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

In the proceeding between

CMS Gas Transmission Company
(Claimant)

and

The Republic of Argentina
(Respondent)

Case No. ARB/01/8

Decision of the Tribunal on Objections to Jurisdiction

Members of the Tribunal

Professor Francisco Orrego Vicuña, President

The Honorable Marc Lalonde P. C., O. C., Q. C.

H. E. Judge Francisco Rezek

Secretary of the Tribunal
Mrs. Margrete L. Stevens

Representing the Claimant
Lucy Reed
Sylvia Noury
Freshfields Bruckhaus Deringer LLP
New York
United States
Nigel Blackaby
Freshfields Bruckhaus Deringer
Paris
France
Guido Santiago Tawil
M. & M. Bomchil Abogados
Buenos Aires
Argentina

Representing the Respondent
Rubén Miguel Citara
Procurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Buenos Aires
Argentina

Date of decision: July 17, 2003

A. Procedure

1. On July 26, 2001, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from CMS Gas Transmission Company (CMS), an entity incorporated in the United States of America, a Request for Arbitration against the Republic of Argentina (Argentina). The request concerns the alleged suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which CMS has an investment. In its request, the Claimant invokes the provisions of the 1991 "Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment." (The Argentina – U.S. Bilateral Investment Treaty or BIT).[1]

2. On July 27, 2001, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt and transmitted a copy of the request to Argentina and to the Argentine Embassy in Washington D.C.

3. On August 15, 2001, the Centre requested CMS to confirm that the dispute referred to in the request had not been submitted by CMS for resolution in accordance with any applicable, previously agreed, dispute-settlement procedure, under Article VII (2)(b) of the BIT. On August 23, 2001, CMS confirmed that it had taken no such steps.

4. On August 24, 2001, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention (the Convention). On this same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

5. On August 30, 2001, the Centre reminded Argentina of the Claimant's proposal concerning the number of arbitrators and the method of their appointment. Under this proposal, contained in paragraph 60 of the request for arbitration, the Arbitral

Tribunal would consist of three arbitrators, one arbitrator to be appointed by each party and the third, who would be President of the Tribunal, to be appointed by agreement of the parties.

6. On September 13, 2001, Argentina informed the Centre of its agreement to the proposal of CMS concerning the number of arbitrators and the method of their appointment. On the same date the Centre informed the parties that since their agreement on the number of arbitrators and the method of their appointment was equivalent to the formula set forth in Article 37(2)(b) of the Convention, the parties were invited to follow the procedure set forth in Arbitration Rule 3 for the appointment of arbitrators.

7. On October 24, 2001 Argentina appointed Judge Francisco Rezek, a national of Brazil, as an arbitrator. On November 9, 2001, CMS appointed The Honorable Marc Lalonde P.C., O.C., Q.C., a national of Canada, as an arbitrator. The parties, however, failed to agree on the appointment of the third, presiding, arbitrator. In these circumstances, by letter of December 5, 2001, the Claimant requested that the third, presiding, arbitrator in the proceeding be appointed in accordance with Article 38 of the ICSID Convention[2].

8. After consultation with the parties, Professor Francisco Orrego Vicuña, a national of Chile, was duly appointed as President of the Arbitral Tribunal. On January 11, 2002, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Alejandro Escobar, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

9. The first session of the Tribunal with the parties was held on February 4, 2002, at the seat of ICSID in Washington, D.C. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the

relevant provisions of the ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect.

10. During the course of the first session the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. The Tribunal, after ascertaining the views of the parties on this matter, fixed the following time limits for the written phase of the proceedings: The Claimant would file a memorial within 120 days from the date of the first session; the Respondent would file a counter-memorial within 120 days from its receipt of the Claimant's memorial; the Claimant would file a reply within 60 days from its receipt of the counter-memorial; and the respondent would file its rejoinder within 60 days from its receipt of the reply. At the first session it was further agreed that in the event of the Respondent raising objections to jurisdiction, the following time limits would apply: the Respondent would file its memorial on jurisdiction within 60 days from its receipt of the Claimant's memorial on the merits; the Claimant would file its counter-memorial on jurisdiction within 60 days from its receipt of the Respondent's memorial on jurisdiction; the Respondent would file its reply on jurisdiction within 30 days from its receipt of the Claimant's counter-memorial on jurisdiction; and the Claimant would file its rejoinder on jurisdiction within 30 days from its receipt of the Respondent's reply on jurisdiction.

11. On May 24, 2002, the Claimant requested an extension till July 5, 2002 of the time limit fixed for the filing of its memorial. On June 6, 2002, the Tribunal granted the extension sought by the Claimant. In doing so, the Tribunal noted that Argentina would be entitled to an equivalent extension if requested, of the time limit fixed for its counter-memorial.

12. On July 5, 2002, the Claimant filed its memorial on the merits and accompanying documentation. On August 5, 2002, Mrs. Margrete L. Stevens replaced Mr. Alejandro Escobar as Secretary of the Tribunal. On September 4, 2002, Argentina requested an extension till October 7, 2002, of the time limit fixed for the filing of the memorial on jurisdiction. On September 11, 2002, the Tribunal granted the extension sought by Argentina. On October 7, 2002, Argentina filed its memorial on jurisdiction.

13. On October 24, 2002, following the Respondent's filing of objections to jurisdiction, the proceeding on the merits was suspended in accordance with ICSID Arbitration Rule 41(3).

14. On December 17, 2002, the Claimant submitted its counter-memorial on jurisdiction. On January 22, 2003, the parties requested an extension of 30 days for each of the remaining two jurisdictional filings. On January 27, 2003, the Tribunal granted the extensions, and fixed the time limit for the filing of the Respondent's reply on jurisdiction for February 11, 2003; and the time limit for the filing of the Claimant's rejoinder on jurisdiction for March 25, 2003.

15. On February 13, 2003, the Respondent filed its reply on jurisdiction, and on March 25, 2003, the Claimant filed its rejoinder on jurisdiction.

16. On April 7-8, 2003, the hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. Ms. Lucy Reed and Messrs. Nigel Blackaby, Jonathan Sutcliffe and Guido Tawil addressed the Tribunal on behalf of the Claimant. Mr. Ignacio Suarez Anzorena addressed the Tribunal on behalf of Argentina. The Tribunal posed questions to the parties, as provided in Rule 32(3) of the Arbitration Rules.

17. The Tribunal has deliberated and considered thoroughly the parties' written submissions on the question of jurisdiction and the oral arguments delivered in the course of the April 7-8, 2003 hearing. As mentioned above, the consideration of the merits has been postponed until the issue of the Centre's jurisdiction and the Tribunal's competence has been decided by the Tribunal. Having considered the basic facts of the dispute, the ICSID Convention and the 1991 Argentina – U.S. BIT, as well as the written and oral arguments of the parties' representatives, the Tribunal has reached the following decision on the question of jurisdiction.

B. Considerations

Argentina's privatization program

18. Beginning in 1989, the Republic of Argentina undertook a broad program of privatization of State-owned companies and other economic activities,[3] while at the same time it proceeded to peg the Argentine peso to the United States dollar and adopted other stabilization measures.[4] Important aims of this program were to achieve currency stability, eliminate inflation and attract foreign investment.

19. One major sector subject to privatization was the gas industry. The Gas Law,[5] the Gas Decree,[6] the 1992 Information Memorandum,[7] the Model License[8] and other instruments were prepared and enacted in order to undertake the reorganization of this important sector of the economy. Within this overall legal framework, Transportadora de Gas del Norte (TGN), an Argentine incorporated company, obtained in 1992 a license for the transportation of gas while blocks of State-owned shares in the company were sold to private investors. Following another Public Offering made in 1995, CMS purchased the shares still remaining in government hands that represented 25% of TGN, and later purchased an additional 4.42% that had been assigned to an employee share program, thus totalling 29.42% of TGN.

20. Under the arrangements made for the privatization of this sector, tariffs were to be calculated in U.S. dollars and expressed in pesos at the exchange rate at the time of billing, and they were also to be adjusted semi-annually in accordance with the United States Producer Price Index ("PPI"). Following a major economic and financial crisis, the Republic of Argentina enacted, starting late 1999, various measures which had, in the Claimant's view, an adverse impact on its business and breached the guarantees which protected its investment in TGN. These various measures later led to the devaluation of the currency and the adoption of additional financial and administrative measures also alleged to have an adverse impact on the investor.[9]

21. The Republic of Argentina does not share those views and believes the measures adopted have a meaning and extent different from what CMS claims. Moreover, the

Republic of Argentina explains that many of these measures are transitory in nature, are currently being subject to renegotiation with investors in the privatization program and do not entail an expropriation of the investment made. The only guarantees made to CMS by the Republic of Argentina, it is further affirmed, were those established in the Terms of the License and these have not been breached.

Nature and limits of the jurisdictional decision

22. The dispute between the parties has been submitted to arbitration under the ICSID Convention pursuant to the Argentina-United States Bilateral Investment Treaty.[10] Although many of the views expressed by the parties concern aspects relating to the merits of the dispute, the Tribunal has at this stage to decide only on aspects of jurisdiction. The discussion which follows relates of course only to the issues and facts pertinent to this particular case.

Measures of public interest and industry-specific measures distinguished

23. Both in the written pleadings and in the hearing, the Republic of Argentina raised, in connection with questions of admissibility, the concern that part of the claim by CMS is not related specifically to the gas industry but to measures of general economic policy affecting the country as a whole. The latter measures, it is further explained, are mainly those connected with the situation of economic, financial and social emergency which arose in late 2001 and early 2002 and which led to the adoption of changes in the exchange and monetary policy then in effect.

24. The Republic of Argentina specifically discusses in its presentations Decree 1570/01 dated December 1, 2001[11] and Law 25.561 of January 6, 2002, related to the public emergency and amendment of the exchange system.[12] This legislation brought to an end the regime of convertibility and parity of the Argentine peso with the United States dollar which had been enacted by Law 23.928 in effect since 1991.[13] Most of the foreign and domestic investments in the public utilities sector were made under that regime in the 1990's. The new legislation also mandated the restructuring and renegotiation of public and private contracts made in foreign currency, extinguished the right of the licensees in the regulated public sector to link

tariffs to U.S. price indices and redenominated rates and tariffs into pesos at the exchange rate of one peso per dollar. A process of renegotiation which is still under way followed the "pesification" and related measures. The Claimant believes that all such measures are not separate and distinct from the original dispute and form a single continuum. According to the Claimant, the aggregate of measures has significantly affected the value of its investment, a view which is disputed by the Republic of Argentina.

25. Although a good part of the views of the parties relating to those earlier measures and to others which followed has much to do with the merits of the case, the Tribunal believes that it is necessary to establish at the outset a clear distinction between measures of a general economic nature, particularly in the context of the economic and financial emergency discussed above, and measures specifically directed to the investment's operation.

26. The ICSID Convention and the jurisdiction of the tribunals established under it were conceived as a system of adjudication of legal disputes arising directly out of an investment, a premise that is specifically included in Article 25(1) of that Convention. This definition excludes quite clearly two kinds of disputes. First, it excludes non-legal questions and, second, it excludes disputes that do not arise directly out of the investment concerned.

27. It follows that, in this context, questions of general economic policy not directly related to the investment, as opposed to measures specifically addressed to the operation of the business concerned, will normally fall outside the jurisdiction of the Centre. A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments.

28. The question is certainly not new in international law.[14] Gold standards or reference currencies embodied in financial transactions, stabilization clauses built into contracts and, more recently, the vast network of bilateral investment treaties are all

expressions of the search for stability and legal certainty. The right of the host State to adopt its economic policies together with the rights of investors under a system of guarantees and protection are at the very heart of this difficult balance, a balance which the Convention was careful to preserve.

29. In an earlier case an ICSID tribunal held that "Bilateral Investment Treaties are not insurance policies against bad business judgments".[15] Similarly, these treaties cannot entirely isolate foreign investments from the general economic situation of a country. They do provide for standards of fair and equitable treatment, non-discrimination, guarantees in respect of expropriation and other matters, but they cannot prevent a country from pursuing its own economic choices. These choices are not under the Centre's jurisdiction and ICSID tribunals cannot pass judgment on whether such policies are right or wrong. Judgment can only be made in respect of whether the rights of investors have been violated.

30. The parties in this case appear not to disagree with this reasoning. The Republic of Argentina, in arguing about the differences between what it considers to be two separate kinds of disputes, emphasizes that general measures of public economic emergency are not directed towards investors but affect the country and its population as a whole. More importantly, the Claimant in justifying its claim for compensation in connection with the "pesification" has also stated:

> "It should be noted, however, that CMS's compensation claim is not founded on the devaluation of the peso, but rather on the loss in value of its investment due to Argentina's dismantling of the dollar-based tariff regime".[16]

31. At the oral hearing held in this case, Counsel for the Claimant, when referring to this distinction between general and specific measures also stated that:

> "CMS assumes that such distinction could be made. (…) However, CMS is by no means complaining about general economic measures, but about specific measures of Argentine federal authorities that breached the commitments made towards CMS under the Treaty and international law."[17]

32. The Claimant has also explained that it is not currently pursuing an earlier claim against Argentina related to restrictions on the transfer of funds abroad introduced by Decree 1570/01[18] because such restrictions "have not had a material impact on

CMS or its investment to date",[19] and has reserved the right to pursue that claim if damages are caused in the future in violation of Article V of the BIT. In the statements and decisions noted the Claimant separates the general measures of economic policy, with specific reference to devaluation, from the material impact they might have had on its investment in light of the Treaty, legislation and contracts.

33. 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 not 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.

34. While conceptually the line between one and the other matter is clear, in practice whether a given claim falls under one or the other heading can only be established in light of the evidence which the parties will produce and address in connection with the merits phase of the case. Counsel for the Republic of Argentina has rightly explained that the distinction made "may have great relevance with regard to liability or responsibility".[20] This means in fact that the issue of what falls within or outside the Tribunal's jurisdiction will be subsumed in the determination of whether a given claim is or is not directly connected with specific measures affecting the investment.

35. For the time being, the fact that the Claimant has demonstrated *prima facie* that it has been adversely affected by measures adopted by the Republic of Argentina is sufficient for the Tribunal to consider that the claim, as far as this matter is concerned, is admissible and that it has jurisdiction to examine it on the merits.

Objection to admissibility on the issue of the Claimant's jus standi

36. The Republic of Argentina has objected to the admissibility of the claim by CMS on the ground that the Claimant does not hold the rights upon which it bases its claim – to wit, TGN being the licensee, and CMS only a minority shareholder in this company, only TGN could claim for any damage suffered. It is further argued that, since TGN is an Argentine company, it does not qualify as a foreign investor under the BIT nor is the License a foreign investment. It follows, in the Respondent's view, that CMS is claiming not for direct damages but for indirect damages which could result from its minority participation in TGN.

37. The Republic of Argentina has also advanced the view that, in addition, CMS cannot claim for its proportional share in TGN, as this would imply that the shareholders have a standing different from that of the company. If TGN arrives at an agreement with the Republic of Argentina, it is further stated, CMS could only oppose such arrangement as an intra-corporate question and not as the holder of an independent right of action.

38. The Respondent explains that the only guarantee the Republic of Argentina gave to CMS related to the legal quality of the shares which were transferred to the Claimant by the Republic of Argentina in the context of the privatization process. Should that legal quality be proven defective, CMS would have *jus standi* to claim for reparation, but this is not the case as the claim concerns the operation of the License and not the shares themselves.

39. CMS has opposed such arguments on the premise that both the BIT and the whole process of investing in TGN was related to the privatization of the gas industry in Argentina, a process which was the subject of specific guarantees and commitments by the Republic of Argentina. These guarantees included measures of legal stability and economic mechanisms aimed at ensuring the financial feasibility and the success of the investment, not just the question of the quality of the shares.

40. In this regard, it is also explained, CMS is not claiming for rights pertaining to TGN but for the rights associated with its investment in the company. It is further stated

that CMS qualifies as a foreign investor under the BIT and its participation as a shareholder is a foreign investment protected under that Treaty, thus having a right of action independently from TGN. This right of action, it is argued, arises directly from the BIT provisions and it is independent from any contractual right of action that TGN might have under the License. International law and not any domestic law which might relate to contracts or other transactions governs such rights of claim, it is further stated. The claims being asserted under the BIT, it is also explained, are direct and not indirect.

41. The arguments that the parties have put forth involve a number of questions of admissibility and jurisdiction. The distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence. In any event, the Tribunal will follow the order of the arguments introduced in respect of one and other concept so as to facilitate their discussion. First, there is the issue of whether a shareholder can claim for its rights in a foreign company independently from the latter's rights and, if so, whether these rights refer only to its status as shareholder or also to substantive rights connected with the legal and economic performance of its investment. Second, there is the question of whether the Claimant satisfies the jurisdictional requirements of the Convention and the BIT, particularly those concerning the existence of a legal dispute, whether this dispute arises directly from the investment, and the nationality of the investor. The Tribunal will address these questions next.

Corporate personality in Argentine legislation

42. The Republic of Argentina has raised as a first bar to the claim by minority shareholders the legal provision in effect in that country, as in most civil and common law countries, to the effect that the corporate legal personality is distinct and separate from that of the shareholders. Distinguished Argentine jurists have been invoked to this effect.[21] However true this legal distinction is, the fact is that it is not determinant in this case. First, as will be discussed further below, the applicable jurisdictional provisions are only those of the Convention and the BIT, not those which might arise from national legislation. But even if the Argentine legislation were relevant, it is also worth noting that that legislation has contributed

significantly to the piercing of the corporate veil when the real interests behind the corporate personality need to be identified as evidenced for example by Article 54, par. 3, of Law 19.550, as amended by Law 22.903.[22]

Shareholder rights under general international law

43. The parties have turned next to the discussion of the situation under international law, with particular reference to the meaning and extent of the *Barcelona Traction* decision.[23] Counsel for the Republic of Argentina are right when arguing that that decision ruled out the protection of investors by the State of their nationality when that State is different from the State of incorporation of the corporate entity concerned, all of it in respect of damage suffered in a third State. However, Counsel for the Claimant are also right when affirming that this case was concerned only with the exercise of diplomatic protection in that particular triangular setting, and involved what the Court considered to be a relationship attached to municipal law, but it did not rule out the possibility of extending protection to shareholders in a corporation in different contexts. Specifically, the International Court of Justice was well aware of the new trends in respect of the protection of foreign investors under the 1965 Convention and the bilateral investment treaties related thereto.

44. *Barcelona Traction* is therefore not directly relevant to the present dispute, although it marks the beginning of a fundamental change of the applicable concepts under international law and State practice. In point of fact, the *Elettronica Sicula* decision evidences that the International Court of Justice itself accepted, some years later, the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant State's legislation.[24]

45. Diplomatic protection itself has been dwindling in current international law, as the State of nationality is no longer considered to be protecting its own interest in the claim but that of the individual affected.[25] To some extent, diplomatic protection is intervening as a residual mechanism to be resorted to in the absence of other arrangements recognizing the direct right of action by individuals. It is precisely this kind of arrangement that has come to prevail under international law, particularly in

respect of foreign investments, the paramount example being that of the 1965 Convention.

46. The Republic of Argentina has advanced the argument that, when shareholders have been protected separately from the affected corporation, this occurred in cases where the shareholders were majority or controlling, not minority shareholders as in the instant case. That fact may be true, but it is equally true, as argued by the Claimant, that the courts and tribunals issuing those decisions were not concerned with the question of controlling majorities; rather they were concerned with the possibility of protecting shareholders independently from the affected corporation, that is, solely with the issue of the corporate legal personality and its limits.

47. State practice further supports the meaning of this changing scenario. Besides accepting the protection of shareholders and other forms of participation in corporations and partnerships, the concept of limiting it to majority or controlling participations has given way to a lower threshold in this respect. Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements,[26] the decisions of the Iran-United States Tribunal[27] and the rules and decisions of the United Nations Compensation Commission,[28] among other examples, evidence increasing flexibility in the handling of international claims.

48. The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and international claims and increasingly in respect of other matters.[29] To the extent that customary international law or generally the traditional law of international claims might have followed a different approach - a proposition that is open to debate - then that approach can be considered the exception.

Shareholder rights under the ICSID Convention

49. As mentioned above, the 1965 Convention is the paramount example of the approach now prevailing in international law in respect of claims arising from foreign investments. It is a well-known fact that Article 25(1) of that Convention did not attempt to define the term "investment", as no definition was generally acceptable. Against this background, all relevant bilateral investment treaties and other instruments embodying the consent of the parties to ICSID's jurisdiction have usually contained definitions in this respect.[30]

50. A rather broad interpretation of "investment" has ensued from these expressions of consent. It should be recalled that the ownership of shares was one of the specific examples of investment given during the negotiations of the Convention as pertinent for the parties to agree in the context of their expressions of consent to jurisdiction.[31] The definition of investment in the Argentina-United States BIT will be considered further below.

51. Precisely because the Convention does not define "investment", it does not purport to define the requirements that an investment should meet to qualify for ICSID jurisdiction. There is indeed no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of its shares. It is well known incidentally that, depending on how shares are distributed, controlling shareholders can in fact own less than the majority of shares. The reference that Article 25(2)(b) makes to foreign control in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State is precisely meant to facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment. The same result can be achieved by means of the provisions of the BIT, where the consent may include non-controlling or minority shareholders.

52. Article 25(1) of the Convention is also relevant in another respect. In the *Fedax* case, Venezuela had objected to ICSID's jurisdiction on the ground that the disputed transaction was not a "direct foreign investment". Although the transaction

considered in that case was different from the one in the present case, the tribunal's holding is useful in the interpretation of the scope of that Article:

> "However, the text of Article 25(1) establishes that the 'jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment'. It is apparent that the term 'directly' relates in this Article to the 'dispute' and not the 'investment'. It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term 'investment' must be given in light of the negotiating history of the Convention."[32]

53. With this background in mind, it is then possible for this Tribunal to examine the meaning of a number of decisions of ICSID tribunals that have dealt with the protection of shareholders. The parties have a different reading of these ICSID cases, with particular reference to *AAPL v. Sri Lanka*,[33] *AMT v. Zaire*,[34] *Antoine Goetz et consorts v. Republique du Burundi*,[35] *Maffezini v. Spain*,[36] *Lanco v. Argentina*,[37] *Genin v. Estonia*,[38] the *Aguas* or *Vivendi* Award[39] and Annulment[40] and *CME v. Czech Republic*.[41] For the Republic of Argentina, all these cases deal with shareholder rights, underlying arrangements and factual situations different from those given in the instant case, and hence do not support jurisdiction in this case. CMS, for its part, believes that, to the contrary, in all those cases the right of shareholders, including minority shareholders, to claim independently from the corporate entity affected has been upheld.

54. There can be no doubt that the factual setting of each case is different and that some may lend themselves more than others to illustrate points of relevance. In some cases, there has been majority shareholding or control by the investor, in others not; in some cases, there has been expropriation affecting specifically the shares, in others not; in some cases, there has been no objection to jurisdiction, in others there has been.

55. However, there can be no doubt that most, if not all, such cases are immersed in the same trend discussed above in the context of international law and the meaning of the 1965 Convention. In the present case, the Claimant has convincingly explained that, notwithstanding the variety of situations in ICSID's jurisprudence noted by the Republic of Argentina, the tribunals have in all such cases been concerned not with

the question of majority or control but rather whether shareholders can claim independently from the corporate entity. In *Goetz* the tribunal reflected this prevailing trend in the following terms:

> «...le Tribunal observe que la jurisprudence antérieure du CIRDI ne limite pas la qualité pour agir aux seules personnes morales directement visées par les mesures litigieuses mais l'étend aux actionnaires de ces personnes, qui sont les véritables investisseurs. »[42]

56. The Tribunal can therefore conclude that there is no bar to the exercise of jurisdiction in light of the 1965 Convention and its interpretation as reflected in its drafting history, the opinion of distinguished legal writers and the jurisprudence of ICSID tribunals.

Shareholder rights under the Argentina-United States Bilateral Investment Treaty

57. The Tribunal turns next to the examination of the definition of "investment" in the Argentina-United States BIT. Article I(1) of this Treaty provides as pertinent:

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

58. Here again the parties have a different reading of that Article. The Republic of Argentina is of the view that, since Article 25 of the Convention requires the control of a local subsidiary in order to qualify as a claimant, the fact that the BIT does not make such a requirement is immaterial since the Convention has to prevail. The Tribunal concluded above that the Convention does not really make such a requirement a central tenet of jurisdiction but only an alternative for very specific purposes. In any event, the provision of the Treaty is not in any way incompatible with Article 25 of the Convention.

59. The Republic of Argentina has also asserted that an investment in shares is indeed a protected investment under the Treaty, but this would only allow claims for

measures affecting the shares as such, for example, expropriation of the shares or interference with the political and economic rights tied to those shares. Such interpretation would not allow, however, for claims connected to damage suffered by the corporate entity. If a claim for indirect damages had been allowed, it is further argued, this would have been stated expressly in the Treaty, as has been done in other bilateral investment treaties, including some signed by Argentina, or in the context of trade arrangements such as the North American Free Trade Agreement or other instruments. Silence on this point, the Respondent argues, cannot be construed as an expression of consent to such type of claims.

60. CMS's understanding is different. In its view, the plain language of the provisions and their legal context can only mean that investment in shares is a protected investment and that the investor has, under the Treaty, the right to claim for its investment independently from any claims that the company in which it has invested might have. Again here, it is a question of seeking to identify the real economic interests behind such transactions. It is argued, in addition, that it was Argentina that required the licensees of the privatization of the gas industry to be local companies and that foreign investors were expressly invited to participate in those companies. The protection granted by investment treaties was expressly mentioned in these invitations. If shareholders were now left out of such substantive protection, it is further explained, this would render the treaties meaningless.

61. The parties have debated the meaning of the decisions of other ICSID tribunals on this question. Again, it is evident that the factual and legal background of each such decision is different. Counsel for the Republic of Argentina have rightly explained that, in some cases, there has been a treaty authorizing indirect claims by the investor, in others there has been an expropriation of a license of the claimant or of the shares held by it, while in yet other cases claimants have been controlling or majority shareholders and thus their claim becomes a direct one.

62. Counsel for CMS have also explained that while in some cases there have been controlling shareholders and in others not, the relevant fact is that, in all such cases, jurisdiction has been accepted on the basis that shareholders have a protected right of their own arising from their investment. None of these cases, it is further stated,

has ever reasoned in terms of requiring control of the corporate entity for the protection of such rights.

63. The task of this Tribunal is rendered easier in light of the *Lanco* case, where the same Argentina-United States BIT and the same definition of investment were interpreted. That tribunal examined jurisdiction under two separate headings, one under the Treaty and the other under the concession agreement, concluding that, while jurisdiction could be founded on either heading, the fact that the investor also had specific rights and obligations under the concession agreement, held to be equivalent to an investment agreement, made the conclusion still more evident. The tribunal held in this respect:

> "The Tribunal finds that the definition of this term in the ARGENTINA-U.S. Treaty is very broad and allows for many meanings. For example, as regards shareholder equity, the ARGENTINA-U.S. Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share; thus the fact that LANCO holds an equity share of 18.3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I of the ARGENTINA-U.S. Treaty.
>
> Nonetheless, the question is more complex considering that LANCO is not only the owner of an equity share in the capital stock of the grantee company, but also that the definition of 'investment' set forth in the ARGENTINA-U.S. Treaty allows one to conclude that LANCO has certain rights and obligations as a foreign investor under the Concession Agreement with the Government of the Argentine Republic".[43]

64. A similar approach was taken by the Committee on Annulment in the *Compañía de Aguas del Aconquija* or *Vivendi* case, when holding under a different but comparable bilateral investment treaty:

> "Moreover it cannot be argued that CGE did not have an 'investment' in CAA from the date of the conclusion of the Concession Contract, or that it was not an 'investor' in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5".[44]

65. In light of the above considerations, the Tribunal concludes that jurisdiction can be established under the terms of the specific provisions of the BIT. Whether the protected investor is in addition a party to a concession agreement or a license agreement with the host State is immaterial for the purpose of finding jurisdiction

under those treaty provisions, since there is a direct right of action of shareholders. It follows that the Claimant has *jus standi* before this Tribunal under international law, the 1965 Convention and the Argentina-United States Bilateral Investment Treaty.

Jurisdictional objection on the dispute not arising directly from investment

66. In close connection with the issues discussed above, the Republic of Argentina has raised a jurisdictional objection on the ground that the dispute does not arise directly from an investment as required by the 1965 Convention. In its view, while the acquisition of shares qualifies as an investment under the Treaty, neither TGN, as an Argentine corporation, nor the License qualify as an investment under the BIT. TGN, the argument follows, has its own assets, including the License; because these assets do not constitute an investment under the Treaty, CMS's claims, based on the alleged breach of TGN's rights under the License, cannot be considered to arise directly from an investment.

67. CMS shares the view that TGN is not an investor under the Treaty, and that it has not been agreed to treat this company as a non-Argentine national because of foreign control. Neither is the License an investment under the Treaty. However, CMS adds, its 29.42% share in TGN qualifies as an investment covered under the Treaty and no majority or controlling ownership is required and hence CMS has the right to claim for compensation in the case of a dispute that arises directly out of its investment in those shares. The dispute, it is further explained, does not relate to TGN's rights but to those arising from the Treaty.

68. 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.

69. There is still another point of contention between the parties. The Republic of Argentina believes that, in any event, CMS could only claim for the 25% share ownership of TGN it purchased from the Argentine government, but not for the full 29.42% it actually owns, as the additional shares were bought from the employee share program. CMS is of the view that its full participation in TGN is the covered investment. Without prejudice that the extent of eventual damages will be an aspect to be discussed at the merits phase of this case, the Tribunal believes that the BIT does not make any differentiation as to the origin of the shares constituting the investment. It is only concerned with the question of State measures that can eventually affect the rights of the investor. It is therefore held that, again *prima facie*, the investor can make its claim for the full share of its participation in TGN.

Jurisdictional objection on not following contractual dispute settlement

70. A separate jurisdictional objection raised by the Republic of Argentina is based on the argument that TGN's License has a separate dispute settlement mechanism before the Federal Courts of Buenos Aires on Contentious Administrative Matters. Similarly, it is argued, the Terms of the License provide for the submission of disputes to the Federal Courts of Buenos Aires on Civil and Commercial matters, entailing an express renunciation to any other forum or jurisdiction. All of this, in the Respondent's view, precludes submission of the instant dispute to an ICSID tribunal.

71. CMS objects to that reasoning on the basis that it is not a party to the License and that the dispute does not arise from the Terms of the License. The dispute, it is argued, relates to the breach of the BIT and its cause of action is founded exclusively on the dispute settlement mechanisms of that Treaty, independently from whether there is in addition a dispute concerning the contract. The Claimant notes moreover that the disputes envisaged in the Terms of the License refer only to questions connected with the sale of the shares.[45]

72. The task of the Tribunal is again rendered easier by the fact that a number of recent ICSID cases have had to discuss and decide on similar or comparable provisions concerning contracts and the scope of the Treaty. First, it is well established that

consent to ICSID jurisdiction is to the exclusion of any other remedy pursuant to Article 26 of the Convention. The tribunal in *Lanco*, for example, held in this respect:

> "...when the parties give their consent to ICSID arbitration, they lose their right to seek to settle the dispute in any other forum, domestic or international, and it therefore presupposes the non-interference of any other forum with the ICSID arbitration proceeding once such proceeding has been instituted".[46]

73. Neither in the *Lanco* case nor in the instant case is there a requirement of the exhaustion of local remedies as a pre-condition to ICSID jurisdiction that could bring into play other jurisdictions. The tribunal also concluded in *Lanco* that:

> "In effect, the offer made by the Argentine Republic to covered investors under the ARGENTINA-U.S. Treaty cannot be diminished by the submission to Argentina's domestic courts, to which the Concession Agreement remits".[47]

74. Following in part the *Lanco* precedent, another ICSID tribunal held in *Compañía de Aguas del Aconquija*:

> "Article 16.4 of the Concession Contract 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. (...) [T]hose claims are not based on the Concession Contract but allege a cause of action under the BIT.(...) Thus, Article 16.4 of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT".[48]

75. The Annulment Committee held in *Wena:*

> "The Committee cannot ignore of course that there is a connection between the leases and the IPPA since the former were designed to operate under the protection of the IPPA as the materialization of the investment. But this is simply a condition precedent to the operation of the IPPA. It does not involve an amalgamation of different legal instruments and dispute settlement arrangements.(...) [T]he acts or failures to act of the State cannot be considered as a question connected to the performance of the parties under the leases. The private and public functions of these various instruments are thus kept separate and distinct".[49]

76. This Tribunal shares the views expressed in those precedents. It therefore holds that the 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.

Jurisdictional objection on the "fork in the road" triggering

77. The considerations made above also help the Tribunal on another jurisdictional objection raised by the Republic of Argentina, namely that the investor triggered the "fork in the road" provision of Article VII(3)(a) of the Treaty. The Republic of Argentina argues that because TGN appealed a judicial decision to the Federal Supreme Court and other administrative remedies were sought, CMS cannot now submit the same dispute to arbitration under the Treaty.

78. The Claimant's view is different. First, there is no triggering of the "fork in the road" provision because TGN is a separate legal entity and it is not the investor; only the investor can make the choice of taking a claim to the local courts or to arbitration, and CMS chose the ICSID arbitration option. Second, the court's decision appealed by TGN relates to judicial proceedings initiated by the Argentine Ombudsman and in which TGN only intervened as a third party; moreover, both the Argentine Government and ENARGAS - the regulatory agency of the gas industry- also appealed that particular decision. It follows, the argument further elaborates, that the Licensee was only undertaking defensive and reactive actions in those proceedings. And third, CMS argues, not only are the parties to those proceedings and to the arbitration different but also the subject-matter of the dispute is not the same; TGN's claim concerns the contractual arrangements under the License while those of CMS concern the affected treaty rights.

79. The Claimant has also explained that TGN has been prevented from making a claim before the courts or through arbitration because of the provisions of Decree 1090/02 of June 26, 2002, and the Ministry of Economy Resolution 308/02 of August 20, 2002. These provisions direct the licensee to make its claims for breach of contract only in the context of the renegotiation process under way and not before the courts; if the latter action is followed, the licensee will be excluded from such renegotiation. This situation, it is further explained, evidences again that TGN could not bring a

claim before the Argentine courts and has not done so. In any event, as mentioned above, such a claim would be entirely separate from that of CMS under the Treaty.

80. Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.[50] This Tribunal is persuaded that with even more reason this view applies to the instant dispute, since no submission has been made by CMS to local courts and since, even if TGN had done so - which is not the case -, this would not result in triggering the "fork in the road" provision against CMS. Both the parties and the causes of action under separate instruments are different.

81. Had the Claimant renounced recourse to arbitration, for example by resorting to the courts of Argentina, this would have been a binding selection under the BIT. In that case, the Tribunal would agree with Counsel for the Republic of Argentina that although Carlos Calvo, a distinguished Argentine international jurist who fathered the Calvo Doctrine and Clause, will not become an honorary citizen of countries having entered into bilateral investment treaties, this would still be a binding decision.[51] However, as no such renunciation took place, the Calvo Clause will not resuscitate in this context.

82. The issue did not pass unnoticed during the approval and ratification of the BIT. In the letter of submittal of the BIT to the United States Congress, the U.S. President explained:

> "The bilateral investment treaty (BIT) with Argentina represents an important milestone in the BIT program. (...) Argentina, like many other Latin American countries, has long subscribed to the Calvo Doctrine, which requires that aliens submit disputes arising in a country to that country's local courts. The conclusion of this treaty, which contains an absolute right to international arbitration of investment disputes, removes U.S. investors from the restrictions of the Calvo Doctrine and should help pave the way for similar agreements with other Latin American states".[52]

Objections on assumed consequences

83. The Republic of Argentina has also expressed concern about some consequences which could arise from the finding of jurisdiction by this Tribunal. In particular, the following possible situations were mentioned: (i) TGN could come to a successful finalization of the negotiation process under way and, separately, an ICSID tribunal could reach a different conclusion; (ii) the eventual discrimination which could take place between domestic and foreign investors in TGN as only the latter have access to arbitration; and (iii) the eventual multiplication of international claims by investors of different nationalities and under separate treaties.

84. The Respondent also argues that it cannot be assumed that CMS is entitled to claim compensation in proportion to its 29.42% share in TGN because, if TGN were to be compensated for the measures adopted by Argentina, there is no guarantee that such benefit would flow through to TGN's shareholders.

85. In the Claimant's view those considerations are not relevant to jurisdiction as it is quite inevitable that different treaty arrangements will assign rights to different investors and these rights most probably will be different from those of domestic investors. Moreover, CMS believes that the negotiation process is not likely to lead to a successful outcome. But, even if it were, CMS affirms that it is not claiming for TGN's losses but for its own loss in the investment venture.

86. The Tribunal notes in this respect that the Centre has made every effort possible to avoid a multiplicity of tribunals and jurisdictions, but that it is not possible to foreclose rights that different investors might have under different arrangements. The Tribunal also notes that, while it might be desirable to recognize similar rights to domestic and foreign investors, this is seldom possible in the present state of international law in this field. Finally, it is not for the Tribunal to rule on the perspectives of the negotiation process or on what TGN might do in respect of its shareholders, as these are matters between Argentina and TGN or between TGN and its shareholders.

The law applicable to jurisdictional determination

87. The parties have discussed, in their written presentations and in the hearings, the question of the applicable law, with particular reference to the meaning of Article 42 of the ICSID Convention. The Republic of Argentina believes that, under this provision, Argentine law is applicable, not only in respect of the resolution of the substance of the dispute but also in respect of the jurisdictional questions the Tribunal has now to decide on. Counsel for the Republic of Argentina has also submitted that, as the Treaty is also part of Argentine law, that law can also be applied, particularly since the jurisdictional objections raised are not only based on Argentine law but also on the Treaty and the ICSID Convention. The Claimant takes a different view and argues that Article 42 is only applicable to the substance of the dispute, jurisdictional questions being decided on the basis of the Treaty and international law only.

88. Article 42 is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from the decisions on jurisdiction, governed solely by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions. However, the argument of the Republic of Argentina has merit in so far as the parties can agree to a different choice of law applicable also to jurisdictional questions. The very option the investor has under the Treaty to submit a dispute to local jurisdiction also involves to an extent a choice of law provision, as local courts will apply mainly domestic law. In such a case, domestic law might apply together with the Treaty and the Convention or separately.

89. Since Argentina believes that the "fork in the road" provision has been triggered as explained above, it is also reasonable to argue in that context for the application of Argentine law, including the Treaty as a part thereof. However, as the dispute under the Treaty is in this case separate from that under the License and no "fork in the road" provision has been triggered, domestic law does not have a role to play in the jurisdictional determination, at least not a direct one.

Objections to admissibility on the nature and number of disputes

90. In addition to the questions of admissibility and jurisdiction raised by the Republic of Argentina discussed above, the Respondent advances three further objections against the admissibility of some of the CMS claims. According to the Republic of Argentina, (i) The original dispute has no relation with the dispute as stated by CMS in its Request for Arbitration; (ii) CMS has submitted to the Tribunal two different disputes and the filing of the second dispute does not comply with the temporal conditions set forth in the Treaty; and (iii) The dispute relating to the alleged restrictions suffered by TGN to transfer funds abroad was not submitted in compliance with the terms of the Treaty.

91. The Tribunal will summarize the arguments raised by Argentina on each of these points, as well as the answers given by CMS to these objections and it will arrive at a determination on each of them.

Relationship between the original dispute and that submitted to arbitration

92. The first question concerns the absence of a relationship between the original dispute and the dispute as stated in the Request for Arbitration. According to the Republic of Argentina, CMS, in its letter of March 12, 2001, prior to notifying its consent to international arbitration, requested payment by Argentina to TGN of the appropriate adjustments to the tariffs based on the PPI. However, the subsequent Request for Arbitration alleges loss by CMS of the expected benefits of its investment and anticipates a claim in excess of USD 100 million. Consequently, the argument follows, the Request for Arbitration implies a claim different from the one submitted by the investor, in its letter of March 12, 2001.

93. Moreover, the Republic of Argentina argues that CMS modified the terms of the dispute along its development. In particular, it was only in its Memorial that CMS disclosed that it intended to dispose of its shares in TGN and that, once it received compensation, it would transfer them to the Argentine Government. Consequently, it is argued, neither a dispute related to clearly identified issues between the parties nor a concrete claim was raised until CMS submitted its Memorial.

94. CMS's position is that the dispute initially notified to Argentina is the same dispute as the one mentioned in the Request for Arbitration and that events occurring after the filing of the Request for Arbitration are part of the same dispute and are within the jurisdiction of the Tribunal. It follows in the Claimant's view that there is no inconsistency between the notification of the dispute to Argentina and the Request for Arbitration.

95. CMS further argues that there is no rule which requires a claimant to accurately or finally quantify its loss in its Request for Arbitration. It is only at the time of filing its memorial that a claimant is required to quantify its compensation claim, and even then the figure can be adjusted as the situation changes. This explains, according to CMS, that the estimate of losses for alleged breaches of the BIT at the time of the Request for Arbitration is one thing and the estimate made at the time of the filing of its Memorial and taking into account measures adopted by the Government of Argentina after the Request for Arbitration is another thing.

96. In CMS's view, the other argument of the Respondent namely that CMS referred, only at the time of its Memorial, to its decision to relinquish ownership of its shares to Argentina upon receipt of compensation is also not relevant to the determination of jurisdiction. CMS argues that this is a merits-related matter and that, in any event, the issues were identified clearly and there was a concrete claim before the production of its Memorial. The offer to relinquish its shares was made by CMS in order to prevent any suggestion of double recovery.

97. The Tribunal cannot agree with the Republic of Argentina's argumentation on this point. First, the Republic of Argentina refers to a CMS letter of March 12, 2001 requesting payment to TGN of the appropriate adjustments to the tariffs based on the PPI. In fact, a number of letters were sent by CMS to the Argentine authorities concerning this issue, beginning with a letter to the President of Argentina dated August 28, 2000, which under cover letters dated October 28, 2000, were transmitted to officials in the Ministry of Foreign Affairs, International Trade and Worship;[53] those letters drew to the attention of the authorities the existence of a dispute between the Republic of Argentina and CMS about its investment in that

country, mentioning specifically the impact upon CMS of the non-adjustment of the tariffs of TGN on the basis of the U.S. PPI and requesting the initiation of consultations and negotiations pursuant to Article VII(2) of the Treaty. That request was repeated in letters of October 27, 2000 to the same authorities,[54] in another letter to the President of Argentina on December 12, 2000[55] and, finally, in the letter of March 12, 2001 referred to by the Respondent in its Memorial on Jurisdiction. While that letter requests that specific steps be taken to allow TGN to benefit from the application of the tariff adjustment in accordance with the Terms of the License granted to it, it also mentions that the absence of such adjustment has resulted in "unlawful reduction of CMS's earnings" and that it has affected its credit qualifications with financial institutions and rating agencies. It then states that, unless appropriate measures are taken to remedy the situation, CMS will file a request for arbitration. There does not appear to have been an answer to those various letters.

98. The six-month period provided by the Treaty for consultation and negotiation having expired without results, CMS formally notified the President of Argentina on July 12, 2001 that it was consenting to arbitration under the terms of the Treaty.[56] In its Request for Arbitration of July 24, 2001, CMS alleges breaches of Article II(2)(a), (b) and (c) and of Article IV(1) of the Treaty and claims compensation for the ensuing damages.

99. The Tribunal is of the opinion that there is full correlation between the content of the letters sent to the Argentine authorities before the Request for Arbitration and the Request itself. The Republic of Argentina argues that if, in accordance with the request in the letter of March 12, 2001, it had paid to TGN the amount it is alleged should have been paid to it, the dispute with CMS would have been resolved, but it then adds that, in the absence of such payment, the subsequent claim by CMS for damages for loss of its investment constitutes a different matter. Referring to the decision on jurisdiction in *Maffezini v. Spain*,[57] the Republic of Argentina affirms that the concrete claim formulated by CMS on March 12, 2001 "is notoriously different from the one stated in the Request for Arbitration."

100. The Tribunal, however, does not share the Respondent's line of reasoning. In its various letters preceding the Request for Arbitration, CMS clearly stated the nature of the dispute between CMS and Argentina, its impact upon its investment, and its request for consultations and negotiations under Article VII(2) of the Treaty. There could not have been any doubt, after receipt of those letters, as to what the dispute was about and the conclusions contained in the Request for Arbitration flowed naturally from the statements made in those letters. Argentina was presented with both clearly identified issues and a concrete claim. Consequently, the Tribunal cannot accept the objection to admissibility raised by the Republic of Argentina on this ground.

Two disputes or a single continuing dispute

101. The second issue raised by the Republic of Argentina concerns the existence of two different and separate disputes. According to the Republic of Argentina, CMS has submitted to the Tribunal two different disputes. The first one relates mainly to actions taken by the Argentine Ombudsman and the judiciary, in August 2000, concerning the application of the PPI to tariffs of the gas industry. The second relates to measures adopted by the executive and legislative authorities during December 2001 and January 2002 and having to do with the major economic crisis faced by the country at that time. That second dispute, it is further affirmed, was not registered in accordance with Article 36(3) of the ICSID Convention and the six-month period required by Article VII(3) of the Treaty between the dates a dispute arose and that of its submission for arbitration has not elapsed. The two disputes, in the Respondent's view, are independent of each other because they are separable in time, in their origins, in their scope, in their circumstances, in their causes and in their treatment.

102. The Respondent argues in particular that the first dispute relates to a decision the effects of which do not go beyond the gas industry, while the additional dispute relates to measures of general scope affecting the whole economy in the context of the economic and social emergency referred to above. In the case of the original dispute, the Argentine Government and its regulatory agency challenged the judicial

decision requested by the Ombudsman, while the situation concerning the additional dispute, it is believed, is completely different.

103. Similarly, it is argued by the Respondent, the background of the original dispute is an alleged inconsistency between the Gas Law, the Convertibility Law and the national Constitution, while the background for the additional dispute is a general crisis and the impossibility of maintaining a certain monetary and exchange rate policy.

104. The measure which gave rise to the first dispute, the Respondent explains, did not require a specific negotiation process with the affected companies. In contrast, there is a specific renegotiation process currently taking place in the context of a general contracts renegotiation concerning public utilities. In fact, it is further stated, as such renegotiation is ongoing with the public utilities concerned one should not prejudge what the conclusion of that process will be; a direct claim can only be made when the situation it deals with is irreversible and definitive.

105. According to CMS, the post-July events relate to the same subject-matter as those before July 2001. The December 2001 and January 2002 measures constituted new facts in the same dispute relating to the Republic of Argentina's interference with the tariff regime, suspending and then abolishing the PPI adjustment of tariffs completely and removing the right to calculate tariffs in U.S. dollars and then express them in convertible pesos at the time of billing. The so-called additional dispute relates to the same subject-matter, the same factual background and the same causes of action.

106. In any event, CMS concludes on this matter, the fact that the post-July 2001 events were not mentioned in the Request for Arbitration does not affect the Claimant's entitlement to submit them to the Tribunal in its Memorial. CMS affirms that Article 36(2) of the ICSID Convention and Rule 2(1)(e) of the ICSID Institution Rules only require the request to "contain information concerning the issues in dispute", and that, accordingly, Arbitration Rule 31 indicates that it is only at the time of its memorial that the claimant is required to argue its claims with specificity. Moreover, under Article 46 of the Convention and Rule 40 of the ICSID Arbitration

Rules, CMS argues its entitlement to bring the matter as an additional or incidental claim because both clauses specifically provide for such a possibility.

107. The Tribunal cannot agree with the Respondent's conclusions on this second issue and it will deal with the various arguments raised by Argentina in that regard. First, whether certain events occurred before and others after the Request for Arbitration is not a determinant factor in deciding whether the Tribunal is seized with one or more disputes. What the Tribunal has to decide, in light of Article 46 of the ICSID Convention and Arbitration Rule 40, is whether those claims arise directly out of the subject-matter of the disputes, whether they are within the scope of the consent of the parties and whether they are within the jurisdiction of the Centre.

108. In so far as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the Articles on State Responsibility adopted by the International Law Commission is abundantly clear on this point.[58] Unless a specific reservation is made in accordance with Articles 19, 20 and 23 of the Vienna Convention on the Law of Treaties, the responsibility of the State can be engaged and the fact that some actions were taken by the judiciary and others by other state institutions does not necessarily make them separate disputes. No such reservation took place in connection with the BIT.

109. At the outset of this Decision, the Tribunal drew the line between acts which directly affect the investor's rights under binding legal commitments and other acts which relate to questions of public policy. Actions which affect those rights will normally relate to measures specifically addressed to the gas industry, but they may also be adopted in conjunction with measures of a more general nature. As long as they affect the investor in violation of its rights and cover the same subject-matter, the fact that they may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct. The Tribunal is also mindful that, as explained above, what the Claimant has now to demonstrate is that *prima facie* it has been affected by actions adopted in violation of its rights and this burden has been met.

110. On a similar line of reasoning, so long as the rights of the investor are affected in a direct manner, what justified the judicial decision of August 18, 2000 and what motivated the adoption of administrative and legislative measures in December 2001 and January 2002 does not alter the jurisdiction of the Tribunal. As noted, it is only when the measures in question are unrelated to specific legal commitments made to the investor that the jurisdiction of the Tribunal will be excluded and liability non-existent. Equally, the fact that the Government of Argentina and one of its regulatory agencies have challenged the above-mentioned judicial decision while the Government has supported the post-July 2001 measures is irrelevant in deciding whether the Tribunal is called upon to deal with one or two disputes.

111. The argument that the background to the so-called two disputes is different is also not a deciding factor as to whether there are one or two disputes. What the Tribunal has to look at is the nature of the dispute or disputes; their background may be different but again, what counts is whether the rights of the investor have been affected or not and whether the claims arise directly out of the same subject-matter.

112. The argument that the first dispute did not require negotiations with the companies concerned while the second opened the door to a renegotiation process is not convincing. The Tribunal is faced with a Request for Arbitration between a foreign investor and the Republic of Argentina under the BIT, the investor claiming that some of its protected rights have been interfered with. The disputants are CMS and the Republic of Argentina; as noted above, whether there are some negotiations taking place between the Government of Argentina and some third parties on some of the same events which gave rise to the dispute cannot be a matter for the Tribunal's consideration, at least not at this stage of the proceedings.

113. The Tribunal is also mindful that the essential facts relating, first, to the suspension of the PPI adjustment in 2000 and the enactment of the other measures in December 2001 and January 2002 are not contested. There is also no disagreement between the parties about the fact that CMS is the investor in the affected company, TGN. Rather, the problem lies in the effect that each party assigns to each of these matters.

114. In order to establish whether the Tribunal is faced with one or two disputes, it is worthwhile keeping in mind that CMS's request for relief in its Request for Arbitration of July 2001 concerns in essence the breach of various rights it alleges to have under the BIT. These rights relate mainly to fair and equitable treatment and full security and protection, arbitrariness and discrimination, observance of obligations and indirect expropriation without compensation.

115. The Request for Arbitration contains a list of the measures which are alleged to be in breach of the Treaty and CMS specifically reserves the right to update its claim in the course of the proceedings. CMS argues that "there is one continuing dispute involving Argentina's interference with and dismantling of the tariff regime that it committed to foreign investors would apply for the gas transportation sector."[59]

Ancillary claims

116. The question to be addressed by the Tribunal is then whether the claims for post-July 2001 events are "incidental or additional claims arising directly out of the subject-matter of the dispute".[60] Note B to Arbitration Rule 40 adds the following explanation:

> "The test to satisfy this condition is whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all the grounds of dispute arising out of the same subject matter".

117. To this end, the Tribunal must reach a determination on the subject-matter of the dispute and decide whether the ancillary or additional claim arises directly out of that subject-matter.

118. The Tribunal is of the view that, in the instant case, the subject-matter of the dispute is the alleged loss by CMS of its investment in TGN caused, it is argued, by the breaches by the Republic of Argentina of its obligations under the BIT. Such breaches relate, in the Claimant's view, to the interference of organs of the Argentine State with the tariff regime applicable to TGN, which was first subjected to deferral of adjustments, followed by a freeze, culminating in the abrogation of

that adjustment and the removal of the right to calculate tariffs in U.S. dollars and then express them in convertible pesos at the time of billing.

119. Note B to Arbitration Rule 40 supports the conclusion that the post-July 2001 events give rise to incidental or additional claims. There is no doubt, in the mind of the Tribunal, that the claim resulting from those events is "so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all the grounds of dispute arising out of the same subject matter".

120. Tribunals in two cases[61] under Chapter 11 of NAFTA, the first one under the ICSID Additional Facility Arbitration Rules and the other under the UNCITRAL Arbitration Rules, reached the same conclusion, on the basis of facts similar to those in the present case.[62]

Observance of consultation period

121. In connection with its allegation about the existence of two separate disputes, the Republic of Argentina has also made the argument that submission to arbitration of the second dispute is inadmissible because it is premature. Under the Treaty, it is maintained, the six-month period referred to above must have elapsed, but the additional dispute was only formally raised with the Government of Argentina on February 13, 2002, some six months after the registration of the case by the Secretary-General of ICSID, on August 24, 2001. The Request for Arbitration was limited to the original dispute relating the U.S. PPI and does not include the additional subject-matter. Since that dispute is different from the first one, the argument follows, it would have required a separate request for arbitration, after the expiry of the above-mentioned six-month period, the whole in accordance with Article 36 of the ICSID Convention and Article VII(3) of the BIT.

122. In the Claimant's view, however, the six-month negotiation period is a procedural and not a jurisdictional or admissibility requirement. Provided the parties have had an opportunity to engage in negotiations, and in particular where the host State has shown no willingness to take this opportunity, the registration period requirement

must be deemed to be satisfied. Moreover, it is concluded, the Republic of Argentina has suffered and will suffer no prejudice as a result of the inclusion of the post-July 2001 events.

123. This argument need not be addressed by the Tribunal in light of its conclusion above that there is a single dispute which contains, however, incidental or additional claims. It is clear from the ICSID Arbitration Rules that such claims do not require either a new request for arbitration or a new six-month period for consultation or negotiation, before the submission of the dispute to arbitration under the Treaty. Indeed, if that were the case, it would be impossible to make sense of Arbitration Rule 40(2) which provides that "an incidental or additional claim shall be presented not later than the reply". But even if it is thought that the period in question does apply, the Tribunal is mindful that CMS, as explained above, repeatedly invited the Argentine Government to undertake consultations on the matter, albeit to no avail. It cannot then be argued that any prejudice has ensued or will ensue for the Republic of Argentina in this context.

Discussion of additional assumed consequences

124. The Respondent has also argued in connection with the two-disputes issue that admitting the additional dispute would constitute a dangerous precedent with the following consequences: (i) an incentive for investors to submit claims ignoring the required six-month period for consultation and negotiation and depriving governments of an opportunity to evaluate the situation; (ii) a disruption of the renegotiation process of public utilities which is currently taking place in Argentina; (iii) since the Tribunal was not given jurisdiction to decide any dispute other than the one which was registered on the basis of the Request for Arbitration, the Tribunal, if it heard the additional dispute, would deprive Argentina of its right of defence. The Claimant does not share these views.

125. As the Tribunal has concluded that, in this case, the disputes are not separate and independent and relate to the same subject-matter, it is immaterial whether the pertinent events occurred before or after the submission of the dispute to arbitration as long as any ancillary claim is made before the reply, as required by Arbitration

Rule 40(2). The nefarious effects feared by the Republic of Argentina will therefore not occur as a consequence of this determination. Rather, nefarious effects would occur if the Tribunal reached a different conclusion for, as the tribunal held in *Metalclad*: “A contrary holding would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity”.[63] The Tribunal wishes to stress, however, that law alone provided all the necessary elements to support the conclusion reached by the Tribunal in the present case.

126. As explained above, the Tribunal also cannot consider the question of whether the current negotiations with various public utilities companies are going well, as believed by the Respondent, or not at all, as affirmed by the Claimant. Those are *res inter alios acta*; it may be that, when the Tribunal comes to address the merits of this case, those elements will have to be taken into consideration but, at this stage, they are irrelevant for the purpose of determining jurisdiction.

Jurisdiction affirmed

127. In light of all the elements discussed above, the Tribunal concludes that the claims resulting from post-July 2001 events, to the extent that they cause damage to the investor in breach of its rights, are of the nature of ancillary claims which, in conformity with Article 46 of the ICSID Convention and Arbitration Rule 40, arise directly out of the dispute, are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

128. The Republic of Argentina has also raised a question of admissibility in connection with CMS’s allegation that it suffered damage connected with the transfer of funds, since this claim has never been presented as a disputed issue under the BIT. However, as noted above, because CMS is not pursuing this claim, at least for the time being, the question of admissibility is rendered moot.

129. The Republic of Argentina has also requested that CMS provide evidence, in connection with Article I(2) of the BIT, that it is not controlled by nationals of a third country and that it has substantial business activities in the United States. Upon

review of the submissions of the parties, the Tribunal concludes that CMS has provided such evidence and the record is abundantly clear on this matter.

130. The Tribunal wishes to note in concluding that counsel for both parties have performed their duties with outstanding professionalism and have at all times fully cooperated with the work of the Tribunal, an attitude for which they must be commended. Their respective arguments have been made in the spirit of professionalism and have raised questions of great importance for this case, ICSID arbitration and arbitration in general.

C. Decision

131. For the reasons stated above the Tribunal decides that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has, accordingly, made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

So decided.

[signed]

Francisco Orrego Vicuña
President of the Tribunal

[signed]

Marc Lalonde
Arbitrator

[signed]

Francisco Rezek
Arbitrator

[1] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, November 14, 1991, in force from October 20, 1994. Hereinafter cited as the U.S.-Argentina BIT.
[2] Under Article 38 of the ICSID Convention, if the Tribunal is not yet constituted within 90 days after the notice of registration of the request has been dispatched, the Chairman of ICSID's Administrative Council shall, at the request of either party, and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal.
[3] Law No. 23.696 of 1989 on the Reform of the State.
[4] Law No. 23.928 of 1991 on Convertibility.
[5] Law 24.076 of 1992 on the Privatisation of the Gas Sector.
[6] Decree 1738/92 of 1992 on the implementation of the Gas Law.
[7] Information Memorandum on the Initial Public Tender Offer, 1992.
[8] Decree 2255/92 of 1992 on the terms and conditions of licenses.
[9] Law No. 25.561 of 2002 on Public Emergency and Reform of the Currency Exchange Regime, Decree 71/2002 on Public Emergency and Decree 214/2002 on "pesification".
[10] See supra, note 1.
[11] Decree 1570/2001, December 1, 2001 on Financial Entities.
[12] Supra, note 9.
[13] Supra, note 4.
[14] J. Sulkowski: "Questions Juridiques soulevées dans les Rapports Internationaux par les Variations de Valeur des Signes Monétaires", Recueil des Cours de l'Académie de Droit International, Vol. 29, 1929, 5 and ff.
[15] *Maffezini v. Spain*, ICSID Award of November 13, 2000, par. 64.
[16] Counter-Memorial on Jurisdiction, at 18, par. 50.
[17] Hearing, April 8, 2003, at 84.
[18] Supra, note 11.
[19] Counter-Memorial on Jurisdiction, at 50, note 118.
[20] Hearing, April 8, 2003, at 40.
[21] Carlos Suárez Anzorena: "Personalidad de las Sociedades", Cuadernos de Derecho Societario, 1973, as cited in the Memorial on Jurisdiction, note 82.
[22] Law No. 19.550 of 1972 on Commercial Corporations, Article 54, par. 3.
[23] *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, Judgment of February 5, 1970, ICJ Reports 1970, 3.
[24] Case Concerning the *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of July 20, 1989, ICJ Reports 1989, 15.
[25] International Law Commission: Preliminary Report on Diplomatic Protection, by Mohammed Bennouna, Special Rapporteur, A/CN.4/484, 4 February 1998, at 5.
[26] David J. Bederman: "Interim Report on Lump Sum Agreements and Diplomatic Protection", International Law Association, Committee on Diplomatic Protection of Persons and Property, Report of the Seventieth Conference, New Delhi, 2002, 230, at 253-256.
[27] For the jurisprudence of the United States-Iran Claims Tribunal see generally George H. Aldrich: The Jurisprudence of the Iran-United States Claims Tribunal, 1996; Charles N. Brower and Jason D. Brueschke: The Iran-United States Claims Tribunal, 1998.
[28] United Nations Compensation Commission, Decision of the Governing Council on Business Losses of Individuals, S/AC.26/1191/4, 23 October 1991, par. F, and Decision 123 (2001).
[29] International Law Association, Committee on Diplomatic Protection of Persons and Property, First Report, Sixty-Ninth Conference, London, 2000.
[30] *Fedax v. Venezuela*, Decision of the ICSID Tribunal on Objections to Jurisdiction, July 11, 1997, pars. 21-26 with citations to the relevant cases and literature.
[31] Ibid., par. 22, note 18.
[32] Ibid., par. 24.
[33] *AAPL v. Sri Lanka*, ICSID Award of June 27, 1990.
[34] *AMT v. Zaire*, ICSID Award of February 21, 1997.
[35] *Antoine Goetz et consorts v. République du Burundi*, Sentence du CIRDI du 10 Février 1999.
[36] Supra, note 15.
[37] *Lanco v. Argentina*, Preliminary Decision of the ICSID Tribunal of December 8, 1998.
[38] *Genin et al .v. Estonia*, ICSID Award of June 25, 2001.
[39] *Compañía de Aguas del Aconquija et al. v. Argentina*, ICSID Award of November 21, 2000.

[40] *Vivendi,* ICSID Annulment Decision of July 3, 2002.
[41] *CME v. Czech Republic*, Partial Award of September 13, 2001.
[42] Supra, note 35, par. 89.
[43] Supra, note 37, pars. 10, 11.
[44] Supra, note 40, par. 50.
[45] TGN License of December 18, 1992, Article 1.3.4, approved by Decree 2457/92.
[46] Supra, note 37, par. 36.
[47] Supra, note 37, par. 40.
[48] Supra, note 39, pars. 53-54.
[49] *Wena v. Egypt,* ICSID Annulment Decision of February 5, 2002, par. 35. The IPPA is the relevant Bilateral Investment Treaty between Egypt and the United Kingdom.
[50] See for example *Aguas*, supra, note 39; *Genin*, supra, note 38; *Olguin v. Paraguay*, Decision of the ICSID Tribunal on Objections to Jurisdiction of August 8, 2000.
[51] Hearing, April 7, 2003, at 75.
[52] Letter of Submittal by the President of the United States, January 13, 1993, U.S. Government Printing Office, Treaty Doc. 103-2, 1993.
[53] Exhibit 25 of the Request for Arbitration.
[54] Exhibit 26 of the Request for Arbitration.
[55] Exhibit 27 of the Request for Arbitration.
[56] Exhibit 30 of the Request for Arbitration.
[57] Supra, note 15.
[58] James Crawford: The International Law Commission's Articles on State Responsibility, 2002, Comments on Article 4 at 94-99.
[59] Hearing of April 7, 2003, at 113.
[60] Article 46 of the ICSID Convention and Rule 40 of the Arbitration Rules.
[61] *Metalclad v. Mexico*, Case No. ARB(AF)/97/1, Award, (August 30, 2000), 40 ILM (2001), 36; *Pope & Talbot Inc. v. Canada* (Award Concerning the Motion by the Government of Canada Respecting the Claim Based upon the Imposition of the "Super Fee" (August 7, 2000)). Legal Authorities No. 95.
[62] It is worth noting that the UNCITRAL Rules do not provide for ancillary claims as such. Article 20 of those Rules states that : "During the course of arbitral proceedings either party may amend or supplement his claim or defense unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement". In many instances, the distinction between supplementing a claim and introducing an ancillary claim may be more semantic than real. However, Article 46 of the ICSID Convention and Arbitration Rule 40 are more restrictive in the sense that the ancillary claim must arise directly out of the subject-matter of the dispute and that it must be made no later than in the reply, if it is an additional or incidental claim, and no later than the counter-memorial, if it is a counter-claim. In the *Pope & Talbot* case, the tribunal concluded that the issue raised by the Claimant "is not a new claim and consequently no amendment of the Claim is required".
[63] Supra, note 61, par. 67.