



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/01/3

ENRON CREDITORS RECOVERY CORPORATION (FORMERLY ENRON CORPORATION)
AND PONDEROSA ASSETS, L.P. V. ARGENTINE REPUBLIC

DECISION ON JURISDICTION (ANCILLARY CLAIM)

02 August 2004

Tribunal:

[Pierre-Yves Tschanz](#) (Appointed by the investor)

[Francisco Orrego Vicuña](#) (President)

[Héctor Gros Espiell](#) (Appointed by the State)

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Decision on Jurisdiction (Ancillary Claim)

Procedural History

1. On March 25, 2003, Enron Corporation and Ponderosa Assets, L.P. ("Claimants") submitted before the International Centre for Settlement of Investment Disputes ("ICSID" or "Centre") a request for arbitration against the Argentine Republic ("Argentine Republic" or "Argentina") for alleged violations of the provisions of the 1991 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments ("Treaty"). The request concerns the adoption by the Government of Argentina of certain measures that allegedly affect the Claimants' investment in a gas transportation company.
2. The Claimants had previously submitted a request for arbitration against the Argentine Republic, also for alleged violations of the Treaty. However, at that time the Claimants disputed the assessment of Stamp Taxes that certain Argentinean provinces applied to the gas transportation company where the Claimants have their investment ("first dispute"). This request was registered by the Centre on April 11, 2001.
3. After requesting observations from the Argentine Republic with respect to the Claimants' request for arbitration of March 25, 2003, the Tribunal decided, in accordance with [Article 46 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States](#) ("Convention"), to accept such request as a claim ancillary to the one already registered by the Centre ("ancillary claim").
4. In its decision, the Tribunal proposed to handle both disputes independently until it decided on the exceptions to jurisdiction in both cases. In addition, the Tribunal also proposed an expeditious schedule in order for the parties to file their written submissions on jurisdiction in connection with the ancillary claim. Based on this schedule, Argentina filed its memorial on jurisdiction on August 20, 2003, while the Claimants filed their countermemorial on jurisdiction on October 17, 2003. Then, on November 19, 2003, Argentina filed its reply and on December 22, 2003, the Claimants filed their rejoinder.
5. The exceptions to jurisdiction regarding the first dispute were resolved by the Tribunal on January 14, 2004. In its decision, the Tribunal declared that it has jurisdiction over the first dispute.
6. Subsequently, a hearing on jurisdiction regarding the ancillary claim was held in Paris, on April 1 and 2, 2004. At the hearing the Claimants were represented by Messrs. R. Doak Bishop and Craig S. Miles from the law firm of King & Spalding, Houston, United States, as well as by Messrs. Guido Santiago Tawil, Alix M. Martínez and Ms. Silvia M. Marchili from the law firm of M. & M. Bomchil, Buenos Aires, Argentina. Messrs. Bishop and Tawil addressed the Tribunal on behalf of the Claimants. The Argentine Republic was represented by Ms. Cintia Yaryura, Ms. Ana Badillos, and Mr. Ignacio Pérez Cortés from the office of the Procuración del Tesoro de la Nación Argentina. All

of them addressed the Tribunal on behalf of the Argentine Republic.

7. During the hearing, the Tribunal also put questions to the parties in accordance with the Rule 32(2) of the Rules of Procedure for Arbitration Proceedings of the Centre ("Arbitration Rules").

The Dispute between the Parties

8. As noted above, this is the second dispute between Enron Corporation and Ponderosa Assets L. P. and the Argentine Republic brought before this Tribunal. The first dispute concerned the assessment of Stamp Taxes by the Argentine Provinces and the jurisdiction of the Tribunal was affirmed by its decision of January 14, 2004 (*Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*) ("Stamp Tax Decision"). This dispute is an ancillary claim arising from the refusal of the Argentine Government to allow tariff adjustments in accordance with the United States Producer Price Index ("PPI") and the enactment of Law No. 25,561 which nullified PPI adjustments and the calculation of tariffs in dollars of the United States of America. In the Claimants' argument, these various measures violate the commitment made to the investor under the Treaty.
9. The extent of the participation by the Claimants in the privatization of the gas industry in Argentina has been explained in the Stamp Tax Decision, and shall not be repeated here. The same holds true of the various shareholding arrangements and companies set up to this end. The Tribunal notes, however, that the parties have continued to argue about the shareholding arrangements connected with the participation of Enron in *Transportadora de Gas del Sur Sociedad Anónima* ("TGS") and related companies.
10. The Argentine Republic has requested that Enron explain these arrangements and the Claimants have provided the Tribunal and Argentina with a number of documents to this effect. The Tribunal is satisfied that the shareholding arrangements have not changed, or not in any significant manner, since the Stamp Tax Decision. Should these arrangements change, evidently the Tribunal will take any developments into account. The Claimants have undertaken the commitment of informing the Tribunal promptly of any changes in this matter.

Argentina's Economic Emergency

11. An extensive portion of the pleadings of the Argentine Republic and the documents submitted in this dispute concern explanations about the economic and social emergency affecting that country.
12. Although most of these aspects belong to the merits of the dispute, the Tribunal is nonetheless aware of this emergency and takes due note of it. At this stage, it is only appropriate to conclude, as in *CMS Gas Transmission Company v. Argentine Republic* ("CMS"),¹ that the Tribunal is not here to examine measures of general economic policy or to judge whether they are right or wrong. Its duty

¹ CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, par. 33; see also Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction of 14 January 2004, pars. 29-30.

is only to examine in due course "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".

13. The Tribunal also notes that while for Argentina there are two different disputes involved in this claim, one relating to the PPI and the other to legislative emergency measures, in the Claimants' view the dispute is just one evolving set of measures that have ended up affecting the investor's rights.

Argentina's Objections to Jurisdiction

14. Like in the Stamp Tax dispute, the Argentine Republic has raised five objections to the jurisdiction of the Center and the competence of the Tribunal. These are first that the Claimants lacks *ius standi* because the dispute concerns contractual rights that appertain to TGS and not the Claimants. Second, an indirect claim such as that asserted by the Claimants is in violation of Article 25(2)(b) of the Convention. Third, the dispute does not arise directly out of an investment as required by Article 25(1) of the Convention. Fourth, the existence of a forum selection clause in the License Contract prevails over any other forum. And fifth, the dispute has already been submitted to the local courts of Argentina.
15. Since these arguments have already been discussed in the Stamp Tax Decision, and the situation in respect of this dispute is not different, the Tribunal will address them briefly and devote more attention to certain aspects that the Argentine Republic has emphasized in respect of this particular dispute.

Jurisdictional Objection Based on the Lack of *Ius Standi* and Related Questions

16. The Argentine Republic first objects to the competence of the Tribunal on the ground that the Claimants lack *ius standi* because only TGS is entitled to bring claims as a corporation. The point has been raised as one of admissibility.
17. In Argentina's view shareholders cannot claim separately from the corporation, not even in proportion to their interest, as they would have only an indirect claim. Under both Argentine legislation and international law, Argentina argues, corporate personality does not allow for indirect claims by shareholders. To the extent that this has been allowed it has always been under express provisions of an exceptional nature. While an investment in shares might qualify for protection under the Treaty, this is only when the shares have been affected as such by measures of the host Government.
18. In the Claimants' view, however, the Treaty specifically allows investors to bring action in relation to their investments, and there is nothing in international law that precludes the exercise of this

right. Their claim is independent of any claim that TGS might have as the holder of the License.

19. Again in this case, the parties have discussed the meaning of the *Barcelona Traction, Light and Power Company, Limited* ("Barcelona Traction")² and the *Elettronica Sicula, S.p.A.* ("ELSI")³ cases in so far as these decisions reflect customary international law. Argentine legislation has also been discussed in this context. In particular, the Claimants argue that the Treaty does not require the Claimants' control of TGS and that a number of ICSID cases have upheld the right of investors to claim on their own right.⁴
20. As was also discussed in the Stamp Tax Decision, Argentina is rightly concerned about the fact that successive claims by minority shareholders that invest in companies that in turn invest in other companies, could end up with claims that are only remotely connected to the measures questioned. However, as explained by the Tribunal in that case, there is a clear limit to this chain in so far as the consent to the arbitration clause is only related to specific investors.⁵
21. The parties also have different views about the second and third jurisdictional objections raised by Argentina. The question of indirect claims is inseparable from the conclusion on *ius standi*: to the extent that minority shareholders are allowed to claim this situation by definition will include investors that could be described as having an indirect participation. The connection of this matter to Article 25(2)(b) of the Convention will be discussed further below.
22. Whether the dispute arises directly out of an investment is related to the same issue as that of which are precisely the rights of the investor under the Treaty. If both majority and minority shareholders are allowed to claim it is because they are protected investors under the Treaty. This element will govern the conclusion as to whether the dispute arises directly out of an investment.

Jurisdictional Objection Concerning the Existence of a Contractual Forum Selection Clause and the Submission of the Dispute to Local Jurisdiction

23. Two other objections raised by the Argentine Republic concern the issue of the existence of a forum selection clause in the License Contract and the related question of whether the dispute was submitted to the local courts. Argentina believes that the forum selection clause of the Contract, assigning exclusive jurisdiction to the Administrative Courts of Buenos Aires, prevails. The Claimants, it is argued, are a third party to that Contract without a right of action of their own. Moreover, it is argued that TGS appealed the PPI measures and submitted to administrative courts

² International Court of Justice, " Barcelona Traction, Light and Power Company, Limited ", (New Application: 1962) (Belgium v. Spain) (1962-1970).

³ International Court of Justice, " Elettronica Sicula, S.p.A." (ELSI), United States of America v. Italy (1987 1989).

⁴ Lanco International, Inc. v. Argentine Republic (ICSID Case No. ARB/97/6), Decision of December 8, 1998; Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Award of November 21, 2000; Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/95/3), Award of February 10, 1999; Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment Proceeding of July 3, 2002; and CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003.

⁵ Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2004, pars. 50-53.

other aspects of the dispute.

24. The Claimants oppose such conclusions and are of the view that contractual choice of forum provisions do not impede ICSID jurisdiction when a Treaty-based claim is involved.⁶ In addition, the Claimants argue that they have not resorted to any local court in Argentina and that eventual actions by TGS do not preclude resort to ICSID arbitration by the Claimants, as held in *Alex Genin and others v. Republic of Estonia* ("Genin")⁷ and *CMS*.⁸

The Tribunal's Findings in Respect of Jurisdiction

25. The Tribunal agrees with the view expressed by the Argentine Republic in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances. This was also the conclusion expressed by the Tribunal in the Stamp Tax Claim Decision.⁹ The key issues raised by the parties in connection with jurisdiction in this case, however, are not really different from those raised in earlier cases. This being the case, the conclusions of the Tribunal follow the same line of reasoning, not because there might be a compulsory precedent but because the circumstances of the various cases are comparable, and in some respects identical.
26. Because the present claim is an ancillary one to that in the Stamp Tax Claim, the Tribunal could have relied on the jurisdictional findings made in that Decision and extend them to this additional dispute. However, the Tribunal has wished to examine anew the jurisdictional arguments made by the Argentine Republic and the views of the Claimants on this matter. The parties have not really made any new argument in this respect and, therefore, the Tribunal sees no basis for changing any of the conclusions already reached in the Stamp Tax Claim.
27. It follows that the Tribunal is persuaded that again in this case the Claimants have *ius standi* to claim in their own right as they are protected investors under the Treaty.¹⁰ The Claimants' right to bring an action on their own has been firmly established in the Treaty and there are no reasons to hold otherwise in connection with this dispute. Neither is this situation contrary to international law or to ICSID practice and decisions.
28. Foreign investors, such as the Claimants, were specifically invited to participate in the privatization process, various companies were set up in Argentina to this effect and investments were channeled into TGS through this network of corporate arrangements. It is simply not tenable to try now to dissociate TGS from those other companies and the investors and argue that the Claimants do not

⁶ *Lanco International, Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6), Decision of December 8, 1998; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of November 21, 2000; *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment Proceeding of July 3, 2002; *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment Proceeding of February 5, 2002; and *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003.

⁷ *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award of June 25, 2001.

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

⁹ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2004, par. 40.

¹⁰ *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, pars. 62-63.

have *ius standi*. This is one of the essential features of the Treaty and the protection it extends to foreign investors.

29. The Treaty language and intent is specific in extending this protection to minority or indirect shareholders. The Tribunal must also emphasize that the definition of investment under Article I(1)(a) of the Treaty has been expressly related to the direct or indirect ownership or control by the foreign national:
 - (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;
30. This definition is the one that controls the whole discussion. It evidently includes the channeling of investments through locally incorporated companies, particularly when this is mandated by the very legal arrangements governing the privatization process in Argentina. Not only was it required that TGS be an Argentine company but also that the holding companies should be incorporated in Argentina.
31. Faced with this very explicit provision, the Tribunal can only conclude that indirect investments are specifically protected under the Treaty.
32. The Tribunal's interpretation is, in addition, fully consistent with the rules on the interpretation of treaties laid down in [the 1969 Vienna Convention on the Law of Treaties](#). Article 31.1 of this Convention provides 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". Also Article 32 indicates the recourse to supplementary means of interpretation, including the "preparatory work of the treaty and the circumstances of its conclusion.". That the Treaty was made with the specific purpose of guaranteeing the rights of the foreign investors and encouraging their participation in the privatization process, is beyond doubt. In view of the explicit text of the Treaty and its object and purpose, it is not even necessary to resort to supplementary means of interpretation, such as the preparatory work, a step that would be required only in case of insufficient elements of interpretation in connection with the rule laid down in Article 31 of the Convention.

The *Mondev* Case Distinguished

33. The Argentine Republic has relied, however, on some recent and earlier cases with a view to request that tribunals should be consistent in their decisions. The Tribunal will examine these cases so as to appreciate their real meaning and extent.

34. The first case on which the Argentine Republic relies is *Mondev International Ltd. v. United States of America* ("Mondev").¹¹ Here, it is correctly argued, the United States adopted the view that shareholders cannot assert claims under the North American Free Trade Agreement ("NAFTA") for damages suffered by the company in which they own shares. Also [NAFTA Article 1139](#) refers to both direct and indirect ownership or control of investments. This same interpretation, it is argued, should be adopted by this Tribunal particularly because the United States is a party to the Treaty.

35. However, the Tribunal in *Mondev* reached a different conclusion. After explaining Mondev's argument to the effect that the phrase "owned or controlled directly or indirectly" was adopted specifically to avoid the difficulties relating to the standing of shareholders raised by the *Barcelona Traction* decision, the Tribunal concluded:

"In the Tribunal's view, it is certainly open to Mondev to show that it has suffered loss or damage by reason of the decisions it complains of, even if loss or damage was also suffered by the enterprise itself. For these reasons, the Tribunal concludes that Mondev has standing to bring its claim."¹²

36. A similar argument is made by the Argentine Republic in connection with the view expressed to the same effect by the United States in *GAMI Investments Inc. v. United Mexican States*,¹³ a case that at this date has not been yet decided.

37. The Tribunal must note, however, as also indicated in the Stamp Tax Claim Decision,¹⁴ that the greatest innovation of ICSID and other systems directed at the protection of foreign investments is precisely that the rights of the investors are not any longer subject to the political and other considerations by their governments, as was the case under the old system of diplomatic protection, often resulting in an interference with those rights. Investors may today claim independently from the view of their governments.

38. The Tribunal also notes that the United States Supreme Court has recently held, in the context of the Foreign Sovereign Immunities Act, that if direct ownership of shares is envisaged in legislation this should be understood as referring to the ownership of a majority of shares and the requirements of formal corporate structure, but when legislation refers to indirect ownership this means that minority shareholders are entitled to certain rights as well and that the formal corporate structure is no longer controlling. Referring to the expression "direct and indirect ownership" used in other statutes, the Court held:

"Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so".¹⁵

¹¹ *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of October 11, 2002.

¹² *Id.*, pars. 82-83.

¹³ *GAMI Investments Inc. v. United Mexican States* (NAFTA/UNCITRAL Arbitration Rules Proceeding), Submission of the United States of America of June 30, 2003.

¹⁴ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2004, par. 48.

¹⁵ *Dole Food Co. v. Patrickson*, U. S. Supreme Court, 123 S. Ct. 1655 (2003).

39. The definition of investment adopted in bilateral investment treaties is a clear example of protection of minority shareholders and most certainly this was not ignored by the United States Senate. This decision of the United States Supreme Court should probably have more weight for the purpose of the United States' views on indirect ownership than that expressed in arbitrations by counsel for that government.

The *Vacuum Salt* Case Distinguished

40. The Argentine Republic has also urged this Tribunal to be consistent with what was decided in the earlier ICSID case *Vacuum Salt Products Ltd. v. Republic of Ghana* ("Vacuum Salt").¹⁶ The Tribunal has examined this case with the greatest interest in order to see whether in fact there would be anything in it suggesting the need for this Tribunal to adopt a conclusion different from that in the Stamp Tax Claim Decision.
41. In that case, the tribunal dealt with the interpretation of Article 25(2)(b) of the Convention in connection with the meaning of "foreign control". This Article provides for juridical persons which have the nationality of the Contracting State party to the dispute to be able to qualify for ICSID jurisdiction when ".because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention". The decision held that because there was no such agreement, the Claimant was precluded from acceding to ICSID jurisdiction.
42. The Argentine Republic believes that this is also the case here, as there has been no agreement to treat any of the Argentine companies involved as nationals of another Contracting State because of foreign control.
43. The Tribunal is not persuaded by these arguments for two reasons. The first one is that *Vacuum Salt* had been at all material times a corporation organized under the 1963 Companies Code of Ghana. There was no foreign investment contract nor any connection to a foreign investment law. There was only a minority Greek shareholder in that company.
44. The situation here is entirely different. There are specific foreign investors, who were invited by the Argentine Government to participate in the privatization process and required to organize locally incorporated companies to channel their investments. At all times this was a foreign investment operation.
45. But there is a second and still more powerful reason that convinces the Tribunal about the fact that *Vacuum Salt* was an entirely different case not comparable in any way to this one. There was no bilateral investment treaty and hence there was no specific definition of investment available.
46. The provision of Article 25(2)(b) allows for locally incorporated companies to claim in ICSID arbitration to the extent that there is an agreement to this effect. Such an agreement would be normally the outcome of the Treaty. This is what the tribunal explained in *CMS* when holding that:

¹⁶ *Vacuum Salt Products Ltd. v. Republic of Ghana* (ICSID Case No. ARB/92/1), Decision on Jurisdiction of February 16, 1994

"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".¹⁷

Contract Claims and Treaty Claims

47. A number of questions raised by the jurisdictional objections of the Argentine Republic concern the discussion about Contract claims and Treaty claims, in so far it is argued that the forum selection clause of the License Contract and the alleged submission of claims to Argentine courts are separate and distinct from Treaty claims, which are precluded because of the lack of *ius standi* and connected arguments.
48. Many tribunals have had to deal with the difference between contract-based claims and treaty-based claims, as evidenced by *Lauder*,¹⁸ *Genin*,¹⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ("Aguas del Aconquija"),²⁰ *CMS*²¹ and *Azurix*²² as well as the Annulment Committees in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Annulment Proceeding)* ("Vivendi")²³ and *Wena Hotels Limited v. Arab Republic of Egypt* ("Wena").²⁴ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* ("SGS v. Pakistan")²⁵ and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* ("SGS v. Philippines")²⁶ are two other recent instances of this discussion.
49. The distinction between these different types of claims has relied in part on the test of the triple identity. To the extent that a dispute might involve the same parties, object and cause of action²⁷ it might be considered as a dispute where it is virtually impossible to separate the contract issues from the treaty issues and drawing from that distinction any jurisdictional conclusions.
50. However, as the Annulment Committee held in *Vivendi*, "A treaty cause of action is not the same as

¹⁷ CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, par. 51.

¹⁸ Ronald S. Lauder v. Czech Republic, Uncitral Final Award, September 3, 2001.

¹⁹ Alex Genin and others v. Republic of Estonia (ICSID Case No. ARB/99/2), Award of June 25, 2001.

²⁰ Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Award of November 21, 2000.

²¹ CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003.

²² Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003 .

²³ Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment Proceeding of July 3, 2002.

²⁴ Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Annulment Proceeding of February 5, 2002

²⁵ SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision on Jurisdiction of August 6, 2003.

²⁶ SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision on Jurisdiction of January 29, 2004.

²⁷ Ronald S. Lauder v. Czech Republic, Uncitral Final Award, September 3, 2001, paras. 161, 163.

a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard".²⁸ The tribunal also held in *CMS*, referring to this line of decisions, 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".²⁹

51. In this case, although there are no doubt questions concerning the Contract between the parties, the essence of the claims, like in the Stamp Tax Claim, relates to alleged violations of the Treaty rights. Having the Tribunal concluded that there are no reasons to change the conclusions on jurisdiction reached in the Stamp Tax Claim Decision, the distinction between contract-based claims and treaty-based claims loses to a great extent its significance in the present phase of the case.

Decision

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

So decided.

²⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment Proceeding of July 3, 2002, para. 113.

²⁹ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, para. 80. See also *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 89.