

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

**IN THE PROCEEDINGS BETWEEN
SEMPRA ENERGY INTERNATIONAL
(CLAIMANT)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

(ICSID Case No. ARB/02/16)

DECISION ON OBJECTIONS TO JURISDICTION

Before the Tribunal comprised of:

Professor Francisco Orrego Vicuña, President
Hon. Marc Lalonde, P.C., O.C., Q.C., Arbitrator
Dr. Sandra Morelli Rico, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Representing the Claimant:

Mr. R. Doak Bishop
King & Spalding LLP
Houston, Texas

Representing the Respondent:

Dr. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Dra. Cintia Yaryura
Dra. Gisela Makowski
Dr. Gabriel Bottini
Procuración del Tesoro de la
Nación Argentina
Buenos Aires-Argentina

Washington, D.C., May 11, 2005

A. PROCEEDINGS

1. On September 11, 2002, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received from Mr. R. Doak Bishop a Request for Arbitration under the Convention for the Settlement of Investment Disputes between States and Nationals of other States (“ICSID Convention” or “the Convention”) on behalf of Sempra Energy International (“Sempra”) against the Argentine Republic. The request relates to disputes with the Argentine Republic regarding measures adopted by the Argentine authorities which, it is argued, have changed the general regulatory framework established for foreign investors in a way which the Claimant asserts severely affects Sempra’s investment in two natural gas distribution companies which together serve seven Argentine provinces. In its request, Sempra invokes the provisions contained in the 1991 treaty between Argentina and the United States concerning the reciprocal encouragement and protection of investment (the “Bilateral Investment Treaty” of the “BIT”).¹

2. On September 12, 2002, in accordance with Rule 5 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), the Centre acknowledged receipt of the request and, on September 13, 2002, sent copies thereof to the Argentine Republic and to the Embassy of Argentina in Washington, D.C.

3. On October 25, 2002, the Centre asked the Claimant to submit additional information regarding some references in its request for arbitration regarding certain claims before tax authorities and before the Supreme Court of Justice. By communications of October 28 and November 5, 2002, the Claimant gave response to this request.

4. On December 6, 2002, the Acting Secretary-General of the Centre registered the request in accordance with Article 36(3) of the ICSID Convention. On the same date, the Acting

Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to constitute an Arbitral Tribunal as soon as possible.

5. On March 4, 2003, the Claimant and the Respondent agreed to set up a single Tribunal to hear Sempra's request for arbitration and another request submitted concurrently by Camuzzi International S.A. ("Camuzzi"), also a shareholder in the gas distribution companies. Camuzzi's request would be decided on separately. The parties also agreed that the Tribunal would comprise one arbitrator appointed jointly by Sempra and Camuzzi, one arbitrator appointed by the Argentine Republic, and a third arbitrator, who would serve as the President of the Arbitral Tribunal, who would be appointed by the Secretary-General of ICSID.

6. On March 10, 2003, the Claimant appointed Mr. Marc Lalonde, a Canadian national, as an arbitrator. On April 3, 2003, the Argentine Republic appointed as an arbitrator Dr. Sandra Morelli Rico, a national of Colombia.

7. After consulting with the parties, the Acting Secretary-General of ICSID appointed Professor Francisco Orrego Vicuña, a Chilean national, as President of the Arbitral Tribunal. On May 5, 2003, the Acting Secretary-General of ICSID, in accordance with Rule 6(1) of the Rules of Procedure for ICSID Arbitration Proceedings (Arbitration Rules), notified the parties that all the arbitrators had accepted their appointments and that the Tribunal had consequently been deemed to be constituted and the proceedings deemed to begun on that same date. On the same day, in accordance with Rule 25 of the ICSID Administrative and Financial Regulations, the parties were informed that Mr. Gonzalo Flores, Senior Counsel ICSID, would serve as Secretary of the Arbitral Tribunal. Subsequently, by letter of July 1, 2004, the Deputy Secretary-General of ICSID informed the Arbitral Tribunal and the parties that Mr. Flores would be replaced by

Mr. Francisco Ceballos Godínez, Counsel, ICSID. Mr. Ceballos Godínez having left ICSID in March 2004, Mr. Gonzalo Flores was reappointed as Secretary of the Tribunal.

8. The first session of the Arbitral Tribunal with the parties was held, as scheduled, on July 3, 2003, at the seat of ICSID in Washington, D.C. At that session the parties stated their agreement that the Tribunal had been properly constituted, in accordance with the pertinent provisions of the ICSID Convention and the Arbitration Rules, declaring that they had no objections whatsoever in this respect.

9. In the course of the first session, the parties expressed their agreement regarding various aspects of the proceedings, as recorded in the respective minutes signed by the President and the Secretary of the Tribunal. The Arbitral Tribunal, after having consulted with the parties, fixed the following time limits for the written part of the proceedings: The Claimant would file a memorial within ninety (90) days from the date of the first session; the Respondent would then file a counter-memorial within ninety (90) days from its receipt of the Claimants' memorial; the Claimant would file its reply within 45 (forty-five) days from its receipt of the Respondent's counter-memorial; and finally, the Respondent would file a rejoinder within 45 (forty-five) days from its receipt of the Claimants' reply. It was also agreed that the parties, if they deemed so appropriate, could submit consolidated memorials combining the claims of Sempra and Camuzzi or the arguments of the Argentine Republic regarding both claims.

10. At this first session, the Tribunal noted that, according to the ICSID Arbitration Rules, the Respondent has the right to raise any objections to jurisdiction no later than the expiration of the time limit fixed for the filing of its counter-memorial. For the case that the Argentine Republic were to raise objections to jurisdiction, the following schedule was agreed upon: the Claimant would file a counter-memorial on jurisdiction within sixty (60) days from its receipt of

the Respondent's memorial on jurisdiction; the Respondent would then file a reply on the question of jurisdiction within thirty (30) days from its receipt of the Claimant's counter-memorial; and finally, the Claimant would file a rejoinder on jurisdiction within thirty (30) days from its receipt of the Respondent's reply.

11. In accordance with the agreed time limits, the Claimant submitted to the Centre its memorial on the merits, with attached documentation, on September 3, 2003. As agreed, this memorial included both the claims of Sempra and Camuzzi.

12. On December 31, 2003, the Respondent filed its memorial with objections to jurisdiction, requesting the Tribunal to declare the dispute outside ICSID's jurisdiction.

13. By letter of January 14, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with Rule 41(3) of the ICSID Arbitration Rules.

14. Subsequently, on March 18, 2004, the Respondent received the Claimant's counter-memorial on jurisdiction, and on May 6, 2004, the Claimant received the Respondent's reply on jurisdiction. Lastly, on June 1, 2004, the Claimant filed its rejoinder on jurisdiction. All these pleadings were made jointly with the concurrent case in respect of Camuzzi.

15. The Tribunal, once it had received the pleadings of each of the parties, considered necessary holding a hearing on jurisdiction, which, with the agreement of the parties, took place in Paris on November 29 and 30, 2004. The Claimant was represented at the hearing by Messrs. R. Doak Bishop and Craig S. Miles (King & Spalding, Houston); Mr. Santiago F. Albarracín was also present on behalf of the Claimant. The Respondent was represented by Drs. Cintia Yaryura and Gisela Makowski and by Dr. Gabriel Bottini, all from the Procuración del Tesoro de la Nación Argentina. This hearing encompassed the parallel cases of Sempra and Camuzzi.

16. During the hearing, Mr. Bishop made an oral presentation to the Tribunal on behalf of the Claimant, and so did Mr. Miles; Dr. Cintia Yaryura in turn, made an oral presentation to the Tribunal on behalf of the Respondent, as did Dr. Makowski and Dr. Bottini. The Tribunal then posed questions to the representatives of the parties, in accordance with Rule 32(3) of the ICSID Arbitration Rules.

17. The Arbitral Tribunal, having considered the basic facts of the dispute, the ICSID Convention and the BIT, together with the written and oral arguments presented by the representatives of the parties, has decided as follows regarding the question on jurisdiction.

Participation of the Claimant in the privatization process

18. The Claimant in this dispute, like other companies which have submitted requests for arbitration against the Argentine Republic before ICSID, participated in a vast privatization program that the country embarked upon in 1989, which included the gas sector among others. The privatization of this sector was carried out by means of the Gas Law and related instruments.²

19. Sempra owns 43.09% of the share capital of Sodigas Sur S.A. (“Sodigas Sur”) and Sodigas Pampeana S.A. (“Sodigas Pampeana”). For its part, Camuzzi, the company which requested the concurrent arbitration proceedings mentioned above, owns 56.91% of Sodigas Sur and Sodigas Pampeana. The latter two Argentine companies, in turn, hold 90% and 86.09%, respectively, of the shares in Camuzzi Gas del Sur S.A. (“CGS”) and Camuzzi Gas Pampeana S.A. (“CGP”), each of which, in its capacity as “Licensee” is a natural gas distribution company. Both CGS and CGP each holds a license granted by the Argentine Republic to both supply and distribute natural gas in seven provinces of that country.

Origins of the dispute

20. The dispute originated in the suspension of the licensee companies' tariff increases based on the U.S. producer price index and the subsequent pesification of these tariffs pursuant to Law No. 25561. In addition, the Claimant asserts that subsidies granted have not been reimbursed and that certain taxes and levies that have been introduced by some Argentine provinces, as well as other measures relating to the payment for services, labor restrictions, and the transfer of tax costs, are prejudicial to it. All the foregoing, in the Claimant's opinion, results in a breach of the guarantees granted by the Argentine Republic pursuant to law and the licenses, and in a violation of the measures of protection to foreign investments provided for under the Treaty.

B. OBJECTIONS TO JURISDICTION

21. The Argentine Republic has filed objections to the jurisdiction of the Tribunal on the grounds that in this case there is no legal dispute, that the measures complained of are not directly related to an investment, that no national of another contracting State has been directly harmed, that the claim is premature, that the Claimant lacks *jus standi*, that the Claimant has not established that it qualifies as an investor, and that the dispute has been submitted to other tribunals.

22. The Respondent also asserts that the fact that Article I(a)(ii) of the BIT defines as investments "a company or shares of stock or other interests in a company or interests in the assets thereof ..." is not sufficient to establish the jurisdiction of an ICSID Tribunal. Moreover, in its opinion, the requirements of Article 25(1) of the Convention have to be met regarding the existence of a legal dispute arising directly from the investment and involving a contracting State with the national of another contracting State. It further asserts that for a juridical person

incorporated in a State to be considered a national of another contracting State, it must be subject to foreign control in accordance with Article 25(2)(b) of the Convention.

23. The Respondent has emphasized the fact that the Claimant's claim is connected with the License and not directly to the investment. If there were a violation, it is argued, it would affect only the licensees—CGS and CGP—but not Sodigas Sur or Sodigas Pampeana, which are only shareholders in the licensees. Nor would domestic companies owned or controlled by Sempra have been affected, which would moreover not meet the requirements of Article 25(2)(b) of the Convention.

24. The Claimant is of the view that all the requirements for establishing the Tribunal's jurisdiction are fully met: it is a legal dispute between a national of the United States and the Argentine Republic concerning losses that affect the interests it has in the licensee companies; the interests involved constitute an investment defined and protected by the BIT; and the harm and losses at issue amount to a violation of the BIT's guarantees.

25. In order to examine these arguments, the Tribunal first has to determine the law applicable to the decision on jurisdiction, a matter that the parties discussed at the hearing. In the Argentine Republic's argument, as the parties have not agreed on any applicable law, there is no option but to resort to the second part of Article 42(1) of the Convention, which calls for the application of domestic legislation and international law. In this context, the argument follows, no court of the Argentine Republic would accept a claim of this sort or allow piercing of the corporate veil.

26. The Claimant is of the view that this provision applies solely to the decision concerning the merits of the dispute, and that for a determination on jurisdiction it is only necessary to apply the Convention and the Treaty.

27. The Tribunal shares the conclusion reached in *Azurix* to the effect that Article 42(1) applies to the merits of the dispute and that to reach a determination on jurisdiction only Article 25 of the Convention and the terms of the Treaty must be applied.³

28. On this basis, the Tribunal will examine now each of the objections presented and the opposing arguments, following for this purpose the same order in which they were presented by the Argentine Republic.

First Objection: Non- controlling shareholder

Opinion of the Parties

29. The Argentine Republic puts forward as an objection to jurisdiction, first, that Sempra does not meet the nationality requirement established in Article 25(2)(b) of the Convention because, in its capacity as minority shareholder in the companies participating in CGS and CGP, it cannot substitute itself in the latter's rights. Accordingly, the Respondent affirms, the denationalization referred to in that article does not occur.

30. Referring to the *Vacuum Salt* case,⁴ which interpreted and applied the provisions of Article 25(2)(b) of the Convention as to the meaning of foreign control, the Respondent argues that what is meant is an "exclusive" control which enables at least blocking changes in the company, a circumstance which does not occur in this case. In the light of the background events and situations leading up to the Convention, it is also affirmed that that article must be understood as referring to foreign nationals that have a "dominant interest"⁵ and that, in response to proposals aimed at eliminating the control requirement, some delegations insisted that it be maintained.⁶ It is further noted that, in the opinion of one author, this concept presumes "effective control or a dominant position and not merely participation."⁷

31. The Claimant asserts, to the contrary, that control is not a requirement for the protection of investments in the system of bilateral treaties on this matter, and refers in this connection to the *Lanco*,⁸ *CMS*,⁹ *Azurix*¹⁰ and *Enron*¹¹ cases. Neither, it is argued, does the Convention define the concept of foreign control and the *Vacuum Salt* case did not exclude the fact that control could be exercised by minority shareholders if they did in fact wield a substantive influence in the company's decisions.

32. Apart from the question of whether minority or indirect shareholders are entitled to protection under the Treaty, a point that will be analyzed separately, the Claimant argues that in this case Sempra and Camuzzi, the Claimant in the concurrent arbitration proceedings, have both separate and joint control in Sodigas and in the licensees, CGS and CGP. In the specific case of Sempra, its holding of 43.09 % in Sodigas enables it to exercise a "negative" control over both Sodigas and the licensees because it can effectively block their decisions; Camuzzi, for its part, can exercise a "positive" control.

33. It is explained in this context that it was the *Vacuum Salt* case which considered the possibility of a shareholders' agreement or other modalities through which control could be exercised by means of positive or negative action over the company's future, concluding that the claimant in that case did not comply with any of these alternatives.

34. In the present case, it is also explained, the joint control of the two companies is expressed first in a Shareholders' Agreement between Sempra and Camuzzi and then in the By-Laws of Sodigas and the licensees. This also means that important resolutions of the Meeting of Shareholders cannot be adopted without the affirmative vote of Sempra and Camuzzi. It is accordingly argued that, in this context, Sempra has a veto power over many resolutions and a substantive influence in the managing of the company.

35. The Argentine Republic rejects the theory of joint control, maintaining that neither of the two investors can demonstrate that it controls Sodigas and the licensee companies in the legal sense of forming the companies' will through effective control or a dominant influence; neither of the investors can make decisions by itself, but must resort to a vote and not even the veto can be considered to imply effective formation of the company's will. It is also pointed out that this would be even less likely to occur in the case of indirect investors.

36. In Respondent's opinion, the theory of joint control leads to the application of two bilateral treaties instead of one, combining the beneficiaries and the respective rules into a single whole, which is incompatible with the consent manifested individually in each treaty and with the personal and material application of each of them.

37. In the Claimant's view, the requirement laid down in Article 25(2)(b) regarding the existence of an agreement concerning foreign control to enable national companies to act directly vis-à-vis ICSID is solely an additional option to the one furnished by the first sentence of the article. This option, moreover, is the one that is also authorized by Article VII(8) of the BIT, in terms of which the Argentine Republic accepted that United States investors with interests amounting to control of Argentine companies can resort to it. However, the argument follows, this option in no way affects the right of an investor of that nationality to submit the dispute to ICSID in his own name if, to this end, it meets the requirements of the Convention and of the BIT. The *CMS*, *Azurix*, and *Enron* cases are again cited in this context.

Considerations of the Tribunal

38. The objection to jurisdiction concerning control of a national company raised by the Argentine Republic involves two aspects. The first relates to the scope of Article 25(2)(b) of the

Convention and whether it establishes an autonomous jurisdiction requirement or one option additional to others. The second aspect, which is definitely a novel approach, refers to the modalities of exercise of control over a company and the alternative of control through a shareholders' agreement.

39. The said article envisages two different situations. The first sentence understands that "National of another Contracting State" is "any juridical person who...has the nationality of a contracting State different from the State that is a party in the dispute..." The second sentence refers to an additional situation: "...and the juridical persons who, having...the nationality of the State that is a party in the dispute, ... and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for purposes of this Convention."

40. The structure of the provision leaves no room for doubt. The first situation is that of a company having the nationality of a contracting State different from the one that is a party to the dispute. To the extent that it meets the requirements of the Convention and of the respective Treaty, that company is eligible to resort to ICSID on the basis of its nationality.

41. The second situation is different. It relates to a company which has the nationality of the State that is a party to the dispute and which, for that reason, could be prevented from claiming against its own State; in such a case, the foreign control criterion enables it to complain as if it were a company of the nationality of the other contracting Party, insofar as this has been agreed between the States concerned. In addition to the substantive difference between these two situations, its supplementary nature, as the Claimant argues, is clearly marked by the word "and" with which the second sentence of the article begins.

42. In the present case, the Claimant in fact had an option. It could claim as a national of the United States, the other contracting State, insofar as it meets the requirements laid down in the Convention and the Treaty. Whether or not the definition of investment considers the case of a minority shareholder or an indirect investment is a separate issue that is the subject of another objection to jurisdiction. Sodigas also had the option to complain as a company incorporated in Argentina, if it is established that this company is under foreign control and, through it, the licensee companies too. This option was the subject of an agreement between the parties contained in Article VII(8) of the Treaty. The existence of this possibility does not prevent the investor claiming as such under the terms of the first sentence, if that option is also available.

43. At the hearing on jurisdiction held in this case, the Argentine Republic raised the question of why Sempra had not claimed as an Argentine company—presumably Sodigas—if in fact it considered that it had control of that company and thereby met the requirements of Article 25(2)(b) of the Convention and of Article VII(8) of the Treaty. The Claimant explained that that option had in fact been considered but the alternative of claiming as a U.S. company was preferred as it would simplify the requirements for registration of the request for arbitration. By letter of February 10, 2005, the Argentine Republic asked the Secretary-General of ICSID to clarify this aspect in so far it concerns discussions allegedly held during the process of registration. After seeking the comments of the Claimant, which were submitted on February 16, 2005, ICSID informed the parties on February 23, 2005 that ICSID only provides general information to the parties and not advice as to the specific legal choices that may be available. The Tribunal finds in this respect that this is an aspect relating to the jurisdiction of the Centre that only the Tribunal can decide and is, consequently, entirely beyond the scope of the functions ICSID Secretary-General. This jurisdictional determination is what the Tribunal will do next.

44. At first sight, the Respondent notes, if an option such as the one discussed were to be permitted this would lead to a contradiction since a shareholder could always claim as such under the first sentence of the article, thus rendering the second sentence redundant. But in fact there is no such contradiction. It is conceivable that where various investor companies resort to arbitration, some can do so as shareholders and others as companies of the nationality of the State that is a party to the dispute, on the basis of the various corporate arrangements and control structures. Thus, for example, in the *Lucchetti* case,¹² *Empresas Lucchetti, S.A.*, petitioned as a foreign investor, while *Lucchetti Perú, S.A.*, did so as a company incorporated in Peru and controlled by the same foreign investor, a situation also envisaged in the pertinent treaty.

45. The Tribunal can then conclude that the option offered by the second sentence of Article 25(2)(b) of the Convention, as well as by Article VII(8) of the Treaty, provides an additional or different alternative which does not in this case prevent an investor from opting to act under the first sentence of the Convention article if it meets the pertinent requirements.

46. In the light of this conclusion, it would appear unnecessary for the Tribunal to consider the second question raised, regarding the manner in which control is exercised, i.e. separately or jointly, since that is not the alternative under which ICSID was accessed. However, it is important to address the concerns and arguments the parties have invoked in this respect.

47. It is first necessary to establish that, from the standpoint of corporate law, it is quite normal that various shareholders might control the policies and operations of a company through a shareholders' agreement, the terms of which are as mandatory as a contract. In this respect, the formation of the corporate will follows the rules of that agreement.

48. This was specifically the situation taken into account in *Vacuum Salt*, when the tribunal held:

“Nowhere in these proceedings is it suggested that Mr. Panagiotopoulos, as holder of 20 percent of Vacuum Salt’s shares, either through an alliance with other shareholders, through securing a significant power of decision or managerial influence, or otherwise, was in a position to steer through either positive or negative action, the fortunes of Vacuum Salt.”¹³

49. The possibility of control through an agreement of shareholders or other means is there envisaged, while at the same time the alternative of a form of both positive and negative control is indicated. The arguments invoked in this connection by the Claimant in this case concerning the existence of an agreement of shareholders and the consequent control of the company, positive for Camuzzi and negative through the exercise of the veto for Sempra, do not appear to contradict what is stated in *Vacuum Salt*.

50. However, there is one aspect on which *Vacuum Salt* sheds no light whatsoever. In that case there was no bilateral treaty on protection of investments and the situation was governed entirely by the law of the host country to the investment. This therefore makes it necessary to examine the problem in the light of the existence of such a treaty, as is the case in the present dispute.

51. The pertinent question is whether a foreign investor can add to its own participation in a local company an additional percentage belonging to another foreign investor so that their combined weight will thereby achieve the necessary control. Of course, combination of the participation of a foreign investor with that of a local investor should be excluded, since in that case, although the combination could result in control, this would not be foreign control. There would not appear to be any problem if various foreign investors of the same nationality, acting

under one and the same treaty, were to make their respective investments in the local company and then organize it by means of an agreement of shareholders.

52. The problem arises in the case of foreign investors of different nationalities acting, as in this case, under different treaties. The Argentine Republic is right when it argues that the consent is expressed in each treaty individually, with a different personal and normative import, in such a way that the combination of various participations could result in situations that that consent did not have in mind and might not have intended to include. In such an alternative the control could not be exercised jointly for the purposes of the Convention and of the Treaty and would have to be measured on the basis of the individual intents.

53. The assertion of the Claimant to the effect that the shareholders' nationality is not relevant inasmuch as they are nationals of a State that is a contracting party to the Convention is not convincing. It could, for instance, result in a shareholder protected by a treaty adding his participation to that of another shareholder who is a national of a State that is a party to the Convention but does not have a bilateral treaty with the host State that would protect him.

54. However, if the context of the initial investment or other subsequent acquisitions results in certain foreign investors operating jointly, it is then presumable that their participation has been viewed as a whole, even though they are of different nationalities and are protected by different treaties. In such a case, it would be perfectly feasible for these participations to be combined for purposes of control or to make the whole the beneficiary.

55. In the present dispute there are three elements that come together to demonstrate that joint participation was actually the case. Sempra's participation began in 1996, being added to that that Camuzzi started in 1992; the companies through which the investments were channeled progressively increased their shareholdings in the licensees, both by purchases from other

shareholders and from the Argentine government itself, which auctioned blocks of shares up to and including the year 2000; the agreement of shareholders and the companies' By-Laws reflect the understandings for the administration and management of the operating companies.

56. All of this was done jointly by Sempra and Camuzzi, in such a way that when the dispute arose it was already a reality that could not be ignored for jurisdictional purposes. An important evidence to this effect, invoked by the Claimant, is that the Office of the Secretary of Defense of Competition and of Consumers of the Ministry of Economy of the Argentine Republic approved the complex share transaction carried out in 2000 by Sempra and Camuzzi, noting that said transaction meant “the assumption of control over the enterprises whose shares are being acquired.”¹⁴ This was precisely a case of joint control.

57. As already noted, with all the importance this discussion has, it becomes somewhat academic in the light of the fact that the access to ICSID was made on the basis of the first sentence of Article 25(2)(b) of the Convention and not on the basis of the requirements concerning control envisaged in the second sentence.

58. It follows from the foregoing that the key question is to determine whether the Claimant meets the requirements for acceding to ICSID, an issue that has been discussed by the parties in the light of other objections to the jurisdiction that will be analyzed next.

Second Objection: Indirect Losses

Opinion of the Parties

59. The second objection to jurisdiction presented by the Argentine Republic is that the Claimant could only validly claim if it could prove that a legal right that it possessed in its capacity as shareholder had been violated, causing it a direct loss. If it were a matter of a mere

interest affected as a result of a measure that affects the company in which it is a shareholder, it is then the company that is entitled to claim and not the shareholder. This is the reason why the Convention requires, in this interpretation, that there be a legal dispute and that the measure challenged has a direct effect on the investment.

60. In support of this viewpoint the history of the negotiation of the Convention is invoked, in that the requirement of a legal dispute “had the purpose of encompassing those cases involving differences of opinion with respect to a legal right” and that the right in question had to arise directly and specifically from the investment.¹⁵ None of this occurs, in Respondent’s opinion, in this case as no right of Sempra has been expropriated or treated unjustly and, if there had been such a violation, only the licensees could consider themselves the holders of the right entitling them to claim; Sempra’s claim is based solely on the decrease of the company’s value and how that impacts the proportional part owned by it as a shareholder.

61. The Argentine Republic also cites the *Methanex* case¹⁶ in which there was discussion as to whether the measures disputed specifically targeted the claimant or whether it was rather a complaint about indirect or consequential losses. Moreover, it is further argued, besides rejecting the idea that claims can be made on account of something that merely affects interests, the tribunal pointed out that such alternative could precipitate an endless chain of complaints before arbitration tribunals.

62. In this same context the argument also discusses the pleadings of the United States in the *GAMI* case,¹⁷ which held that a shareholder can only claim if his rights as such have been violated, and the support given to this viewpoint by customary international law, as expressed in the *Barcelona Traction* case.¹⁸ The decision on jurisdiction in *CMS* also recognized such an import, in the Respondent’s opinion, in that it affirmed that a tribunal could not consider

measures of a general nature but only those that violate specific obligations entered into with the investor.

63. In any event, the argument adds, the rights of the investor are defined and delimited by the national law of the host country or, where applicable, derivative claims must be expressly permitted, as is the case under certain conditions in the North American Free Trade Agreement (NAFTA) or the Free Trade Agreement between Chile and the United States.¹⁹ Without such authorization, the shareholders would be able to acquire priority over any other creditor of the company.

64. The Claimant's view is radically different. It argues in fact that the dispute brought by *Sempra* is of a legal nature since it refers to a violation of the obligations contained in the Treaty and the corresponding compensation, noting that the existence of such obligations arises directly from the Treaty and is independent of the fact that the right of the licensees may also have been violated. This is the reason why, in this other opinion, the right protected is that of the investor arising directly from the investment made; neither is it a matter of general measures but of measures that specifically affect these rights.

65. The Claimant cites in support of its position the decisions on jurisdiction in the *CMS*, *Enron* and *Azurix* cases, which it asserts rejected similar arguments by the Argentine Republic in comparable or identical situations. It further argues that the decision in the *Methanex* case has been incorrectly interpreted by the Respondent since that decision required that there be a significant legal connection between the measure and the investment, which was not present in that case but is precisely the situation in the present dispute. Neither is there any evidence for believing there could be an endless chain of indirect claims, as in fact has not happened, nor

could there be a double recovery for damages or the rights of creditors become subordinated to shareholders' claims.

66. In addition to the cases and situations discussed by the parties in their written presentations, they had the opportunity to undertake an extensive exchange of opinions at the hearing, including, at the Tribunal's request, their views on the similarities and differences of this dispute compared with other cases referred to. Some recent decisions on protection of investments were also discussed, as will be noted further below.

Considerations of the Tribunal

67. The foregoing discussion involves two main aspects: the existence of a legal dispute and whether, if there is one, it arises directly from the Claimant's investment.

68. The Tribunal has no difficulty in concluding that both elements are clearly present in this case. First, the record shows a marked difference between the parties concerning the nature and extent of their respective rights and expectations and their pretensions. This difference not only concerns the facts but mainly the law, as it is reflected in the Treaty. The actual claim submitted, as will be examined below, arises from the alleged violation of the rights and guarantees that the investor has in the light of the Treaty. The legal nature of this dispute is beyond any doubt.

69. Next, the dispute arises directly from the investment that the Claimant has made in the companies incorporated in the Argentine Republic for the purpose of channeling the investment to the licensees. In this connection, if one were to conclude anything different, one would be depriving the Treaty of any effect since it was signed with the precise intention of guaranteeing the investments that would be made in the privatization process, by means of the specific modality with which they were made.

70. As will also be discussed below, this is the definition of investment that is included in the Treaty, a definition which the Tribunal cannot ignore since, as the tribunal noted in *Azurix*, it sought to facilitate agreement between the parties thereby preventing that the corporate personality of the company might interfere with the protection of the real interests associated with the investment.²⁰

71. Whether the measures in dispute can have a general effect, as the Argentine Republic affirms, or an effect that directly affects the investor, as Sempra argues, is an important distinction which flows in part from *CMS*, but which, in any case, is a determination that must be made in connection with the merits and not at the jurisdictional stage. The Tribunal shares the Respondent's opinion to the effect that setting the value of the currency is a sovereign right, citing in support of this view the decision in *Serbian Loans*,²¹ but if this determination eventually affects a legally enforceable commitment it is not unrelated to the jurisdiction of an arbitration tribunal to which a dispute on the subject matter is brought. However, from there to argue, as the Respondent does, that hearing the dispute violates the principle of self-determination and a rule of *jus cogens*, as recognized in the *Western Sahara* case,²² there is a considerable distance.

72. Notwithstanding that some of the cases cited by the parties will be discussed when considering certain meanings of international law that have been disputed, it is necessary to clearly state the Tribunal's understanding in two recent cases which have been the subject of intense debate by the parties, both in their written presentations and at the hearing.

73. The first of these is the *Methanex case*. The Argentine Republic rightly argues that the views put forward by the parties in that case are very similar to those disputed here. The Claimant asserted that its rights had been affected by the measures taken, while the Respondent was of the view that measures that affected the company could not be actionable by the

shareholders who had no more than a mere interest. However, it is also true that the tribunal sought to determine whether there was a significant connection between the measures and the investment.

74. That connection, it was concluded, was not there in the case of *Methanex* since the Claimant did not even produce the component that was regulated by the measures questioned. However, that connection does exist in the present case since the investment was made to carry out the specific economic activity involved in the privatization project, in addition to the fact that in doing so contracts leading to the issuance of a license were signed with the State.

75. The second case that the parties have discussed in this connection is *GAMI*. Here too, the parties disputed the right of action of a shareholder (GAMI) about a loss deriving from damage to the company in which it had invested (GAM). In this case the tribunal held:

“The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.”²³

76. This Tribunal shares that conclusion, particularly to the extent that the treaty on which the protection or guarantee claimed is based provides for the possibility of a shareholder to resort to arbitration concerning the investment made, which is precisely the case in the present dispute where direct or indirect ownership are considered and a broad definition of investment is adopted. The conclusion in the *Mondev* case,²⁴ where problems of action for derivative damages are also discussed, is based on the same concept.²⁵

77. The argument made by the Argentine Republic and which is also reflected in *Methanex*, to the effect that if the right of shareholders to claim when only their interests are affected is recognized it could lead to an unlimited chain of claims, is theoretically correct. However, in practice any claim for derivative damages will be limited by the arbitration clause. As noted in connection with this argument by the tribunal in *Enron*:

“...the answer lies in establishing the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.”²⁶

78. Moreover, the fact must be noted that if the investor has rights protected under a treaty their violation will not result in merely affecting its interests but will affect a specific right of that protected investor.

79. The objection to jurisdiction made by the Argentine Republic on grounds of the indirect nature of the damage does not find support in the light of the facts of this case and of the applicable law. However, the objection concerning the *jus standi* of the Claimant must still be examined.

Third Objection: Lack of *jus standi*

Opinion of the Parties

80. In close connection with the issues discussed above, the Argentine Republic raises an additional objection to jurisdiction based on the view that the Claimant lacks *jus standi* to claim in this case. The Respondent argues that although companies qualify as investments under the terms of the Treaty, such companies must be directly or indirectly owned or else be controlled by a national or a company having the nationality of the other State party to the dispute. In the opinion of the Argentine Republic, Sempra does not own or control any national company having links with the licensees.

81. The Claimant argues that its claim was not made in respect of the rights the licensees might have but rather in its own name, a right provided for under the Treaty, in particular Article I(1)(a). It also argues that this is in any case a question to be discussed in connection with the merits and not at the jurisdictional stage; as such, it must be decided in the light of the Convention, the Treaty and international law.

82. This issue is also inextricably bound up with the question now often faced by international arbitration tribunals in terms of drawing a distinction between disputes arising from the violation of a treaty on investment protection and those that are of a purely contractual nature.

83. In Respondent's view, Sempra cannot argue that it has a genuine claim of its own in the light of the Treaty entitling it to bring an action before ICSID since, if it has suffered harm this is purely of a contractual nature and should therefore be a matter of claim and action by the licensee companies.

84. For the Argentine Republic this is the import of the decision of the International Court of Justice in the *ELSI* case,²⁷ where the Court concluded that compliance with national law is different from compliance with the provisions of a treaty. In the Argentine Republic's opinion, this is also the import of the decision of the Annulment Committee in *Vivendi*, where it was concluded that if the claim was of a contractual nature it would give effect to the choice-of-forum clause included in that contract.²⁸

85. The *SGS v. Pakistan* case²⁹ was also based, the argument follows, on the distinction between contract and treaty claims, even when it was established that a contract-based claim could at the same time be one under the treaty; on the other hand, in the decision on annulment in *Vivendi* the two concepts were separated in establishing that the rules must be independent in one and the other case and originate in different facts.

86. In the present case, according to the Argentine Republic's argument, the entire basis of the claim is its contract-related nature since the property affected has to be defined by the law of the State host to the investment, the alleged facts are not in any way connected with the Claimant and the remedy sought is the performance of the licensees' contract. Hence, in that opinion, there is no claim under the Treaty that the Tribunal could validly hear.

87. The Claimant, as already noted, argues that its claim is not based on rights that the licensees might have but on its own rights under the Treaty; the right to bring action under the Treaty is independent of the fact that there could also be elements of national law or parallel causes of action.

88. In the opinion of this other party, this would be the real meaning of the decision on annulment in *Vivendi* when the Committee holds that the violation of a treaty and a contract are different matters which must be determined by international law in the case of the former and by

contract law in the latter.³⁰ Successive decisions by ICSID tribunals have, it is asserted, also affirmed the right of shareholders to claim under the protection accorded them by the respective treaty, including *Maffezini*,³¹ *Goetz*,³² *AAPL*,³³ *Genin*,³⁴ *CMS*, *Azurix*, *Enron* and *GAMI*, among others.

89. It is further argued that in the *Barcelona Traction* case the decision did not rule on the existence of shareholders' rights in international law and their protection, but on the situation arising from national law and in connection with the specific topic of diplomatic protection and the harm that the State of nationality of the shareholders might have suffered; rather, on the contrary, the decision expressly recognized the different situation that arose in international law with regard to protection of investments.

Considerations of the Tribunal

90. The three objections to jurisdiction that have been discussed have in common the argument that the Tribunal could not hear the claims of investors who did not control the licensees and had not suffered any direct losses but only indirect and derivative effects, and that the right belongs to the licensees under a contract and not to their shareholders under international law. On the basis of these considerations the view is taken that the Claimant lacks *jus standi*.

91. Without prejudice to what has already been noted with regard to the first two objections, they must all be analyzed in the light of the specific provisions of the Treaty. The essential issues the Tribunal must decide are, first, whether the provisions of the Treaty do or do not allow for the claim of an investor who is not a majority shareholder and, second, whether the cause of action lies in the Treaty, the contract, or both.

92. The relevant provision is that of Article I(1)(a) of the Treaty:

“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;

93. There is no question that this is a broad definition, as its intent is to extend comprehensive protection to investors. Quite a few arbitration tribunals, acting under both the ICSID and the UNCITRAL rules, have recognized this import in the context of the same treaty and have concluded that, in the light of the very terms of the provision, it encompasses not only the majority shareholders but also the minority ones, whether they control the company or not. As the tribunal explained in the *Goetz* case, the authority to act granted to shareholders by the treaties on investments seeks protection for the real investors. In the *Enron* case the tribunal concluded that:

“The Tribunal must accordingly conclude that under the provisions of the Bilateral Investment Treaty, broad as they are, claims made by investors that are not in the majority or in the control of the affected corporation when claiming for violations of their rights under such treaty are admissible.”³⁵

94. The same conclusion has been shared by the tribunals in *CMS* and *Enron (Additional Claim)*, among various others. This Tribunal has no reason not to concur with that conclusion, even though some of the elements of fact in each dispute may differ in some respects. If the

purpose of the Treaty and the terms of its provisions have the scope the parties negotiated and accepted, they could not now, as has been noted, be ignored by the Tribunal since that would devoid the Treaty of all useful effect.

95. The second aspect the Tribunal must clarify is whether the Claimant's plea is founded on a contract, in a treaty, or both. Since the time this distinction was made in the *Lanco* case, the discussion of the matter has been significantly advanced. A claim can have a purely contractual origin and refer to a right that does not qualify as an investment, in which case there will be no jurisdiction, as was the case in *Joy*;³⁶ but it can also originate solely in the violation of a provision of the treaty independently from domestic law or, as is more frequently the case, originate in a violation of a contractual obligation that at the same time amounts to a violation of the guarantees of the treaty. In these other cases there will be no obstacle to the exercise of jurisdiction.

96. The latter is the criterion followed by several recent decisions on jurisdiction, particularly those on annulment in *Vivendi* and *Wena*³⁷ and the decision in *SGS v. Pakistan*. Another approach has been that of *SGS v. Philippines*,³⁸ in which it was considered necessary first to have a contract-related aspect of the claim heard by a national court and to retain ultimate jurisdiction over those aspects connected with the treaty.

97. This issue was well described by the Annulment Committee in *Vivendi* when it concluded:

“The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina. It was open to Claimants to

claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of articles 3 and/or 5 of the BIT.”³⁹

98. On the basis of this criterion, the choice of a local forum for contractual purposes was also considered compatible with election of arbitration for purposes of the treaty,⁴⁰ as will be discussed further below.

99. Notwithstanding the differences of fact that distinguish these cases from others, the Tribunal sees no grounds to depart from this conceptual reasoning in that it arises from the very system of protection agreed to by the parties. The Tribunal must accordingly determine whether Sempra’s claim belongs solely to the contract-related claim category, as the Argentine Republic asserts, or is based additionally or exclusively on the provisions of the Treaty, as the Claimant argues.

100. While the specific nature of each claim can only be assessed by examining the merits of the dispute, the Tribunal notes at this stage that the dispute arises from how the violation of contractual commitments with the licensees, expressed in the license and other acts, impacts the rights the investor claims to have in the light of the provisions of the Treaty and the guarantees on the basis of which it made the protected investment.

101. The claim is accordingly founded on both the contract and the Treaty, independently of the fact that purely contractual questions having no effect on the provisions of the Treaty can be subject to legal action available under the domestic law of the Argentine Republic. Neither here does the Tribunal have any reason to depart from this approach. The fact that the Treaty also includes the specific guarantee of a general “umbrella clause”, such as that of Article II(2)(c), involving the obligation to observe contractual commitments concerning the investment, creates an even closer link between the contract, the context of the investment and the Treaty.

102. The Argentine Republic has rightly expressed its concern about the fact that this approach could lead to double recovery for the same harm, one as a result of domestic contract-based action and the other as the outcome of an international arbitral award. The Respondent also draws attention to the fact that in the *GAMI* case, in the light of the NAFTA provisions all compensation must benefit the company and not the shareholder. This is a real problem that needs to be discussed in due course, but again it is an issue belonging to the merits of the dispute. In any event, international law and decisions offer numerous mechanisms for preventing the possibility of double recovery.

Fourth Objection: Renegotiation in progress

Opinion of the Parties

103. The Argentine Republic also objects to jurisdiction on the ground that the claim is not mature since the matter is still subject to a renegotiation process between the licensees and the Government. It is also claimed that what is at issue is a loss permanently fluctuating and therefore undetermined.

104. In the Respondent's view, if jurisdiction is affirmed it would result in an asymmetry and unequal treatment between the company and its foreign shareholders. In so far the latter would be able to claim for measures that affect the company, they ought also to accept that acts of the company benefiting the investors should be duly taken into account. Notwithstanding that the company is divested of rights in order to benefit foreign investors, the Respondent further argues, it is not accepted that these should have obligations concerning the conduct and actions of the domestic company.

105. The Claimant asserts that the renegotiation process has not led to any solution whatsoever and is in fact paralyzed; it cannot therefore have any influence on the question of jurisdiction to resolve the dispute. It also argues that, in any event, this is an issue of admissibility which has to be decided on the merits of the dispute.

106. Moreover, the Claimant argues that the losses are quantifiable and can be proved, but that is also something to be considered when examining the merits of the dispute.

Considerations of the Tribunal

107. This objection to jurisdiction raises four separate questions.

108. The first relates to the renegotiation process. As the tribunal held in *CMS*, it is not the task of an arbitral tribunal to take views on renegotiation proceedings which pertain exclusively to the parties.⁴¹ Whether or not this renegotiation is successful will be apparent from its specific outcomes, but the Tribunal should not defer proceedings on this count.

109. The second question is the one relating to the meaning of admissibility. This aspect was also considered by the tribunal in *Enron* when holding that acceptance of an objection to admissibility would normally result in rejection of the claim on the merits.⁴² When this becomes evident in the jurisdiction phase it will be possible to resolve it at that point, but this is definitely not the case in the context of this dispute.

110. The third question raised relates to the determination and quantification of the losses. This is also a question belonging to the merits of the claim and it is in that context that the eventual losses suffered will have to be identified and proved.

111. The fourth question refers to the asymmetry and unequal treatment the Argentine Republic asserts would occur. It is quite evident that in the context of a system of investment

protection under international law, only the beneficiaries of such protection can resort to it. This was the intention of the Treaty and is also the situation in international law as it enables specific parties to take action in the light of its rules and mechanisms. Whether this protection can or should be extended to national investors is an alternative which only the evolution of international law and/or domestic law will be able to determine, but it is not what the parties to the Treaty intended.⁴³

112. The protected foreign investors clearly can claim on account of measures that affect the company to the extent that this is possible under the terms of the respective treaty, as is the case in this instance. This is entirely different from the intra-company relations to which the argument mentioned also appears to refer. To the extent that the acts of the company benefit the foreign investors, there is no reason why such benefits should not be taken into account at the appropriate time. Similarly, the investors will always have obligations vis-à-vis the company, and these will not change as a result of a claim under international law. Moreover, a shareholder may be even entitled to sue the directors or managers for acts of the company that cause him harm.

113. In the light of these considerations, the Tribunal concludes that this objection is not pertinent.

Fifth Objection: Lack of evidence on the status of investor

Opinion of the Parties

114. The Argentine Republic also objects to jurisdiction on the argument that Sempra has not established or proven its condition of investor with the pertinent corporate documents. The

Claimant asserts it has provided all necessary documentation relating to the company structure confirming its status as an investor protected under the Treaty.

Considerations of the Tribunal

115. The Tribunal has examined the documentation submitted and has no reason to believe that the Claimant does not qualify as an investor. Moreover, a most detailed examination of the company structure of Semptra, and also of that of Camuzzi, was made by the Argentine authorities themselves in the context of the protection of competition, as will be discussed further below. Accordingly, this objection cannot be retained.

Sixth Objection: The dispute has been submitted to national courts

Opinion of the Parties

116. The Argentine Republic further objects to jurisdiction on the ground that the Claimant is prevented from taking action in this forum as a result of the forum selection clause of the license, which provides only for action before domestic courts; it is also argued that since the dispute has been submitted to the national courts of Argentina, the option under the principle *electa una via* (“fork-in-the-road”) provided for in the Treaty has in fact been exercised.

117. In the Claimant’s opinion, the choice of forum clauses in the licenses do not prevent disputes arising from treaty breaches being submitted for arbitration by ICSID, since the different forums have different scopes and objectives. Various decisions adopted by arbitral tribunals are cited in support of this opinion, in particular the decision of the tribunal in the *Lanco* case⁴⁴ and those of the Annulment Committees in *Vivendi*⁴⁵ and *Wena*,⁴⁶ among others.

118. The Claimant also argues that this dispute has not been submitted to the national courts and that the licensees have expressly refused to participate in proceedings regarding adjustment of tariffs and the actions of the Ombudsman. It is also argued that, in any case, no dispute about shareholders' rights under the Treaty has been submitted to said courts, nor has the Respondent identified any court in this context.

119. It is further asserted by the Claimant that decisions of ICSID tribunals have emphasized the difference between disputes of a commercial nature which do not involve provisions of the treaty, which can be submitted to the national courts in accordance with the respective contracts, and disputes which do impinge upon the guarantees provided under the treaty concerned, and which can be submitted to arbitration in accordance with the mechanisms laid down in that treaty.⁴⁷

Considerations of the Tribunal

120. Discussion of the meaning of forum selection clauses in a contract is already a common feature of many disputes brought to arbitration. This is a direct consequence of the difference between a contract-based and a treaty-based claim, as noted.

121. The conclusion reached in this respect by the Annulment Committee in *Vivendi* is meaningful:

“[W]here “the fundamental basis of a claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.”⁴⁸

122. This Tribunal, like others that have considered this issue before, sees no reason to conclude otherwise. Moreover, by admitting the distinction between a contract-based and a treaty-based claim, the choice of forum is, as noted, a consequence of it that as such cannot affect the essence of the distinction.

123. Just as a dispute that is purely contract-related will have to be brought before the forum envisaged in the contract, so too a dispute relating to the interpretation of a treaty can be submitted to the mechanisms of that treaty. If the contrary were true, the contract would nullify the provisions of the treaty. The Government of Chile, for example, refrained from putting forward objections to jurisdiction in the *MTD* case despite the fact that the contract specified the choice of a local forum, as it rightly understood that to the extent there was an alleged violation of the pertinent treaty that clause would not affect arbitral jurisdiction.⁴⁹

124. The parties have discussed in this case other recent arbitral decisions which have considered the distinction between a dispute originating in a contract and one arising from a treaty, and its connection with the choice of forum, in particular *SGS v. Pakistan*, *SGS v. Philippines* and *Generation Ukraine*.⁵⁰ Notwithstanding the different meaning that each party attributes to those decisions, the Tribunal notes that none contradicts the basic principle that a dispute can originate in a contract and simultaneously have an effect on a treaty, or the principle that a contract-related dispute can be submitted to the local forum and one under the treaty to the arbitral tribunal.

125. In point of fact, in *SGS v. Pakistan* the dispute involved proceedings in various national courts and the arbitral forum specified in the treaty, with the tribunal concluding that it had jurisdiction over those contract-related aspects of the dispute that at the same time involved a violation of the treaty, but not over those that had no connection with the standards of protection

set by the treaty in question.⁵¹ Similarly, in *Generation Ukraine* the tribunal confirmed its competence to consider the claims that related to the treaty and noted that technical aspects of the dispute should be submitted to the national courts as provided in the contract; the latter could be eventually transformed into a treaty claim in case of denial of justice.⁵²

126. Even *SGS v Philippines*, which has prompted so much discussion, does not depart from the essential principle that those aspects of the dispute originating in the treaty can be submitted to the arbitral forum, even though the tribunal required that a contract-related component of that dispute concerning the precise amount of the amount due under the contract had to be resolved first by the domestic court.⁵³

127. The Tribunal also notes that in the present case submission of the dispute to a national court has not been established and, as far as a dispute under the Treaty is concerned, it has solely been submitted to this Tribunal. The principle *electa una via* does not show that an option in favor of local jurisdiction has been made; rather to the contrary, it shows opting for arbitral jurisdiction.

128. The Tribunal accordingly concludes that this objection cannot be retained.

The meaning and extent of international law

Opinion of the Parties

129. The parties have also discussed in the context of this dispute the meaning and extent of international law and the role of arbitral tribunals in the interpretation of treaties. This question was first raised in the Reply of the Argentine Republic and addressed by the Claimant in its Rejoinder. It was also discussed in the hearing.

130. The Argentine Republic argues in this connection that the consent given in ratifying the Convention does not mean that Argentina has consented to submitting a dispute to ICSID, for which an express commitment in writing is required. It is argued that while the investors are the addressees and beneficiaries of the system, the Treaty has been signed between States and must be interpreted in the light of the Vienna Convention on the Law of Treaties.

131. Resorting to general criteria of legal interpretation and the rules of the Vienna Convention, the Respondent believes that such interpretation must be based on the intention of the parties and that States signatories to the treaty are the best qualified to do so. In that view, interpretation is not the task of arbitral tribunals and the case law to this effect should be ignored. That function of States is connected to the principle that unilateral State acts can create legal obligations.⁵⁴

132. Relying on those concepts, the Respondent believes that the relevant interpretation of the Treaty or equivalent provisions is that given by the representatives of the United States in the *GAMI*, *Methanex* and *Mondev* cases. Respondent also argues that intention cannot be established by means of the opinion of writers or other unofficial acts.

133. The Respondent is particularly critical of the decision in *Enron*,⁵⁵ considering that an alleged invitation to participate in the investment was confused with the required consent, as it was understood that the invitation had been made by the Argentine Government and because the bidding was national and not international. In the case of *Sempra*, it is further argued, this invitation could not have taken place as it was not issued either in the case of *Camuzzi*

134. Nothing in this argument, it is also asserted, is related to a question of diplomatic protection, also discussed in *Enron* when holding that, if the system is guided by the declarations of a State, reversion to the stage of diplomatic protection would inevitably follow. The

Argentine Republic explains the differences between diplomatic protection and the system of investment protection, pointing out that even though, in the latter case, States may make different rules as to how a dispute arises and is dealt with, this does not mean that they have moved away from the standards of protection and rules of procedure.

135. Both *Enron* and *CMS* are also criticized for having apparently considered that the large number of investment-protection treaties and the *lex specialis* contained in them have become the general rule in connection with international claims.⁵⁶ In the Respondent's opinion, a kind of induction process which raises the *lex specialis* to the level of customary international law cannot be justified.

136. The relevant interpretation, the argument follows, is that which arises from the intention of the State expressed in the provisions of some treaties and omitted from the provisions of other treaties signed by the same State; this comparative exercise makes it possible to establish the value of silence vis-à-vis that of words, arguing that if a treaty includes a certain provision but a subsequent or simultaneous treaty does not, this constitutes a presumption that the recognition of the rights concerned is not intended

137. The Claimant is of the view that the interpretation of treaties cannot disregard the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose, as provided in Article 31 of the Vienna Convention and customary law. The intention of the parties, it is asserted, is not a principal or supplementary means of interpretation, even less so when one is attempting to apply the interpretation the United States has given to a provision of NAFTA to a separate treaty on investment protection.

138. The intention expressed by the negotiators of the program of bilateral treaties, which the Claimant cites in detail, would appear to indicate that the United States does not share the

intention attributed to it by the Argentine Republic in this matter. Moreover, it is argued that the United States' interpretation in these NAFTA cases has been systematically rejected by the respective tribunals. Neither, it is also argued, does United States law play any role in the matter.

Considerations of the Tribunal

139. The Tribunal agrees with the Argentine Republic that the consent expressed in ratifying the Convention is not the consent required by the Convention for bringing a claim before ICSID; this indeed requires a separate declaration by means of a treaty or other acts making such consent unequivocally clear.

140. The Tribunal, however, cannot disregard the fact that the Argentine Republic signed the Treaty with the United States. This instrument embodies the expression of consent for resorting to arbitration should a dispute arise between the investor and the State with respect to the guarantees ensured under the Treaty. If what the Respondent is arguing is that an ad-hoc agreement between the investor and the State is needed to submit a specific dispute to arbitration, then this is a mistaken understanding. The Treaty is self-sufficient for this purpose and the option of resorting to dispute resolution is exercised by the investor by the simple fact of expressing its own consent. The concept of an arbitration clause (“compromis”) additional to the agreement on arbitration, which was in favor at some point in private arbitration, is not envisaged in the Treaty and is no longer of great use.

141. The Tribunal also agrees with the Respondent that the rules for a correct interpretation are those of the Vienna Convention, which are also those that were followed in customary international law.⁵⁷ The relevant provision is that of Article 31 of the Convention, providing that

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁸

142. This being the principal means of interpretation, it is the one that must be applied by the Tribunal. It has already been noted that the terms of the Treaty opted for the alternatives discussed, making it unnecessary to resort to supplementary means. But even if that were necessary, the negotiating history of the Treaty does not show that the intention asserted today by the Argentine Republic was that this country and the United States had in signing the Treaty. Rather to the contrary, the clear intention was to provide full protection for investors. A sizeable number of treaties were concluded by the Argentine Republic with the specific intent of encouraging the interest of foreign investors in the privatization program. To this end is that the terms of the Treaty discussed above were included.

143. Article 31 also makes it possible, if necessary, to take into account subsequent agreements or practices followed by the parties to a treaty with respect to its interpretation or application. The parties to NAFTA are certainly not the same as those to the Treaty. This would make it difficult to extend the interpretation that one party makes of a treaty to that which another party makes of a different treaty.

144. Nevertheless, as the tribunal held in *Enron*,⁵⁹ it could be possible that the interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties might be the same, unless a different intention is expressed. This was the approach followed by the tribunal in *Maffezini*, where for the correct interpretation of the treaty between the Argentine Republic and Spain the tribunal took into account the policy that the latter country had followed in concluding numerous bilateral treaties to protect Spanish investors abroad and the terms of those treaties.

145. What the United States has affirmed in the discussion of the NAFTA cases noted has a relative value, as in any event that interpretation would have to find some support in the context of the Treaty or its background. However, as also noted, that background in this case points in a different direction, not allowing to identify the approach to interpretation of one ambit with that of the other. The fact that the competent tribunals have also rejected that interpretation is not irrelevant. Neither is the opinion of those who were responsible for the drafting and negotiation of a State's bilateral treaties irrelevant, in that it serves, precisely, to establish the original intention.

146. The fact that international law recognizes unilateral acts as a source of obligations is separate from the discussion in the matter of this dispute, since the essential requirement for that to happen is that there be the intention to create an obligation. The Tribunal cannot presume that intention if it is not expressly stated. Counsel representing the State in arbitration proceedings have the duty to put forward all the arguments they deem appropriate to defend their position, but a tribunal could not presume that each of those arguments constitutes the expression of a unilateral act that obligates the State. This intention was expressly stated, for example, in the case of the *Filetage a l'intérieur du Golfe de Saint-Laurent* and was recognized as such by the tribunal.⁶⁰

147. Notwithstanding the Argentine Republic's opinion to the contrary, interpretation is not the exclusive task of States. It is also the duty of tribunals called upon to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty. This is precisely the role of judicial decisions as a source of international law in Article 38(1) of the Statute of the International Court of Justice, to which the Respondent refers.

148. It is not the task of this Tribunal to consider the criticism of decisions of other tribunals, which may or not be justified, but it is necessary to discuss some aspects of that criticism which have a bearing on this case.

149. The first of these aspects is whether Sempra was or was not invited to participate in the privatization process. While the information provided indicates that Sempra did not make its investment until 1996, the fact of the matter is that the Treaty was in effect for all who wished to participate in the process, without any time limit. Moreover, officials of the Argentine Republic were not unaware of this investment.

150. The second aspect is the one connected with diplomatic protection. The Tribunal agrees with the Argentine Republic that diplomatic protection involves concepts and mechanisms that are very different from those available in the system of international investment protection. The latter has devised a mechanism that is separate from the role of the State of the investor's nationality, but not from that of the State host to the investment, which will have to participate in cases where a dispute arises with the investor.

151. For the same reason that diplomatic protection is inappropriate under the bilateral treaty system, neither can this system rely on approaches arising from that traditional mechanism, in particular those of the *Barcelona Traction* case. As the tribunal points out in *GAMI*:

“The Tribunal however does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection. The ICJ itself accepted in *ELSI* that US shareholders of an Italian corporate entity could seize the international jurisdiction when

seeking to hold Italy liable for alleged violation of a treaty by way of measures *imposed on that entity*.”⁶¹

152. This is the reason why today it could not be asserted in the light of the evolution of international law, that shareholders that qualify as protected investors within the scope of the system for protecting foreign investors are prevented from claiming their rights, even when the harm has been inflicted on the company in which they participate. The International Court of Justice itself did not fail to consider this point in *Barcelona Traction* in the light of what was then the emerging system for protecting investors under the Convention.

153. As the tribunal in *LG&E* also noted, whatever may have been the merits of *Barcelona Traction*, that case was concerned solely with the diplomatic protection of nationals by their State, while the case here disputed concerns the contemporary concept of direct access for investors to dispute resolution by means of arbitration between investors and the State.⁶²

154. The fact that, as the Respondent notes, in *ELSI* the shareholders held 100 percent of the shares and total control of the company, in addition to the fact that a bankruptcy situation was involved, neither of which apply in this case, does not change the principle at issue which is that shareholders can claim on their own. If, moreover, the treaties provide similar rights to shareholders having indirect ownership or control, or who are not majority shareholders, this does not alter that principle either. This was also the criterion applied by the tribunal in *LG&E*.⁶³

155. As noted, the parties have also discussed the importance of *Vacuum Salt* in this context because the investor in that case did not have control of the company and could not therefore claim under the Convention. However, as the tribunal in *Enron* noted, in *Vacuum Salt* there were two situations entirely different from those of *Enron* and this case: the company was entirely subject to Ghanaian legislation, without there being even a foreign-investment contract,

and, even more important, there was no bilateral treaty to protect the investment.⁶⁴ The latter is precisely what makes the difference in this case.

156. The Tribunal must, finally, refer to the question raised to the effect that *lex specialis* cannot be considered as leading to a rule of customary law. First, the Tribunal must note that there is no obstacle in international law to the expression of the will of States through treaties being at the same time an expression of practice and of the *opinion juris* necessary for the birth of a customary rule if the conditions for it are met.⁶⁵

157. In *CMS*, the tribunal held that the system of treaties on protection gives rise to a *lex specialis* which “...can now be considered the general rule, certainly in respect of foreign investments and international claims....”⁶⁶ However, this does not necessarily mean that it refers to the emergence of a customary rule. The general rule is evidenced by the fact that practically all disputes relating to foreign investments are today submitted to arbitration by resorting to the mechanisms of that *lex specialis*, as expressed by means of bilateral or multilateral treaties or other agreements. Only in very exceptional instances do the affected parties resort to diplomatic protection; the latter cannot then be considered the general rule in the system of international law presently governing the matter, but as a residual mechanism available when the affected individual has no direct channel to claim on its own right.

C. DECISION

For the reasons set forth above, the Tribunal hereby decides that this dispute falls within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has accordingly

issued the Order necessary for continuation of the proceedings, in accordance with Arbitration Rule 41(4).

It is so decided.

Francisco Orrego Vicuña
President of the Tribunal

Sandra Morelli Rico
Arbitrator

Marc Lalonde
Arbitrator

¹ Treaty between the United States and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of 1991, in force since October 20, 1994

² Law 24.076 of 1992 on the privatization of the gas sector and Decree 1738/92 of 1992 on application of the gas law.

³ *Azurix Corp. v. the Argentine Republic* (ICSID Case No. ARB/01/12), Decision on jurisdiction of December 8, 2003, paras. 48-50, 43 *ILM* 262 (2004) (hereinafter *Azurix*).

⁴ *Vacuum Salt Products v. Republic of Ghana* (ICSID Case No. ARB/92/1), Award of February 16, 1994, 9 *ICSID Rev.—FILJ* 72 (1994) (hereinafter *Vacuum Salt*).

⁵ Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Vol. IV, 1969, p. 48, as cited in the *Memorial on Jurisdiction of the Argentine Republic*, Note 4 (hereinafter *Memorial on Jurisdiction*).

⁶ Documents Concerning the Origin and the Formulation of the Convention on Settlement of Investment Disputes between States and Nationals of other States, Vol. IV, 1969, p. 171, as cited in *Memorial on Jurisdiction*, Note 5.

⁷ *Memorial on Jurisdiction*, para. 18, with reference to Schreuer, Christoph H., *The ICSID Convention: A Commentary*, Cambridge University Press (2001), p. 315.

⁸ *Lanco International, Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6), Preliminary decision on jurisdiction of December 8, 1998, 5 *ICSID Rep.* 367 (hereinafter *Lanco*).

⁹ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on objections to jurisdiction of July 17, 2003, 42 *ILM* 788 (2003) (hereinafter *CMS*).

¹⁰ *Azurix*.

¹¹ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on jurisdiction of January 14, 2004, <http://www.asil.org/ilib/Enron.pdf> (hereinafter *Enron I*).

¹² *Lucchetti S.A. and Lucchetti Peru, S.A. v. Republic of Perú* (ICSID Case No. ARB/03/4), Award of February 7, 2005, par. 15, <http://www.worldbank.org/icsid/cases/lucchetti-award.pdf> (hereinafter *Lucchetti*)

¹³ *Vacuum Salt*, para. 53, as cited in the Reply on Jurisdiction of the Argentine Republic, para. 14 (hereinafter *Reply on Jurisdiction*).

¹⁴ Ministry of Economy, Office of the Secretary for Defense of Competition and the Consumer, Resolution No. 196, September 20, 2000, and Annexed Opinion of the Commission on the Defense of Competition; Exhibit No.2 to the Claimant's Rejoinder on Jurisdiction.

¹⁵ Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Vol. IV, 1969, p. 84, 308, as cited in *Memorial on Jurisdiction*, Notes 15 and 20.

¹⁶ *Methanex Corporation v. United States of America*, Preliminary Award on Jurisdiction and Admissibility, Aug. 7, 2002, <http://www.state.gov/documents/organization/12613.pdf>

¹⁷ *GAMI Investments, Inc. v. United Mexican States*, Brief of the United States of America, June 30, 2003, <http://www.state.gov/documents/organization/22212.pdf> as cited in *Memorial on Jurisdiction*, Note 9 (hereinafter *GAMI*).

¹⁸ International Court of Justice, *Barcelona Traction, Light and Power Company Limited, Reports*, 1970, p. 4, para. 44, as cited in *Memorial on Jurisdiction*, Note 11.

¹⁹ Free Trade Treaty between Chile and the United States, June 6, 2003. <http://www.direcon.cl/documentos/TLC%20EEUU/version%20completa%20TLCChile%20EEUU.pdf>

²⁰ *Azurix*, para. 64.

²¹ Permanent Court of International Justice, *Serbian Loans*, Series A. No. 20, 1929

²² International Court of Justice, *Advisory Opinion Concerning Western Sahara, Reports*, 1975, p. 12.

²³ *Gami*, Final award of November 15, 2004, <http://www.state.gov/documents/organization/38789.pdf> para. 33.

²⁴ *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Final award of October 11, 2002, 6 *ICSID Rep.* 192 (2004).

²⁵ *Enron Corporation y Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (additional claim) of August 2, 2004, paras. 33-36 (hereinafter *Enron II*).

²⁶ *Enron I*, para. 52.

²⁷ International Court of Justice, *Eletronica Sicula S. p. A. (ELSI), Reports*, 1989, p. 15.

- ²⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision of the *ad hoc* Committee of July 3, 2002, 19 *ICSID Rev.—FILJ* 89 (2004), pár. 98 (hereinafter *Aguas*).
- ²⁹ *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of August 6, 2003, 18 *ICSID Rev.—FILJ* 301 (2003) (hereinafter *SGS v. Pakistan*).
- ³⁰ *Aguas*, para. 50.
- ³¹ *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction of January 25, 2000, 16 *ICSID Rev.—FILJ* 212 (2001).
- ³² *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3), Award of the Tribunal of February 10, 1999, 15 *ICSID Rev.—FILJ* 457 (2000) (hereinafter *Goetz*).
- ³³ *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award of the Tribunal of June 27, 1990, 6 *ICSID Rev.—FILJ* 526 (1991).
- ³⁴ *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award of the Tribunal of June 25, 2001, 17 *ICSID Rev.—FILJ* 395 (hereinafter *Genin*).
- ³⁵ *Enron I*, para. 49.
- ³⁶ *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Decision on jurisdiction of August 6, 2004, <<http://www.asil.org/ilib/JoyMiningEgypt.pdf>>
- ³⁷ *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision of the Tribunal on Annulment of February 5, 2002, 6 *ICSID Rep.* 129 (2004) (hereinafter *Wena*).
- ³⁸ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction of January 29, 2004, <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf> (hereinafter *SGS v. Philippines*).
- ³⁹ *Aguas*, para. 112.
- ⁴⁰ *Wena*.
- ⁴¹ *CMS*, para. 86.
- ⁴² *Enron I*, para. 33.
- ⁴³ *CMS*, para. 86.
- ⁴⁴ *Lanco*, paras. 39-40.
- ⁴⁵ *Aguas*, para. 101.
- ⁴⁶ *Wena*, para. 31.
- ⁴⁷ Claimant's Counter-Memorial on Jurisdiction, pp. 57-58, with special reference to *Genin* and *Azurix*.
- ⁴⁸ *Aguas*, para. 101.
- ⁴⁹ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Award of May 25, 2004, <<http://www.asil.org/ilib/MTDvChile.pdf>>, para. 90.
- ⁵⁰ *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of September 16, 2003, <<http://www.asil.org/ilm/Ukraine.pdf>> (hereinafter *Generation Ukraine*).
- ⁵¹ *SGS v. Pakistan*, para. 162.
- ⁵² *Generation Ukraine*, para.20.33.
- ⁵³ *SGS v. Philippines*, para. 128.
- ⁵⁴ International Court of Justice, *Nuclear Tests Case, Reports*, 1974, p. 253.
- ⁵⁵ Reply on Jurisdiction of Argentina, p. 48, with reference to *Enron I*.
- ⁵⁶ *CMS*, para. 48.
- ⁵⁷ McNair: *The Law of Treaties*, 1961, 364-382.
- ⁵⁸ Ernesto de la Guardia: *Derecho de los Tratados Internacionales*, 1997, 216-230.
- ⁵⁹ *Enron I*, para. 47.
- ⁶⁰ *Differend Concernant le Filetage à l'intérieur du Golfe de Saint-Laurent (Canada-France)*, Award of July 17, 1986, *Revue Générale de Droit International Public*, 1986/3, 713-786, p. 756.
- ⁶¹ *Gami*, para. 30, emphases in original, notes omitted.
- ⁶² *LG&E Corp., LG&E Capital Corp. y LG&E International Inc. v. República Argentina* (ICSID Case No. ARB/02/1), para. 52 (hereinafter *LG&E*).
- ⁶³ *LG&E*, para. 50.
- ⁶⁴ *Enron II*, paras. 43-45.
- ⁶⁵ Julio A. Barberis: "Réflexions sur la coutume internationale," *Annuaire Français de Droit International*, Vol. XXXVI, 1990, 9-46.
- ⁶⁶ *CMS*, para. 48.