INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)
Washington, D.C.

Case No. ARB/02/1

IN THE PROCEEDINGS BETWEEN

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

and

ARGENTINE REPUBLIC
(Respondent)

DECISION ON CLAIMANTS' REQUEST FOR SUPPLEMENTARY DECISION

Members of the Tribunal:

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

Secretary of the Tribunal:
Claudia Frutos-Peterson

Date of dispatch to the parties: 8 July 2008

A. INTRODUCTION

1. On 3 October 2006, the Tribunal rendered a Decision on Liability (the "Decision on Liability") in which it found the Respondent to be in breach of its obligations under the Treaty.[1] It retained jurisdiction to determine damages in a subsequent phase of the arbitration.

2. On 3 November 2006, the Tribunal issued Procedural Order No. 6 (the "P.O. No. 6") proposing a methodology for the calculation of damages. In this Order, the Tribunal stated that Claimants' claim for future damages in the form of lost profits was too uncertain and, for this reason, it ruled to "*limit the damages to be awarded to the period between 18 August 2000 and 28 February 2005, with the exception of the period of State of Necessity, and without prejudice to Claimants' rights to claim damages from Respondent in the present or other proceedings in the event that Respondent continues to breach its obligations after 28 February 2005*." (Footnotes omitted)

3. On 5 December 2006, the Secretary of the Tribunal circulated the parties' comments regarding P.O. No. 6. In their comments, Claimants contested the cut-off date for the calculation of damages and submitted the witness statement of Mr. Flaiban, LG&E's Country Manager – Argentine Business, offering new evidence on the Respondent's continuous breaches of the Treaty.

4. The final decision on damages was embodied in the Award issued on 25 July 2007 (the "Award"). In the Award, the Tribunal, after consideration of the whole spectrum of the parties' arguments on damages, including their comments on P.O. No. 6, ordered the Respondent to pay US$57,400,000 plus interest for damages suffered by the Claimants between 18 August 2000 and 28 February 2005.

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[1] Capitalized terms not defined in this Decision have the meaning provided for in the Decision on Liability and the Award.

B. PROCEDURE

5. On 23 August 2007, Claimants submitted a Request for a Supplementary Decision (the "Request"), in accordance with Article 49 of the ICSID Convention and Rule 49 of the ICSID Arbitration Rules. Respondent filed its Observations on the Request (the "Observations"), on 26 October 2007.

6. On 12 November 2007, Claimants filed their Reply to the Observations (the "Reply") and Respondent submitted its Rejoinder to the Request (the "Rejoinder"), on 26 November 2007.

7. By letter dated 29 February 2008, the Tribunal informed the parties that no further submissions were required and that no hearing would be held. The proceeding was declared closed on 7 July 2008.

C. PARTIES' POSITIONS

8. Claimants note that the Tribunal chose not to consider their evidence of continuing breach and continuing damages, submitted with their comments to P.O. No. 6, on the grounds that the Respondent had not had the opportunity to respond to this evidence. Claimants allege that, in doing so, the Tribunal left unresolved the issue of post-28 February 2005 damages. Consequently, Claimants request that "*in the interest of justice and efficiency*" the Tribunal update the quantum of compensation owed by Respondent for damages sustained from 1 March 2005 to 31 July 2007 and avoid the delays and costs of new proceedings. For this purpose, Claimants submit a supplemental declaration by Mr. Flaiban as further evidence of the Respondent's continuous breach, alleging that the Respondent has not restored any of the guarantees of the Regulatory Framework and has not paid due compensation. Claimants further submit an approximate calculation of such compensation.

9. In its Observations, Respondent asserts that the recourse provided for in Article 49(2) of the ICSID Convention is designed to correct inadvertent and non-substantial omissions

occurring in an Award. The Claimants' Request, therefore, exceeds the limits of a supplementary decision because: (a) it does not refer to an "inadvertent" omission but to a deliberate decision adopted by the Tribunal; (b) it does not attempt to amend a minor error but to address substantial issues such as the extension of the damages period and the duplication of the Award's quantum; (c) it purports to treat a question that has already been resolved, while the purpose of Article 49(2) is not to reopen proceedings; (d) it does not address the Award itself but the preliminary acts, in particular P.O. No. 6; and (e) it introduces new alleged facts and evidence for the Tribunal's consideration.

10. Finally, Respondent draws attention to the controversial nature of the evidence submitted by the Claimants and brings to light other relevant facts that would need to be taken into account in the determination of additional damages, in particular, the agreement signed with the Licensee in the renegotiation process, the retroactive increase of tariffs, new legislation concerning the emergency and LG&E's disposal of its investment. It contends that granting the Request would result in the Tribunal's exceeding its powers and a violation of the Respondent's right to due process and defense since it would not be permitted to contest such evidence; recourse to a supplementary decision not being the appropriate means. Consequently, the Respondent asks for the Request to be dismissed and for costs to be covered by Claimants.

11. In their Reply, Claimants allege that, although Respondent had been given the opportunity to challenge their arguments and rebut the evidence, it had chosen to remain silent and to raise unfounded procedural objections as well as vague and speculative allegations regarding tangential facts that are irrelevant to the question of damages. In the Claimants' view, the Respondent's objections are unfounded because they mischaracterize the purpose of recourse to a supplementary decision, as set out in Article 49(2) of the ICSID Convention, or are inapplicable to this case. Moreover, Claimants allege that, since the absence of restoration of the guarantees and the amount of dividends received by Claimants in the relevant period are uncontroversial, the Tribunal should proceed to apply the methodology adopted in the Award to supplement it with an

additional calculation of compensation. Claimants note, however, that the Respondent should be given full opportunity to defend its interests.

12. In its Rejoinder, the Respondent sustains its arguments concerning the nature and scope of recourse to a supplementary decision and denies the Claimants' allegation that it consented to the facts and evidence submitted by them. The Respondent underlines that submitting new facts and evidence is strange to such remedy and that, therefore, the Respondent's Observations to the Request are not the appropriate means by which to respond to them. Accordingly, Respondent reiterates its demand for the dismissal of the Request and the allocation of costs to Claimants.

D. TRIBUNAL'S ANALYSIS

13. It is undisputed that the purpose of recourse to a supplementary decision, as set out in Article 49(2) of the ICSID Convention, is to provide a remedy to questions that the Tribunal has omitted to decide in an award. Claimants' Request, however, does not concern a question that the Tribunal has omitted to decide in the Award.

14. In its Award, the Tribunal dealt at length with the Claimants' arguments concerning the cut-off date for calculating accrued losses. Its third consideration in determining the appropriate method for the quantification of compensation, at paragraphs 92 to 95, reads as follows:

> 92. Thirdly, as to the date for calculating accrued losses, Claimants contend that the cut-off date should be December 2006, the date of submission of their comments on Procedural Order No. 6. According to Claimants, there is "*no justification*" for using 28 February 2005 as the cut-off date once evidence is produced that "*the breach has continued and is continuing*". Claimants claim to have produced this evidence by submitting the witness statement of Mr. Enrique Flaiban who testified on the status of the Licensees' tariff levels.
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> 93. The Tribunal agrees with Claimants that, if evidence is produced, damages should be awarded. However, Claimants forget that, for evidence to be considered by this Tribunal, Argentina must be given the opportunity to react to such evidence. The Respondent did not have this opportunity with regard to Mr. Flaiban's witness statement.
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> 94. The Tribunal decided during the Hearing that no further submissions or evidence would be presented after 28 February 2005,[37] the date of the PHB in which

> conclusive remarks concerning each parties' case were to be exposed. The Claimants themselves opposed the introduction of new evidence by Argentina after this date.[38]
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> 95. Respect for due process obliges this Tribunal to only consider evidence that the other side has been able to test. On the basis of this evidence, the Tribunal assesses Argentina's continuous breach of its obligations between 18 August 2000 and 28 February 2005. Any event occurring after 28 February 2005 that could be seen to remedy the Respondent's breaches and affect the calculation of damages (like the progress on the renegotiation process) is not considered in the present procedure, as indicated in Procedural Order No. 6.

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37. *See* Hearing in the merits, January 29, 2005, Hearing Transcripts, vol. 7, at 1616-24.

38. Argentina attempted on three occasions to introduce evidence regarding the alleged progress in the renegotiation process (Letters of 2 September 2005, 12 January 2006 and 11 April 2006). The Claimants opposed to the Tribunal's acceptance of such evidence (Letters of 14 September 2005, 24 January 2006 and 27 April 2006). The Tribunal, based in its previous decision that no further submissions be filed, rejected the introduction of the evidence (Letters of 5 October 2005, 30 January 2006 and 9 May 2007).

15. With respect to due process, the Tribunal decided that it would not consider further evidence on the breach of the Respondent's obligations after 28 February 2005. It appears, therefore, that Claimants are attempting to reopen the discussion of a question that has been dealt with and disposed of by the Tribunal.

16. In addition, the Claimants misconceive the function of the recourse to a supplementary decision by asserting that it allows Argentina to respond to their new arguments and evidence. The supplementation process is not a mechanism by which parties can continue proceedings on the merits or seek a remedy that calls into question the validity of the Tribunal's decision. Referring to Professor Schreuer, the *ad hoc* Committee in the *Vivendi* case noted:

> […] it is important to state that that procedure [by which ICSID awards and decisions may be supplemented and rectified], and any supplementary decision or rectification as may result, in no way consist of a means of appealing or otherwise revising the merits of the decision subject to supplementation or rectification.[2]

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2 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award, ¶11 (28 May 2003).

17. The Tribunal is aware of the Claimants' concern about their available means to claim post-28 February 2005 damages. It cannot, however, disregard the principle of due process nor the purpose of the supplementation process, as provided for in Article 49(2) of the ICSID Convention, to address this concern. Claimants are not, however, deprived of their right to claim additional damages. The possibility of starting new proceedings under the ICSID Convention still remains.

18. With regard to costs of the present proceedings concerning a supplementary decision, the fees and expenses of the Tribunal are determined at US$74,954.74, which shall be bore by the Claimants. In view of the circumstances of the case, each party shall bear its own legal and other expenses.

E. TRIBUNAL'S DECISION

For the foregoing reasons, the Tribunal renders the following decisions:

(a) Claimants' Request is denied;

(b) The fees and expenses of the Tribunal are determined at US$74,954.74, which shall be borne by the Claimants; and

(c) Each party shall bear its own legal and other expenses.

Made in Washington, D.C., in English and Spanish, both versions equally authentic.

/signed/

Professor Albert Jan van den Berg

Arbitrator

Date: 11 June 2008

/signed/

Judge Francisco Rezek

Arbitrator

Date: 14 June 2008

/signed/

Dr. Tatiana B. de Maekelt

President

Date: 19 June 2008