclusivity of ICSID arbitration, giving rise to the existence of another forum in which to settle the dispute. This would result in a concurrence of jurisdictions, which would have to be resolved in light of the provision in the second sentence of Article 26. Thus, the second sentence is precisely the waiver, by the Contracting State party, of the prior exhaustion requirement, a requirement that the State may reserve to itself, through such second sentence, which operates as a rule of judicial abstention, such that the local courts to which the State submits a dispute with an investor who is a foreign national should refer the Parties to ICSID arbitration. (§ 38).

78. As the Tribunal in the *Lanco* case indicated, this criterion was also used in the *MINE v. Republic of Guinea* case⁹ and *Mobil Oil Corporation et al. v. New Zealand*.¹⁰

⁹ *MINE v. Republic of Guinea* (ICSID Case No. ARB/84/4).

¹⁰ *Mobil Oil Corporation et al. v. New Zealand* (ICSID Case No. ARB/87/2).

D. Other requirements

79. According to the pleas submitted by the Respondent, no negotiations took place between LG&E and the Argentine Republic with regard to the additional request of the Claimants.

80. Since more than six months elapsed from the date on which the dispute arose (i.e., 24 January 2002 for the so-called “Additional Dispute”), there is no bar to initiating the arbitral proceeding.

81. The acts of the Respondent complained of by the Claimants in the “Additional Request” are sequential to those alleged by the Claimants in their original Request. Already for that reason and for reasons of efficiency, they need not be addressed in a separate proceeding. Moreover, the Respondent had not shown any prejudice in having the disputes adjudicated in one single set of proceedings. It is also in compliance with Article 46 of the ICSID Convention, according to which:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

82. Further, it is irrelevant that the Licensees may be in a process of negotiation with the Respondent. They do so from their own (corporate) perspective. If and to the extent that such negotiations have an effect on Claimants’ investment, such an effect may form part of the Tribunal’s consideration of the merits of the case. This may also apply to the outcome of cases brought by other investors in the Licensees under the Bilateral Treaty against the Respondent.

83. In light of the foregoing, the Tribunal need not consider the parties’ other contentions, including those regarding Article II(1) of the Bilateral Treaty (the most favored nation clause).

IV. DECISION

84. For the reasons stated above, the Tribunal:

- (a) HOLDS that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal;

- (b) DISMISSES all of the Respondent's objections to the admissibility of the dispute and all of the Respondent's objections to the jurisdiction of ICSID and the competence of this Tribunal;
- (c) ORDERS by virtue of Rule 41(4) of the Arbitration Rules the continuation of the procedure pursuant Section 15.2 of the Minutes of the First Session;
- (d) RESERVES all questions concerning the costs and expenses of the Tribunal and of the parties for subsequent determination.

TATIANA B. DE MAEKELT

President

FRANCISCO REZEK

Arbitrator

ALBERT JAN VAN DEN BERG

Arbitrator