INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID): LANCO INTERNATIONAL INC. V. ARGENTINE REPUBLIC (PRELIMINARY DECISION ON JURISDICTION OF THE ARBITRAL TRIBUNAL)*

[December 8, 1998]
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PRELIMINARY DECISION:

JURISDICTION OF THE ARBITRAL TRIBUNAL

ICSID CASE No. ARB/97/6

LANCO INTERNATIONAL INC.

v.

THE ARGENTINE REPUBLIC

ARBITRAL TRIBUNAL:

Bernardo M. Cremades
Guillermo Aguilar Alvarez
Luiz Olavo Baptista

Washington, D.C., DECEMBER 8, 1998

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In the city of Washington, D.C., December 8, 1998

In the arbitration before the International Centre for Settlement of Investment Disputes, number 97/6, between

(i) on the one hand, LANCO INTERNATIONAL INC., having its principal place of business at 3111 W. 167th Street, Hazel Crest, Illinois 60429, United States of America (Claimant), and

(ii) on the other hand, the ARGENTINE REPUBLIC (Respondent),

(hereinafter, together, "the Parties")

this preliminary decision on jurisdiction of the Arbitral Tribunal is hereby issued:

PRELIMINARY DECISION ON THE JURISDICTION OF THE ARBITRAL TRIBUNAL

I. PROCEDURAL BACKGROUND

§ 1 In its request for arbitration of October 1, 1997, LANCO INTERNATIONAL INC. (hereinafter "LANCO" or "Claimant"), a company established and operating under the laws of the United States of America (State of Illinois), filed, on its own behalf, a request for arbitration with the Secretary-General of the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") against the Argentine Republic (hereinafter "Argentine Republic" or "Respondent").

The request for arbitration seeks compensation for damages due to alleged breach by the Respondent of the obligations set out in Article I(I)(2)(c), II(2)(a), and Article IV(1) of the bilateral treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed November 14, 1991 at Washington, D.C., ratified by the Argentine National Congress on September 25, 1992, by Law No. 24, 124, and by the President of the United States on January 3, 1994, and in force as of October 20, 1994 (hereinafter "ARGENTINA-U.S. Treaty").

Article VII of the ARGENTINA-U.S. Treaty provides that in the event that a dispute cannot be settled amicably, the national or company concerned may submit the dispute for resolution to ICSID, created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter "ICSID Convention"), opened for signature at Washington, D.C., on March 18, 1965.

§ 2 Once the request for arbitration was received by the Secretary-General of ICSID, a copy of the request and its accompanying documentation was sent to the Respondent. The request for arbitration was registered by the Secretary-General of ICSID on October 14, 1997, thereby initiating the arbitration procedure.

The Arbitral Tribunal was constituted on March 19, 1998, and is made up of Mr. Guillermo Aguilar Alvarez (appointed by LANCO), Mr. Luiz Olavo Baptista (appointed by the Argentine Republic), and Mr. Bernardo M. Cremades (appointed, pursuant to the agreement of the Parties, by the Secretary-General of ICSID). The parties acknowledged that the Arbitral Tribunal was adequately constituted at its first session, which was held at Washington, D.C. on April 21, 1998.

In this arbitration, LANCO is represented by Mr. Daniel M. Price, Esq., of the law offices of Powell, Goldstein, Frazer & Murphy LLP, of Washington, D.C. The Argentine Republic is represented by Mr. Jorge Campbell, of the Secretariat of International Economic Relations of the Ministry of Foreign Affairs, International Trade and Worship, of the Argentine Republic.

§ 3 On April 21, 1998, the Arbitral Tribunal held a preliminary session at Washington, D.C., in which the President of the Arbitral Tribunal stated that the Argentine Republic had raised objections to the jurisdiction of the Arbitral Tribunal. It was agreed that the Claimant should submit a memorial setting forth its arguments on the merits and on the objections to jurisdiction raised by the Argentine Republic on June 22, 1998 (memorial of the requesting party). The Argentine Republic submitted its counter-memorial on the merits and on jurisdiction 60 days after having received the Claimant's brief, i.e. on August 21, 1998 (counter memorial). The Claimant submitted a reply, which was to have been received by September 10, 1998; upon Claimant's request, the deadline was extended to September 30. The time period for the Respondent to submit its rejoinder was similarly extended to November 11, 1998.

On December 7, 1998, a hearing was held with the Arbitral Tribunal and the Parties at Washington, D.C., in the course of which each party presented its arguments on the jurisdiction of this Arbitral Tribunal.

After the hearing, the Arbitral Tribunal met and concluded as follows:

II. FACTUAL BACKGROUND

§ 4 THE MINISTRY OF ECONOMY AND PUBLIC WORKS AND SERVICES of the Argentine Republic issued a national and international public invitation to bid for the concession of port terminals at PUERTO NUEVO, City of Buenos Aires, Argentine Republic. That invitation was made by resolution No. 669 of June 21, 1993, approving the Bid Conditions, General Techincal Specifications, and Particular Technical Specifications, all to apply in the competitive bidding process in question; at the same time the Secretariat for Transportation of the same Ministry was authorized to make the invitation to bid.

After the relevant process for awarding the contract, and by Resolution No. 710 of the MINISTRY OF ECONOMY AND PUBLIC WORKS AND SERVICES, of June 6, 1994, Terminal No. 3 of PUERTO NUEVO, city of Buenos Aires, was awarded to the consortium TERMINALES PORTUARIAS ARGENTINAS S.A., formed by the companies AUTOTRANSPORTES ANTARTIDA A.T.A. S.A.; MI-JACK PRODUCTS INCORPORATED (as of April 1, 1995, called LANCO INTERNATIONAL INC.); ARPETRO S.A.; and ROGGE MARINE CONSULTING GmbH.

§ 5 The Concession Agreement for Port Terminal No. 3 was signed on June 6, 1994, for the purpose of developing and operating that terminal, within the scope of the provisions of the Bid Conditions and of the General and Particular Technical Specifications. The signing parties were, on the one hand, the MINISTRY OF ECONOMY AND PUBLIC WORKS AND SERVICES (the Grantor) and on the other hand, TERMINALES PORTUARIAS ARGENTINAS S.A. "in the process of incorporation" (the Grantee) and AUTOTRANSPORTES ANTARTIDA A.T.A., S.A.; MI-JACK PRODUCTS INC.; ARPETRO S.A.; and ROGGE MARINE CONSULTING GmbH, the latter as awardees and guarantors of the grantee's obligations.

The grantee company TERMINALES PORTUARIAS ARGENTINAS S.A. had been constituted on May 6, 1994, by the companies AUTOTRANSPORTES ANTARTIDA A.T.A., S.A.; MI-JACK PRODUCTS INC. (now LANCO); ARPETRO S.A.; and ROGGE MARINE CONSULTING GmbH. LANCO subscribed 17.4% of the capital stock of TERMINALES PORTUARIAS ARGENTINAS S.A., which is the equity share it holds at this time. In addition, it currently enjoys usufruct rights in respect of 13% of the capital stock of that company, as reflected in the Public Registry of Commerce of the City of Buenos Aires.

§6 The Concession Agreement provides at Clause 12:

"*For all purposes derived from the agreement and the BID CONDITIONS, the parties agree to the jurisdiction of the Federal Contentious-Administrative Tribunals of the Federal Capital of the ARGENTINE REPUBLIC.*" (Translation.)

§7 The issue of this Arbitral Tribunal's jurisdiction arises from the moment the Claimant considers ICSID arbitration to be appropriate for settling its dispute with the Argentine Republic, based on its understanding that it has made an investment as the national of another State in the territory of the Argentine Republic, to which the ARGENTINA-U.S. Treaty is applicable. That treaty provides for recourse to ICSID arbitration at Article VII(3)(i).

The Argentine Republic considers that Article 12 of the Concession Agreement applies, and that therefore as regard any dispute that may arise under that contract, recourse must be had to the Federal Contentious-Administrative Tribunals of the City of Buenos Aires, which is the jurisdiction freely agreed upon by the parties after the entry into force of the ARGENTINA-U.S. Treaty. The Argentine Republic further understands that LANCO merely has shareholder equity in the Grantee company and is therefore not a Party, as such, to the Contract, and consequently has no standing, by itself, to make a claim for performance of the obligations arising under the Concession Agreement. The only person with standing to do so is the Grantee, but since the Grantee is a company of Argentine nationality, it is not covered by the ARGENTINA-U.S. Treaty.

III. REASONS

A. APPLICABILITY OF THE BILATERAL TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE ARGENTINE REPUBLIC CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

§8 Before examining whether the requirements established by Article 25 of the ICSID Convention (opened for the signature of all the member countries of the International Bank for Reconstruction and Development on March 18, 1965, and which is referenced by the ARGENTINA-U.S. Treaty in its Article VII(3)(a)(i)) have been met, the Tribunal must decide whether the ARGENTINA-U.S. Treaty applies to the dispute between LANCO and the Argentine Republic.

In effect, the Tribunal finds itself before a case in which ICSID has received a request for arbitration under its auspices pursuant to a provision in a bilateral investment treaty. This is increasingly common, as more and more States sign bilateral treaties on the reciprocal encouragement and protection of their investments that include a clause for the submission of disputes to ICSID arbitration. This has led to a number of ICSID arbitration proceedings, including the first case to be settled on such as basis, *Asian Agricultural Products, Ltd.* v. *Republic of Sri Lanka (AAP v. Sri Lanka)*; and also including the case of *American Manufacturing & Trading Inc.* v. *Republic of Zaire (AMT v. Zaire).*

In this context, the United States and the Argentine Republic have signed a Treaty Concerning the Reciprocal Encouragement and Protection of Investment by nationals and companies of one Party in the territory of the other Party (the ARGENTINA-U.S. Treaty). This Treaty was signed on November 14, 1991; it was ratified by the Argentine Republic by Law No. 24,124 of September 25, 1992, and by the President of the United States on January 3, 1994. Pursuant to its Article XIV, it entered into force on October 20, 1994, 30 days after the exchange of the instruments of ratification.

§9 To determine whether the ARGENTINA-U.S. Treaty applies, this Tribunal must analyze (*a*) whether LANCO's involvement in the Argentine Republic can be characterized as an investment; (*b*) whether there is an investment dispute, as defined in Article VII *ab initio*; and (*c*) whether the conditions established in Article VII for access to ICSID arbitration have been met.

(a) **The existence of an investment for the purposes of the ARGENTINA-U.S. Treaty**

This Tribunal must analyze the definition of the term "investment" in the ARGENTINA-U.S. Treaty, set forth in its Article I(1) as follows:

> *"(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:*
>
> *"(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*
>
> *"(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*
>
> *"(iii) a claim to money or a claim to performance having economic value and directly related to an investment;*
>
> *"(iv) intellectual property which includes, inter alia, rights relating to:*
>
> *literary and artistic works, including sound recordings,*
> *inventions in all fields of human endeavor,*
> *industrial designs,*
> *semiconductor mask works,*
> *trade secrets, know-how, and confidential business information,*
> *and*
> *trademarks, service marks, and trade names; and*
>
> *"(v) any right conferred by law or contract, and any licenses and permits pursuant to law."*

§10 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.

§11 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.

§12 In effect, the Tribunal observes that the parties to the Concession Agreement are the MINISTRY OF ECONOMY AND PUBLIC WORKS AND SERVICES of the Argentine Republic (the Grantor) and TERMINALES PORTUARIAS ARGENTINAS S.A. (the Grantee), but also four more companies, including the Claimant who, in terms, sign the Concession Agreement "*in their capacity as awardees and guarantors of the grantee's obligations.*" The wording leaves no doubt but that the companies appearing therein, including LANCO, sign the contract and therefore are parties to it, in their capacity as awardees and guarantors; consequently, LANCO is liable to the Argentine State for the obligations arising under the contract in the conditions established therein. This argument has been noted by the Parties, and this Tribunal considers it fundamental for understanding that LANCO is a party, in its own name and right, to the Concession Agreement, not just by virtue of being owner of a share of the capital stock, as Claimant alleges.

§13 The Tribunal concludes, based on the language of the contract and the administrative procedures of the invitation to bid that led to the awarding of the concession and the signing of the Concession Agreement, that the Argentine Government sought to hold responsible for the viability of the project not only the Grantee, but also the companies that constituted the Grantee, and that participated in the bid in their own name and on their own behalf.

To that end, these companies are contemplated in the Bid Conditions, in the various decrees approving the invitation to bid, and in the Concession Agreement. In effect, Article 9 of the Bid Conditions, which the Concession Agreement refers to, under the heading "Bidders — unification of representation — liability," provides:

> "*Natural or juridical persons, individually or in consortium, national or foreign, may participate in this invitation to bid. If awarded the bid, they must undertake to create a corporation [sociedad anónima] located in the country, and if they are foreign, as a local company formed with external capital . . .*
>
> "*The bids submitted by consortia should clearly state the percentage of participation of each co-bidder, and unify their representation, granting a special power-of-attorney, duly authorized before a Notary Public, to the common representative, with sufficient powers to act, bind, and hold liable all the co-bidders in this invitation to bid up until it is awarded and the agreement signed.*
>
> "*Liability: Each of the co-bidders shall have unlimited and joint and several liability vis-à-vis the National State for each and every obligation emerging from the submission of the Bid to the signing of the Contract. The awardee and the firms that are part of it shall be jointly liable, with the corporation that is the grantee, to the National State for all the contractual obligations over the entire period covered by the agreement. In the event that any of the partners that constitute the awardee should fail to carry out the commitments that stem from the joint liability, all the others assume joint liability, each in a manner proportional to its respective shareholder equity.*" (Translation.)

§14 It is clear from the wording of this article, and the other related articles in the Bid Conditions, that the Argentine State foresaw the possibility, which turned out to be the case in reality, that a group of co-bidders (who would form a company) might come forth who, after the award were made to the grantee company, would be jointly liable throughout the period covered by the agreement. Moreover, in the event of a breach by any of the partners in their joint liability, the other partners would assume the liability proportional to their equity share. It is clear, therefore, that LANCO is liable for all contractual obligations to the extent of its equity share. Moreover, in the event that one of the partners does not comply, LANCO will be liable for an additional share, also proportional to its equity. Thus the Argentine State may turn to LANCO for the performance of the obligations.

Consistent with the foregoing, by Decree No. 1194 of July 19, 1994, the President of Argenita decreed:

> "*Article 1.— All steps taken by the Ministry of Economy and Public Works and Services to carry out the national and international public bidding for the concession of the port terminals at Puerto Nuevo, City of Buenos Aires, Argentine Republic, as regards Terminal No. 3, identified in said competitive process, are hereby approved.*
>
> "*Article 2.— Approval is hereby given to the Concession Agreement in respect of Terminal No. 3 [Contrato de Concesión de la Terminal no. 3] at Puerto Nuevo, City of Buenos Aires, Argentine Republic, signed by the Minister of Economy and Public Works and Services and Terminales Portuarias Argentinas, S.A. (in formation) and the members of the consortium submitting the bid: Autotransportes Antártida A.T.A. S.A.; Mi-Jack Products Incorporated; Arpetro S.A.; and Rogge Marine Consulting GmbH, on June 1994, and its Annexes, a certified copy of which is attached hereto and forms an integral part of this decree.*" (Translation.)

§15 In view of all the foregoing, this Tribunal understands that there is an investment for the purposes of applying the ARGENTINA-U.S. Treaty, in that the investment by LANCO is not merely an investment in stock, but also one made by signing, along with other companies, a Concession Agreement with the Government of the Argentine Republic under which certain rights and obligations arise for the investor.

§16 This, nonetheless, does not make the Concession Agreement an investment agreement, since not all the parties are legally situated in like manner. However, it is also clear that insofar as LANCO is a party to this agreement as awardee and guarantor, the Concession Agreement, with respect to the foreign investor, can be characterized as an investment agreement, since the obligations that arise under Article 9 of the Bid Conditions, to which the Concession Agreement expressly refers in order to define the character of the awardee forming part of the Grantee, leave no doubt but that LANCO is liable to the Argentine State not only because of its direct equity ownership in the Grantee company, but also by reason of its direct liability to the Grantee and to all of its co-awardees in their liability to the State, in the event of a default by any of them. In other words, the Argentine State can proceed against LANCO for the performance of these obligations, be they pecuniary or obligations to perform, such as to provide a service. From this liability, it can be concluded that LANCO is a party to the Concession Agreement, in its own name and right, and in its capacity as a foreign investor; and for the purposes of Article VII(1) of the ARGENTINA-U.S. Treaty, it can be considered that the Concession Agreement is in effect an investment agreement.

(b) The existence of an investment dispute for the purposes of Article VII(1) of the ARGENTINA-U.S. Treaty

§17 The ARGENTINA-U.S. Treaty requires the existence of an investment dispute in order for its dispute-settlement provisions to be applicable.

Article VII of the ARGENTINA-U.S. Treaty provides:

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

§18 Article I of the ARGENTINA-U.S. Treaty does not require, as the Argentine Republic alleges, that the investment agreement refer to an exclusively foreign investment. Nor can this Tribunal agree with the definition offered by the Argentine Republic of an investment agreement, according to which "*a concession agreement that does not contain specific clauses referring to foreign investments is not an investment contract in the terms and scope of the BIT, not even under the assumption that the Concession Agreement had been entered into by a State Party and a national or company of the other Party controlled 100% by foreigners*" (Respondent's Rejoinder of November 9, 1998, page 2) (Translation).

It should be recalled here that the Bid Conditions do provide for foreign companies to come forth as bidders, as arises from the reference it makes to the legislation regulating foreign investment; thus, Article 8 of the Bid Conditions specifically indicates:

> "*This bidding is national and international in character. It shall be governed by the laws of the Argentine Republic and the provisions of these Bid Conditions, its Circulars, the accepted Bid, and the Agreement signed with the awardee . . . With respect to foreign investments, the Laws . . . shall apply along with their regulatory decrees.*" (Translation.)

§19 A different matter is that the Concession Agreement does not to make any mention of the fact that at least one of the signers is foreign, from which it follows that by act or omission this fact was not taken into account by its drafters, for whom, it would appear, the Concession Agreement was setting forth a purely national relationship, in which — as it had to be — the disputes are submitted to the Argentine administrative tribunals, making mention of the submission to the administrative tribunals of the City of Buenos Aires, even though such submission need not have been made explicit, for if one is to submit to a court, it could only be the contentious-administrative tribunals of the City of Buenos Aires, as this jurisdiction is not subject to mutual agreement.

Notwithstanding the foregoing, the Argentine Republic having included the awardees in their own name and right (in our case, LANCO) to ensure the sound completion of the project, the Argentine Republic should bear in mind that the ARGENTINA-U.S. Treaty applies to its relationship with LANCO, although no mention was made of the ARGENTINA-U.S. Treaty in the Concession Agreement, which was not possible as it had not yet entered into force (the issue of entry into force and its repercussions are addressed in detail below).

§20 Having concluded that the ARGENTINA-U.S. Treaty does apply to the instant case, given the existanece of an investment dispute, this Tribunal must now examine whether the requirements for an investor to be able to have recourse to ICSID arbitration, established in Article VII of that Treaty, have been met.

(c) Compliance with the requirements of Article VII of the ARGENTINA-U.S. Treaty

Article VII establishes:

> "2. *In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:*
>
> *"(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or*
>
> *"(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or*
>
> *"(c) in accordance with the terms of paragraph 3.*
>
> "3. *(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:*
>
> *"(i) to the International Centre for Settlement of Investment disputes ('Centre') established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965, ('ICSID Convention'), provided that the Party is a party to such Convention; or*
>
> *"(ii) to the Additional Facility of the Centre, if the Centre is not available; or*
>
> *"(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or*
>
> *"(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.*

"(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

"4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

"(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

"(b) an 'agreement in writing' for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ('New York Convention')."

(i) **Article VII(2): Dispute-settlement mechanisms at the option of the investor**

§21 A literal reading of the first paragraph of Article VII(2) indicates that where there is an investment dispute, the parties should initially seek to settle it amicably. Should this effort fail, the investor may choose among: (i) having recourse to the ordinary jurisdiction for the dispute, i.e. the local courts as per the law of the State in whose territory the investment has been made, or (ii) having recourse to previously agreed dispute-settlement procedures, or (iii) having recourse to the international arbitration arrangement provided for in the following paragraph.

§22 The first option is to have recourse to the local courts; this is an option available to all persons or companies, without any need for it to be set out in any treaty, nor for it to be agreed. In this case, if the investor had chosen this option, it would have had recourse to the Federal Contentious-Administrative Tribunals of the City of Buenos Aires, which is the ordinary jurisdiction.

§23 With the second option, the investor may submit the dispute to previously agreed dispute-settlement procedures.

§24 This provision, which would appear to raise no doubts, has been the subject of a debate between the parties; consequently, the Tribunal will now examine this point in detail.

The Claimant interprets the choice made in Article 12 of the Concession Agreement to be a previously agreed procedure, in the meaning of Article VII(2)(b).

For its part, the Argentine Republic interprets Article VII(2)(b) as referring to agreements entered into prior to the entry into force of the ARGENTINA-U.S. Treaty, and therefore excluding the dispute-settlement mechanisms agreed upon following the entry into force of said Treaty, which prevail. The Argentine Republic alleges: "*Article VII(2) of the BIT prescribes the options available to the national or company involved in the event that a dispute arises. The dispute that makes available the options of Article VII(2) must fall within the categories exhaustively set forth as 'investment disputes' defined in section 1 of this Article. As established above, legal disputes relating to the Concession Agreement are excluded from the situations covered by Article VII of the BIT, by virtue of the existence of a forum-selection clause freely consented to by the parties after the entry into force of the BIT.*" (Translation.) And it adds that "*the parties to the BIT (i.e. the Argentine Republic and the United States of America) did not consent to alter the legal value of the agreements reached by a State Party to the BIT and a national or company of the other Party after the entry into force of the BIT. Had this been the intention, they would have so stated expressly and unequivocally in the text of the BIT, since it would mean reversing a residual principle of both Argentine and U.S.*

domestic law, and which at the same time is a general principle of law internationally." (Respondent's Rejoinder, page 8) (Translation).

§25 This Tribunal shares the view of the Claimant that the expression "*previously agreed*" means prior to the moment that the dispute arises, consistent with Article VII(2) *ab initio* where it specifies: "*In the event of an investment dispute . . . the national or company concerned may choose*" among dispute-settlement procedures. This Tribunal does not share the Claimant's interpretation, when Claimant states that "*[t]here is no doubt that the choice of forum clauses in the Concession Agreement is a previously agreed dispute-settlement procedure*" for the purposes of Article VII(2)(b) (Reply of Claimant, page 38) (Translation).

§26 This Tribunal understands that the stipulation of Article 12 of the Concession Agreement, according to which the parties shall submit to the jurisdiction of the Federal Contentious-Administrative Tribunals of the City of Buenos Aires, cannot be considered a previously agreed dispute-settlement procedure. The Parties could have foreseen submission to domestic or international arbitration, but the choice of a national forum could only lead to the jurisdiction of the contentious-administrative tribunals, since administrative jurisdiction cannot be selected by mutual agreement. In this regard, the Parties could not have selected the jurisdiction of the Federal Contentious-Administrative Tribunals of the City of Buenos Aires because it would hardly be possible to select the jurisdiction of courts whose own jurisdictions are, by law, not subject to agreement or waiver, whether territorially, objectively, or functionally. As the contentious-administrative jurisdiction cannot be selected or waived, submission to the contentious-administrative tribunals cannot be understood as a previously agreed dispute-settlement procedure.

§27 Nor can this Tribunal agree with the interpretation of the Argentine Republic, according to which Article VII(2)(b) makes reference to agreements entered into between the Parties prior to the entry into force of the ARGENTINA-U.S. Treaty, and consequently agreements concluded after the entry into force of the ARGENTINA-U.S. Treaty are not subsumed by this Article, and therefore are not an option for the investor, but rather prevail.

The Argentine Republic forgets, first, that Article XIV of the ARGENTINA-U.S. Treaty clearly establishes that it "*shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.*" Therefore, it applies to all investments, and their respective agreements, whether prior or subsequent to entry into force of the Treaty.

Moreover, the Argentine Republic alleges that the Concession Agreement was entered into after the entry into force of the ARGENTINA-U.S. Treaty; nonetheless, it seems more correct to say that the ARGENTINA-U.S. Treaty entered into force after the signing of the Concession Agreement, if June 6, 1994, is taken as the date the Concession Agreement was signed, and taking October 20, 1994, as the date for entry into force of the ARGENTINA-U.S. Treaty, this being the date of entry into force according to Article XIV(1) thereof, and bearing in mind that treaties enter into force upon the date agreed upon by the signatory States, as provided by the Vienna Convention on the Law of Treaties, adopted May 23, 1969, and ratified by the Argentine Republic on December 5, 1972, at Article 24(1). As provided by the ARGENTINA-U.S. Treaty, this moment came 30 days after the exchange of the instruments of ratification, and no prior to that time.

Therefore, the literal interpretation leads to the conclusion that Article VII(2)(b) should be understood to refer to the agreements that existed at the time the dispute arose, and it has nothing to do with the entry into force of the ARGENTINA-U.S. Treaty.

In addition, one must bear in mind that Article VII(2)(b) does not appear, from a strictly legal standpoint, to be the most appropriate place to regulate the scope of application of the ARGENTINA-U.S. Treaty. It appears more logical that an issue of the treaty's scope of application should be regulated in a specific article for that purpose, rather than in an article that gives the national the option to choose the dispute-settlement method.

§28 In any event, even if it were possible to submit the dispute to a previously agreed system for dispute settlement, which is not the case, the investor has not done so, and consequently the only choice remaining is Article VII(2)(c), which is described in the following section.

(ii) Article VII(3): Submission to binding international arbitration

According to Article VII(3)(a):

> "*Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:*
>
> > "*(i) to the International Centre for the Settlement of Investment Disputes ('Centre') established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ('ICSID Convention'), provided that the Party is a party to such Convention.*"

§29 The wording of this paragraph leaves no doubt as to its meaning. In the event that the national or company has not submitted the dispute for resolution pursuant to paragraph (2)(a) or (b), and six months have elapsed since the date on which the dispute arose, the company or national involved may have recourse to binding arbitration before ICSID.

The Spanish-language and English-language texts, both of which are authentic, clearly establish that the dispute may be submitted to binding arbitration before ICSID "*provided that the company concerned has not submitted the dispute*" or "*en el caso en que el nacional no haya sometido la solución de la controversia*" and six months have elapsed.

§30 The investor has not submitted the dispute to the Federal Contentious-Administrative Tribunals of the Argentine Republic nor to any other previously agreed dispute-settlement system. In addition, aside from the efforts to reach agreement, more than six months have elapsed since the letter sent on March 18, 1997, by the President of LANCO to the Minister of Economy and Public Works and Services setting forth the dispute that had arisen, such that the letter of September 17, 1997, sent by LANCO's attorney to the Minister expresses the written consent of the national for the purposes of the ARGENTINA-U.S. Treaty to submit to the arbitration provided for at Article VII(3)(i).

(iii) Open invitation to international arbitration

Article VII(3)(b) reads:

> "*Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.*"

And Article VII(4) states that:

> "*Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3 . . .*"

§31 The ARGENTINA-U.S. Treaty establishes the possibility of the investor choosing between the local courts (recourse to the courts which in any event are available to natural and legal persons by virtue of the basic principle of the right to effective judicial protection) and other means of dispute settlement, such as arbitration, which requires

the previous agreement of the parties. In addition, the ARGENTINA-U.S. Treaty, once certain requirements are met, allows the investor to submit the dispute to ICSID arbitration. The ARGENTINA-U.S. Treaty therefore gives the investor the power to choose among several methods of dispute settlement; consequently, once the investor has expressed its consent in choosing ICSID arbitration, the only means of dispute settlement available is ICSID arbitration.

§32 The States that are signatories to the ARGENTINA-U.S. Treaty make a generic offer in Article VII(4) to submit to international arbitration as selected by the investor pursuant to Article VII(3).

The Tribunal observes that this ARGENTINA-U.S. Treaty is the first instance of the Argentine Republic having accepted submission to international arbitration without reservations. In effect, in previous treaties signed by the Argentine Republic, as for example with the Switzerland, the foreign investor is obligated first to submit the dispute to the local courts. The only exceptions may be found in bilateral treaties with the German Federal Republic (April 1, 1990) and the United Kingdom (December 11, 1990), in which the dispute may be submitted to international arbitration if there has been a special agreement to that effect between the investor and the State, or if the local courts have not issued their decision after 18 months.

Consequently, the ARGENTINA-U.S. Treaty entails a definite change in the foreign investment regime in the Argentine Republic, allowing for recourse to international arbitration without intricate conditions and definitely discarding the exclusivity of territorial jurisdiction, as the foreign investor is not obligated to submit to the local courts.

§33 The consent of the investor, along with that of the Argentine Republic, expressed in Article VII(4), creates the consent needed to provide ICSID with jurisdiction over this dispute, pursuant to Article 25(1) of the ICSID Convention, despite the Argentine Republic's allegation that there is an applicable dispute-settlement mechanism agreed upon following the entry into force of the ARGENTINA-U.S. Treaty, which substitutes or replaces the consent given to ICSID arbitration.

§34 The Argentine Republic considers that the general offer made by it in the ARGENTINA-U.S. Treaty is only valid insofar as there is no stipulation to the contrary. "*The Argentine Republic reiterates that the selection of jurisdiction freely agreed upon after the entry into force of the BIT excludes the jurisdiction of ICSID for hearing any dispute associated with the contractual relationship emanating from the Concession Agreement*" (Respondent's Rejoinder, page 13) (Translation).

> "*The general offer or open invitation of Argentina and of the United States of America to U.S. and Argentine investors, respectively, or the fact of considering that the investor expresses its consent in writing upon submitting a dispute to ICSID, does not constitute the written consent required by Article 25(1) of ICSID, when subsequent to that generic offer there is an agreement between parties by which they freely consent to select a forum to settle any dispute related to the Concession Agreement.*
>
> "*The generic offer that the States Parties formulate in Article VII(2) for accepting arbitral jurisdiction is residual or has effect where there is no stipulation by the parties to the contrary, pursuant to Article 26 of the ICSID Convention. While according to the BIT that choice is to be made by the investor once the dispute arises, it is unquestionable that the investor may only exercise that right to choose 'unless otherwise stated,' in the terms of Article 26 of the ICSID Convention*" (Id., page 10) (Translation).

§35 In light of this agreement, the Tribunal proceeds to analyze the meaning of Article 26 of the ICSID Convention, which provides:

> "*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*"

§36 The first sentence has two aspects. The first is that the consent of the parties to arbitration is considered as consent to such arbitration to the exclusion of any other remedy, unless otherwise stated. In other words, 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. The idea underlying this rule on exclusivity of the remedy is to give the investor an effective forum for settling his disputes, avoiding other procedures which, for various reasons, may not appear very attractive to the parties.

§37 The second sentence of Article 26 refers to the traditional conception of exhaustion of domestic remedies prior to acceding to international arbitration. The exclusivity rule established in the first sentence means that there is no need to exhaust domestic procedures before initiating ICSID arbitration, unless otherwise stipulated. To this end, the second sentence allows the State to require prior exhaustion of its administrative or judicial remedies as a condition for its consent to arbitration under the ICSID Convention.

§38 Article 26 is merely a standard for interpretation, a presumption that arbitration is the exclusive remedy, but that the parties may require exhaustion of domestic remedies. The stipulation to the contrary, if any, would merely eliminate the presumption as to the exclusivity of ICSID arbitration, giving rise to the existence of another forum in which to settle the dispute. This would result in a concurrence of jurisdictions, which would have to be resolved in light of the provision in the second sentence of Article 26.

Thus, the second sentence is precisely the waiver, by the Contracting State party, of the prior exhaustion requirement, a requirement that the State may reserve to itself, through such second sentence, which operates as a rule of judicial abstention, such that the local courts to which the State submits a dispute with an investor who is a foreign national should refer the Parties to ICSID arbitration, as was established in the cases of *MINE* v. *Republic of Guinea*, and *Mobil Oil Corporation* v. *New Zealand Government*.

Therefore, the allegation by the Argentine Republic cannot be sustained, considering that the stipulation to the contrary, if it exists, does not replace any consent, but instead dilutes the presumption as to the exclusivity of ICSID arbitration, as indicated above.

And in any event, the nature of clause 12 of the Concession Agreement as a *stipulation to the contrary*, for the purposes of Article 26, first sentence, of the ICSID Convention, insofar as that clause reiterates the material, objective, and territorial jurisdiction in the case of an administrative concession, is highly questionable. The alleged selection of jurisdiction, as a possibility that may be envisaged by Argentine law, has not been shown by the Respondent. Therefore, the inclusion of a clause along these lines adds nothing to the agreement, since, even had this clause not existed, at the option of the Claimant without need for prior agreement, recourse could have been had to the jurisdiction under Article VII(1) of the ARGENTINA-U.S. Treaty.

§39 A State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made (*i*) in a bilateral investment treaty that offers submission to ICSID arbitration, (*ii*) in domestic legislation, or (*iii*) in a direct investment agreement that contains an ICSID clause.

The ARGENTINA-U.S. Treaty does not provide at any point for the exhaustion of domestic remedies, and the Argentine Republic, for its part, has not alleged that there is any such domestic legislation. The only requirement that

the ARGENTINA-U.S. Treaty does provide for is the period of six months that is required for turning to ICSID arbitration.

§40 In our case, the Parties have given their consent to ICSID arbitration, consent that is valid, there thus being a presumption in favor of ICSID arbitration, without having first to exhaust domestic remedies. In effect, once valid consent to ICSID arbitration is established, any other forum called on to decide the issue should decline jurisdiction. The investor's consent, which comes from its written consent by letter of September 17, 1997, and its request for arbitration of OCTOBER 1, 1997, and the consent of the State which comes directly form the ARGENTINA-U.S. Treaty, which gives the investor the choice of forum for settling its disputes, indicate that there is no stipulation contrary to the consent of the parties. It should be recalled that Article 25(1) *in fine* establishes: "*When the parties have given their consent, no party may withdraw its consent unilaterally,*" in our case by the Argentine Republic after the investor has accepted ICSID arbitration. 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.

Finally, it should be noted that Article 26, as a rule of judicial abstention of local courts, is underpinned by Article 64 of the ICSID Convention, which provides that the International Court of Justice will be called on to settle any issues of interpretation among Contracting States; thus if a local court does not apply that norm, it may expose its own State to an international claim under Article 64 of the ICSID Convention.

B. THE REQUIREMENTS OF ARTICLE 25 OF THE ICSID CONVENTION

The Tribunal shall now proceed to consider its jurisdiction to decide the dispute in the instant case. The general rule that determines the jurisdiction of ICSID, and consequently that of this Tribunal, is established in Article 25 of the ICSID Convention:

> "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by the State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*"

§41 This rule enumerates several requirements to determine ICSID's jurisdiction, among which the fundamental and central consideration is the consent given by the parties to the dispute to submit their dispute to ICSID.

This consent must be in writing, and once given it may not be withdrawn unilaterally.

The parties between whom the dispute has arisen must be, on the one hand, a "Contracting State," i.e. a party to the Convention, or a "*constituent subdivision or agency of a Contracting State*," and on the other hand, a national of another Contracting State. Article 25 defines the term "*National of another Contracting State*" as "*any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for purposes of this Convention.*"

The dispute must *arise directly from an investment.*

(a) **Jurisdiction based on consent**

§42 As stated in the Report of the Executive Directors accompanying the Convention, at paragraph 23: "*Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).*"

§43 The ICSID Convention does not specify how consent is to be given, it merely indicates that it shall be in writing. Nonetheless, the above-mentioned Report of the Executive Directors anticipated, at paragraph 24, that a State could give its consent to ICSID in legislation on investment: "*Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromis regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.*"

Moreover, consent to ICSID arbitration by a State may come from a bilateral treaty. In this regard, the award in *American Manufacturing & Trading, Inc.* v. *Republic of Zaire* (SINZA Award) establishes, on the basis of the provisions of a bilateral treaty with language very similar to the bilateral treaty before us in this case, that consent for the purposes of Article 25(1) is understood to be given by the State party to the dispute in the bilateral investment treaty from the moment the State extends a generic invitation to all the investors who are nationals of the other Contracting State to submit the settlement of their possible disputes to ICSID jurisdiction. In contract, the consent of the investor who is a national of the other Contracting State, must be given by the investor in writing, since the consent of the State is not binding on the investor.

§44 In the case before us the consent of the Argentine Republic arises from the ARGENTINA-U.S. Treaty, in which the Argentine Republic has made a generic offer for submission to ICSID arbitration.

In effect, Article VII(3) provides: "*Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.*" And Article VII(4) provides: "*Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for: (a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules.*"

The investor's consent, as noted, has been given by the investor LANCO and it has been so expressed unequivocally, such that this will, together with that of the Argentine Republic expressed in the ARGENTINA-U.S. Treaty, creates the consent necessary for conferring jurisdiction on ICSID, and therefore on this Tribunal. This is the same situation that is reflected in the SINZA Award, in which the United States and Zaire signed a bilateral treaty that contained a clause enabling the investor to choose ICSID arbitration, and stating that the exercise of that option in writing constitutes the consent needed for the purpose of Article 25 of the ICSID Convention.

The written consent by the Argentine Republic is set forth in the ARGENTINA-U.S. Treaty; as concerns the investor, as indicated *supra*, such consent was set forth in its letter of September 17, 1997, and in the request for arbitration, which was filed with ICSID on October 1, 1997.

(b) **Personal jurisdiction**

§45 The requirement of Article 25 in terms of the nature of the parties is not at issue, since on the one hand we have the Argentine State, and on the other a corporation constituted under laws of the State of Illinois, in the United States, both the United States and the Argentine Republic being parties to the ICSID Convention. The United States ratified the ICSID Convention on June 10, 1966, and the Argentine Republic signed it on May 21, 1991, and ratified it on October 19, 1994; consequently, pursuant to Article 68 of the Convention, it has been in force for Argentina since 30 days following the date of deposit of its ratification, which is to say, as November 18, 1994.

§46 As for the nationality of the investor company, and as observed by the Arbitral Tribunal called on to decide the case of *Société Ouest-Africaine des Bétons Industriels (SOABI)* v. *Republic of Senegal*, in the Decision on Jurisdiction, the ICSID Convention does not define the term "nationality," which leaves in the hands of each State the power to determine whether a company does or does not have its nationality. As a general principle, to this end, the States use as criteria the principal place of business or where the company is established. Thus, "*a juridical person which has the nationality of the Contracting State party to the dispute, being the expression used in Article 25(2)(b) of the Convention, is a juridical person which, under the legal system of the State in question, has its principal place of business in such State or has been established under its legislation concerning company law.*" (Translation.)

Claimant LANCO is established under laws of the State of Illinois, in the United States, pursuant to Illinois statute on Business Organizations, in force since July 1, 1984, and has its principal place of business in Illinois; therefore, pursuant to the laws of the United States, it has U.S. nationality and should consequently be considered a national of another Contracting State for the purposes of Article 25 of the ICSID Convention. According to this provision, "*any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration*" receives such treatment. This is the case here, since LANCO is a juridical person, a corporation legally established under the laws of the United States; it thus has the nationality of a Contracting State, the United States, which is different from the State Party to the dispute, i.e. the Argentine Republic. In addition, it is registered before the *Inspección General de Justicia* of the Ministry of Justice of the Argentine Republic, in its register of foreign nationals [*Estatuto de Extranjeros*].

The question of the nationalities of the Parties to the dispute is, therefore, not an issue.

(c) **Subject-matter jurisdiction**

§47 Article 25 establishes that the dispute must be legal in nature and arise directly from an investment.

The nature of the dispute is left in part to the provisions of the Parties in expressing their consent, in this case the ARGENTINA-U.S. Treaty. As examined *supra*, there is a legal dispute with respect to the obligations that arise for the Argentine Republic from the ARGENTINA-U.S. Treaty in relation to a foreign investor, in particular as regards Articles II(2)(a) and (b), and IV(1) of that Treaty.

In this regard, the above-mentioned Report of the Executive Directors, at paragraph 26, indicates: "*The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interest are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.*"

In the instant case, LANCO understands that the Argentine Republic has breached its obligations established in the ARGENTINA-U.S. Treaty; it thus seeks to have the Tribunal rule on the following points: (*i*) the Argentine Republic has breached the obligations it assumed in Article II(2)(c) of the ARGENTINA-U.S. Treaty with respect to investments, and (*ii*) those assumed in Article II(2)(a) to the effect that it must accord fair and equitable treatment to investments; in addition, (*iii*) its breach constitutes a deprivation of a right conferred on the Claimant by the

Concession Agreement, and therefore under Article IV(1) it should receive compensation; and (*iv*) finally, its breach also constitutes conduct equivalent to an expropriation, because it is responsible for the damages incurred by the Claimant. All of these are points indicative of a legal dispute.

§48 As regards the fact that this dispute arises directly out of an investment, once again here the term "investment" is not defined in the ICSID Convention, but it is defined in the ARGENTINA-U.S. Treaty, which sets the bounds within which we operate in this case. It has been shown *supra* that there is an investment for the purposes of that Treaty, since several of the requirements set forth in Article I of that Treaty are met, and, in addition, there is an investment dispute, as defined, once again, in the ARGENTINA-U.S. Treaty, Article VII(1). The Arbitral Tribunal will examine the arguments of both parties regarding the merits of this dispute, whether it arises under the Concession Agreement or the ARGENTINA-U.S. Treaty.

IV. PRELIMINARY DECISION

§49 In view of the foregoing, from the documents and arguments made by the Parties, this Arbitral Tribunal must decide, as a preliminary matter — and its decision shall be included in its final award — that it has jurisdiction to examine the merits of the dispute that has arisen, pursuant to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, D.C. on March 18, 1965.

[signature]

Bernardo M. Cremades

[signature]

Guillermo Aguilar Alvarez

[signature]

Luiz Olavo Baptista