

Date of dispatch to the parties: February 6, 2007

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

IN THE PROCEEDING BETWEEN

SIEMENS A.G.  
(CLAIMANT)

AND

THE ARGENTINE REPUBLIC  
(RESPONDENT)

ICSID CASE No. ARB/02/8

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AWARD

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*Members of the Tribunal*

Dr. Andrés Rigo Sureda, President  
Judge Charles N. Brower, Arbitrator  
Professor Domingo Bello Janeiro, Arbitrator

*Secretary of the Tribunal*

Ms. Claudia Frutos-Peterson

*Representing the Claimant*

Dr. Guido Santiago Tawil  
M. & M. Bomchil  
Buenos Aires  
Argentina

and

Dr. Peter Gnam  
Siemens A.G.

*Representing the Respondent*

H.E. Osvaldo César Guglielmino  
Procurador del Tesoro de la Nación Argentina  
Procuración del Tesoro de la Nación Argentina  
Buenos Aires  
Argentina

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## **I. Procedural History**

1. On May 23, 2002, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received from Siemens A.G. (“Siemens” or “Claimant”) a request for arbitration against the Argentine Republic (“Respondent”, “Argentina” or “Government”). On June 7, 2002, the Centre acknowledged receipt of the request in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”) and informed the Claimant that it would not take further action until it had received the prescribed lodging fee as provided by Institution Rule 5(1)(b). On June 13, 2002, the Centre acknowledged receipt of the prescribed lodging fee by the Claimant and transmitted a copy of the request to Argentina and to the Argentine Embassy in Washington, D.C. in accordance with Institution Rule 5(2).

2. According to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (“the Convention”), the Secretary-General of the Centre registered the request for arbitration on July 17, 2002. In accordance with Institution Rule 7, the Secretary-General notified the parties on the same date of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

3. On August 7, 2002, the parties agreed that the Arbitral Tribunal would consist of three arbitrators, one arbitrator to be appointed by each party and the third, who shall serve as the President of the Tribunal, to be appointed by the agreement of the parties. The Claimant appointed Judge Charles N. Brower, a U.S. national, and the Respondent appointed Professor Domingo Bello Janeiro, a Spanish national. However, the parties failed to agree on the appointment of the third, presiding arbitrator. On October 21, 2002, the Claimant requested that the third, presiding arbitrator be appointed in accordance with Article 38 of the Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”).

4. After consulting the parties, Dr. Andrés Rigo Sureda, a national of Spain, was appointed by the Centre as the third, presiding arbitrator. In accordance with Rule 6(1) of the Arbitration Rules, on December 19, 2002, the Secretary-General notified the parties that all three arbitrators accepted their appointment and that the Arbitral Tribunal was deemed to be constituted and the proceedings to have begun on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal. The Tribunal held its first session with the parties in Washington, D.C. on February 13, 2003.

5. Mr. Guido Santiago Tawil of M. & M. Bomchil and Mr. Peter Gnam of Siemens A.G. represent the Claimant. Messrs. Tawil and Gnam represented the Claimant at the first session. Mr. Osvaldo César Guglielmino, Procurador del Tesoro de la Nación Argentina, represents the Respondent. Messrs. Ignacio Suárez Anzorena and Carlos Lo Turco, acting on instructions from the then Procurador del Tesoro de la Nación Argentina, and Mr. Osvaldo Siseles, from the Ministerio de Economía, represented the Respondent at the first session.

6. During the first session, the parties agreed that the Tribunal had been properly constituted in accordance with the ICSID Convention and the Arbitration Rules and that they did not have any objections to any members of the Tribunal. It was also noted that the proceedings would be conducted under the Arbitration Rules in force since September 26, 1984.

7. During the first session, the parties also agreed on several other procedural matters, which were later set forth in the written minutes signed by the President and the Secretary of the Tribunal. Regarding the written submissions, the Tribunal, after consulting with the parties, fixed the following time limits for the presentation of the parties' pleadings: The Claimant would file a Memorial within 90 (ninety) days from the date of the first session; the Respondent would file a Counter-Memorial within 90 (ninety) days from its receipt of the Claimant's Memorial; the Claimant would file a Reply within 60 (sixty) days from its receipt of the Respondent's Counter-Memorial, and the Respondent would file a Rejoinder within 60 (sixty) days from its receipt of the Claimant's Reply.

8. The Tribunal further noted that, according to the Arbitration Rules, the Respondent has the right to raise any objections to jurisdiction no later than the expiration of the time limit fixed for the filing of its Counter-Memorial, and that, in the event that the Respondent would raise objections to jurisdiction, the following schedule would apply: the Claimant would file its Counter-Memorial on jurisdiction within the same number of days used by Argentina to file its objections to jurisdiction, but in any event, the Claimant would have a minimum of 60 (sixty) days to file its Counter-Memorial on jurisdiction; the Respondent would file its Reply on jurisdiction within 30 (thirty) days from its receipt of the Claimant's Counter-Memorial on jurisdiction; and the Claimant would file its Rejoinder on jurisdiction within 30 (thirty) days from its receipt of the Respondent's Reply on jurisdiction. It was also agreed that, if the Respondent would raise any objections to jurisdiction and proceedings would be resumed following the filing of such objections (because the Tribunal dismisses the objections or because it decides to join them with the merits of the dispute), the calendar agreed for the merits would recommence, and the Respondent would have the remaining number of days at the date of the filing of its objections to jurisdiction for the filing of its Counter-Memorial on the merits.

9. On March 14, 2003, the Claimant filed its Memorial on the merits and accompanying documentation.

10. On March 24, 2003, Ms. Claudia Frutos-Peterson, ICSID, Counsel, replaced Mr. Flores as the Secretary of the Tribunal.

11. On April 8, 2003, the parties agreed that the hearing on jurisdiction would take place on January 20-22, 2004, in Washington, D.C.

12. By letter of June 10, 2003, the Argentine Republic requested an extension of time due to the institutional succession in the Argentine Government to file its Counter-Memorial on the merits and/or to raise any objections to the jurisdiction of the Centre until August 4, 2003. By letter of June 18, 2003, the Claimant objected to the extension requested by the Respondent.

13. On June 23, 2003, due to the particular circumstances, the Tribunal granted the extension sought by Argentina and informed the parties that if Argentine filed its Counter-Memorial without objecting to jurisdiction, the Claimant, if requested, would be granted a similar extension of time to file its

Reply on the merits. The Tribunal further noted that if the Argentine Republic filed any objections to jurisdiction, the Claimant would have the same number of days used by the Argentine Republic to file such objections for the filing of its Counter-Memorial on jurisdiction.

14. On July 1, 2003, Mr. Horacio Daniel Rosatti informed the Tribunal that he had been appointed Procurador del Tesoro de la Nación Argentina.

15. In accordance with Arbitration Rule 41(1), on August 4, 2003, the Respondent filed a Memorial raising objections to the jurisdiction of the Centre and the competence of the Tribunal. In its Memorial on jurisdiction, Argentina requested the Tribunal for a 45 (forty-five) day extension of the time limit to file its Counter-Memorial on the merits in the event that the Tribunal would declare that it has competence over this matter.

16. Pursuant to Arbitration Rule 41(3), on August 7, 2003, the Tribunal suspended the proceedings on the merits.

17. After inviting the Claimant to present any observations on the time limit extension requested by the Respondent, the Tribunal informed the parties on August 21, 2003, that it was premature to decide on the extension of the time limit to file the Counter-Memorial on the merits requested by Argentina.

18. On October 16, 2003, the Claimant filed its Counter-Memorial on jurisdiction. On November 17, 2003, the Respondent filed its Reply on jurisdiction.

19. On December 10, 2004, the Respondent requested to postpone the hearing on jurisdiction scheduled for January 20-22, 2004 until February 15, 2004. On December 11, 2004, the Tribunal invited the Claimant to present any observations to the Respondent's request. On the same date, the Claimant presented its observations asking the Tribunal to reject the Respondent's request and to maintain the previous agreed schedule for the hearing on jurisdiction.

20. After considering the Respondent's request to postpone the hearing on jurisdiction, the Claimant's observations thereon, the fact that the development of the proceeding would not be affected due to the brevity of the postponement requested, the availability of the parties, and the agreement of the same to have a two-day hearing, the Tribunal, by letter of December 19, 2003,

informed the parties of its decision to schedule the hearing on jurisdiction on February 3 and 4, 2004.

21. On December 24, 2003, the Claimant filed its Rejoinder on jurisdiction.

22. As previously decided by the Tribunal, the hearing on jurisdiction took place in Washington, D.C. on February 3 and 4, 2004. At the hearing, the Claimant was represented by Mr. Guido Santiago Tawil, Mr. Peter Gnam, Mr. Stephan Signer and Ms. María Inés Corrá. Messrs. Tawil and Gnam addressed the Tribunal on behalf of the Claimant. The Respondent was represented by Ms. Andrea Gualde, Ms. Ana Badillos, and Mr. Jorge Barraguirre from the Procuración del Tesoro de la Nación Argentina, as well as by Messrs. Osvaldo Siseles from the Ministerio de Economía, and Mr. Roberto Hermida from the Embassy of Argentina in Washington, D.C. Ms. Gualde and Mr. Barraguirre addressed the Tribunal on behalf of the Respondent. During the hearing, the Tribunal also questioned to the parties in accordance with Arbitration Rule 32(3).

23. On July 2, 2004, the Respondent requested to extend its 45-day extension request to file its Counter-Memorial on the merits to 75 days, in the event that the Tribunal would declare that it had jurisdiction.

24. On August 3, 2004, the Tribunal issued its Decision on Jurisdiction, which is part of this Award, declaring that the dispute was within the jurisdiction of the Centre and the competence of the Tribunal.

25. On that same date, the Tribunal issued Procedural Order No. 1, establishing the timetable for the continuation of the proceeding, after taking into consideration the reasons expressed by the Respondent in its requests for an extension of the time limit to file its Counter-Memorial on the merits and the observations of the Claimant. The timetable was decided as follows: the Respondent was to file its Counter-Memorial on the merits within 60 (sixty) days, counting from the date of that Procedural Order; the Claimant was to file its Reply within 60 (sixty) days from its receipt of the Respondent's Counter-Memorial, and the Respondent was to file its Rejoinder within 60 (sixty) days from its receipt of the Claimant's Reply. Two alternate dates were set for the hearing on the merits, and the parties were asked to inform the Secretariat on the number of days needed for the hearing.



26. On August 10, 2004, both parties requested the hearing on the merits to be held on April 4-15, 2005. Additionally, the Claimant reserved its right to request an extension, if needed, to file its Reply, in the understanding that such an extension should not change the hearing dates already set.

27. On August 16, 2004, Argentina notified the appointment of Mr. Osvaldo César Guglielmino as Procurador del Tesoro de la Nación Argentina.

28. On August 19, 2004, the Tribunal confirmed that the hearing on the merits was to be held on April 4-15, 2005, and that, if needed, the Tribunal would additionally be available on April 18-19, 2005. (Later on the parties confirmed to the Tribunal that there would be no need to extend the hearing to April 18-19, 2005).

29. On September 24, 2004, Argentina requested an additional extension of 15 (fifteen) days of the time limit to file its Counter-Memorial on the merits due to the recent appointment of Mr. Osvaldo César Guglielmino as Procurador del Tesoro de la Nación Argentina. By letter of September 29, 2004, the Claimant objected to the extension requested by the Respondent. After considering the Respondent's request and the Claimant's observations, the Tribunal, by letter also of September 29, 2004, granted the 15 day extension requested by the Respondent to file its Counter-Memorial on the merits, on the understanding that a similar extension, if requested, would be granted to the Claimant, and informed the parties that no further extensions would be authorized. The Tribunal also invited the parties to directly exchange their filings in Buenos Aires to avoid further delays.

30. In accordance with the Tribunal's decision, the Respondent filed its Counter-Memorial on the merits on October 19, 2004. In its Counter-Memorial, the Respondent requested the production of certain documents by the Claimant: (i) forward contract in US dollars ("dollars or "\$"), (ii) financial statements of Siemens IT Services, S.A. ("SITS") from its commencement of business in Argentina, and (iii) financial statements of Siemens for the same period with respect to the registration of all operations transacted between SITS-Siemens and the rest of the affiliates of the Claimant parent corporation. By letter of December 1, 2004, the Claimant informed the Tribunal that it would submit, together with its Reply, a copy of SITS' financial statements for the fiscal years

ended September 30 of 1997 to 2003 and the Annual Reports of Siemens for the fiscal years ended September 20 of 1997 to 2003.

31. On December 1, 2004, the Respondent filed an application to disqualify the President of the Tribunal under Article 57 of the Convention. On December 7, 2004, in accordance with Arbitration Rule 9(6), the two co-arbitrators informed the parties that the proceedings were suspended and that the schedule for the parties' submissions and the date for the hearing on the merits were to be maintained.

32. On December 14, 2004, the Claimant requested a 15-day extension to file its Reply on the merits, which was due on December 20, 2004. By letter of December 21, 2004, the two co-arbitrators granted the extension requested by the Claimant, in accordance with the Tribunal's letter of September 29, 2004. Accordingly, the Claimant was to file its Reply on the merits no later than January 4, 2005. The Claimant filed its Reply on the merits on December 27, 2004. However, due to the suspension of the proceedings, the Claimant's Reply was circulated neither to the Tribunal nor to Argentina. After considering several communications exchanged by the parties regarding whether to provide a copy of the Claimant's Reply to the Respondent, the co-arbitrators decided, with the agreement of the parties, that a copy of the Claimant's Reply be delivered directly to the Respondent in Buenos Aires and that the Respondent was to file its Rejoinder within 60 (sixty) days from the receipt of the Claimant's Reply, i.e., no later than March 14, 2005.

33. By letter of February 3, 2005, the co-arbitrators, having considered the parties' request to delay for some days the hearing on the merits, granted such request.

34. On March 2, 2005, the Respondent requested a 15-day extension to file its Rejoinder due to translation difficulties. On March 3, 2005, the Claimant expressed its opposition to granting the extension.

35. On March 10, 2005, the Secretariat sent the parties Judge Brower's and Professor Bello Janeiro's separate opinions concerning Argentina's proposal for disqualification. In accordance with Arbitration Rule 9, the proceeding was to remain suspended pending a decision on the disqualification proposal, and, therefore, the date for the hearing on the merits was postponed

indefinitely. In addition, the 15-day extension requested by the Respondent to file its Rejoinder was granted, which was then to be filed no later than March 29, 2005.

36. On March 16, 2005, the Deputy Secretary-General of ICSID informed the parties that in accordance with Article 58 of the ICSID Convention, the Chairman of the Administrative Council was to decide on the Respondent's proposal for disqualification as the other members of the Tribunal were divided on the proposal. In addition, the Deputy Secretary-General also informed the parties that, because the President of the Tribunal had been a staff member of the World Bank and as proceeded in an earlier similar ICSID case, the request would be sent to the Secretary-General of the Permanent Court of Arbitration ("PCA") at The Hague to provide his recommendation on the disqualification proposal.

37. As directed, on March 29, 2005, the Respondent filed its Rejoinder on the merits.

38. On April 8, 2005, the parties were informed that the PCA would not hold a hearing with the parties, as requested by Argentina, but that it had agreed to receive any additional written information from the parties, besides that already filed by them and provided by ICSID to the PCA. Accordingly, the parties were informed on April 11, 2005, that considering Argentina's intention to send such additional information, the decision by the Secretary-General of the PCA on the disqualification proposal was postponed until April 15, 2005. On such a date, the Secretary-General of the PCA sent his recommendation to ICSID. Based on that recommendation, the Secretary-General of ICSID informed the parties on April 15, 2005 that the disqualification proposal was not sustained. In accordance with Arbitration Rule 9, the proceeding was resumed with the composition of the Arbitral Tribunal unchanged.

39. On April 15, 2005, two letters from the Respondent, dated December 7, 2004 and February 25, 2005, that had been received while the proceedings were suspended, were circulated. In its letters, the Respondent insisted on its request for the production of evidence by the Claimant of: (i) a copy of the "forward" contract, and (ii) a copy of SITS' financial statements and

Siemens' annual reports for the periods therein indicated. The Respondent also requested a 30-day period for the examination of such documents.

40. On April 18 2005, the Claimant requested that the hearing on the merits be scheduled to take place at the earliest possible time.

41. By letter of April 25, 2005, the Claimant, by invitation of the Tribunal, filed its observations on the Respondent's letters of December 7, 2004 and February 25, 2005.

42. On April 26, 2005, the Tribunal informed the parties that the hearing on the merits would be held on October 10-21, 2005, in Washington, D.C.

43. Between June 7, 2005 and July 28, 2005, the parties exchanged multiple communications regarding the Respondent's document request. The Tribunal granted the Claimant and the Respondent, respectively, time to present observations with respect to the Respondent's document request, as well as with respect to the different documents presented by the Claimant in this regard, (Tribunal's letters of June 7 and 27, 2005, and July 15 and 26, 2005). On September 2, 2005, after taking note of the Respondent's letter of August 17, 2005, objecting to the documents provided by the Claimant in connection with the Respondent's document request, as well as the Claimant's response of August 22, 2005, the Tribunal informed the parties that the information filed by the Claimant was not the information that the Tribunal had requested on July 15, 2005. Consequently, the Tribunal ordered the Claimant to furnish the requested information no later than September 8, 2005.

44. On September 2, 2005, the parties filed a document with their comments on the Tribunal's directives concerning the organization of the hearing on the merits. In addition, the parties requested the Tribunal to fix a time limit in order for the parties to file additional documents to be used during the hearing. According to the agreement of the parties, such documents were to be limited to: (i) new issues brought up by the Respondent, its experts or witnesses in its Rejoinder; (ii) documents in support of the examination of witnesses and experts, and (iii) documents related to events that occurred after the parties' pleadings.

45. As instructed by the Tribunal, on September 9, 2005, the Claimant filed accounting information in connection with Siemens Nixdorf

Informationssysteme A.G. (“SNI”)’s investment in SITS. The Tribunal, by letter of September 12, 2005, invited the Respondent to make any observations on the documents filed by the Claimant no later than September 29, 2005.

46. Between September 9, 2005 and September 15, 2005, in accordance with the Tribunal’s instructions of September 2, 2005, the parties informed the Tribunal of the names of the witnesses and experts that they were planning to examine and cross examine during the hearing as well as their agreement on the order of appearance for the witnesses and experts. (Respondent’s letters of September 9 and September 14, 2006, and Claimant’s letter of September 15, 2006).

47. On September 15, 2005, the Tribunal set September 23, 2005 as a deadline for the parties to object to the additional documents that were to be filed respectively by the Claimant and the Respondent.

48. As instructed by the Tribunal, the parties filed their respective additional documents on September 16, 2005, and on September 21, 2005, the Claimant submitted further information with respect to the capital contributions made by SNI in SITS.

49. On September 27, 2005, following the Tribunal’s invitation of that same date, the Respondent made certain observations with regard to the information filed by the Claimant on September 9 and 21, 2005 in connection with SNI’s investment in SITS.

50. On September 28, 2005, the Claimant rebutted the observations made by the Respondent by letter of September 23, 2005, with regard to the additional documents that had been filed by the Claimant on September 16, 2005.

51. In connection with the Respondent’s observations filed on September 27, 2005, the Claimant, by letter of October 3, 2005, offered, among other things, to submit, if the Tribunal so requested, a copy of SITS’s books related to its expenditures, as well as any other additional documentary information that the Tribunal may consider appropriate.

52. On October 4, 2005, having taken into account the parties’ communications with regard to their additional documents, the Tribunal informed the parties of its decision to: (i) reject certain additional documents filed by the

Respondent, which referred to an issue that had been known to the Respondent since 1998, and had not been previously raised; (ii) request explanations from both parties with regard to certain additional documents; (iii) admit other additional documents filed by the Claimant for the reasons stated by the Claimant's letter of September 28, 2005; and (iv) subject the admission of certain exhibits filed by the Claimant to the timely submission of further explanations from the Claimant in such respect. The Tribunal set October 6, 2005 as the deadline for the parties to provide the information therein requested, and the parties did so.

53. By letter of October 4, 2005, the Claimant agreed to the modification of the schedule for the appearance of the witnesses and experts during the hearing requested by the Respondent by a letter of that same date.

54. On October 5, 2005, following the Tribunal's invitation of October 3, 2005, the Respondent filed observations with regard to the Claimant's objections raised on September 30, 2005 to the inclusion of Mr. Claudio Antonio Michalina as a member of Argentina's delegation to the hearing on the merits. According to the Claimant, Mr. Michalina was not part of the legal team, but rather an assistant to one of the Respondent's witnesses, Mr. Daniel Eduardo Martín.

55. All the pending matters raised before the Tribunal were decided on October 7, 2005, before the hearing on the merits took place. The Tribunal ratified the rejection of the Respondent's submission of certain additional documents, because they had been known to the Respondent since 1998. The Tribunal also decided that Mr. Michalina could attend the hearing because each party decides who attends the hearings in its representation. Regarding the Claimant's accounting information requested by the Respondent, the Tribunal decided to accept the information provided by the Claimant, to take note of the Claimant's willingness to submit SITS' accounting books, should the Tribunal need them, and to declare that the Claimant had complied with the filing of the supporting documents in connection with SNI's investment in SITS.

56. On October 7, 2005, the Respondent, referring to the Claimant's letter of September 28, 2005, ratified its objections of September 23, 2005 to the new evidence filed by the Claimant.

57. The hearing on the merits took place on October 10-17, 2005, in Washington, D.C., present at the hearing were:

*Members of the Tribunal*

Andrés Rigo Sureda, President

Charles N. Brower, Arbitrator

Domingo Bello Janeiro, Arbitrator

*ICSID Secretariat*

Claudia Frutos-Peterson, Secretary of the Tribunal

Mercedes Cordido-Freytes de Kurowski, Consultant

*On behalf of the Claimant*

Peter Gnam (Siemens A.G.)

Stephan Signer (Siemens A.G.)

Rubén Daniel Slame (Siemens A.G.)

Guido Santiago Tawil (M. & M. Bomchil)

Rafael Mariano Manóvil (M. & M. Bomchil)

María Inés Corrá (M. & M. Bomchil)

Ignacio Minorini Lima (M. & M. Bomchil)

Federico Campolieti (M. & M. Bomchil)

Agustín García Sanz (M. & M. Bomchil)

*On behalf of the Respondent*

Oswaldo César Guglielmino (Procurador del Tesoro de la Nación Argentina)

Jorge Alberto Barraguirre (Procuración del Tesoro de la Nación Argentina)

Fabián Rosales Markaida (Procuración del Tesoro de la Nación Argentina)

José Luis Cassinerio (Procuración del Tesoro de la Nación Argentina)

María Luz Moglia (Procuración del Tesoro de la Nación Argentina)

Adriana Lilian Busto (Procuración del Tesoro de la Nación Argentina)

Luis Eduardo Rey Vásquez (Procuración del Tesoro de la Nación Argentina)

Martín Guillermo Moncayo von Hase (Procuración del Tesoro de la Nación Argentina)

Claudio Antonio Michalina (Procuración del Tesoro de la Nación Argentina)

Philippe Sands, Q.C.

Helen Mountfield

58. As per request of the Tribunal, the Claimant filed during the hearing SITS's accounting books ("Mayor", "Caja" and "IVA") for the relevant periods.

59. As instructed by the Tribunal, on November 23, 2005, the parties filed their post-hearing briefs.

60. On November 23, 2005, the Respondent filed certain observations concerning the additional accounting information provided by the Claimant during the hearing and, on November 30, 2005, filed a report with accompanying documentation on the accounting documents provided by the Claimant, as well as on "the assessment conducted and Siemens A.G.'s claim for damages". The Respondent's letter of November 23, 2005 was contested by the Claimant on December 21, 2005. The Tribunal invited the Respondent to present any observations on this letter by January 14, 2006.

61. On January 17, 2006, the Claimant noted that the Respondent had not filed observations on the Claimant's letter of December 21, 2005 before the deadline set by the Tribunal, and requested the Tribunal to declare the proceeding closed pursuant to Arbitration Rule 38(1).

62. On January 26, 2006, the Respondent informed the Tribunal that it had not received the Tribunal's letter of December 27, 2005, and rejected the Claimant's request for the closure of the proceeding.

63. On January 30, 2006, the Claimant sent a letter reiterating that the deadline established by the Tribunal for the Respondent to file any



observations on its letter of December 27, 2005 had lapsed, and insisted on its request to the Tribunal to declare the proceedings closed.

64. On February 1, 2006, the Respondent sent its observations on the Claimant's letter of December 21, 2005, as well as supporting documentation to justify why they had not received the Tribunal's letter of December 27, 2005.

65. On February 16, 2006, the Tribunal, after considering the Respondent's communications of January 26 and February 1, 2006, and that of the Claimant of January 30, 2006, decided: (i) to accept the explanations given by the Respondent with regard to its delay in filing observations to the Claimant's letter of December 21, 2005; (ii) to admit the Respondent's letter of February 1, 2006; and (iii) to invite the Claimant to make, no later than February 23, 2006, any observations it might have. The Claimant filed its observations on February 17, 2006.

66. On March 1, 2006, the Respondent sent a letter in reply to the Claimant's letter of February 17, 2006, to which the Claimant answered on March 9, 2006. On March 13, 2006, the Tribunal informed the parties of its decision to disregard such communications because they had not been requested by the Tribunal, and the parties had already had several occasions to raise the observations they had deemed pertinent in such regard (Respondent's letters of November 23 and 30, 2005, January 26 and February 1, 2006, and Claimant's letters of December 21, 2005, January 17, 30, and February 17, 2006).

67. On March 31, 2006, the Respondent requested the Tribunal to reconsider its decision of March 13, 2006. On April 13, 2006, the Tribunal confirmed its decision of March 13, 2006 for the reasons there established.

## **II. The Jurisdiction of the Tribunal**

68. Argentina has invited the Tribunal to review its finding on jurisdiction in light of recent decisions in the cases of *Plama Consortium Ltd. v. Republic of Bulgaria*<sup>1</sup> and *Salini Costruttori, S.p.A. & Italstrade, S.p.A. v. Hashemite Kingdom of Jordan*<sup>2</sup> on the application of the most-favored-nation

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<sup>1</sup> *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (February 8, 2005).

<sup>2</sup> *Salini Costruttori, S.p.A. & Italstrade, S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (November 29, 2004).

clause (“MFN clause”). The Claimant has for its part referred to the decision of the tribunal in *Gas Natural SDG S.A. v. the Argentine Republic*<sup>3</sup> which reaches similar conclusions as *Emilio Agustín Maffezini v. Kingdom of Spain*<sup>4</sup> and the Tribunal on the scope of the MFN clause. The Tribunal will not review what it has already decided; it is inappropriate at this stage of the proceedings and the Tribunal has no doubt about its findings. The Tribunal will limit itself to observe that the cases adduced by the Respondent deal with the application of the MFN clause to situations not akin to the instant case. Indeed, in *Plama* and *Salini v. Jordan*, tribunals faced extensions of the MFN clause to situations widely different from the facts considered by the Tribunal or for that matter considered in *Maffezini* or *Gas Natural*. The Claimant in *Salini* sought to include, through the application of a MFN clause, an umbrella clause where the basic treaty had none. In *Plama*, there was no ICSID clause in the basic treaty. There had never been any question that the parties to these proceedings agreed to ICSID jurisdiction and the issue was avoidance, through the MFN clause, of a procedural requirement that Argentina has consistently dispensed within the investment treaties it has concluded since 1994.

### **III. Applicable Law**

#### **1. Positions of the Parties**

69. Siemens argues that the Treaty on the Mutual Protection and Promotion of Investments between the Federal Republic of Germany and the Argentine Republic, dated July 9, 1991 (“Treaty”), contains an explicit choice of law in Article 10(5) which mandates the Tribunal to decide the merits of the dispute “on the basis of this Treaty, and, as the case may be, on the basis of other treaties in force between the Contracting Parties, the internal law of the Contracting Party in whose territory the investment was made, including its rules of private international law, and on the general principles of international law”. Siemens then refers to Article 42(1) of the Convention which directs the Tribunal to look first to the rules agreed by the parties. In this case, the rules agreed by

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<sup>3</sup> *Gas Natural SDG S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction (June 17, 2005).

<sup>4</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (January 25, 2000).

the parties are the provisions of the Treaty that constitute a special bilateral regime with respect to the matters regulated by it.

70. Siemens argues further that, in the case of *lacunae*, general international law applies and it has a corrective role in the sense that it controls and prevails over domestic law. In this respect, Siemens refers to Professor Weil's statement on the relationship between domestic law and international law under Article 42(1) of the Convention, to wit: "[...] no matter how domestic law and international law are combined, under the second sentence of Article 42(1), international law always gains the upper hand and ultimately prevails."<sup>5</sup> Siemens also refers to the Draft Articles on Responsibility of States adopted by the International Law Commission ("ILC") ("Draft Articles"), which state: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."<sup>6</sup>

71. Siemens contends that this conclusion is reinforced by Article 7(1) of the Treaty which provides:

"If the laws and regulations of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favorable than is provided for by the Treaty, such regulation shall to the extent that it is more favorable prevail over this Treaty."

Therefore, the Claimant argues that Argentine law may prevail over the provisions of the Treaty only to the extent that it provides treatment to the investment more favorable than the Treaty. Conversely, those provisions of domestic law that may be less favorable are not applicable.

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<sup>5</sup> P. Weil, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois*, 15 ICSID Review – FILJ (2000), p. 409.

<sup>6</sup> Article 3 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission. Claimant's LA No. 49.

72. In any case, according to Siemens, the host State's domestic law is relevant only with respect to factual issues as held by the doctrine and the International Court of Justice ("ICJ") in *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*:

"From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish Law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."<sup>7</sup>

73. Furthermore, Siemens points out that, as held by the Annulment Committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. the Argentine Republic*<sup>8</sup> and the tribunal in *Técnicas Medioambientales TECMED, S.A. v. the United Mexican States*<sup>9</sup>, governmental measures that are lawful under domestic law are not necessarily in conformity with international law. Siemens concludes that domestic law is only relevant as evidence of Argentina's measures and conduct and needs to be analyzed through the lens of international law.

74. Argentina contends that there is no express agreement between the parties as to the law applicable to the dispute and that the Treaty does not indicate the law to be applied and, therefore, the Tribunal should apply the municipal law of Argentina. In this respect, Argentina affirms that the constitutional law of Argentina is the first source of law to be applied, and explains that the Argentine Constitution recognizes the right to property and the right of the State to regulate it provided it is done by law and subject to principles

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<sup>7</sup> *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment No.7, May 25, 1926, 1 World Court Reports (1934), 510, Claimant's Legal Authorities No. 31.

<sup>8</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. the Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002).

<sup>9</sup> *Técnicas Medioambientales TECMED, S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003).

of reasonableness and equality. As further explained by Argentina, these principles mean that restrictions on individual rights must be warranted by the facts and meet a social necessity or convenience and the limitation must be in line with the ends sought. Argentina further points out that, under Article 75(22) of the Constitution, treaties rank above the law and, under Article 27, treaties must conform to the principles of public law set by the Constitution.

75. Argentina draws to the Tribunal's attention that the constitutional reform of 1994 recognized a number of international instruments on human rights to have constitutional rank. Argentina claims that the human rights so incorporated in the Constitution would be disregarded by recognizing the property rights asserted by the Claimant given the social and economic conditions of Argentina.

## **2. Considerations of the Tribunal**

76. The Tribunal has been established under the provisions of the Treaty and the ICSID Convention. Under Article 42(1) of the Convention, the Tribunal is obliged to apply the rules of law agreed by the parties. The Treaty provides that a tribunal established under the Treaty shall decide on "the basis of this Treaty, and, as the case may be, on the basis of other treaties in force between the Contracting Parties, the internal law of the Contracting Party in whose territory the investment was made, including its rules of private international law, and on the general principles of international law." By accepting the offer of Argentina to arbitrate disputes related to investments, Siemens agreed that this should be the law to be applied by the Tribunal. This constitutes an agreement for purposes of the law to be applied under Article 42(1) of the Convention.

77. In regards to the arguments whether international law is referred to in the Treaty or the Convention as a corrective to municipal law or as a filler of *lacunae* in that law, the Tribunal refers to the finding of the Annulment Committee in *Wena Hotels Limited v. Arab Republic of Egypt* in the sense that: "The law of the host State can indeed be applied in conjunction with international law if this is

justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.”<sup>10</sup>

78. The Tribunal has found that it has jurisdiction over breaches of the Treaty and will review the conduct of Argentina as a State party to the Treaty in respect of the commitments undertaken in the Treaty. In so doing, and as stated by the *Ad Hoc* Committee in *Vivendi II*, the Tribunal’s inquiry is governed by the Convention, by the Treaty and by applicable international law. Argentina’s domestic law constitutes evidence of the measures taken by Argentina and of Argentina’s conduct in relation to its commitments under the Treaty.

79. In any case, the Treaty is not a document foreign to Argentine law. As explained by Argentina, the Constitution and treaties entered into by Argentina with other States are the supreme law of the nation, and treaties have primacy over domestic laws.<sup>11</sup> In this respect, the Tribunal notes the reference made by Argentina to international human rights law ranking at the level of the Constitution after the 1994 constitutional reform and implying that property rights claimed in this arbitration, if upheld, would constitute a breach of international human rights law. This argument has not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case.

80. The allegations of the parties will require that the Tribunal interpret the Treaty. In this respect and as a general matter, the Tribunal recalls that the Treaty should be interpreted in accordance with the norms of interpretation established by the Vienna Convention on the Law of Treaties of 1969 (“Vienna Convention”). The Vienna Convention is binding on the parties to the Treaty. Article 31(1) of the Vienna Convention requires that a treaty 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.”

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<sup>10</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, *Ad Hoc* Committee Decision on Application for Annulment (February 5, 2002), 41 *ILM* (2002), p. 941.

<sup>11</sup> Section 31 and Article 75(22) of the Argentine Constitution.

#### IV. The Facts

81. On August 26, 1996, Argentina called for bids on the provision of an integral service for the implementation of an immigration control (“the DNM<sup>12</sup> sub-system”), personal identification (“the RNP<sup>13</sup> sub-system”) and electoral information (“the DNE<sup>14</sup> sub-system”) system (“the System” or “the Project”), including the provision of all equipment necessary for data processing and the intercommunication of such equipment, start-up, technical support and maintenance services, and preparation, printing and home delivery of national identity cards (“DNIs”).

82. For the purpose of participating in the bidding, Siemens, acting through SNI, a company legally integrated into Siemens, created SITS, a domestic Argentine company as required by the Bidding Terms and Conditions. SITS was organized as a special purpose company and used by Siemens for the exclusive purpose of investing in the Project.

83. SITS submitted a bid which included, as required by Argentina, a statement declaring that: (i) SNI had been integrated into Siemens since 1992, Siemens being the owner of 100% of SNI’s stock; (ii) SNI was controlled by Siemens, which appointed SNI’s directors and instructed them in relation to SNI’s activities and projects; and (iii) as a result of SNI’s integration into Siemens, the latter was jointly and severally liable for SNI’s obligations towards third parties.

84. Argentina selected SITS’ bid taking into consideration Siemens’ credentials and financial soundness. The contract for the provision of the System (“the Contract”) was awarded to SITS by Decree No. 199/98. The Contract between SITS and Argentina was executed on October 6, 1998 and approved by Decree 1342/98. The Contract took effect on November 21, 1998.

85. The compensation for the services to be provided under the Contract consisted of the price of each DNI issued, including home delivery and DNI updates, the fees for the immigration proceedings processed through the System and the price for printing the voting rolls. All prices in the Contract were

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<sup>12</sup> *Dirección Nacional de Migraciones.*

<sup>13</sup> *Registro Nacional de las Personas.*

<sup>14</sup> *Dirección Nacional Electoral.*

denominated in Argentine pesos (“pesos” or “AR\$”). At the time, pesos were convertible into dollars at par pursuant to the Convertibility Law.

86. The Contract had a six-year term as from its effective date – November 21, 1998 - and was automatically renewable twice for a three-year term, i.e., for a total of twelve years, unless a notice of intent to the contrary had been given by either party. However, the parties had agreed to give such notice only if the purpose of the Contract had been fully met.

87. The execution of the Project had two stages: a System engineering stage, which consisted of designing the System specifications and acquiring the computer hardware, software and telecommunications networks necessary for its implementation, and a System operation stage, to be managed by the Government. SITS would receive compensation only during this second stage.

88. Production of DNIs was scheduled to begin in August 1999 and extend to the whole country. To this effect, it was necessary for the Argentine government to reach agreements with the Provinces and the City of Buenos Aires (“the External Circuit”).

89. In August 1999, Argentina requested SITS to postpone production of the new DNIs. According to the minutes signed by SITS and the Government, the postponement was due to an extraordinary increase in demand for DNIs because of the short period left before the elections scheduled on October 24, 1999, and to the fear that the introduction of the new mechanisms under such circumstances would burden the public with inconveniences that should be avoided.<sup>15</sup> Thus DNIs production was postponed to October 1, 1999 for foreign residents’ DNIs and November 1, 1999 for Argentine citizens’ DNIs. Production of the respective DNIs started on those dates.

90. In the October election, Mr. Fernando de la Rúa became President-elect. The new authorities took office on December 10, 1999.

91. The DNM sub-system started to operate on February 1, 2000 and its operation was halted on February 2, 2000. On that date, SITS requested an

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<sup>15</sup> Minutes dated August 18, 1999, approved by Decree No. 1054/99. Exhibit 40 to the Memorial.



explanation for the interruption. On February 7, SITS was informed that the operation of the sub-system required a governmental authorization. The sub-system continued to be interrupted indefinitely.

92. On February 24, 2000, Argentina suspended the production, printing and distribution of all new DNIs because, in the case of foreigners' DNIs, the RNP sub-system printed the left thumbprint at the place reserved for the right thumbprint. Argentina prohibited SITS from introducing any modification to the System to correct this problem.

93. These two suspensions occurred in the context of statements made by Government officers to SITS and Siemens in January 2000 to the effect that the Government would seek to renegotiate the DNIs price, and increase the number of free-of-charge DNIs.

94. In March 2000, the Government set up a special commission under the Ministry of the Interior to review the Contract and propose a course of action ("the Commission"). During the negotiations that ensued, Siemens made several proposals and agreement was reached with the Commission on a proposal on November 10, 2000. The Commission sent the negotiated proposal to the Government and the Government gave Siemens a "Contract Restatement Proposal" identical in its terms to the proposal submitted by the Commission for the Government's approval.

95. Siemens' representatives met with the President of Argentina on December 19, 2000. Allegedly he promised to issue the decree approving the negotiated terms of the Contract Restatement Proposal by December 31, 2000. When the decree was not issued, Siemens addressed several notes in February 2001 to the Minister of the Interior expressing concern over the delay.<sup>16</sup> The Minister replied on March 12, 2001 and attributed the delay to the required intervention of controlling agencies.<sup>17</sup>

96. In November 2000, the Argentine Congress approved the Economic-Financial Emergency Law ("the 2000 Emergency Law") which

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<sup>16</sup> Exhibit 57 to the Memorial.

<sup>17</sup> Exhibit 58 to the Memorial.

empowered the President to renegotiate public sector contracts. This law became effective two days before the Contract Restatement Proposal was submitted by the Commission to the Minister of the Interior. The Government proposed to include the Contract under the provisions of the 2000 Emergency Law and Siemens did not object, in the belief, according to Siemens, that this step would speed up the approval of the Contract Restatement Proposal.

97. The Minister of the Interior was replaced and, in March 2001, the new Minister, Mr. Mestre, claimed to be unaware of the Contract Restatement Proposal. On May 3, 2001, SITS received a new Draft Proposal from the Government which differed from the Contract Restatement Proposal. On May 8, 2001, SITS replied commenting on the new terms, and requesting the exhibits to the proposal which had not been enclosed. The Minister informed Siemens that the new proposal was not negotiable and, on May 18, 2001, the Contract was terminated by Decree 669/01 under the terms of the 2000 Emergency Law. SITS filed an administrative appeal which was rejected by Decree 1205/01.

## **V. Allegations of the Parties**

98. The Tribunal will now describe at length the allegations of the parties as they relate to the facts of the dispute.

### **1. Memorial**

99. In its Memorial, Siemens has framed its claim in the context of the Treaty, the Convertibility Law of 1991, Decree No. 2128/91, and the State Reform Law of 1989. Siemens contends that it entered into the Project based on the assurance of the authorities' commitment and the legal security framework provided by these instruments.

100. Siemens explains that significant investments were made during 1999 and further investments were made in 2000, due to Argentina's requirements as a prerequisite for resuming income-generating operations, for an aggregate amount of \$284 million up to May 18, 2001. Additional expenses exceeding \$9.1 million were incurred after termination of the Contract and until September 2002.

101. Siemens claims that the following results were achieved:

- (i) as regards the DNM sub-system, establishment of the immigration information center, and the immigration flows and border control systems at three locations; the Government first hindered this component from becoming operational and later hindered its functioning, but Argentina has nonetheless benefited from better processing, follow-up and control of immigration proceedings, and the generation of single, non-duplicate files for each alien, containing all identification data, which reduced tampering possibilities;
- (ii) as regards the RNP sub-system, the engineering stage was completed by August 1999 and it became operational by August 19, 1999, the electronic loading of the Remaining Human Potential File (“Back Record Conversion” or “BRC”) was performed (by December 1999, 45.8 million individual records had been digitalized), an ID personalization center was completed, hardware and software were acquired, buildings were fitted, the communications network was implemented, training courses were held, more detailed and demanding System applications were developed, and a pilot test not required under the Contract was performed. However, because of the measures taken by Argentina, only 3,189 DNIs were issued over a period of 147 days as opposed to 12,000 DNIs foreseen as the initial daily average;
- (iii) as regards the DNE sub-system, the electoral information component was completed by August 1999, and SITS carried out the processing, printing and distribution of provisional lists and final voting rolls for the national elections of October 24, 1999; and
- (iv) physical and IT security equipment and technical support were provided by SITS to the three implementation agencies.

102. Siemens explains that the investments were financed through capital contributions by Siemens through SNI in the amount of \$27 million, through loans made by one of the wholly owned subsidiaries or in minor amounts

by local financial institutions (later refinanced by Siemens directly or through SNI and totaling approximately \$242 million), and through non-financial funding by the Siemens Group in the amount of \$15 million approximately up to May 18, 2001. Siemens further explains that the investments were exclusively applied to the Project since SITS was a special purpose company used by Siemens only for the execution of the Project.

103. Siemens alleges that, during the first year of the Contract, Argentina failed to make budgetary provision for the obligations it had undertaken under the Contract, to provide facilities for Project development, to assign appropriate personnel to fill the different positions and take the corresponding training courses. Siemens also alleges that Argentina delayed approval of the Functional Operational Model (“FOM”) during seven months notwithstanding its relevance, failed to execute with the provincial authorities the agreements to carry out production of the new DNIs throughout the country, failed to adopt the measures necessary to replace the existing DNIs by those issued through the System, and failed to discontinue the manual system of issuing DNIs. Siemens observes that these breaches of the contractual obligations were noted by the independent auditor hired by the Government.

104. Siemens recalls that in the context of these failures, in August 1999, Argentina requested SITS, on account of the October elections, to postpone commencement of the new DNIs production until October 1, 1999 for foreign residents and November 1, 1999 for Argentine citizens. Later Argentina requested that the discontinuation of the old DNIs be postponed to November 30, 1999, except for certain jurisdictions for which a new deadline of January 31, 2000 was established.

105. According to Siemens, after the October elections, the new authorities failed to make budgetary provision for the second year of the Project and to enter into agreements with the provincial authorities. Argentina also delayed providing the technical definitions essential to complete the immigration component and, as a result, it did not start to operate until February 1, 2000.

106. Siemens refers to the suspension of the DNM sub-system on February 2, 2000, allegedly because of lack of authorization to operate the sub-system given that public funds were at issue. According to Siemens, the requirement of such authorization was not provided for in the Contract and was not required for the border control component of the DNM sub-system. Siemens alleges that SITS never got an adequate response and was never paid for the documents actually processed.

107. Regarding the suspension of production of DNIs on February 24, 2001, Siemens affirms that this is a technical inconsistency that could have been quickly solved by modifying one sentence in the printing software. Siemens recalls that Article 17 of the Contract established a procedure in the event that errors were detected but, instead of respecting it, the Argentine authorities prohibited SITS from introducing any correction while the Contract was in effect.

108. According to Siemens, since January 2000 the newly elected authorities had made public announcements reported in the press indicating their intention to renegotiate the Contract to obtain a reduction in the DNI price, a larger number of free DNIs and a postponement of the discontinuation of the manual system. Siemens submits that the actions taken in February 2000 by Argentina suspending the two income-generating activities of the Project had the objective of pressuring SITS to re-negotiate the Contract at the point at which most of the investment for the Project had been made.

109. Siemens explains that, during the renegotiation of the Contract with the Commission from March to November 2000, each proposal made by SITS was rejected and resumption of the operation of the System was subject to ever more demanding economic concessions. In November 2000, as explained by Siemens, the parties agreed on the basic terms on which the Contract would be reinstated and the immediate System operation would be resumed, namely, a \$5 reduction in the price of the DNIs (in part to be compensated by a \$3 increase in airport passengers' fees to be passed on to SITS), an increase in the annual free-of-charge DNIs from 75,000 to 250,000, and a reduction in the immigration and voting roll printing fees. Siemens draws to the attention of the Tribunal that the Ministry of Finance authorities opined favorably on the new terms as also did

the RNP, DNM and DNE. The restated terms were set forth in the Contract Restatement Proposal provided by the Government to Siemens on November 30, 2000 with the understanding that this proposal would now be formalized by the Government.

110. Siemens explains that the 2000 Emergency Law was published on November 21, 2000 and that, in order to facilitate the approval of the terms agreed, the Commission proposed to include the Contract under the provisions of the 2000 Emergency Law in a note to the Minister of the Interior dated November 23, 2000.<sup>18</sup> The Minister declared the Contract subject to the 2000 Emergency Law by Resolution No. 1779 of December 6, 2000.<sup>19</sup>

111. Siemens alleges that, when in March 2001 a new Minister of the Interior was appointed, he claimed to be unaware of the agreement reached between the two parties and the undertaking made by the President. The new Minister ordered, on April 6, 2001, the inclusion in the administrative file of the minutes, dated October 30, 2000, of a meeting of Directors of Provincial Registry Offices rejecting the Contract continuation. According to Siemens, he also instructed Sindicatura General de La Nación (“SIGEN”), RPN, DNM and DNE to re-analyze matters related to the Contract and these agencies reached different conclusions from when they reviewed the Contract Restatement Proposal.

112. Siemens refers to the new Draft Proposal presented to Siemens on May 3, 2001 with terms significantly different from those negotiated, mainly, reduction of the number of DNIs to be issued to almost one half as it did the effective term of the Contract, and elimination of the obligation to discontinue issuance of the old DNIs. Siemens points out that the exhibits referred to in the Proposal were not furnished to SITS. According to Siemens, the only purpose of this proposal was to trigger a rejection and create an excuse to terminate the Contract. In its Reply on May 8, Siemens recalled that the parties had already reached an agreement and certain aspects had already been implemented, and that the changes indicated above were unacceptable because they changed completely the economic-financial equation, and requested the missing exhibits

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<sup>18</sup> Exhibit 55 to the Memorial.

<sup>19</sup> Exhibit 60 to the Memorial.

to complete the evaluation. The Minister responded immediately indicating that failure to accept such proposal as a whole would result in early termination of the Contract. In fact, even when the proposal was presented to Siemens as a draft, the instruction of the Minister was that the Proposal was to be notified for acceptance or rejection.<sup>20</sup>

113. Siemens argues that such a proposal was only an illegitimate tool to avoid liability for frustrating the Contract. In this respect, *inter alia*, Siemens points out a number of irregularities in the proceedings for the Contract termination, such as the failure to obtain the Ministry of Economy's consent to subject the Contract to the 2000 Emergency Law and factual inaccuracies, e.g. the covering letter from the Minister of the Interior to the President submitting Decree 669/01 stated that the Contract costs were beyond the capabilities of the Government notwithstanding that there were no supporting budgetary reports and in November 2000 the Ministry of Economy had opined otherwise,<sup>21</sup> and the Government had approved the budget for the proposed restated terms of the Contract which in turn had been approved by Congress on December 12, 2000 and the President on December 29, 2000.<sup>22</sup> Siemens also points out that said letter reports errors in the System without supporting evidence (errors which were disregarded by the President), it uses the Provinces' opposition to the Project notwithstanding that the Contract was undertaken by Argentina itself within its exclusive powers,<sup>23</sup> and it exaggerates deliberately the costs based on RPN's analysis.

114. Siemens points out that the Contract was terminated on the sole grounds of the 2000 Emergency Law, which termination was ratified by Decree No. 1205/01 rejecting SITS's appeal against Decree 669/01. Siemens recalls that Argentina denied SITS access to the administrative file for purposes of filing the appeal and presenting evidence in support of its claims. Siemens alleges that the administrative file was not made available until Siemens reported the secret handling of the file and Siemens had filed the claim under the Treaty. After

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<sup>20</sup> Exhibit 66 to the Memorial.

<sup>21</sup> Exhibit 53 to the Memorial.

<sup>22</sup> Exhibit 70 to the Memorial.

<sup>23</sup> Article 2 of Law No. 17,671. Exhibit 35 to the Memorial.

Contract termination, Siemens claims that Argentina caused delays in the transfer and reception of equipment and in the assessment of the compensation, and never returned the performance bond, which had lost its purpose once Argentina terminated the Contract unilaterally. According to Siemens, SITS continued to provide technical support, train personnel as agreed in cases of Contract termination, assigned to the Government ownership of the computer hardware, the installed communications equipment and fittings and the non-exclusive licenses for use of application software, and requested the Ministry of the Interior to arrange for the transfer of the satellite links.

115. Siemens points out the passivity of the Government during the months that followed the termination of the Contract and that in November 2001, the Ministry of the Interior called the SITS' sub-contractors to conduct a test and assess the possibility of resuming production of the DNIs without Siemens. According to Siemens, the tests conducted in *Casa de Moneda* were satisfactory and *Casa de Moneda* proposed to produce DNIs through the System provided by SITS.

## **2. Counter-Memorial**

116. In its Counter-Memorial, Argentina alleges that Siemens raised false expectations by the statements made in the bid for the Contract. Siemens had stressed its experience and that of its sub-contractors in high-performance secure systems to meet automated data and image-capturing requirements for issuing passports, foreign resident documents, drivers licenses, visas, frequent traveler cards, health plan cards and DNIs, but in reality neither Siemens nor SNI had been involved in projects of a similar size because no country in the world had undertaken a project of the complexity, size and significance of the Project. According to Argentina, Siemens and SNI lacked the technical expertise to provide a comprehensive service involving the operation and support of a secure and reliable personal identification, migration control and electoral information system.

117. As regards Siemens' claim that Argentina delayed the approval of the FOM and it is at fault for the non-implementation of the External Circuit,



Argentina argues that Siemens presents a traditional notion of contracts with the parties' obligations bearing a relationship of interdependence and does not take into account the particularities and complexities surrounding the procurement of information technology products and services. Argentina explains that the Contract is a turnkey information technology contract including tailored software development and it is inevitable that there will be some uncertainty as to the actual completion date of the work.

118. Argentina alleges that in this type of contract the reporting and advisory duties of the information technology service provider and product supplier play a key role in maintaining the balance between the parties. Argentina recognizes that it received assistance from technical personnel who participated in the guideline-setting stages for the technical definition of the System, but this is not sufficient, argues Argentina, to eliminate the imbalance in technical expertise level between the parties.

119. As regards the approval of the FOM, Argentina describes how, a few days before the deadline for the presentation of the FOM, it requested SITS to deliver the working papers so that RNP's technical staff could advance with the examination of the FOM. SITS never provided the documentation requested. Argentina refers to a number of communications sent to SITS that show the delay in the acceptance of the FOM by Argentina was due to inconsistencies in the FOM proposed by SITS. To further support its argument, Argentina refers to two reports prepared by RNP on the weaknesses of the FOM submitted by SITS and the security of the FOM. In brief terms, several items in the FOM submitted by SITS did not comply with applicable law, were defined on a general or incomplete basis, or failed to provide specifications for the security, audit, and quality and management control of the System. Argentina infers from the foregoing that SITS' technical qualifications were not sufficient to perform the Contract and that it used the Project to gain experience.

120. As regards the External Circuit, Argentina explains that SITS and Argentina through RNP agreed that the proposed model could not be implemented as described in the Contract and SITS was requested to design an External Circuit taking into account the following general guidelines: (i) flexible

terms for a gradual regional implementation; (ii) installation of computers in the Manual Data Capture Centers under the charge of SITS to facilitate form scanning; (iii) set-up of scanning and quality control centers in every provincial capital, for purposes of resolving any possible rejection of the applications in the applicant's location; and (iv) the maintenance by the contractor of the investment levels that had originally been agreed.

121. Argentina further explains that it is not surprising that the Provinces were not interested in signing framework agreements for the External Circuit since they were not advantageous from an economic point of view; under them, the Provinces would receive lower compensation while the expenses they had to incur for the System to work efficiently were higher. Argentina also refers to the nature of its federal system of government where the Government cannot oblige the Provinces to enter into agreements to cooperate in the performance of functions that belong to the Federal Government.

122. Argentina argues that SITS was aware of the circumstances of the country, it had admitted that the design of the External Circuit was not consistent with the social reality of Argentina and it was necessary to do a comprehensive review of the design, the External Circuit could not be implemented until the FOM was approved on condition that SITS fulfilled certain requirements, and, in the agreement signed between Argentina and SITS on November 26, 1999, the Coordinator of the Project at RNP and the SITS' Project Director were empowered to introduce amendments to the System set-up schedules and in the size of the Electronic Data Capture Centers.

123. Argentina also argues that, given the long presence of Siemens in the country and as a product and service provider to the public sector, SITS should have been aware of the political issues that would necessarily have an impact on the performance of some stages of the Contract and compliance with its obligations.

124. Argentina alleges that data capture for the External Circuit could not be set up in the Provinces because of the suspension of manufacturing, printing and distribution of DNIs on February 24, 2000. Argentina alleges also

non-compliance by SITS with its obligation to deposit the source codes in escrow and transfer them to the Government upon completion of the Contract. Argentina affirms that without the source codes it could not properly operate the System after termination of the Contract. Furthermore, Argentina had detected errors in the System and the source codes were necessary to correct SITS' work.

125. Argentina contends that, contrary to Siemens' claim that Argentina did not comply with the schedule provided for in the Contract to cease issuing DNIs manually, SITS had agreed to reformulate the terms of the Contract applicable to begin issuing new DNIs and consented to the extension of the term for the discontinuation of manual DNI issuance.

126. Argentina explains that the Contract did not amend the law regulating when DNIs are issued and updated. The law requires that a DNI be issued when a baby is born and this document is updated when the child reaches school age. Then a photograph is added to the identity document and the right thumb fingerprint is stamped on the document. This DNI is replaced when a person turns sixteen and a new photograph is taken. Then this DNI is updated when a person turns thirty. In order to determine whether the Project was economically advantageous, SITS should have calculated the number of DNIs that had to be replaced.

127. According to Argentina, the RNP sub-system was the most important undertaking since the revenues it would generate would guarantee the expected return on the investment made by Siemens, and it was precisely in the design of this sub-system that SITS failed to comply with its obligations. On February 23, 2000, the RNP head of the Aliens Division reported that federal police officers had discovered that on two DNIs belonging to foreigners the fingerprint was incorrectly identified, e.g., the left thumbprint was identified as the right thumbprint. Argentina explains that the technical report states that the fingerprint experts verified that the fingerprints had been correctly taken by RNP staff. The head of the RNP Aliens Division concluded that the error was in the design of the System which was entrusted exclusively to the Claimant, which defeated the purpose of implementing an information technology system to avoid the risk of human error.

128. Argentina contests that Article 17 of the Contract was applicable in that situation. Argentina explains that such article is intended to regulate the parties' conduct in the event of any possible physical error of the identity document and not an error involving the inappropriate design.

129. Argentina then turns to the 2000 Emergency Law and points out that this law provided that the events of *force majeure* foreseen in sections 53 and 54 of Law No. 13,064 were considered to have occurred, that within 30 days the Government should determine the contracts subject to the provisions of the 2000 Emergency Law, that government contracts would not be terminated if the continuation of the works or the performance of the contract was possible on the basis of the "shared sacrifice" principle, and that compensation payable in the case of those contracts revoked on grounds of convenience, merit and advisability would not include lost profit or unproductive expenses.

130. Argentina further points out that in no circumstances did the Contract entail the privatization of the System's operation and that the goal of the Commission established by Resolution No. 263/00 was to find a solution ensuring the continuity of the Contract given the crisis in Argentina. Argentina explains the doctrine of unforeseeability that would apply in the emergency situation:

"There is certainly no obligation for the Government to compensate the contractor as the events causing the contractual imbalance are totally beyond the Government's control. There is nothing that would prevent the strict and specific application of the contract provisions and thus the termination of the contract [...] However, no benefit for the public interest can be derived from this situation; quite the contrary, the public interest will not be satisfied by the abrupt interruption of the service provision. Thus, the doctrine of unforeseeability or unforeseeable risk may be applied to these cases. According to the doctrine, the Government has to provide assistance to the concessionaire, sharing the risks that

unpredictability might have arisen for purposes of avoiding a total collapse of the licensed service.”<sup>24</sup>

131. Argentina further explains that it is obliged to revoke a public contract when the public need that would be satisfied by the contract disappeared or new public demands require that it be terminated. Revocation by reason of public interest is one of the cases of a Government’s liability for lawful actions and entails the obligation to compensate the contractor whose individual right is sacrificed for the sake of the public, but compensation shall not include lost profits or unproductive expenses.

132. Argentina disputes Siemens’ affirmation that the Government took advantage of the passing of the 2000 Emergency Law allegedly to accelerate the implementation of the agreement concluded with Siemens. Argentina explains that it is correct that SITS participated in the report prepared by the Commission, but it is not correct that such report had to be considered by the Government and SITS as a formal and final renegotiation proposal. According to Argentina, the report was an initial contract renegotiation proposal which included the Contractor’s point of view.

133. Argentina also questions the position taken by Siemens in respect of the role of SIGEN and its refusal to furnish the cost structure of SITS’ services. According to Argentina, SIGEN was unable to determine the reasonableness of compensation to SITS because it had not access to conclusive information about the cost of the services. Argentina disputes the allegation that the reduction of the original DNIs price reflected SITS’ share of the sacrifice to continue with implementation of the Contract. Argentina recalls in this respect that Article 4.6.2 of the Contract required disclosure of SITS’ cost structure where extraordinary and unforeseeable events materially and adversely affect the original economic and financial equation of the Contract.

134. Argentina also takes issue with the characterization by the Claimant of the 2000 Emergency Law as an instrument devised to hurt the Claimant. Argentina also contests the truthfulness of the assertion by Siemens

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<sup>24</sup> E. García-Enterría and T. Ramón Fernández, *Curso de Derecho Administrativo* (1997), vol. I, p. 732. Counter-Memorial, para. 555.

that it has been penalized by pursuing this arbitration and lists a number of public sector contracts won by Siemens in recent years. According to Argentina, Siemens continued to do business with the Government and with other public sector players and provided new services after the termination of the Contract.

135. Argentina describes the steps involved in the reception of SITS' assets to justify the delay, which it also ascribes to lack of cooperation by SITS at that stage. Indeed, according to Argentina, SITS refused to participate in the asset verification process because the inventories already submitted by SITS included all necessary specifications for asset identification. In fact, according to Argentina, SITS' inventories in most cases referred to total quantities without a breakdown that would permit actual verification of the assets' existence and their relevance to the System. Argentina claims that, in contrast, the Notary General's Office recorded the asset verification proceedings, including a list of the assets present in the various agencies belonging to the System and unequivocal information regarding each and every asset.<sup>25</sup>

136. Argentina also refers to the issue of the verification of certain computer equipment stored at the Siemens National Route 8 plant in San Martin County in the Province of Buenos Aires. Argentina claims that the Government was only informed of the existence of such equipment in a presentation made by SITS to the Asset Reception Committee on September 4, 2001. Argentina explains the difficulties that this revelation presented for the Government as, among other matters, it was uncertain whether these assets were part of the assets to be transferred under Article 10.7 of the Contract and, if they were, it was unclear whether or not the Government should actually receive them because of SITS' refusal to transfer title to those assets until payment was made to SITS. The Asset Reception Committee decided to accept the National Route 8 assets on December 17, 2001 and that on December 20, 2001, both parties should agree on a procedure to receive them. The serious events that happened on that date led to the worst ever political and institutional crisis in Argentina, but once the new authorities were in place in Argentina, the Asset Reception

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<sup>25</sup> Exhibit 144 to the Counter-Memorial.

Committee continued with its work and requested the Tribunal de Tasaciones de la Nación (“TTN”) to appraise the assets.

137. Then Argentina describes the performance tests of the various sub-systems at RPN, DNE and DNM and affirms that in all three cases the technicians concluded that the sub-systems were not operative. Argentina explains that SITS was invited to attend the tests but refused the invitation. Furthermore, the tests had to be carried out without access to the source codes that SITS should have turned over to Argentina at Contract termination. According to Argentina, without the source codes it was not possible to determine the degree of progress by SITS regarding the purpose of the Contract and it was not possible to conduct an accurate appraisal.

138. Argentina provides the breakdown of the appraisal conducted by the TTN, which in the aggregate amounts to AR\$71,735,510, and explains that the items appraised would be valuable only if, among other matters, SITS would deliver the source codes, the licenses for basic software and databases, and the use of SITS’ software licenses. Argentina reports that the TTN pointed out that it was not certain that all licenses could be transferred as their respective contracts did not provide for such possibility.

139. As regards the performance bond, Argentina argues that it ends on termination of the Contract, provided that the Contractor has fulfilled its obligations under the Contract, which has not been the case. Argentina in this respect particularly emphasizes the fact that the source codes and the software licenses have not been delivered by SITS to the Government.

### **3. Reply**

140. In its Reply, the Claimant notes that Argentina recognizes the fundamental facts of the case and the events that frustrated Siemens’ investment. The Claimant takes issue with the argument that Argentina was the weaker party because of an alleged technology gap. The Claimant points out this cannot be true when Argentina had designed the Bidding Terms and Conditions, defined the characteristics of the service, and reserved the right to control and manage the tasks during Contract performance.

141. Siemens disputes that there was a mutually agreed renegotiation process. According to Siemens, the Government took advantage of the sunk cost of Siemens' investment to impose a renegotiation process not provided for in the Contract. Siemens also questions the arguments based on security concerns. Siemens first points out that lack of security or reliability of the System was not the subject of any discussion between the parties during the performance of the Contract, that these arguments were developed after the Contract termination, and that the only audit report issued during the term of the Contract on the security of the System was submitted to the authorities by the external security auditor appointed by the Government, which audit report concluded that the System reasonably complied with the security standards required by the Contract. According to Siemens, this is confirmed by the termination of the Contract with no finding of fault on the part of the Contractor (Decree 669/01) and the ratification of the termination in September 2001 after the SIGEN reports had been issued (Decree 1205/01).

142. Siemens also points out that the security concerns of the old system which motivated the tender (Decree 1310/94) for a new system are still valid, while the security and reliability of the System was never questioned before this arbitration. Siemens surmises that if the real concern had been security, then the logical course of action would have been to allow the Contract's performance, instead of discontinuing the Project and preserving the system that caused the documentary emergency from which Argentina is still suffering.

143. Siemens argues that Argentina distorts reality and deliberately intends to confuse the situation that led to the passage of the 2000 Emergency Law with the economic and political crisis that resulted in the enactment of Emergency Law No. 25,561 in 2002. Siemens explains that, contrary to the description made by Argentina, the 2000 Emergency Law only declared the fiscal accounts in emergency and empowered the new administration to repudiate certain contracts concluded by its predecessor. According to Siemens, the emergency was not related to "extraordinary and unforeseeable" events unrelated to the State as claimed by Argentina, because public deficits fail to



meet such qualifications: the events that led to the enactment of the 2000 Emergency Law were attributable exclusively to the State itself.

144. Siemens contests Argentina's allegations regarding its technical qualifications. Siemens recalls that in the bidding process SITS was allocated the best ratings in terms of experience in the implementation and or administration of the System, and in project integration and capacity to handle the Project. Siemens recalls that Argentina holds Siemens in such high regard that it has repeatedly requested its intervention in other public projects, even after the Contract's termination.

145. Siemens dismisses Argentina's allegations regarding defects in the Contract and recalls that, in compliance with Decree No. 1310/94, the Ministry of the Interior approved the Bidding Terms of Conditions through Resolution No. 2183/96, stating in the whereas clauses that RPN, DNM, DNE, the Ministry of the Interior, the Attorney General's office and SIGEN had been involved in their preparation. RPN, DNM and DNE prepared reports for the Technical Evaluation Committee which concluded: "it may be inferred from the technical reports received, from which contents this Committee finds no reasons to depart,"<sup>26</sup> that the bidders have complied with all the provisions referring to the items and amounts tendered, and that "it is appropriate to share the conclusions reached by the Technical Agencies consulted [RNP, DNM, DNE], that SIEMENS IT's rating is 13.03% higher than the rating [...]."<sup>27</sup> Furthermore, it is Siemens' contention that:

"Only Argentina was in a position to identify its own political, economic and social needs involved in the System. It was also the one that had the duty to set the requirements consistent with its own capabilities and limitations. Contrary to its claims, it was Argentina and not the Contractor that had the duty to inform its contractual party of the economic, political or social limitations that could be encountered in the design, implementation and subsequent development of the Project."<sup>28</sup>

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<sup>26</sup> Reply, para. 137.

<sup>27</sup> *Ibid.*, para. 138.

<sup>28</sup> *Ibid.*, para. 142.

146. As regards the delayed approval of the FOM and the allegation by Argentina that SITS lacked the technical capacity to perform the Contract, Siemens asserts that the reasons that delayed FOM approval were not of a technical nature that could be ascribed to SITS, but originated in the indolent attitude of the Government and its lack of cooperation with SITS.

147. Siemens contests the presentation made by Argentina on the failure of implementing the External Circuit and the implication that it was Siemens that designed this circuit and determined its need. According to Siemens, the model incorporating the External Circuit was created by Argentina taking into account the country's geographical extent and the rules applicable to its personal identification and registration activity. Furthermore, Argentina has justified not making the necessary budget allocations on the basis of ignorance of the characteristics required for the buildings allocated to the External Circuit. Siemens claims that this is not a valid reason because Argentina had all the information to purchase the properties and prepared a budget estimate months later when the System was paralyzed.

148. As regards the failure to discontinue the production of the old manually produced DNIs, Siemens recalls that the "cut-over" criterion was a basic commitment of Argentina under the Contract and an essential component of the Project, that, in any case, Argentina did not meet the new deadlines agreed reluctantly by SITS, and that the error detected by the police occurred several months after the original date of the "cut-over" and after the new deadlines.

149. Siemens contends that the decision to suspend the for-profit-operations of the System were arbitrary. In the case of the fingerprint error, Siemens insists that it originated in a mistaken software sentence found in the programming of one of the applications. According to Siemens, SITS acknowledged the error and offered to correct it immediately, but the Government decided to suspend provisionally the processing of DNIs for Argentine nationals and foreigners throughout the System. The decision remained in effect until the termination of the Contract.

150. Siemens contests the interpretation given by Argentina to Article 17 of the Contract. This Article does not distinguish between design errors and errors related to individual documents; it simply refers to a DNI that may have errors resulting from any cause, whether attributable to SITS or the Government.

151. Siemens recalls that the services provided by SITS to the DNM and DNE were accepted by the relevant agencies and that, in the case of the DNM sub-system, its operation was suspended because of the alleged lack of formal authorization for the launch of the sub-system after one day of operation and not because of the flaws that Argentina now points out, supported by a report of SIGEN of September 2001, four months after termination of the Contract and eighteen months after the suspension of the sub-system operation. According to Siemens, the sub-system is in use by DNM to this date.

152. Siemens questions the use of the technical studies presented by Argentina in this arbitration when the Government did not consider that SITS had committed breaches to allow the Contract's termination, nor did it ever notify SITS of the serious breaches now invoked in accordance with the procedures provided for in the Contract, nor imposed any sanctions whatsoever based on the alleged inconsistencies of the System. According to Siemens, SIGEN produced its reports months after the System had started to operate with express approval of RPN, and after the authorities had already decided to terminate the Contract. Siemens claims that Argentina did not convey the reports or their recommendations to SITS or Siemens and refers to Article 10.2 of the Contract, which provides that:

“Following Systems implementation, but prior to their being put into operation, the security and high degree of inviolability of the Systems shall be tested and certified by a world-class auditor appointed by mutual agreement of the parties. The inexistence of observations from the State's Security Officer shall imply the acceptance of the Systems' security and inviolability test results.”

153. Siemens affirms that the only auditing reports provided for in the Contract determined the reasonable accomplishment of the System's security

standards, including the initial stage, SITS' compliance with its contractual obligations, and the Government's non-compliance with theirs. Siemens points out that these reports were ignored by the Government and excluded from the administrative files, probably, Siemens surmises, because their outcome was deemed unfavorable to Argentina.

154. Siemens recalls that two months prior to the creation of the Commission, and days before the suspension of for-profit operations, the new authorities declared publicly before informing SITS of their intentions that the Contract had to be reviewed. Siemens also recalls that the technical aspects were irrelevant in the discussions to renegotiate the Contract, and that the issues discussed were limited to the reduction in the number of DNIs, migration proceedings prices, the redesign of the External Circuit, the progressive discontinuance of the manual system as opposed to the "cut-over", an increase in the amount of free-of-charge DNIs, etc. Siemens submits that these were not "external circumstances" or an "extraordinary and unforeseeable event that materially affected the equilibrium of the relationship", but reflected the opposition of the new Administration to the obligations undertaken by its predecessor. Siemens notes that, with a high degree of political opportunism, the Government took advantage of the fact that by then most of the investment for the Project had been made.

155. Siemens questions the correctness of the *ius variandi* as understood by Argentina. First, Siemens refers to the acknowledgement by Argentina that the power of the Government to vary the terms may be exercised only to the extent to which the economic balance of the contract is preserved. However, Siemens points out that Argentina neglects to mention the limitations to the *ius variandi*. Indeed, the authority of the State to modify the terms and conditions of the contract does not affect those provisions pertaining to compensation and financial advantages, since it would be contrary to the principle of good faith and to business security to allow the State to modify the contract unilaterally and reduce compensation. Siemens refers to the limitations imposed by the Argentine Constitution and law, in particular the property safeguard (Article 17 of the Constitution), the proportionality principle (Article 28

of the Constitution), the *pacta sunt servanda* rule (Article 1197 of the Civil Code) and the principle of good faith (Article 1198 of the Civil Code).

156. Siemens argues that, when Argentina called for foreign investment to carry out its public sector transformation in 1990, Argentina assumed that some of the legal features of the public contract could discourage investors and deliberately self-limited its public powers and prerogatives. Siemens points out that one of the most important limitations was directed at preventing the unilateral modification or termination of contracts, even if ostensibly in the ‘public interest.’<sup>29</sup> Thus Article 33.6 of the Contract provides that, “Any change or amendment to this Contract shall be agreed upon by the parties and set forth in writing.” Article 26.1 limits early termination by the State to cases of SITS’ fault, and Article 3.5.2 limits early termination by the State until all existing DNIs issued as of the date of the Contract had been replaced.

157. Siemens submits that “if the State does not comply with the previously described limitations, it would be in breach of its duties and it should be accountable for its wrongful acts by fully compensating the contractor for having deprived it of its vested rights and/or having frustrated its legitimate expectations (as appropriate).”<sup>30</sup> Siemens also points out that Argentina does not specify any new events that would justify a different assessment of the public interest as it was when the Contract was awarded; a change of Administration is not a valid legal ground. The renegotiation of the Contract was initiated, not as an exercise of Argentina’s discretionary powers, but as an attempt to depart from its contractual obligations.

158. Siemens insists that there was “no mutual will to renegotiate following a change in circumstances, but a coerced process involving substantial alterations of the initial conditions to the detriment of SITS, strongly conditioned by the fact that – the investment already being made – the State suspended the operations of the income generating systems [sub-systems] [...]”<sup>31</sup>

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<sup>29</sup> *Ibid.*, para. 225.

<sup>30</sup> *Ibid.*, para. 229.

<sup>31</sup> *Ibid.*, para. 242.

159. Siemens recalls the Argentine Supreme Court constitutionality test for emergency measures that restrict individual rights, namely, they may last only as long as necessary to allow the cause of the measures to disappear, and “Even where a more intense exercise of police power is recognized in emergency circumstances, the Supreme Court has repeatedly held that an individual’s own property cannot be taken without a declaration of public use and prior compensation.”<sup>32</sup> The application of the 2000 Emergency Law to terminate the Contract was a political decision and not, as alleged by Argentina, the result of events “absolutely alien and independent from the administrative activity.”<sup>33</sup>

160. Siemens contends that the disclosure of SITS’ cost structure was necessary only at a later stage and points out that, during the 14 months of negotiations prior to SIGEN’s report in March 2001, this issue was never raised. Furthermore, the Contract was based on a price cap and the cost to Argentina did not depend on SITS’ cost structure, the conditions of Article 4.6.2 of the Contract had not been met and the 2000 Emergency Law did not trigger them, and even the Draft Proposal of May 2001 did not require any disclosure.

161. Siemens notes that there was no “shared sacrifice” and that the burden was exclusively on SITS is particularly evident in the May 2001 Draft Proposal intended to provoke a rejection from SITS and to justify the termination of the Contract on the basis of the 2000 Emergency Law. Siemens asserts that its reply to the proposal was not a rejection, but that it only insisted on the need to reach a solution that would respect the parties’ rights and previous commitments, and requested the missing annexes for a correct assessment of the proposal.

162. Siemens recalls that the new Minister of the Interior ordered new reports from RNP, DNM and DNE and that these agencies issued reports in April 2001 that differ from those issued in December 2000, particularly in the case of RNP. The proposal of May 2001 shows that technical issues were not relevant and the disclosure of the cost structure was not required by the State at the time of formulating such proposal. The State had not required it as a condition of the

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<sup>32</sup> *Ibid.*, para. 259.

<sup>33</sup> *Ibid.*, para. 262.

Contract when it was awarded nor was it part of the November 2000 Contract Restatement Proposal.

163. Siemens points out that it was denied access to the administrative file until August 2001 –three months after termination of the Contract – and then it realized that: the file had been started on December 13, 2000, it included documents dated from as early as January 2000, and reports favorable to the Contract's continuation were absent. According to Siemens, such reports apparently had been included in the file and then removed without indicating the reason; notably, the SWIPCO reports were missing and were also ignored in the Counter-Memorial.

164. Siemens then refers to the contracts that Argentina has reported in the Counter-Memorial to have been terminated under the 2000 Emergency Law to respond to the claim of discrimination, and argues that these contracts were not comparable, that main contracts involving foreign investments had been formally excluded, that most of them had been renegotiated and not terminated and that the two public works terminated were in the end terminated because of the contractors' fault. Siemens points out that a passport contract between a local company and the State is not included in the list presented by Argentina, and was not subject to the 2000 Emergency Law notwithstanding how expensive it was.

165. Siemens claims that, after termination of the Contract, the behavior of Argentina was as arbitrary as before, namely, it denied access of SITS to the administrative file, subjected SITS' compensation to the performance and to the physical tests of the System after it had been in the power of the State since its transfer and over which SITS had lost control a long time before, excluded SITS from the tests at *Casa de Moneda*, and issued reports unfavorable to SITS without notifying SITS or including them in the administrative file. Siemens claims that Argentina's lack of good faith is confirmed by bringing before this Tribunal a large number of contractual breaches absent any actual decision of the Government pertaining to the Contract.

166. Siemens affirms that SITS took every possible action to overcome the difficulties placed in its way by Argentina and to avoid the expropriation of the Contract and recover its investment.

167. Siemens points out that it took Argentina 28 months to receive the assets transferred from SITS. Siemens recalls how Argentina did not take measures for the orderly transfer of the non-exclusive licenses for the use of the applications software or the contract for the supply of satellite link services, and all links between SITS' help desk and the System were cut in May 2001. Siemens claims that the passive behavior of Argentina caused losses and jeopardized the System. Hence, SITS could not agree to any physical, performance or functionality test carried out by the Government after its damaging attitude.

168. Siemens notes the positive results of the test at *Casa de Moneda* in order to verify the overall operation of the System. Siemens refers to the following statement in a letter provided by the President of *Casa de Moneda* to the Under-Secretary of the Interior reporting on the test results:

“As per your request, I would like to inform you the positive result of the verification test of the operativity [*sic*] of the General Persons Identification System that forms part of the Argentine and International Public Bidding Process No. 01/96, the contract of which was terminated by Decree 669/01.

[...]

Therefore, it has been verified that it is possible to print identity documents at the plant.”<sup>34</sup>

169. Siemens also points out that SITS' sub-contractors who were present at the tests reported that they “[...] evidenced the successful operation of the systems set up for the production of DNIs, and that pursuant to Section 2 of Decree No. 669/2001 those systems were received by the Government.”<sup>35</sup> Siemens refers to press reports on the satisfactory functioning of the System

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<sup>34</sup> *Ibid.*, para. 341, emphasis added by the Claimant.

<sup>35</sup> *Ibid.*, para. 342, quotation from a note from Imaging Automation.



notwithstanding attempts by officials of RNP to prevent its operation to the extent that floppy disks and software applications containing important information for the issuance of the DNIs mysteriously were lost.<sup>36</sup>

170. Siemens maintains that the source code issue lacks any merit. First, source codes were excluded from the Contract. The Government, prompted by a question of SITS seeking confirmation that the only right to be acquired by the Ministry of the Interior over the software would be a non-exclusive use license, replied: “The requirement included in the bidding terms and conditions related to the software is that the Ministry of the Interior be transferred a permanent and non-exclusive use license”, and “the bidder or contractor may assign all or a portion of the ownership rights over the software if it so accepted.”<sup>37</sup> Siemens affirms that there is no reference in the Contract to software source codes and, to have access to them, Argentina would need to negotiate directly with the software copyright owners.

171. Siemens recalls that software and source codes are protected by Argentine law and international law and that no third party has the right to access, reproduce, execute, adapt and modify them without the copyright holder’s express authorization.

172. Siemens notes that the Respondent never demanded compliance with Article 10.12 of the Contract prior to this arbitration. As the evidence attached to the Counter-Memorial shows, this article was invoked by Argentina for the first time in April 2002, nearly a year after Contract termination and after the provision had lost its effect. Furthermore, the allegation made by Argentina that defects had been detected in the System that require access to the source codes to be corrected is an argument first made by Argentina in its Counter-Memorial.

#### **4. Rejoinder**

173. In its Rejoinder, Argentina points out that it is striking that, notwithstanding the contractual concerns expressed by Siemens in this

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<sup>36</sup> *Ibid.*, paras. 344-345 and footnotes 402 and 403.

<sup>37</sup> *Ibid.*, para. 353, emphasis added by the Claimant.

arbitration, it never saw fit to initiate the dispute settlement provisions set out in Article 30 of the Contract. Argentina emphasizes the seriousness of the breaches of the Contract by SITS, and that Siemens agreed to renegotiate the Contract and to the application of the 2000 Emergency Law to the renegotiation. Siemens was aware of the consequences of renegotiating under that law. Argentina explains that the final proposal was prepared after receiving the opinions of the General Department of Legal Affairs of the Ministry of the Interior and of SIGEN. Argentina also points out that the delay in compensation can be attributed to institutional changes but also to the lack of cooperation of SITS with the Asset Reception Committee.

174. Argentina clarifies that it is true that Siemens won the bid on the basis of Siemens' qualifications as technology leader but the System failed to perform the task identifying and registering individuals pursuant to Law No. 17,671. Argentina affirms that the FOM was never approved and hence the System never existed, only some functions worked.

175. Argentina questions the political motivations alleged by the Claimant at each step of the way. Argentina points out that the FOM approval process already showed before the change of Government that SITS lacked the technical expertise required. The FOM was approved on November 26, 1999, subject to the observations made by RNP, and Argentina allowed SITS to start printing the DNIs beforehand so that SITS could recover its investment. As regards the External Circuit, Argentina clarifies that it was refused by the Provinces because of economic reasons, that it would have been irresponsible to oblige the Provinces considering how onerous the model was and the impossibility of continuing efficiently with the development of the Project, and that SITS agreed with the Government on November 26, 1999 to empower the project coordinator of RNP and the project manager of SITS, together with the Provincial Directors of Vital Records, to amend the schedules of implementation, composition and size of the Electronic Data Collection Centers and established December 20, 1999 as the deadline for implementation.

176. Argentina dismisses the contention that no budgetary allocations were made and refers to pertinent provisions of the budget laws for 1999, 2000

and 2001, and alleges that it would have been irresponsible on the part of Argentina to use the budget to develop a faulty product.

177. Argentina maintains that the manual system to issue DNIs could not be suspended because the System as such never worked. The mistake detected by Argentine police officers was not a minor mistake; it was a major design error in the sub-system. The DNM component also failed; it was installed in less than 10% of the places and presented gross validation mistakes. Argentina argues that SITS failed to bring any action against the measures taken and only objected to Decree 669/01 and then for reasons different from those adduced here.

178. Argentina insists that Article 17 of the Contract referred only to errors related to the physical support and not to the design of the software, that it was essential for the Government to secure the continuation of the System, that the interruption was not a penalty, and that the mistake in the fingerprint did not give rise to the revision of the Contract.

179. Argentina observes that Siemens has not objected to any of the safety-related questions in the report of SIGEN; it simply asserts that it was not notified. In respect of the date when the report was issued, Argentina dismisses the point made by Siemens since surely a report needs some time to be prepared and the date of the report is the date of its completion. Furthermore, Argentina notes that SITS was aware of the preparation of the report since its representatives attended the audit meetings organized by SIGEN.

180. Argentina asserts that at no time has it affirmed that the Contract was rescinded by the Contractor's fault. The reports of the various agencies were used to revise the Contract but the rescission was done under the 2000 Emergency Law. Argentina alleges that it did not inform SITS of any breaches nor imposed any sanctions because it was its intention to preserve the Contract and affirms that at all times it acknowledged that the rescission was a consequence of the economic and financial emergency.

181. Argentina affirms that it does not confuse the emergency of 2000 with that of 2002; the circumstances detected in 1999, which gave rise to the

2000 Emergency Law, are the background to the crisis that burst in December 2001. Argentina asserts that the two crises are linked, contrary to the argument made by Siemens.

182. Argentina explains that the Commission had no power to reach agreement with SITS and, therefore, it could not commit or oblige the State. Argentina describes the Contract Restatement Proposal prepared by the Commission as an internal preparatory document indicating SITS' point of view.

183. Argentina further explains that the report of SIGEN was an internal report of the Administration, and that due to their importance and effects some documents are published on its website. Thus there is nothing surprising that SITS learned of its existence that way rather than through a formal notice. Argentina understands the business reasons for SITS' disagreement with the changes resulting from SIGEN's report, but it does not understand the refusal of SITS to reveal its cost structure which would have assisted the Government in finding a more rapid and favorable solution for the parties.

184. Argentina takes issue with the statements by Siemens that only Siemens was required to do its part in aid of the shared sacrifice principle. To maintain the Contract as Argentina tried to do, adapting it to the economic circumstances of Argentina and its population represented a cost to Argentina over simply letting the Contract collapse.

185. Argentina argues that, when the Claimant did not accept 10 of the 21 points in the Draft Proposal, Argentina concluded that the points accepted by SITS were not sufficient to meet its savings expectations, and that Siemens may not argue now that it did not reject the proposal and that the State frustrated the Contract. Argentina recalls that SITS was informed that the 2000 Emergency Law had passed and that the Contract should not be excluded from it since the Contract was not a privatization contract, and affirms that the purpose of Argentina, when it included the Contract under the 2000 Emergency Law, was not to rescind the Contract but rather to reach an agreement that guaranteed its survival. According to Argentina, Resolution MI No. 1779/00 was clear in stating that the proposal made to the Contractor could be modified by the Contractor, but

in such case the Government could reject the modification and rescind the Contract.

186. Argentina recalls that the System never reached the C2 Security Level required under Annex II, Appendix I of the Contract for the configuration installed in the Document Production Centre (“DPC”) and the Central Scanning Center. Argentina explains that SIGEN security reports in respect of the RPN and DNM were started by SIGEN on December 21, 2000, and February 21, 2001, respectively. The reports show that the Contract needed to be revised and redrafted not only because of errors in the design related to printing of fingerprints but also because of failures in IT security. Argentina explains that, because the Contract was rescinded under the 2000 Emergency Law and not for non-performance reasons, it was not necessary to have the final conclusions of the three audits carried out by SIGEN. On the other hand, according to Argentina, the SIGEN audits are a relevant element to bear in mind for the appraisal of property and equipment delivered by SITS upon termination of the Contract.

187. Argentina argues that the scope of the audit conducted by Pistrelli was limited because of its terms and the time when it took place, and may not be used validly to refute the recourse to SIGEN. Pistrelli’s audit was in the nature of desk work and could analyze the System only in a preliminary phase because it had not started to operate as a whole. On the other hand, affirms Argentina, SIGEN carried out an integral audit after the System operated and the Project was halted due to a mistake in its design. Argentina recalls that RPN criticized the Pistrelli audit and requested elaboration of a number of points and that, as of April 17, 2000, the authorities had not been able to prove whether the security changes requested by RPN had been incorporated.

188. Argentina observes that SITS refused to participate every time tests were carried out in spite of several invitations made by the Government. Argentina also points out that SITS refused to participate in the asset reception process notwithstanding official invitations to this effect. Thus SITS did not participate in the physical cross-checking, operative cross-checking or performance cross-checking because: (i) the inventories of assets already

furnished contained accurate specifications, and (ii) since termination of the Contract it had not been in charge of the operation of the System, did not have access to the equipment and did not know the physical and operative situation.

189. Argentina acknowledges that SITS has the right to compensation and that it has taken all the measures leading to satisfy it.

190. Argentina confirms that the contractual performance bond has not been returned because there has been no compliance of SITS with Article 10.12 of the Contract regarding deposit of the source codes and with Article 10.7 regarding the delivery of licenses for the use of applications software. According to Argentina, the return of the performance bond is not required until the Asset Reception Committee issues a decision as to compliance by SITS with its contractual obligations.

191. Argentina maintains that the agreements between SITS and the sub-contractors have been transferred to the State and that the amount to be paid is included in the amount of compensation assessed by the TTN.

192. Argentina takes exception to the allegation that it has not been diligent in respect of the transfer of the non-exclusive licenses and the satellite links. Argentina contends that the licenses have not been delivered because delivery was subject by SITS to prior payment by the Government. As regards the assignment of satellite links, it was the choice of Argentina to continue or not with the same provider.

193. Argentina rebuts the statements of Siemens on the test of *Casa de Moneda*. In the first place, the test was conducted outside the asset reception process and there was no reason to invite SITS since the Contract by then had been terminated. Furthermore, Argentina affirms that the test was not as successful as the Claimant pretends since documents were printed only and not produced and, even with the assistance of sub-contractors, it was not possible to make the System work appropriately.

194. Argentina then turns to the source codes issue and re-affirms that the codes were necessary for the purpose of determining the extent of compliance by SITS with its obligations within the framework of the 2000

Emergency Law and Resolution ME No. 3/2001. Argentina also questions the statement of Siemens that Argentina had never raised the issue of compliance with Article 10.12. Argentina in fact requested the source codes at the request of the TTN and SITS breached Article 10.12 by not providing them. Argentina explains that the value of the source codes has been included in the assessment carried out by the TTN.

## **VI. Merits of the Dispute**

195. Argentina has based its defense on its submission that the claim of Siemens is grounded on issues of contractual performance, while Siemens maintains that its claim is based on breaches of the Treaty, including the breach of the umbrella clause – Article 7(2) of the Treaty. The Tribunal will address this question first and, before turning its attention to the other specific claims related to expropriation, fair and equitable treatment, and arbitrary and discriminatory measures, it will consider the relevance of SITS’ and Siemens’ agreement to the Contract Restatement Proposal and alleged agreement of SITS and Siemens to include the revision of the Contract under the framework of the 2000 Emergency Law.

### **1. Umbrella Clause**

#### **a) Positions of the Parties**

196. The Tribunal will start by recalling the specific arguments of the parties on the meaning of Article 7(2) of the Treaty. This article reads as follows:

“Each Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory.”

197. Siemens argues that Argentina breached Article 7(2) of the Treaty by failing to comply with its obligations with regard to Siemens’ investment. According to Siemens, such obligations may be contractual obligations in agreements between States and investors or broader undertakings contained in the States’ national investment legislation. The effect of Article 7(2) is to protect investments against interferences with contractual rights and licenses elevating

them to violations of the Treaty regardless of breaches of Articles 2 and 4. Siemens observes that this conclusion is even more compelling if the State does so in bad faith, for political reasons and lacking public purpose. Siemens also finds that this conclusion is confirmed by Article 10(1), which covers all “[d]isputes concerning investments in the sense of this Treaty between a Contracting Party and a national or company of the other Contracting Party [...]”

198. In its Counter-Memorial, Argentina reviews the history of the umbrella clauses and in particular refers to the concept of the essential base of the claim introduced in *Woodruff v. Venezuela*<sup>38</sup> and used in *Vivendi II* for purposes of determining the validity of the forum choice in the contract. Argentina finds further support in its argumentation in *Ronald S. Lauder v. the Czech Republic*<sup>39</sup>, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. the Republic of Estonia*<sup>40</sup>, *CMS Gas Transmission Company v. Argentine Republic*<sup>41</sup> and *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*.<sup>42</sup> In the latter case, Argentina points out that the tribunal insisted that the text of the clause has to be unambiguous and that there must be clear and convincing evidence of the purpose of the umbrella clause to elevate contractual claims to treaty claims. Argentina also finds support in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* since both SGS tribunals were moved by the goal of preventing the transformation of contractual claims into international claims.

199. Argentina points out that the tribunal in *SGS v. Philippines* restricts the commitments to which the clause is applicable: “For Article X(2) to be applicable, the host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment – not as a matter of the application of some legal obligation of a general character. This is very far from

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<sup>38</sup> *Woodruff v. Venezuela*, RIAA, Vol. IX, p. 213, AL RA No. 72.

<sup>39</sup> *Ronald S. Lauder v. the Czech Republic*, Award (September 3, 2001), published in [www.mfcr.cz/Arbitraz/en/FinalAward.doc](http://www.mfcr.cz/Arbitraz/en/FinalAward.doc), Siemens LA No. 6.

<sup>40</sup> *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. the Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001), AL RA No. 73.

<sup>41</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), AL RA No. 64.

<sup>42</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 18 ICSID Review 307, para. 163, AL RA No. 74.



elevating to the international level all ‘the municipal, legislative or administrative or other unilateral measures of a Contracting Party.’<sup>43</sup> Furthermore, according to Argentina, if there is an exclusive contractual forum selection clause, the forum specified in the contract is the forum with jurisdiction over contractual matters.

200. Applying these considerations to the instant case, Argentina argues that “the clause can only be invoked *vis-à-vis* an Investment Agreement in the case of breach of the Agreement and not *vis-à-vis* a concession contract governed by domestic administrative law and containing an agreed upon forum clause. Siemens intentionally confuses the Investment Agreement with the investment, terms that are not equivalent and cannot be merged.”<sup>44</sup>

201. In its Reply, Siemens affirms that Article 7(2) includes obligations arising from a contract. Siemens finds that the attempt by Argentina to distinguish between an investment agreement and domestic utility contracts has no support under the terms of investment treaties or in their ordinary meaning. Siemens points out that Articles 7(2) and 10(1) use the term “investments”, which is broadly defined and that claims raised under an umbrella clause are additional to and independent of claims based on the other protections under the Treaty. According to Siemens, under an umbrella clause, “any violation of a contract thus covered, becomes a violation of the BIT. The consequence is that the BIT’s clause on dispute settlement becomes applicable to a claim arising from the breach of the contract.”<sup>45</sup>

202. Siemens argues that case law supports its claims under article 7(2) of the Treaty. First, it refers to the criticism of the *SGS v. Pakistan* in *SGS v. Philippines* which termed that decision unconvincing because it failed to give any clear meaning to the umbrella clause. Siemens points out that the facts of the instant case are different because *SGS v. Pakistan* did not involve any allegation of sovereign interference with the Contract. Second, Siemens recalls the conclusion of the tribunal in the Philippines case: “[the umbrella clause] makes it

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<sup>43</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/03/10, Decision on Objections to Jurisdiction (January 29, 2004), para. 121, cited in the Counter-Memorial, para. 1039.

<sup>44</sup> Counter-Memorial, para. 1047.

<sup>45</sup> Reply, para. 591, citing Professor Schreuer’s legal opinion.

a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.”<sup>46</sup> Third, Siemens rebuts the argument of Argentina that a more specific provision shall take precedence over a more general one. Relying on the opinion of Professor Christoph Schreuer, Siemens contends that this argument in fact favors Siemens’ position:

“The dispute settlement clause in the BIT is merely a standing offer to investors. By accepting that offer an investor perfects a specific arbitration agreement. The ICSID arbitration agreement, as perfected through the institution of proceedings, applies only to the specific dispute. By contrast, the dispute settlement clause in the Contract refers to any dispute arising from the Contract. It follows that the ICSID arbitration agreement is the more specific one. The principle *generalia specialibus non derogant*, should work against the contractual forum selection clause and in favor of ICSID.”<sup>47</sup>

Fourth, Siemens rejects the arguments on the essential claim base and the contractual forum clause for having been already rejected by the Tribunal in its decision jurisdiction.

203. Argentina in its Rejoinder denies as a primary submission that there were any breaches of its obligations towards the Claimant and, if the Tribunal would consider otherwise, then these would be a contractual matter to be determined by the proper law of the Contract and not international law. Furthermore, Argentina contests the meaning attributed by the Claimant to the umbrella clause, and points out that, in the case of *SGS v. Philippines*, the wording of the clause was different and it referred to “specific” investments, and that, in any case, the tribunal found that the umbrella clause did not “convert the issue of the extent or content of such obligations into an issue of international law.”<sup>48</sup> Argentina explains that the case law provides very little authority to

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<sup>46</sup> *SGS v. Philippines*, para. 128, quoted in the Reply, para. 599.

<sup>47</sup> Legal opinion of Professor Schreuer, quoted in the Reply, para. 603.

<sup>48</sup> *SGS v. Philippines*, para. 128, quoted in the Rejoinder, para. 667.

support the approach embraced by the Claimant and that *SGS v. Pakistan* and *Salini v. Jordan*<sup>49</sup> are evidence of the unwillingness of arbitral tribunals to embark on the resolution of contractual disputes. Argentina concludes by reminding the Tribunal that the approach proposed by the Claimant would re-write the Treaty, depart from the classical approach to the arbitral function under international law, and bring into play the provisions of Article 52 of the Convention.

**b) Considerations of the Tribunal**

204. The Tribunal considers that Article 7(2) has the meaning that its terms express, namely, that failure to meet obligations undertaken by one of the Treaty parties in respect to any particular investment is converted by this clause into a breach of the Treaty. Whether an arbitral tribunal is the tribunal which has jurisdiction to consider that breach or whether it should be considered by the tribunals of the host State of the investor is a matter that this Tribunal does not need to enter. The Claimant is not a party to the Contract and SITS is not a party to these proceedings.

205. In regards to the scope of Article 10(1), the Tribunal concurs with the submission that reference to disputes related to investments would cover contractual disputes for purposes of the consent of the parties to arbitration given the wide meaning of the term “investments” and the terms of Article 7(2). However, to the extent that the obligations assumed by the State party are of a contractual nature, such obligations must originate in a contract between the State party to the Treaty and the foreign investor as, for instance, in the *SGS* cases.

206. The Tribunal does not subscribe to the view of the Respondent that investment agreements should be distinguished from concession agreements of an administrative nature. Such distinction has no basis in Article 7(2) of the Treaty which refers to “any obligations”, or in the definition of “investment” in the Treaty. Any agreement related to an investment that qualifies as such under the Treaty would be part of the obligations covered under the

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<sup>49</sup> *SGS v. Islamic Republic of Pakistan*, quoted in the Rejoinder, para. 673; *Salini v. Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award (January 31, 2006), quoted in the Rejoinder, para. 673.

umbrella clause. The Tribunal does not find significant, for purposes of the ordinary meaning of this clause, that it does not refer to “specific” investments. The term “investment” in the sense of the Treaty, linked as it is to “any obligations”, would cover any binding commitment entered into by Argentina in respect of such investment.

## **2. Consent of Siemens and SITS**

207. The positions of the parties related to the argument advanced by Argentina to the effect that SITS or Siemens agreed to the measures taken by Argentina have already been described. The Tribunal recalls that such argument is based on the fact that SITS and Siemens agreed to the Contract Restatement Proposal in November 2000, that no administrative appeal was filed by SITS except with respect to Decree 669/01, and that they did not object to the ministerial Resolution placing the Contract under the regime of the 2000 Emergency Law.

208. As regards the agreement to the Contract Restatement Proposal, Argentina itself contends that it was a preliminary agreement that was not binding. In any case, Argentina modified the proposal and SITS did not accept certain terms of the revised proposal. Thus it is difficult to understand how it can be held that SITS or Siemens have agreed to the Contract Restatement Proposal if its terms were not an agreement but, as argued by Argentina, an internal document in which the views of the private party were expressed and Argentina did not accept them.

209. The argument on the consent of Siemens and SITS to the application of the 2000 Emergency Law to the Contract is even more puzzling to the Tribunal. It is expected that individuals and companies will obey the law; it is not a question of choice, as would be the option to accept a negotiated proposal.

210. It is a matter of dispute between the parties as to whether Siemens or SITS did not object to the application of the 2000 Emergency Law regime to the Contract because they were led to believe by the Respondent that this would speed up the administrative processing of the Contract Restatement Proposal. Whatever the reasons for not objecting, Argentina always had the

power to apply the 2000 Emergency Law to the Contract, irrespective of the position of Siemens or SITS on the matter, and it did. It is clear from the evidence that the expectation of Siemens was that the Contract Restatement Proposal would not be modified even if this may have been possible under the 2000 Emergency Law. It would lack logic that a high official of Siemens would be received by President de la Rúa to plead that a decree be issued on terms different from those negotiated.

211. To conclude, the Tribunal considers that, for purposes of evaluating the measures taken by Argentina in light of its commitments under the Treaty, the allegations based on the consent of Siemens or SITS are not relevant.

212. The Tribunal will now turn to the other specific commitments under the Treaty alleged by Siemens to have been breached by Argentina. Since the parties understand these commitments differently, not only as they apply to the facts of this case but also in their meaning, the Tribunal will describe first in respect of each commitment the arguments made by the parties on its scope and meaning.

### **3. Expropriation**

#### **a) Positions of the Parties**

213. Siemens argues that its investment has been expropriated indirectly as a result of measures taken by Argentina. According to Siemens, whether or not Argentina intended to expropriate its investment is irrelevant, what is of essence is the actual effect of the measures on the investors' property: "measures that indirectly, but effectively, deprive an investor of the use or enjoyment of its investment, including the deprivation of the whole or a significant part of the economic benefit of property, are as expropriatory as the seizure of an investor's formal title to its property."<sup>50</sup>

214. Siemens further argues that contractual rights and the right to complete a project are part of the property rights that may be expropriated and that government measures that frustrate such assurances and substantially

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<sup>50</sup> Memorial, para. 248.

deprive investors of their rights to have them respected amount to an expropriation.

215. According to Siemens, irrespective of whether or not the purpose of a State measure affects its legality, it does not affect the State's obligation to compensate the investor promptly, adequately and effectively; as plainly stated in Article 4(2) of the Treaty, the public purpose of expropriatory measures by either State party in no way alters the legal obligation to compensate investors affected by those measures. Failure to provide prompt, adequate and effective compensation renders the expropriation unlawful whether or not it is for a public purpose.

216. Siemens claims that the acts and omissions of Argentina were expropriatory measures that substantially deprived Siemens of the use and enjoyment of its investment, and significantly reduced its value without payment of any compensation. Siemens relied on the following assurances given and obligations undertaken by Argentina: (i) replacement of all DNIs previously issued by new DNIs issued through the System; (ii) discontinuation of the issuance of manual DNIs; (iii) implementation of the System on a nationwide basis; (iv) processing of immigration proceedings through the System and payment of the corresponding fees; and (v) adoption of all measures necessary to fulfill the obligations under the Contract and regular collection of SITS' revenues resulting from the fees and prices paid by the users.

217. According to Siemens, these assurances constituted essential conditions of its investment and Argentina was aware of its meaning as recognized in the report of the Commission:

“Progressive replacement of all DNIs [...] is actually the State's guarantee rather than an obligation of the contractor, and defines the value of the contract [...]

[...] the contract term, which is defined as a six-year term that may be extended for two three-year periods, prescribes a mechanism that guarantees returns on the investment made; this relates to the need to have all existing DNIs replaced by the ones dealt with in the contract

[...].”<sup>51</sup>

218. Siemens affirms that the acts and omissions of Argentina qualify as “measures” under Article 4(2) of the Treaty. According to Siemens, the term “measures” is an all encompassing term for any actions attributable to a State that may affect an investment and includes acts performed by its different organs and subdivisions. In the case of its investment, Siemens refers to the following measures that resulted eventually in its expropriation:

(i) From the date of execution of the Contract and up to August 1999 Argentina failed to meet the obligations it had undertaken to allow the performance of the Contract on schedule; it did not make the necessary budget allocations, it did not provide the funds and human resources necessary to make the system operational, it delayed approval of the FOM, it failed to execute agreements with the Provinces, and it did not adopt the statutory and executive measures necessary to carry out the replacement of existing DNIs by those issued through the System.

(ii) Argentina pressed SITS into postponing the initial date for DNI production because of the then upcoming elections and into agreeing to postpone until January 31, 2000 discontinuation of the manual issuance of DNIs.

(iii) Argentina failed: (A) to adopt alternative measures to implement the System throughout its territory even when the RNP had the exclusive power to issue the DNIs and gather the information to produce them, (B) to provide budget allocations for the Project for the year 2000, (C) to provide the technical definitions to complete implementation of the immigration proceedings system and the imposition of new requirements not included in the new Project, and (D) to provide the facilities to implement the External Circuit to extend the System throughout the national territory.

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<sup>51</sup> Quoted in para. 277 of the Memorial.

(iv) Argentina notified Siemens in January 2000 that it intended to reduce the originally agreed-upon prices in the Contract and that agreement to the reduction was a condition for the continuation of the Contract and, in February 2000, unjustifiably halted immigration processing and DNI production through the System.

(v) The negotiations that ensued were concluded in November 2000 with the promise that the System's revenue-generating operations would immediately resume, and to speed approval of the new contractual terms the Contract was subjected to the Emergency Law of 2000. Notwithstanding assurances of the President of the Republic that a decree would be issued approving the new terms before the end of the year, the new terms were never approved.

(vi) New terms were proposed by Argentina in May 2001 on a take it or leave it basis without providing the basic elements for an evaluation of the proposal. The new proposal was not acceptable to SITS, which indicated its willingness to consider alternatives. Argentina terminated the Contract on May 18, 2001 invoking the power granted under the 2000 Emergency Law and without reference to any technical or other reason related to the fulfillment of the Contract by SITS.

(vii) After termination of the Contract, Argentina failed to pay compensation, although it had acknowledged its obligation to do so, denied the right of defense to SITS when SITS filed an appeal against Decree 669/01, failed to receive the equipment, facilities and instruments used in Project execution, and refused to return the Contract performance bond although it was mandatory to return it at Contract termination.

(viii) Siemens' investment was the only foreign investment expropriated under the 2000 Emergency Law and the public purpose invoked to terminate the Contract was merely an excuse to legitimize the measure adopted by the Government for political convenience, since economic studies carried out by the Ministry of Economy had recommended renegotiation of the terms agreed by the parties.



219. Siemens concludes by affirming that the aggregate of these measures amounts to a creeping expropriation of its investment and submits that, notwithstanding that Argentina's conduct constitutes a case of creeping expropriation, it seems reasonable to consider May 18, 2001, the date of Decree 669/01, as the date of expropriation for valuation purposes. Siemens adds that the Treaty states that the value of an investment for purposes of compensation is determined by reference to the date before the intention to expropriate became known, and, therefore, the effects of the taking itself and any act related to the taking, including threats to take the asset concerned, that may have diminished the value of the property or enterprise on the date of the taking, shall not be considered in the valuation and that Siemens is entitled to compensation for any loss suffered before or after May 18, 2001 caused by Argentina's creeping expropriation.

220. In its Counter-Memorial, Argentina denies that it expropriated Siemens' investment and draws the Tribunal's attention to the following sentence of Article 4(2) of the Treaty: "The legality of the expropriation, nationalization or similar measure, and the amount of the indemnification should be reviewable through ordinary legal proceedings." Based on this sentence, Argentina asserts that it is entitled to apply this review option to any future decision of the Tribunal in connection with the alleged expropriation.

221. Argentina challenges the qualification of events by Siemens. It is Argentina's contention that for events to lead to an expropriation each one of them should affect the investment adversely. However, when the main feature of a contract is to provide one set of goods -the System in the instant case-, it is not possible to speak of successive acts, either the Contract is thwarted or not. Argentina argues that Siemens is unable to provide evidence that the alleged expropriatory events affected the investment adversely. In this respect, Argentina refers to the statement of Siemens that it agreed to renegotiate the Contract not only to save it but also because the Government had promised to resume the System's operation. This means, according to Argentina, that the Contract would not have been thwarted and there could not be a creeping expropriation. Argentina finds support for its line of argument in *Generation Ukraine, Inc. v.*

*Ukraine*, which admitted difficulty in finding many cases that fall under the creeping expropriation category and stated:

“A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor’s rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation.”<sup>52</sup>

222. Argentina then develops the argument that Siemens’ claim is a purely contractual claim and international law does not include regulations on contracts, as acknowledged in *Saudi Arabia v. Arabian American Oil Company (Aramco)*, *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*<sup>53</sup>, and by Professor Brownlie<sup>54</sup>. Furthermore, Siemens has not contributed evidence showing, as stated by the Annulment Committee in *Vivendi II*, clear conduct contrary to the relevant standard in the circumstances of the case. Argentina disputes the relevance of the Iran-US Claims Tribunal case law because the law applicable to the cases before that tribunal is different from the law applicable in this arbitration. That tribunal has to rule on contractual disputes, can apply commercial usages and has highly discretionary powers in deciding the applicable law. Argentina reminds the Tribunal that the applicability of the legal principles developed by the Iran-US Claims Tribunal was explicitly rejected in *Pope & Talbot, Inc. v. Canada*<sup>55</sup> and *S.D. Myers, Inc. v. The Government of Canada*<sup>56</sup>. Argentina also argues in detail the inapplicability to the instant case of holdings by the tribunals adduced by Siemens regarding acquired international rights: (i) *Aramco* was concerned with the application of international law to a contract that included its own stabilization clause, (ii) *Revere Cooper & Brass*,

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<sup>52</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (September 16, 2003), para. 20.26, quotation in the Counter-Memorial, para. 911.

<sup>53</sup> *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 I.L.R. 117, 165, AL RA No. 45; *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (November 1, 1999), ICSID Review, Foreign Investment Journal 1, 25, AL RA No. 47, cited in the Claimant’s Memorial, para. 917, 919.

<sup>54</sup> I. Brownlie: *Principles of Public International Law*, Oxford University Press, 5<sup>th</sup> ed., 1998, 550, 551, AL RA No. 46, cited in the Claimant’s Memorial, para. 918.

<sup>55</sup> *Pope & Talbot, Inc. v. Canada*, Interim Award (September 13, 2001), AL RA No. 50, cited in the Counter-Memorial, para. 926.

<sup>56</sup> *S.D. Myers, Inc. v. The Government of Canada*, Partial Award (November 13, 2000), cited in the Counter-Memorial, para. 926.

*Inc. v. Overseas Private Investment Corporation*<sup>57</sup> was a classic investment agreement protecting the investment differently from an investment treaty and it was internationalized by a stabilization clause, (iii) *Antoine Goetz et consorts v. Republic of Burundi*<sup>58</sup> was concerned with the revocation of a permit to operate in a free trade zone, (iv) *CME Czech Republic B.V. (the Netherlands) v. The Czech Republic*<sup>59</sup> was not concerned with contractual guarantees by a State, and (v) the findings of *CME* were contradicted by *Lauder*.

223. Argentina questions how Siemens has drawn the line to delimit the State's legitimate actions from actions entitling an investor to compensation. Argentina argues that, if the effect of depriving a person of its property is the criterion for this purpose, then any regulation would be expropriatory because regulations have a damaging effect on regulated parties. Argentina refers to the proportionality test advanced by *Tecmed* between the measures taken and the public interest pursued by them, and to the deference due to the State when it defines issues of public policy. Thus this requires a more complex analysis than proposed by Siemens.

224. Argentina finds support in recent arbitral awards - *Consortium RFCC v. Royaume du Maroc*<sup>60</sup>, *Waste Management, Inc. v. United Mexican States*<sup>61</sup>, *Generation Ukraine, SGS v. Philippines* - for arguing that a breach of treaty is not a breach of contract, it is not enough to qualify a contractual breach as a treaty violation, there should be a reasonable effort by the investor to obtain compensation through the domestic channels under the law applicable to the contract, and the State should not have used its sovereign powers to amend pre-existing legal situations and the parties' rights and obligations. In this respect, Argentina affirms that:

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<sup>57</sup> *Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, Award (August 24, 1978).

<sup>58</sup> *Antoine Goetz et consorts v. Republic of Burundi*, ISCID Case No. ARB/95/3, Award (September 2, 1998).

<sup>59</sup> *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award (September 13, 2001).

<sup>60</sup> *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award (December 22, 2003), para. 38 (AL RA 60), cited in the Counter-Memorial, para. 972.

<sup>61</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004), para. 171 (AL RA 61).

“(a) it did not act under its *ius imperii* powers; (b) it terminated the contract with SITS under the habitual and ordinary forms provided therefor by Argentine law; (c) such act did not thwart any right granted to the investor or its affiliate under the law of the Contract; and (d) after the termination of the Contract it was not engaged in any acts aimed at thwarting the rights agreed upon with SITS for the termination.”<sup>62</sup>

225. Argentina also affirms that, like the Philippines in the *SGS* case, it had “not issued any act (law or decree in sovereign function) aimed at disregarding the possible contractual rights of SITS. Should there be any debt, it would still exist.”<sup>63</sup>

226. Argentina requests the Tribunal to focus on two aspects of *Generation Ukraine*. First, arbitral tribunals do not exercise the function of an administrative review agency. Second, arbitral tribunals should consider the changes in the economy of the State hosting the investments when assessing the investor’s legitimate expectations. Argentina also calls the attention of the Tribunal to the holding in *Waste Management II*, to the effect that international expropriation law is not meant to eliminate the ordinary risk assumed by foreign investors, and to the fact that, under the Contract, SITS took responsibility for the business risk.

227. Argentina denies that it gave Siemens any warranty or profitability assurance, and claims that Siemens agreed to revise the Contract when faced with the failure of the essential features of the System and the substantial alteration of the economic conditions under which the Contract was intended to be carried out. Argentina contends that Siemens must comply with the Contract before requesting its fulfillment and lists as breaches of the Contract concealed from the Tribunal the following: delay in the design of the FOM and the Security Operating Model, the imperfect designs for the Security Operating Model, the External Data Capture Circuit and fingerprint taking, ignorance of the Argentine personal identification system, failure to deliver the source codes, vulnerability of

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<sup>62</sup> Counter-Memorial, para. 969.

<sup>63</sup> *Ibid.*, para. 986.

the System, and the hindrances placed by SITS during the entire reception process, including its refusal to participate.

228. In any case, pleads Argentina, even if the arguments of Argentina were rejected, the mere “effect” criterion applied by the Iran-US Claims Tribunal would not result in an expropriatory effect of the alleged actions of Argentina under Argentine law applicable to the Contract.

229. In its Reply, Siemens rejects the allegation of Argentina that, under Article 4(2), it has the right to submit to review before the local courts the potential award of this Tribunal. Siemens explains that this Article grants the investor, who is the only party affected by the expropriation measures, the right to challenge the legality of the expropriation and the amount of the compensation in ordinary judicial proceedings.

230. Siemens then questions the definition of expropriation used by Argentina in its allegations, namely, that expropriation may occur only directly or through measures that autonomously and independently affect the investment adversely, that deprivation of or substantial interference with contractual rights does not constitute an expropriation under international law, and that the effect of the measure should completely thwart the investment or be unreasonable,

231. Siemens notes that the Treaty includes measures tantamount to expropriation and explains that provisions on indirect expropriation are usually generic statements given the great variety of possible measures. Siemens refers to the findings by the tribunals in *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*,<sup>64</sup> *CME, Metalclad Corporation v. The United Mexican States*,<sup>65</sup> *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*,<sup>66</sup> *Middle East Cement Shipping and Handling Co.*

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<sup>64</sup> *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (February 17, 2000).

<sup>65</sup> *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000).

<sup>66</sup> *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Case No. 7, Award No. 141-7-2- (June 22, 1984), 6 IRAN-U.S. C.T.R. (1986), 219, at pa. 225, Legal Authorities No. 23, cited in the Memorial, para. 243.

*S.A. v. Arab Republic of Egypt*<sup>67</sup> and *Tecmed* to show the endorsement of the notion of indirect expropriation by arbitral tribunals; such expropriation takes place by a variety of measures that by themselves would not necessarily be expropriatory or adversely affect the investment, nor would they need to be intended to be expropriatory. Siemens refers to scholarly opinion on the notion of creeping expropriation:

“In some, if not most other, creeping expropriations, however, that intent [to expropriate], though possibly present at some level of the host state’s government, will be difficult, if not impossible to discern. Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor’s property rights.”<sup>68</sup>

232. Siemens alleges that an analysis of *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*,<sup>69</sup> *Tradex Hellas S.A. v. Republic of Albania*,<sup>70</sup> *Santa Elena*, *Tecmed*, *Generation Ukraine* and Iran-US Claims Tribunal jurisprudence shows that expropriatory measures that take place step by step should be analyzed in their aggregate effects and not “autonomously and independently” as argued by Argentina. Siemens concludes that the termination of the Contract was not the only expropriatory step but the last of a clear chain of measures taken by Argentina since 1999 that destroyed the value of Siemens’ investment.

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<sup>67</sup> *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (April 12, 2002).

<sup>68</sup> M. Reisman *et al*, “*Indirect Expropriation and its Valuation in the BIT Generation*”, 74 *BYIL* (2003) pp. 123-124, cited in the Reply, para. 422, emphasis added by the Claimant.

<sup>69</sup> *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, Award on Jurisdiction and Liability (October 27, 1989), 95 *Int’l Law Reports* (1994), 184, at pa. 210-11, Claimant’s Legal Authorities No. 35, cited in the Memorial, para. 372.

<sup>70</sup> *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case, No. ARB/94/2, Award (April 29, 1999).

233. Siemens disputes Argentina's assertion that there cannot be expropriation following contractual breaches and repudiation of the Contract. Siemens refers to the opinion of Professor Schreuer, who states that:

“[...] the mere fact that the investment was made on the basis of a contract does not preclude a violation of the BIT [the Treaty]. Nor does an allegation of contract violations mean that a BIT claim cannot arise from the same facts. The standards are simply different. It is incumbent upon the Claimant to demonstrate a violation of the BIT. This task is not made impossible or more onerous by the simultaneous existence of contract violations.”<sup>71</sup>

234. Siemens further disputes the argument that, when a contract is subject to a domestic legal system, expropriation of rights under the contract would be precluded. Siemens maintains that the law governing a particular contract and whether contractual rights may be expropriated are two distinct and unrelated questions; contractual rights may be expropriated as tangible property may be expropriated. Siemens also questions the argument that a contract cannot be governed by international law unless it contains a stabilization clause: “the decisive point is that the absence of a stabilization clause does not mean that the contract cannot be the object of an expropriation. The expropriation of rights under a contract containing a stabilization clause would merely give rise to an additional claim for violation of that clause.”<sup>72</sup>

235. Siemens recalls that Article 1 of the Treaty defines as protected investments “every kind of asset” and specifically “rights to funds used to create economic value or to any performance with an economic value” and “concessions conferred by public law entities.” Siemens alleges that judicial practice unanimously supports a wide concept of property that includes rights under contract, e.g., the decisions in *Rudloff*<sup>73</sup>, *Norwegian Shipowners*<sup>74</sup>, *Factory at Chorzów*<sup>75</sup>, and the case law of the Iran-US Claims Tribunal.

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<sup>71</sup> Reply, para. 433.

<sup>72</sup> *Ibid.*, para. 438, quotation from Professor Schreuer's legal opinion.

<sup>73</sup> *Rudloff Case*, Interlocutory Decision, 1903, 9 Reports of International Arbitral Awards (RIAA) 244, 250 (1959), Legal Authorities 40, quoted in the Reply, para. 442.

236. According to Siemens, a breach of contract or actions affecting contract rights may constitute an expropriation when: (i) the breach consists of one or part of a series of acts that combine to effect a creeping expropriation; (ii) the breach is of such fundamental nature that it goes to the heart of the promised performance and adversely affects the continuance of the project concerned; (iii) regulatory conduct denies contract rights or requires their alteration; (iv) specific contract rights or rights under a contract as a whole are repudiated, and (iv) a stabilization clause is breached. Siemens affirms that most of these situations apply in the instant case.

237. As regards the argument that Argentina did not act in its sovereign capacity, Siemens finds the argument implausible given termination of the Contract by decree, rejection of the appeal by decree, and termination based not on contractual grounds but on the 2000 Emergency Law. Furthermore, Argentina has argued that a decisive reason for the termination was that a substantial number of Provinces refused to participate in the implementation of the Project.

238. Siemens explains that the purpose of the measures is not a criterion to determine whether an expropriation has occurred. Under Article 4(2) of the Treaty, public purpose is a criterion for the expropriation's legality, "Similarly, proportionality and reasonableness may play a role in assessing whether the power to expropriate has been exercised properly. But these criteria do not affect the question whether an expropriation exists or not."<sup>76</sup> Commenting on the cases relied on by Argentina, Siemens observes that they relate to regulatory takings, while Siemens was deprived of its investment through measures taken directly against it and not through regulatory measures.

239. Siemens rejects the argument that it needed to seek prior recourse through domestic channels and observes that this is an attempt to reintroduce an argument already put forward at the jurisdictional stage. Siemens

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<sup>74</sup> *Norwegian Shipowners' Claims (Norway v. United States)*, Award (October 13, 1922), 1 *RIAA* 307, p. 325.

<sup>75</sup> *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment (May 25, 1926), *PCIJ Series A, No. 7*, p. 44.

<sup>76</sup> Reply, para. 465, quotation from Professor Schreuer's legal opinion.



explains that, under Article 26 of the Convention, the Contracting Parties waive the local remedies rule unless they state otherwise, which Argentina has not done and, in any case, SITS and the Claimant made every reasonable effort to obtain correction of Argentina's measures through domestic means, including an administrative appeal against Decree 669/01. Contrary to the factual situation in the cases of *Waste Management II* and *Generation Ukraine* adduced by Argentina, in the instant case Siemens' loss is persistent, irreparable, caused by the Government and not by low-level officials whose acts of maladministration might easily be corrected.

240. Siemens also dismisses the argument that it may not be entitled to claim under the Treaty because it allegedly failed to perform its own obligations. Siemens observes that Article 4(2) does not impose any duty with regard to the investor; there is no defense based on the failure to comply with the other party's duties.

241. Argentina in its Rejoinder affirms that Siemens fails to draw the line between a contractual breach and the expropriation of an agreement, and clarifies that it referred to *Waste Management II* in its argument because the tribunal in that case established criteria for expropriation of an agreement, namely, an effective repudiation of the property rights of the investor which prevents it from exercising them entirely or to a substantial extent, and not redressed by remedies available to the claimant. Argentina emphasizes the reasonableness of the measures taken as part of the expropriation concept and as held by the European Court of Human Rights and *Tecmed*.

242. Argentina contends that the measures were taken under the usual and ordinary forms of terminating an agreement and Siemens failed to reply to its arguments and focused instead on whether the measures were taken in the exercise of its *ius imperium*. Argentina insists that there is a requirement of making a reasonable effort on the part of the investor to obtain correction in the domestic jurisdiction, and that this is a substantive requirement to distinguish between an act of maladministration from an act which constitutes an expropriation, "not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is

doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction.”<sup>77</sup> In this respect, Argentina argues that SITS failed to comply with its essential duties and agreed to re-negotiate the Contract to conform to the fiscal possibilities of the State and the pocketbook of the people.

243. Argentina takes issue with the contention of Siemens that the defense of non-performance does not apply because investors may assert their rights under the Treaty. Argentina argues that the exception *non adimpleti contractus* is equally a principle of international law. Argentina maintains that the conditions set in *Waste Management II* for contract expropriation are not met in this case. According to Argentina, the actions taken before Decree 699/01 were in response to technical errors and failures to deliver on the part of SITS and its sub-contractors. Argentina insists that the termination of the Contract by Decree 669/01 was not only based on economic considerations but also on technical grounds after receiving independent advice. Therefore, Decree 669/01 was a legitimate, rational and proportionate response to a disappointing and inadequate performance of SITS’ contractual obligations; it was not an expropriatory measure since “[i]t left intact the Claimant’s contractual rights, and in particular the ability to have recourse to the national courts of Argentina to challenge acts of its contractual partner which it considered to have breached the Contract.”<sup>78</sup>

244. Argentina further develops the argument that investment treaties are not a guarantee of profits to foreign investors and contends that if Decree 669/01 were to be considered expropriatory by the Tribunal, then the expropriation is a lawful expropriation because “it was a reasonable and proportionate response to a national fiscal crisis; it was carried out for a public purpose; it was not discriminatory on national or any grounds; and the decree contained within its terms provision for compensating SITS for cancellation of the Contract.”<sup>79</sup> Argentina explains that there were at least two major public policy reasons for the termination of the Contract: the massive fiscal crisis which necessitated cutting back projects involving a high level of public expenditure,

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<sup>77</sup> *Generation Ukraine*, para. 20.30, quoted in Rejoinder para. 544.

<sup>78</sup> Rejoinder, para. 571.

<sup>79</sup> *Ibid.*, para. 572.

and the inability or unwillingness of a substantial number of Provinces to participate in the Project given the fiscal crisis.

**b) Considerations of the Tribunal**

245. Before considering the arguments dealing with expropriation proper, the Tribunal will address the issue of contractual claims as opposed to treaty claims which has been argued by the parties in the context of the asserted breach of Article 4(2) and also of Article 7(2) (the umbrella clause). Subsequently, the Tribunal will discuss whether under Article 4(2) the findings of this Tribunal are subject to review by the ordinary courts, whether each individual measure in a creeping expropriation needs to be considered autonomously, whether the proper law of the Contract is relevant for purposes of expropriation, whether intent of the State to expropriate is necessary or only the effects of the State's measures need to be considered, whether an expropriation has taken place, and, if so, whether it conformed with the Treaty requirements.

**i) Treaty claims and Contract Claims**

246. Argentina has argued that at no time in the course of the dispute with SITS it took measures that could be regarded as an exercise of its police powers as a State, including when it terminated the Contract under the 2000 Emergency Law. The Tribunal considers that Argentina's view of when a State acts *iure imperii* is exceedingly narrow and inconsistent with the arguments advanced by Argentina itself.

247. The distinction between acts *iure imperii* and *iure gestionis* has its origins in the area of immunity of the State under international law and it differentiates between acts of a commercial nature and those which pertain to the powers of a State acting as such. Usually States have been restrictive in their understanding of which activities would not be covered by their immunity in judicial proceedings before the courts of another State. Here we have the reverse situation where the State party posits a wide content of the notion of *iure gestionis*.

248. In applying this distinction in the realm of investor-State arbitration, arbitral tribunals have considered that, for the behavior of the State as

party to a contract to be considered a breach of an investment treaty, such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract:

“ Pour qu’il y ait droit à compensation il faut que la personne de l’exproprié prouve qu’il a été l’objet de mesures prises par l’Etat agissant non comme cocontractant mais comme autorité publique. Les décisions aux cas d’expropriation indirecte mentionnent toutes l’ ‘interférence’ de l’Etat d’accueil dans l’exercice normal, par l’investisseur, de ses droits économiques. Or un Etat cocontractant n’ ‘interfère’ pas, mais ‘exécute’ un contrat. S’il peut mal exécuter ledit contrat cela ne sera pas sanctionné par les dispositions du traité relatives a l’expropriation ou à la nationalisation à moins qu’il ne soit prouvé que l’Etat ou son émanation soit sorti(e) de son rôle de simple cocontractant(e) pour prendre le rôle bien spécifique de Puissance Publique. ”<sup>80</sup>

249. *Waste Management II* distinguished a number of categories to determine whether it was faced with a matter of contract non-performance or expropriation. In the first category are those cases “where a whole enterprise is terminated or frustrated because its functioning is simply halted by decree or executive act, usually accompanied by other conduct.”<sup>81</sup> In the second category fall instances of “acknowledged taking of property, and associated contractual rights are affected in consequence.”<sup>82</sup> The third category includes cases “where the only right affected is incorporeal.”<sup>83</sup> In the latter cases, “the mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts.”<sup>84</sup>

250. The tribunal in *SGS v. Philippines* excluded as a treaty claim the debt owed to SGS because there had not been a “law or decree enacted by the

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<sup>80</sup> *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No.ARB/00/6, Award (December 22, 2003), para. 65.

<sup>81</sup> *Waste Management II*, para. 172.

<sup>82</sup> *Ibid.*, para. 173.

<sup>83</sup> *Ibid.*, para. 174.

<sup>84</sup> *Idem.*

Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation [...] A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal.”<sup>85</sup>

251. In the *Jalapa Railroad* case, the US-Mexican Mixed Claims Commission decided: “Here the Government of Veracruz stepped out of the role of contracting party and sought to escape vital obligations under its contract by exercising its superior governmental power.”<sup>86</sup>

252. In *Salini v. Jordan*, the tribunal held:

“Only the State, in the exercise of its sovereign authority (*puissance publique*), and not as a Contracting Party, has assumed obligations under the bilateral agreement. [...] In other words, an investment protection treaty cannot be used to compensate an investor deceived by the financial results of the operation undertaken, unless he proves that his deception was a consequence of the behavior of the receiving State acting in breach of the obligations which it had assumed under the treaty.”<sup>87</sup>

253. What all these decisions have in common is that for the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its “superior governmental power”. It is not a matter of being disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action.

254. In the instant case, what actions did Argentina take to step out of its role as a contractual party? In the first place, Argentina issued Decree 669/01 on the basis of the 2000 Emergency Law. Argentina has advanced the argument that termination of the Contract by Decree 669/01 was based not only on the fiscal emergency but also on the failures of the Contractor. This is not a credible argument inasmuch as Decree 669/01 and Decree 1205/01 did not provide for

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<sup>85</sup> *SGS v. Philippines*, para. 161.

<sup>86</sup> Referred to in Professor Schreuer’s legal opinion, p. 50. Whiteman, *Digest of International Law* (1976), vol. 8, pp. 908-909.

<sup>87</sup> *Salini v. Jordan*, para. 155.

termination based on non-performance and Argentina itself has manifested in these proceedings that at no time had it affirmed that the Contract was rescinded by the Contractor's fault.<sup>88</sup>

255. Argentina itself has argued that the Tribunal should defer to Argentina in deciding what is in the public interest of Argentina, and should consider the measures taken by Argentina – the 2000 Emergency Law and Decree 669/01 - as a response by the State to the impending financial and social crisis. The Tribunal has no intention of second guessing the considerations that led Argentina to declare a fiscal emergency in 2000. At this stage, the Tribunal simply notes that this argument is not consistent with the submission that Decree 669/01 was a measure taken as a simple contracting party. Whether Decree 669/01 is a measure in breach of the Treaty is a question that the Tribunal will address later.

256. In the view of the Tribunal, Decree 669/01 is not the only measure that can be attributed to Argentina as a State. Argentina used its governmental authority on other occasions. First, Argentina interfered in the contractual relationship with SITS by requiring changes in the economic equation when the change of Government occurred and nearly a year before the fiscal emergency was declared. Argentina has claimed that, as a State, it has a right under administrative law to request changes in a contract. The Tribunal considers that, irrespective of whether the changes requested were or were not within the *ius variandi* of the State (a disputed matter between the parties), this is a right that Argentina claims as a State in order to control the deteriorating fiscal situation in the country. This is an assessment by the State related to the public interest and not one that would pertain to a regular contractual party.

257. Second, Argentina failed to enter into the agreements with the Provinces related to the External Circuit. The Tribunal considers this matter to be beyond a contractual breach because Argentina relies on its political structure to excuse itself from the obligation undertaken and because it relied on it as a matter of policy for terminating the Contract. As a State, Argentina should know

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<sup>88</sup> Paras. 222 and 232 of the Rejoinder.

what is possible for it to do (or not to do) with respect to its Provinces and the extent to which it may honor its commitments because of its own political structure.

258. Third, the *permanent* suspension of the two main components of the Project –the RPN sub-system and the DNM sub-system – also falls in the non-contractual category. The fact that an authorization was needed and never given for the immigration component is clearly a governmental act which had no basis in the Contract and its need came to light only when the DNM sub-system started to operate and in the context of Argentina expressing its intention to renegotiate the Contract. The alleged authorization requirement is suspect because the Contract had been drafted by Argentina and all the agencies that were involved later when the Contract was in effect had previously reviewed the terms of the Contract. The “provisional” suspension of the RPN sub-system is reasonable in terms of checking and correcting errors; what exceeds the contractual role and does not fit with Argentina’s legitimate security concerns is that SITS was not allowed to correct the error and that the manual system is still in effect as it was when the Contract was open for bids. During the Contract renegotiation, the resumption of the RPN sub-system was not linked to security concerns.

259. Fourth, Decree 669/01 provides for compensation to be paid. Argentina has not paid compensation, using arguments that go beyond its rights under the Contract. We refer to the issue of the source codes. SITS may or may not have complied with Article 10.12. At this stage it is immaterial because the Contract has been terminated and this article only required that the source codes be deposited with a notary public until the termination of the Contract. There is no provision of the Contract that requires delivery of the source codes to Argentina at Contract termination. There are provisions covering delivery of non-exclusive licenses but not of source codes. This is such an important matter in the technology field, as Argentina itself has argued, that it could not have been left to interpretation and guesswork. If it had been really intended *ab initio* that the source codes would have to be delivered to Argentina, the Contract would have specifically provided for this obligation. This is confirmed by the answer given by

the Ministry of the Interior to Question No. 48 of SITS during the bidding stage of the Contract. The Minister had been asked to confirm that, under Article 95 of the Contract, the Ministry of the Interior's only right in respect of the software would be a non-exclusive license to its use. The Minister replied that the Bidding Terms and Conditions required that a permanent and non-exclusive license of use of the software be transferred to the Ministry. The Minister added: "This notwithstanding the bidder or the contractor may transfer in full or in part the property rights to the software if it would be acceptable [to the bidder or the contractor]." <sup>89</sup>

260. The Tribunal concludes that, in the actions listed above, Argentina acted in use of its police powers rather than as a contracting party even if it attempted at times to base its actions on the Contract. As to the other allegations made by Siemens, they relate to delays, non-budgetary allocations, or continuation of the manual system to issue DNIs and are actions that, in the context, could be construed as acts of a contractual party or of the sovereign acting as such. They are not essential to a finding of expropriation and the Tribunal will not consider them.

**ii) Ordinary Courts' Review of the Legality of the Expropriation and of the Amount on Account of the Compensation under Article 4(2) of the Treaty**

261. Article 4(2) provides that the legality of the expropriation, nationalization or equivalent measure, and the amount of compensation, may be subject to review by the ordinary courts. Argentina has reserved its right to apply this review option to any future decision of the Tribunal in connection with the expropriation. The context of the sentence does not support any right of Argentina in that respect. Article 4(2) is concerned with expropriation, nationalization or measures tantamount to either taken by the parties to the Treaty, and with the compensation paid. It is that expropriation or nationalization or compensation that is subject to the review of the ordinary courts, not a

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<sup>89</sup> Exhibit 94 to the Memorial, emphasis added by the Tribunal. Translation by the Tribunal.



decision by this Tribunal. The objective of the sentence in question is to ensure that the investor has access to the ordinary local courts to review actions by the Government. It is a right that the parties accord to the investor, not to themselves, in relation to decisions of this Tribunal.

### **iii) Autonomy of the Measures constituting Creeping Expropriation**

262. Argentina has argued that each measure alleged by the Claimant to be part of the process that results in a creeping expropriation must have an adverse effect on the investment, and that in the instant case it is not possible to speak of successive acts because if agreement had been reached on the renegotiated Contract, the Contract would not have been thwarted, to use Argentina's own words.

263. By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.

264. We are dealing here with a composite act in the terminology of the Draft Articles. Article 15 of the Draft Articles provides the following:

“(1) The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act”.

265. As explained in the ILC's Commentary on the Draft Articles:

“Paragraph 1 of Article 15 defines the time at which a composite act 'occurs' as the time at which the last action or omission occurs which,

taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series.”

266. The concept could not be better explained.

#### **iv) Expropriation of Contractual Rights and Proper Law of the Contract**

267. Argentina has linked the argument about expropriation of contractual rights and the law applicable to the Contract and assumes that unless a contract is internationalized through a stabilization clause, it is not susceptible of expropriation. The fact that the Contract is subject to Argentine law does not mean that it cannot be expropriated from the perspective of public international law and under the Treaty. The two issues are unrelated. The Contract falls under the definition of “investments” under the Treaty and Article 4(2) refers to expropriation or nationalization of investments. Therefore, the State parties recognized that an investment in terms of the Treaty may be expropriated. There is nothing unusual in this regard. There is a long judicial practice that recognizes that expropriation is not limited to tangible property. The Tribunal will refer, for the sake of brevity, to the findings of the Permanent Court of Arbitration (“PCA”) in the case of the *Norwegian Shipowners’ Claims* and the Permanent Court of International Justice (“PCIJ”) in the *Factory at Chorzów Case*.

268. The PCA held that “[...] whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed.”<sup>90</sup> The PCIJ found that:

“[...] it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland. As these rights related to the Chorzów factory and were, so to speak, concentrated in that factory, the prohibition contained in the last

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<sup>90</sup> Norwegian Shipowners’ Claims (Norway v. United States), p. 325.

sentence of Article 6 of the Geneva Convention applies in all respects to them.”<sup>91</sup>

269. These findings on the issue are conclusive and have been followed by ICSID and NAFTA tribunals, and the Iran-US Claims Tribunal. The Respondent has taken exception to the relevance of cases decided by the latter tribunal on the basis of the law applicable to those cases. The Tribunal considers that the findings of that tribunal are significant in that they show the consistency of approach on this matter by different international jurisdictions.

**v) Intent to Expropriate**

270. Argentina has argued against taking into consideration only the effect of measures for purposes of determining whether an expropriation has taken place. The Tribunal recalls that Article 4(2) refers to measures that “a sus efectos” (in its Spanish original) would be equivalent to expropriation or nationalization. The Treaty refers to measures that have the effect of an expropriation; it does not refer to the intent of the State to expropriate. The quotation of the finding of the PCA in *Norwegian Shipowners* refers to “whatever the intentions”<sup>92</sup> of the US were when the US took the contracts. A different matter is the purpose of the expropriation, but that is one of the requirements for determining whether the expropriation is in accordance with the terms of the Treaty and not for determining whether an expropriation has occurred.

**vi) Was the Investment Expropriated?**

271. The Tribunal has identified a series of measures that Argentina took which cannot be considered as measures based on the Contract but on the exercise of its public authority. Of all these measures, Decree 669/01 by itself and independently can be considered to be an expropriatory act. It was not based on the Contract but on the 2000 Emergency Law, it was a permanent measure and the effect was to terminate the Contract. Had it not been for Decree

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<sup>91</sup> *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment (May 25, 1926), *PCIJ Series A, No. 7*, p. 44.

<sup>92</sup> *Norwegian Shipowners' Claims*, p. 325.

669/01, and if a revised contract proposal had been agreed, the measures taken previously by themselves might not have had the effect and permanence required to be considered expropriatory, but, as no agreement was reached and the measures were never revoked, they stand as part of a gradual process which, with the issuance of Decree 669/01, culminated in the expropriation of Siemens' investment.

272. Contrary to the facts of the cases adduced by Argentina, the acts identified by the Tribunal as measures leading to the expropriation are acts of Argentina, decided at the highest levels of government, and not "simple acts of maladministration by low level officials." For that reason, Argentina's argument that simple acts of maladministration by low-level officials should be pursued in the local courts lacks validity in the circumstances of the instant case.

**vii) Was the expropriation in accordance with the Treaty?**

273. The Treaty requires that the expropriation be for a public purpose and compensated. The Tribunal finds that there is no evidence of a public purpose in the measures prior to the issuance of Decree 669/01. It was an exercise of public authority to reduce the costs to Argentina of the Contract recently awarded through public competitive bidding, and as part of a change of policy by a new Administration eager to distance itself from its predecessor. On the other hand, the public purpose of the 2000 Emergency Law was to face the dire fiscal situation of the Government. This is a legitimate concern of Argentina and the Tribunal defers to Argentina in the determination of its public interest. However, while the Tribunal would be satisfied in finding that an expropriation has occurred based only on Decree 669/01, and that the public purpose pursued by this Decree, in the context of Argentina's fiscal crisis and the 2000 Emergency Law, would be sufficient to meet the public purpose requirement of expropriation under the Treaty, the Tribunal cannot ignore the context in which Decree 669/01 was issued, nor separate this Decree from the other measures taken by Argentina in respect of the investment that culminated in its issuance. Decree 669/01 became a convenient device to continue the process started more than a year earlier long before the onset of the fiscal crisis. From this perspective, while

the public purpose of the 2000 Emergency Law is evident, its application through Decree 669/01 to the specific case of Siemens' investment and the public purpose of same are questionable. In any case, compensation has never been paid on grounds that, as already stated, the Tribunal finds that are lacking in justification. For these reasons, the expropriation did not meet the requirements of Article 4(2) and therefore was unlawful. The Tribunal will examine the issues of compensation after addressing the alleged breaches of other obligations of Argentina under the Treaty.

#### **4. Fair and equitable treatment**

##### **a) Positions of the Parties**

274. Siemens argues that the obligation to treat an investment fairly and equitably requires arbitral tribunals to take into account the totality of the circumstances in each case. The proposition that investments shall have fair and equitable treatment and full protection and security constitutes the “overriding obligation”, and other standards must be applied as part of this general one. According to Siemens, fair and equitable treatment and full protection and legal security are intended to accord foreign investors broad protection, including a stable and predictable investment environment. Predictability is an essential element of stability, the rules and practices that affect investments must be predictable. A State violates the fair and equitable treatment standard when it fails to respect the specific assurances that it had given to investors as an inducement to invest and on which investors relied in making the investment

275. Siemens contends that Argentina provided assurances that SITS would be allowed to complete the Project and obtain the earnings that were the price of the System in an investment environment that was and would remain stable and predictable. To induce Siemens to invest in the Project, Argentina granted SITS the right to implement the complete and integral provision of the System and to issue all the DNIs to replace those existing on the date of the Contract, and all new DNIs and their renewals after the System entered into operation. The investment logically had to be made before the System startup

and the return on the investment was dependent on the issuance of the DNIs and the processing of immigration proceedings.

276. According to Siemens, the acts and omissions previously described destroyed irreparably the legal framework for Siemens' investment, and at all times prior to the unilateral termination of the Contract Argentina promised that the Project would continue and the operation of the System would be resumed. Furthermore, due to Siemens' claim for compensation, Siemens has faced serious problems in other activities in Argentina.

277. Siemens argues that the standard of just and equitable treatment requires stable investment environments by ensuring transparency and predictable rules and practices, which in turn mean that the investor may rely on the undertakings made by the State to the investor. Additionally, fair and equitable treatment means freedom from coercion and harassment, due process and good faith. According to Siemens, RNP interposed serious obstacles to the regular performance of the DNI sub-system, the new authorities after the elections abused the vulnerable position of SITS and the renegotiation process announced in January 2000 was carried out under the threat of the early cancellation of the Contract. Siemens claims that Argentina committed gross procedural improprieties by interrupting the income generating activities, by denying SITS' access to the administrative records, by denying SITS the right to be heard on the May 2001 proposal and withholding information necessary for the decision of SITS on the proposal, by failing to meet the core requirements for terminating the Contract under the 2000 Emergency Law, and by removing administrative files pointing to the Government's failures. Furthermore, after termination of the Contract, SITS was denied information on the background of Decree 669/01 and evidence in support of its position, internal reports were issued without notice to SITS or without recording them in the administrative file, and SITS was excluded from the DNI sub-system test carried out together with SITS' former sub-contractors.

278. According to Siemens, the actions referred to above show also lack of good faith in the conduct of Argentina; in particular, the May 2001 proposal was done in bad faith to trigger the Contract's termination. Siemens

adds non-payment of compensation, keeping the Contract performance bond, not taking responsibility for the sub-contractors' claims and the fact that all the alleged contractual breaches on which Argentina bases its defense were never notified to SITS or Siemens.

279. In its Counter-Memorial, as regards the violation of the full protection and security obligation, Argentina argues that the Claimant has failed to allege how this breach had taken place and affirms that this obligation refers only to physical damage. Then Argentina objects to the concept of fair and equitable treatment advanced by Siemens. Argentina argues that fair and equitable treatment means no more than the minimal treatment afforded by international law. It certainly does not mean that it gives arbitral tribunals the power to decide on the basis of equity. Argentina refers approvingly to the interpretation on this point by the NAFTA Free Trade Commission ("FTC"), recent investment treaties signed by the US and the findings of tribunals in *Genin, S.D. Myers* and *Azinian*.

280. Argentina disagrees with Siemens on the application of the standard of just and equitable treatment to the facts of the case. Argentina refers to the principle of good faith enshrined in this standard, how this standard applies equally to investors and States and how Siemens breached it during the failed negotiation that led to the rescission of the Contract. Thus Siemens systematically refused to reveal its cost structure; and "[i]n a demonstration of bad faith, Siemens went along with negotiations with the Commission named by the Argentine Government, by successive reductions in the final price of IDs."<sup>93</sup> Siemens also accepted the inclusion of the Contract in the 2000 Emergency Law and is prevented now by the doctrine of *estoppel* to claim that it was unaware of the implications, for "if its intention was to save the contract, it should have undertaken to bear the consequences that resulted from this emergency and adjust its expectations and claims so as to reach the shared burden of sacrifice" established by this law.<sup>94</sup> The need for shared sacrifice, according to Argentina, stems from the good faith that the parties owe each other, and fair and equitable

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<sup>93</sup> Counter-Memorial, para. 1079.

<sup>94</sup> *Ibid.*, para. 1080.

treatment “in essence constitutes a guarantee of appropriate and reasonable treatment and that this should be viewed and analyzed taking into consideration the concrete and specific historical circumstances of the treatment. Fair and equitable treatment contains elements of good faith, consistency and reasonableness, which should be evaluated always bearing in mind the events that originated this arbitration.”<sup>95</sup>

281. Argentina also contends that the System did not provide the intended security and refers the Tribunal to the multiple security deficiencies pointed out in the audit performed by the Argentine authorities. In this respect, Siemens is responsible for SITS’ failures. It is not possible to make a claim for events affecting the subsidiary and at the same time avoid the legal consequences of the subsidiary’s acts.

282. As a final argument under this heading, Argentina alleges that SITS and Siemens consented to the 2000 Emergency Law in a case of normative acquiescence. Argentina refers in this respect to the *Preah Vihear Temple* case where the ICJ found: “It is an established rule that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error.”<sup>96</sup> Argentina argues that Thailand, the party pleading error, can be substituted by the Claimant and SITS, which “accepted the emergency and their incorporation to the emergency legal system.”<sup>97</sup>

283. In its Reply, Siemens affirms that the allegation of Argentina that the conduct of SITS or Siemens lacks good faith because of the failure to reveal the cost structure is misplaced. Indeed, Article 2(1) addresses the duties of the State to the investors and not the reverse, and neither the Contract nor the 2000 Emergency Law required such disclosure. As for the doctrines of *estoppel* and acquiescence invoked by Argentina, Siemens points out that both doctrines had their origins in inter-State relations and it is doubtful that they can be extended to

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<sup>95</sup> *Ibid.*, para. 1082.

<sup>96</sup> *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports (1962) p. 26, cited in para. 1090 of Counter-Memorial.

<sup>97</sup> *Ibid.*, para. 1092.



the area of investor-State relations. Siemens claims that there is no statement of fact by Siemens on which Argentina could have relied to its own detriment, and as regards acquiescence to the law, Siemens observes that the applicability of legislation does not depend on the assent or protest of foreign investors or of any other party subject to the law, and the fact that SITS did not take legal action against Resolution No. 1779/00 of the Ministry of the Interior does not mean that Siemens waived its rights under the Treaty against an uncompensated expropriation or other actions violating the Treaty's substantive standards.

284. Siemens denies that the protection accorded by the standard of fair and equitable treatment is the minimum required of States under international law:

“An interpretation that is in accordance with the BIT’s object and purpose would also have to give some independent meaning to the fair and equitable treatment standard. An interpretation that reduces its meaning to standards that are contained already in customary international law would deprive it of any independent meaning and would make the provision redundant. The application of the general principles of international law is already mandated by Article 10, paragraph 5 of the BIT. If Article 2(1) of the BIT providing for fair and equitable treatment is to have an independent meaning it must be in addition to the general principles of international law.”<sup>98</sup>

285. Siemens points out that the *Neer* standard has been rejected consistently in recent decisions: (i) in *ELSI*, the ICJ considered that to be a breach of the standard State conduct needs to show “a willful disregard of the process of law, an act which shocks, or at least surprises, a sense of judicial propriety”, (ii) in *Mondev Intl. Ltd. v. The United States of America* and *Loewen Group, Inc. and Raymond L. Loewen v. the United States of America*, the tribunals used the adjectives “improper and discreditable”, (iii) in *Loewen, Waste Management* and *MTD*, the tribunals considered discrimination against foreigners an important indicator of failure to respect fair and equitable treatment,

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<sup>98</sup> Reply, para. 504, quotation of Professor Schreuer’s legal opinion.

and (iv) in *Waste Management* and *MTD* the tribunals used terms such as arbitrariness, idiosyncrasy, injustice, lack of good faith, lack of due process and proportionality.<sup>99</sup>

286. As regards the views of Argentina on the scope of “full protection and security”, Siemens observes that the Treaty goes further than most investment treaties when it refers to “legal” security and this reference is “a strong indication that the provision, as contained in the BIT [Treaty], goes beyond mere physical violence and extends to the investor’s legal position.”<sup>100</sup> Siemens refers to the following measures or omissions that deprived it of its protection and legal security: failure to make the budgetary allocations, suspension of the income-generating activities, renegotiation of the Contract under extreme pressure, and abusive use of the 2000 Emergency Law to terminate the Contract.

287. In its Rejoinder, Argentina argues that, given the failure of SITS to perform its obligations under the Contract and the circumstances of fiscal stringency, the issuance of Decree 669/01 could not be considered an arbitrary, grossly unfair, idiosyncratic measure, nor did it involve lack of due process. Argentina contests the broad interpretation of fair and equitable treatment by Siemens and takes issue with the approach taken by *Tecmed* and *MTD* in applying this standard of protection. Argentina considers that the standard applied by these tribunals does not reflect an accurate international standard. Argentina submits that fair and equitable treatment does not encompass the protection of legitimate expectations and the establishment of a stable investment environment.

288. Argentina also submits that, even if the Tribunal were to apply an expanded concept of fair and equitable treatment, there was no violation of this

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<sup>99</sup> Reply, para. 506, quotation of Professor Schreuer’s legal opinion, para. 299 et seq., where reference is made to: (1) *Neer v. Mexico*, Opinion, United States-Mexico, General Claims Commission, October 15, 1926, 21 AJIL 555 (1927); (2) *Eletronica Sicula S.p.A.* (ELSI) (United States of America v. Italy), International Court of Justice, Judgment, July 20, 1989, ICJ Reports 1989; (3) *Mondev Intl. Ltd. v. The United States of America*, Award, October 11, 2002, 42 ILM85 (2003); (4) *Loewen Group, Inc. and Raymond L. Loewen v. the United States of America*, Award, (June 26, 2003);

<sup>100</sup> *Ibid.*, para. 559, quotation from Professor Schreuer’s legal opinion, emphasis added by the Claimant.

standard by Argentina. Argentina refers to the fact that the Claimant had never raised the political motivation of Argentina's acts before this arbitration and had consented to the acts that it now questions. Argentina submits that Siemens agreed on the laws that it now questions and that is, among other reasons, why there was no violation of the Treaty by Argentina. Argentina wonders what legitimate expectation can be affected by acts of the State to which the investor has consented.

**b) Considerations of the Tribunal**

289. The parties' allegations raise issues about the scope of standard of fair and equitable treatment and full protection and security and its relevance in this case. As regards the scope, the parties hold different views on whether the obligation to treat an investment fairly and equitably refers to the minimum standard of treatment of aliens under customary international law or requires from the State a higher standard of conduct more in consonance with the objective of the Treaty. They also differ on whether "security" refers to physical security or to security in a wider sense. The Tribunal will first address these two issues.

290. In their ordinary meaning, the terms "fair" and "equitable" mean "just", "even-handed", "unbiased", "legitimate".<sup>101</sup> As expressed in the Treaty preamble, it is the intention of the State parties to intensify their economic cooperation, and their purpose to create favorable conditions for the investments of the nationals of a party in the territory of the other, while recognizing that the promotion and protection of such investments by means of a treaty may serve to stimulate private initiative and improve the well being of both peoples. It follows from the ordinary meaning of "fair" and "equitable" and the purpose and object of the Treaty that these terms denote treatment in an even-handed and just manner, conducive to fostering the promotion and protection of foreign investment and stimulating private initiative. The parties to the Treaty show by their intentions and objectives a positive attitude towards investment. Terms such as "promote" or "stimulate" are action words that indicate that it is the intention of

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<sup>101</sup> *The Oxford English Dictionary*. Similarly defines these terms *Diccionario de la Lengua Española*, 22nd edition, at [www.rae.es](http://www.rae.es).

the parties to adhere to conduct in accordance with such purposes. This understanding is confirmed by Article 2(1) of the Treaty, whereby each party even undertakes to promote the investments of nationals or companies of the other party.

291. The specific provision of the Treaty on fair and equitable treatment is found also in Article 2(1) after the commitment to promote and admit investments in accordance with the law and regulations and as an independent sentence: “In any case [the parties to the Treaty] shall treat investments justly and fairly (“En todo caso tratará las inversiones justa y equitativamente”).”<sup>102</sup> There is no reference to international law or to a minimum standard. However, in applying the Treaty, the Tribunal is bound to find the meaning of these terms under international law bearing in mind their ordinary meaning, the evolution of international law and the specific context in which they are used.

292. Argentina has indicated its support for the interpretation of Article 1105 of NAFTA by the FTC. The Tribunal observes first that this article bears the heading “Minimum Standard of Treatment.” Paragraph 1 of this article states: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” As interpreted by the FTC and as indicated in the title of the article, the standard of treatment is the minimum required under customary international law.

293. The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment. In 1927, the US-Mexican Mixed Claims Commission considered in the *Neer* case that a State has breached the fair and equitable treatment obligation when the conduct of the State could be qualified as outrageous, egregious or in bad faith or so below international standards that a reasonable and impartial person would easily recognize it as such. This description of conduct in breach of the fair and equitable treatment standard has been considered as the expression of

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<sup>102</sup> Article 2(1) of the Treaty.

customary international law at that time. For the Tribunal the question is whether, at the time the Treaty was concluded, customary international law had evolved to a higher standard of treatment.

294. It will be useful for this purpose to review the cases referred to by the parties in support of their differing positions. Argentina has particularly relied on *Genin*. In that case, the tribunal without engaging in a textual analysis of the fair and equitable treatment clause in the US-Estonia BIT considered this requirement to be an international minimum standard, which could only be breached by “a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”<sup>103</sup> That tribunal found that, in the circumstances of the case, Estonia did not breach the duty of fair and equitable treatment; however, it hoped that the “Bank of Estonia will exercise its regulatory and supervisory functions with greater caution regarding procedure in the future,”<sup>104</sup> and observed that “the awkward manner by which the Bank of Estonia revoked EIB’s license, and in particular the lack of prior notice of its intention to revoke EIB’s license and of any means for EIB or its shareholders to challenge that decision prior to its being formalized, cannot escape censure.”<sup>105</sup>

295. After the interpretation of the FTC, several tribunals established under NAFTA have held that the customary international law to be applied is the customary international law as it stood when that treaty was concluded and not in 1927. In *Mondev*, the tribunal held that “the content of the minimum standard today cannot be limited to the content of customary international law as recognized in arbitral decisions in the 1920s.”<sup>106</sup> The same tribunal noted that the State party in the dispute agreed that the international standard of treatment has evolved as all customary international law has, and that the two other State parties to NAFTA also agreed with this point.<sup>107</sup> Therefore, that tribunal considered that:

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<sup>103</sup> *Genin*, para. 367.

<sup>104</sup> *Ibid.*, para. 372.

<sup>105</sup> *Ibid.*, para. 381.

<sup>106</sup> *Mondev Intl. Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), para. 123.

<sup>107</sup> *Ibid.*, para. 124.

“the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for ‘fair and equitable’ treatment of, and for ‘full protection and security’ for, the foreign investor and his investments.”<sup>108</sup>

And found that “To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”<sup>109</sup>

296. The tribunal in *Loewen* came to a similar conclusion: “Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice.”<sup>110</sup>

297. After reviewing arbitral awards under NAFTA, the tribunal in *Waste Management II* reached the conclusion that:

“the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is

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<sup>108</sup> *Ibid.*, para. 125.

<sup>109</sup> *Ibid.*, para. 116. The tribunal in *ADF* affirmed the same point: “what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.” *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (January 9, 2003), para. 179.

<sup>110</sup> *Loewen*, párr. 132.

relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”<sup>111</sup>

298. The parties have also referred to *Tecmed*, which describes just and equitable treatment as requiring:

“treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”<sup>112</sup>

299. It emerges from this review that, except for *Genin*, none of the recent awards under NAFTA and *Tecmed* require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably, and that, to the extent that it has been an issue, the tribunals concur in that customary international law has evolved. More recently in *CMS*, the tribunal confirmed the objective nature of this standard “unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.”<sup>113</sup> That tribunal also understood that the conduct of the State has to be below international standards but not at their level in 1927 and that, as in *Tecmed* and *Waste Management II*, the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment.

300. The Tribunal has already noted that the standards of conduct agreed by the parties to the Treaty indicate a favorable disposition to foreign investment. The purpose of the Treaty is to promote and protect investments. It

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<sup>111</sup> *Waste Management II*, para. 98.

<sup>112</sup> *Tecmed*, para. 154. Unofficial translation from the Spanish original published by ICSID on its web site.

<sup>113</sup> *CMS*, para. 280.

would be inconsistent with such commitments and purpose and the expectations created by such a document to consider that a party to the Treaty has breached its obligation of fair and equitable treatment only when it has acted in bad faith.

301. The Tribunal will now turn to the question of the meaning of full protection and security. According to Argentina, “security” refers only to physical security while the Claimant attributes to this term a wider meaning, in particular because the Treaty refers to “legal security.”

302. The Tribunal first notes that, although the parties have argued the application of this standard as a single standard, the Treaty provides for the fair and equitable treatment and full protection and security under two different Articles. The parties do not seem to have found this separation to be significant and the Tribunal will not dwell further on this point. The Tribunal also notes that Argentina in its arguments did not address the fact that security was qualified by “legal” in this instance.

303. As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than “physical” protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, “security” is qualified by “legal”. In its ordinary meaning “legal security” has been defined as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.”<sup>114</sup> It is clear that in the context of this meaning the Treaty refers to security that it is not physical. In fact, one may question given the qualification of the term “security”, whether the Treaty covers physical security at all. Arguably it could be considered to be included under “full protection”, but that is not an issue in these proceedings.

304. Based on this understanding of fair and equitable treatment and full protection and legal security, the Tribunal will now consider whether the

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<sup>114</sup> *Diccionario de la lengua española*, 22<sup>nd</sup> edition, at [www.rae.es](http://www.rae.es). Translation by the Tribunal. The original text in Spanish reads as follows: “cualidad del ordenamiento jurídico que implica la certeza de sus normas y, consiguientemente, la previsibilidad de su aplicación.”



actions of Argentina, identified by the Tribunal as actions taken by Argentina acting as a State, constitute a breach of this obligation.

305. Argentina has argued that Siemens and its subsidiary, for whose conduct Siemens is responsible, acted in bad faith because they accepted the laws of Argentina and alleged before this Tribunal political motives which were never denounced during the long lasting re-negotiation of the Contract. Siemens has argued likewise that it was never notified under the Contract of all the failures that have been alleged by Argentina in these proceedings. The parties' response to these arguments is similar: both parties were intent on reaching a renegotiated agreement that ultimately proved elusive.

306. The Tribunal considers that neither party may hold against the other positions that it may have taken during a good faith negotiation.<sup>115</sup> In any case, acceptance of laws or regulations should not be held against a company which has accepted them by the Government that adopted them. As stated elsewhere by the Tribunal, to comply with the law is not understood to be an optional matter. In this respect, the arguments advanced by Argentina on acquiescence and *estoppel* are misplaced and have already been dealt with by the Tribunal.

307. On the other hand, the Tribunal finds without merit the argument made by Siemens that since filing its claim Siemens has encountered difficulties to operate in Argentina. This statement is contradicted by the affirmation in Siemens' Reply that Argentina holds Siemens in such high regard that it has repeatedly requested its intervention in other public projects, even after the Contract's termination

308. To conclude, the Tribunal finds that the initiation of the renegotiation of the Contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens' investment. The Tribunal also finds that when a government awards a

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<sup>115</sup> In the *Factory at Chorzów* case, the PCIJ pointed out that it could not "take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement." *Merits, PCIJ, Series A* (1928), p. 51.

contract, which includes among its critical provisions an undertaking of that government to conclude agreements with its provinces, the same government can not argue that the structure of the State does not permit it to fulfill such undertaking. This runs counter to the principle of good faith underlying fair and equitable treatment. The arguments made to justify delay in paying compensation without basis in the Contract or Decree 669/01 and the denial of access to the administrative file for purposes of filing the appeal against Decree 669/01 show lack of transparency of Argentina in respect of the investment, particularly when Argentina itself has manifested in these proceedings that at no time had it affirmed that the Contract was rescinded due to the Contractor's fault.<sup>116</sup>

309. For these reasons, the Tribunal finds that the full protection and legal security and fair and equitable treatment obligations under the Treaty have been breached by Argentina.

## **5. Arbitrary and Discriminatory Measures**

### **a) Positions of the Parties**

310. Siemens argues that, based on the plain meaning of "arbitrary", the measures adopted towards Siemens' investment meet the test of arbitrariness: "not governed by any fixed rules or standard", "performed without adequate determination of principle and one not founded in nature of things", "without cause based upon the law", or "failure to exercise honest judgment", "characterization of a decision or action taken by an administrative agency [...] [as] willful and unreasonable action without consideration or in disregard of facts or law or without determining principle."<sup>117</sup>

311. According to Siemens, the intentional frustration of the performance of the Contract when all the investment had been made to put the System into operation was arbitrary. The measures were unreasonable, taken unilaterally without due cause or justification. They caused serious damage to Siemens for which it has not been compensated. The measures were also

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<sup>116</sup> Rejoinder, paras. 222 and 232.

<sup>117</sup> Memorial, para. 337, citing *Black's Law Dictionary*, 1990, sixth edition, p. 104.

discriminatory in intent and effect. No other investor was treated like Siemens, no measures such as those imposed on Siemens' investment were adopted by Argentina concerning contracts or investments of similar importance, in particular, no other public contract was terminated by Argentina under the 2000 Emergency Law and compensation has never been paid. These discriminatory measures impaired Siemens' ability to manage, use and enjoy its investment.

312. In its Counter-Memorial, Argentina argues that the measures it adopted were reasonable in proportion to their purpose and of general application. Thus, they were neither arbitrary nor discriminatory. Argentina refers to the concept of arbitrariness defined by the ICJ in *ELSI*: "It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety;"<sup>118</sup> and the arbitral tribunal in *Genin*: "any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action."<sup>119</sup> According to Argentina, the measures it took were in defense of vital security of the State, to keep the data on its inhabitants secure since otherwise it would violate rights enshrined in international treaties on the protection of human rights.

313. Argentina also questions the qualification as arbitrary of the delay in approving the FOM. The FOM presented by SITS was not in a condition to be approved and Argentina showed diligence by requesting in advance information that would have helped in speeding up the approval process and that SITS did not provide. According to Argentina, a government may not be accused of being arbitrary when it tries to protect and preserve the confidentiality of the data on its inhabitants.

314. As to the meaning of "discriminatory", Argentina contends, based on *ELSI* and *S.D. Myers*, that, for a measure to be discriminatory, the measure has to be harmful, favor a national against a foreign investor and be intended to discriminate. Argentina argues that the measures it took were intended to protect its citizens and as such could not be considered discriminatory. Furthermore, the measures taken in relation to Siemens' investment had nothing to do with any

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<sup>118</sup> *Genin*, Counter-Memorial, para. 1108 citing *ELSI*, *ICJ Reports* (1989), para. 128.

<sup>119</sup> *Ibid.*, para. 1110 citing *Genin*, para. 371.

differential treatment vis-à-vis any other investor group in the same situation because Siemens was in a unique situation.

315. In its Reply, Siemens insists that in terms of Article 2(3) of the Treaty actions are arbitrary if they are opposed to the rule of law or surprise a sense of juridical propriety, or if a measure harming an investor cannot be justified in terms of rational reasons that are related to the facts. Siemens contests the argument of “voluntary consent” or “acquiescence” by SITS and affirms that what occurred was an abusive exercise of the State’s authority that left SITS powerless. According to Siemens, Argentina’s measures were “arbitrary because they dismantled the entire legal framework that had led Siemens to conduct its investment, contrary to the expectations of any reasonable and impartial person. The political motivation behind Argentina’s actions only serves to emphasize the arbitrariness of the measures adopted.”<sup>120</sup>

316. As regards discriminatory treatment, according to Siemens, the criterion is whether the foreign investor has been treated less favorably than domestic investors or investors of other nationalities; *de facto* discrimination is sufficient even without violation of the host State’s domestic law. Siemens argues that the measures taken towards Siemens’ investment were not of a general nature; the Contract is the only significant contract terminated which involved a foreign investor and the only foreign investment terminated unilaterally under the 2000 Emergency Law.

317. In its Rejoinder, Argentina recalls that the Contract was unique in terms of its scope, importance, duration and expense. Argentina explains how the Contract could not be compared to the passport issuance contract that the Claimant adduced as evidence of discrimination. Passports are not obligatory, while DNIs are. In the face of an economic crisis, Argentina had a right to protect its interests and those of its citizens. The measures taken by Argentina in response to “the fiscal emergency were of general operation, for a public purpose and did not introduce unreasonable discrimination.”<sup>121</sup> Argentina further explains that the fact that public utilities were excluded from the 2000 Emergency law

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<sup>120</sup> Reply, para. 571.

<sup>121</sup> Rejoinder, para. 643.

does not mean that the crisis did not impact their rights, e.g., foreign companies that invested in the natural gas transport and distribution agreed to defer adjustment of their fees as permitted in their contracts sixteen months before the termination of the contract. Argentina concludes by asserting that, given the enormous costs of the Contract, “it cannot be said that the measures taken to terminate it early were unfair, unjust or disproportionate to the extent of the problem in hand.”<sup>122</sup>

### **b) Considerations of the Tribunal**

318. In its ordinary meaning, “arbitrary” means “derived from mere opinion”, “capricious”, “unrestrained”, “despotic.”<sup>123</sup> *Black’s Law Dictionary* defines this term as “fixed or done capriciously or at pleasure; without adequate determining principle”, “depending on the will alone”, “without cause based upon the law.” There is also abundant case law on the interpretation of this term to which the parties have referred. The Tribunal considers that the definition in *ELSI* is the most authoritative interpretation of international law and it is close to the ordinary meaning of the term emphasizing the willful disregard of the law. The element of bad faith added by *Genin* does not seem to find support either in the ordinary concept of arbitrariness or in the definition of the ICJ in *ELSI*.

319. In the instant case, certain measures taken by Argentina do not seem to be based on reason. Argentina has explained that an authorization was needed to start the operation of the DNM sub-system, but has failed to explain why the authorization was never given after the investment was made and the DNM sub-system had started to operate. Similarly, the Tribunal does not question the importance to the vital interests of Argentina to have secure identification of individuals, but applied to the suspension of the RPN sub-system such argument would have justified requiring an immediate correction of the error. No evidence has been submitted that the error could not be corrected. Instead, SITS was denied the possibility of correcting the error. While the Tribunal could accept that there may have been reasons to justify the temporary

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<sup>122</sup> *Ibid.*, para. 657.

<sup>123</sup> *The Oxford English Dictionary*. This term is similarly defined in the *Diccionario de la Lengua Española*, 22<sup>nd</sup> edition, at [www.rae.es](http://www.rae.es).

suspension of the DNM and RPN sub-systems, the Tribunal finds its permanent suspension arbitrary.

320. As to discriminatory measures, under Article 3(1) and (2) of the Treaty, the parties undertook to treat each other's nationals and companies not less favorably than they treat their own investors or those of a third party. Whether intent to discriminate is necessary and only the discriminatory effect matters is a matter of dispute. In *S.D. Myers*, the tribunal considered intent "important" but not "decisive on its own."<sup>124</sup> On the other hand, the tribunal in *Occidental Exploration and Production Company v. Republic of Ecuador* found intent not essential and that what mattered was the result of the policy in question.<sup>125</sup> The concern with the result of the discriminatory measure is shared in *S.D. Myers*: "The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent." The discriminatory results appear determinative in *Marvin Roy Feldman Karpa v. United Mexican States*,<sup>126</sup> where the tribunal considered different treatment on a *de facto* basis to be contrary to the national treatment obligation under Article 1102 of NAFTA.

321. The Tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment. The Claimant has based its arguments mainly on the fact that the Contract was the only major contract, and the only contract with a foreign investor, terminated under the 2000 Emergency Law, while the contract of the Government with an Argentine national to issue passports was allowed to stand notwithstanding the high costs associated with it. The Respondent has explained to the Tribunal that the Contract was unique and that the mandatory nature of DNI justified the difference in treatment. The Tribunal considers that, while there are aspects in the actions of Argentina that seem discriminatory, the allegations of the Claimant have not been fully substantiated. Given the holdings

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<sup>124</sup> *S.D. Myers*, para. 254.

<sup>125</sup> *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA case No. UN3467, Award (July 1, 2004), para. 177.

<sup>126</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), para. 184.

of the Tribunal under other protections of the Treaty, the Tribunal finds it unnecessary to determine whether Argentina breached the non-discriminatory treatment obligation.

## **VII. Compensation**

### **1. Positions of the Parties**

322. Siemens claims that it is entitled to receive full and comprehensive compensation for the breaches of the Treaty and to recover the fair market value of its wrongfully expropriated investment, calculated for valuation purposes immediately before the date of expropriation of May 18, 2001; the loss of profits or *lucrum cessans* and the additional damage caused as a result of the expropriatory measures and acts, including those damages claimed by subcontractors and suppliers of Siemens and/or SITS regarding the Project and caused by Argentina's expropriation. In addition, Siemens claims pre and post-award interest of 6% compounded annually.

323. Siemens argues that the expropriation was unlawful because it did not meet the conditions of the Treaty and international law, namely, it did not serve a public purpose, it did not satisfy the formal and substantive requirements of due process, it did not comply with the legal standards of treatment set forth in the Treaty and no compensation was paid. Based on the *Factory at Chorzów* case, Siemens pleads that an illegal dispossession leads to a twofold obligation: first, the obligation to restore the property in question or, if this is not possible, to pay compensation corresponding to its value; and second, there is an obligation to pay damages for any additional losses sustained as a consequence of the taking.

324. Siemens observes that the value of the asset expropriated is not affected by whether or not an expropriation is lawful, but the amount of compensation due to an investor may be significantly affected. In the instant case, Siemens claims that the value of the property at the moment of the taking plus interest to the day of payment is a legal floor, and calls upon the Tribunal to add any potential consequential damages so as to "wipe out all the

consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>127</sup>

325. Siemens considers as appropriate the definition of fair market value in *Starrett Housing Corp. v. The Islamic Republic of Iran*: “[T]he price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat.”<sup>128</sup>

326. Siemens argues that the fair market value includes the lost future profits that the enterprise would have gained had it been allowed to continue to operate, points out that SITS was a single project company, and affirms that its future revenues and profits were ascertainable on the basis of the commitments made by Argentina. Siemens refers to *Norwegian Shipowners, LETCO* and the concurring opinion of Judge Brower in *Amoco International Finance Corporation*, which stated that “[...] where the expropriated property consists of contract rights, the compensation must be defined by the anticipated net earnings that would have been realized, as well as one can judge, had the contract been left in place until completion.”<sup>129</sup>

327. Siemens claims that SITS, as a single project company, had foreseeable and ascertainable revenues and profits based on the commitments made by Argentina. Furthermore, any negative effect of the taking itself or the measures related to the taking must be excluded from the valuation. According to Siemens, a State may not reduce its obligation to pay compensation simply by creating a situation in which expropriation is to be feared before it occurs or by breaching contractual obligations or other duties to the foreign investor.

328. According to Siemens, the appropriate method of valuation is the book value method in its variant of actual investments. Based on this method, Siemens claims that, as of May 17, 2001, the value of its investment amounts to US\$283,859,710. Siemens affirms that this amount is comparable to the

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<sup>127</sup> Memorial, para. 392 citing the *Factory at Chorzów* case, *Merits, PCIJ, Series A*, 1928, p. 47,

<sup>128</sup> *Ibid.*, para. 394, citing *Starrett Housing Corp. v. the Islamic Republic of Iran*, Case No. 24, Final Award No. 314-24-1, (August 14, 1987), Claimant’s Legal Authorities No. 52.

<sup>129</sup> *Ibid.*, para. 402.



amounts that could be obtained with the application of other alternative methods of valuation. In addition, Siemens claims to be entitled to US\$124,541,000 on account of *lucrum cessans*.

329. Siemens also claims additional damages based on the unlawful nature of the expropriation measures and the behavior of Argentina prior to and after the date of expropriation. On this account, Siemens claims: (i) the costs incurred for maintaining a skeleton operation in Argentina to allow the conclusion of the Project, (ii) storage costs because of a 20-month delay in the transfer of assets to the Government, (iii) training costs and costs of technical support services provided by SITS during a period in excess of 75 days after May 18, 2001 pursuant to Article 26.3 of the Contract, (iv) damages claimed or that may be claimed by subcontractors involved in the Project's execution as a result of the expropriation, (v) unpaid invoiced services of SITS to the DNE agency in 1999, and (vi) the costs of this arbitration and of counsel. According to Siemens, subcontractors' damages amount to US\$44,678,462 and the aggregate amount of the other items is US\$9,397,899.

330. Siemens claims pre-award compounded interest at the rate of 6% per annum so that it is fully compensated for the loss suffered and considers that May 18, 2001 should be the date of expropriation for valuation purposes, including for the assessed value of the lost profits. In the case of the additional damages, interest shall be applied from the dates in which they have been caused.

331. Argentina argues in its Counter-Memorial that Siemens is not entitled to the compensation it has claimed: First, the Treaty in Article 4(2) states that compensation shall correspond to the value of the investment expropriated. Argentina interprets the reference to "value" of the investment – as opposed to "fair market value" - to exclude future profits. To support this point, Argentina reviews its own treaty practice and offers examples in four categories ranging from compensation on the basis of fair market value of the investment to the classical Hull formula, or a partial Hull formula or "the value" of the investment as in the case of the Treaty. Argentina alleges that there is no uniformity in the doctrine on the level of compensation.

332. Argentina questions the cases relied on by Siemens to argue the extent of the damages claimed. According to Argentina, in *Maffezini*, neither *lucrum cessans* nor future profits were redressed, and full compensation awarded in the *Factory at Chorzów* case does not correspond to fair market value. Argentina requests the Tribunal to apply the principles of *Tecmed*, a case that Argentina finds strikingly similar to this case and quotes approvingly its reasoning under Mexican law. Argentina affirms that Argentine law applicable to this case and the 2000 Emergency Law to which Siemens consented do not grant the compensatory right claimed by Siemens.

333. Argentina also questions the currency of the claimed compensation. Argentina argues that it did not guarantee the value of the investment in terms of dollars. Argentina points out that the Contract was not a dollar contract and that Siemens entered into a forward dollar contract to secure US\$190 million, the same amount of the alleged loans made by the parent company to its Argentine affiliate. The existence of such contract, according to Argentina, proves that Siemens never intended to enter into a contract with Argentina in a foreign currency.

334. Argentina explains that under Decree 669/01 for Siemens to be compensated in the amount calculated by the Appraisals Tribunal in accordance with the Contract, the applicable law and the Treaty, Siemens has to deliver real assets in condition to be used, otherwise Argentina would not receive any consideration for its compensation. To achieve this objective, the Appraisals TTN established the following conditions: delivery of the source codes, executable programs correctly set up and approved, delivery of the licenses for base software, databases and other necessary utilities, delivery of the licenses for application software of the sub-contractors, delivery of documentation related to applications, systems and training proved as to its usefulness, and ability to use the Contractor's software licenses.

335. Argentina criticizes the valuation carried out by Siemens' expert. Argentina points out that: (i) he did just office work and had not checked the market values to confirm that the amounts charged by suppliers to SITS reflect the usual market practices, (ii) he did not consider whether the intra-Siemens

Group transfers were carried out at arm's length, (iii) he did not carry out the task personally and did not perform any due diligence, (iv) he accepted all of Siemens' assumptions at face value without verifying them, (v) he affirms to have applied the book value method when he never analyzed where the alleged funds of Siemens were invested and the same analysis should have been done in respect of SITS' liabilities, (vi) he maintains that the book value method and the discounted cash flow analysis reach the same result when the figures are different, and (vii) he made a number of mistakes in calculating future income. Furthermore, the supporting documentation of the valuation is lacking.

336. In its Reply, Siemens argues that it is entitled to full compensation and that "investment value" has to be given its plain and ordinary meaning. Siemens points out that: (i) the Treaty does not qualify the reference to investment value, (ii) "value" in its ordinary meaning is defined as "[t]he monetary worth or price of something; the amount of goods, services, or money that something will command in an exchange," and (iii) in a free market economy the exchange is conducted on the market. Therefore, "the plain and ordinary meaning of 'value' is what one may expect to obtain in exchange for something, that is to say its 'fair market value.'"<sup>130</sup>

337. Siemens observes that the legal authorities referred to by Argentina relate to the general debate on the extent of compensation under customary international law and not to the interpretation of the Treaty which contains a clear standard of full compensation. Siemens refers to *CME* where the tribunal, drawing its conclusions from the *Factory at Chorzów* case, ruled that "genuine value" in Article 5 of the Netherlands-Czech Republic BIT meant the fair market value of the investment. Siemens also refers to *Biloune* which held that the fair market value, which takes into account future profits, is the most accurate measure of value of the expropriated property.

338. On the issue of future profits, Siemens draws the attention of the Tribunal to how the ILC has expressed the principle that lost profits are awarded where there is a reliable basis for the expectation of future income:

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<sup>130</sup> Reply, para. 620.

“In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable. This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.”<sup>131</sup>

According to Siemens, the contractual provisions concerning the production, issuance and price of the DNIs and other fees constituted a “legally protected interest of sufficient certainty.”<sup>132</sup>

339. Siemens points out that Argentina refers to documents which are 30 and 45 years old and pertain to debates already settled. Furthermore, in *Tecmed*, and contrary to what Argentina has alleged, the tribunal awarded compensation in accordance with the provisions of the relevant investment treaty, on the basis of the market value of the assets concerned, lost profits and compound interest.

340. Siemens argues that, for purposes of Siemens’ claim of expropriation under international law, the domestic law of Argentina and the provisions of the 2000 Emergency Law are irrelevant.

341. Siemens also contends that, in any case, it is entitled to fair market value on the basis of the Treaty’s most-favored-nation clause and other investment treaties signed by Argentina that specifically provide for such valuation of expropriated assets.

342. Siemens contests the affirmation by Argentina that there was no unlawful expropriation and affirms that the requirements of public benefit, compensation and compliance with the general principles of treatment provided for in the Treaty had not been respected by Argentina. Siemens insists on full damages and, given the unlawful nature of the expropriation, consequential damages all paid in dollars. In this respect, Siemens recalls that the investment was made in dollars and argues that the forward contract itself proves this point. Siemens adds that it is entitled to the value of the investment immediately before

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<sup>131</sup> *Ibid.*, para. 632.

<sup>132</sup> *Ibid.*, para. 633.

the date of the taking when the peso had parity with the dollar. Siemens also recalls that, as it explained at the jurisdictional stage, its right to compensation under the Treaty is distinct from SITS' rights under the Contract and domestic law, and that Argentina never offered nor even approved any compensation under the 2000 Emergency Law.

343. Siemens points out the shortcomings of the valuation report of the TTN, among others: (i) it was never submitted to SITS for consideration, (ii) it was prepared long after termination of the Contract and a long time after SITS lost control and supervision of the System, (iii) it evaluated items individually rather than the System as a whole, and (iv) it was not done in the currency of the investment. According to Siemens, the appraisal done by the TTN does not even reflect the compensation due to SITS under the 2000 Emergency Law.

344. Siemens further points out that Argentina fails to provide a proper response for the sub-contractors' claims and the excuses for withholding the performance bond under the Contract are unsustainable and constitute another arbitrary measure taken by Argentina.

345. As regards Argentina's criticisms of the valuation report prepared by Siemens' expert, Siemens argues that Argentina has misunderstood the task of the expert, which was to evaluate the loss suffered by Siemens on the investment and not to evaluate SITS' loss under the Contract under Argentine law. According to Siemens, it was not the task of this expert to value individual assets: "Valuing hardware and software on a part by part basis, when the very condition of those items are now the result of the expropriation, would provide no support in valuing Siemens A.G.'s investment in the contractual right to operate the System and to generate revenue and return on its investment."<sup>133</sup> Siemens adds that Argentina ignores the fact that the financial statements and accounting records relied on by the expert had been audited by a leading auditing firm – KPMG -, and refers to case law showing the appropriateness of the use of audited accounting records to carry out a valuation task. According to Siemens, Argentina also ignores the fact that SITS was a single project company, which

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<sup>133</sup> Reply, para. 699. Quotation from Expert Lemar's Rebuttal Report.

should answer the criticism that the expert never examined where the alleged funds of Siemens were invested. Regarding the costs of the investment, Siemens contends that, if Siemens' global price was the lowest in the bidding for the Contract, the individual cost and prices of the components would also be lowest or extremely competitive compared to other tenders.

346. In its Rejoinder, Argentina argues that the fair market value of an expropriated property as the measure of compensation for an expropriated investment is not always applicable when an expropriation becomes necessary for social policy reasons. If this would not be the case, it would be a serious limitation on State sovereignty, and no social or economic reforms could be accomplished by poorer nations. Argentina maintains that it had effectively become bankrupt, and that to maintain that an expropriation is only lawful if full market compensation is payable is incompatible with the principle of self-determination. Argentina refers in this respect to professor Brownlie's statement that: "The principle of nationalization unsubordinated to a full compensation rule may be supported by reference to principles of self-determination, independence, sovereignty and equality."<sup>134</sup> Argentina also refers to the statement of the European Court of Human Rights in *James v. UK*, which held that Article 1 of the First Protocol does not "guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest' such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of full market value."<sup>135</sup>

347. Argentina affirms that these considerations are applicable to the situation in Argentina and are entirely consistent with the Treaty. Argentina concludes that, even if there was an expropriation, the Claimant would not be entitled to more than the direct losses and not to the *lucrum cessans*.

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<sup>134</sup> Rejoinder, para. 575.

<sup>135</sup> *James v. UK*, *European Court of Human Rights*, 1986, 8, EHRR 123, para. 48, Respondent's Legal Authorities No. AL RA 86, quotation in the Rejoinder, para. 577. Emphasis added by the Respondent.

## 2. Considerations of the Tribunal

348. The Tribunal will address the following issues raised by the parties: applicable law for purposes of determining compensation, the meaning of “value” of the investment, currency of compensation, whether compensation should include *lucrum cessans* and consequential damages, on what evidence it should be based, the amount of compensation, the applicable rate of interest, and whether it should be simple or compound interest.

### a) Applicable Law

349. The Tribunal has found that Argentina took measures that had the effect of expropriating the investment and that such expropriation is in breach of the Treaty, and hence unlawful. The Tribunal has also found that the Respondent breached its obligations to provide fair and equitable treatment and full protection and security and that it adopted arbitrary measures in respect of the investment. The law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty.

350. The Draft Articles are currently considered to reflect most accurately customary international law on State responsibility. Article 36 on “Compensation” provides:

“1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

351. This Article relies on the statement of the PCIJ in the *Factory at Chorzów* case on reparation:

“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and

reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>136</sup>

352. The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account “all financially assessable damage” or “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.

**b) Value of the Investment**

353. In the *Factory at Chorzów* case, the PCIJ asked the experts to calculate the value of the undertaking as of the date of the taking and as of the later date of its prospective judgment, and such value to include the lands, buildings, equipment, stocks and process, supply and delivery contracts, goodwill and future prospects. It is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award be compensated in full. Otherwise compensation would not cover all the consequences of the illegal act. While the Tribunal has determined that the Treaty does not apply for purposes of determining the compensation due to Siemens, which is governed by customary international law as reflected in *Factory at Chorzów*, it is worth noting that the PCIJ, as the Treaty itself, refers to the value of the investment without qualification. To reach its conclusion, the PCIJ did not need to have “value” qualified by “full”. The Tribunal is satisfied that the term “value” does not need further qualification to mean not less than the full value of the investment. Having reached this conclusion, it is unnecessary for the Tribunal to discuss the argument advanced by the Claimant that it is entitled to

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<sup>136</sup> *Factory at Chorzów, Merits, PCIJ, Series A, No. 17, 1928, p. 47.*



the fair market value of its investment on the basis of the MFN clause in the Treaty.

354. Argentina has pleaded that, when a State expropriates for social or economic reasons, fair market value does not apply because otherwise this would limit the sovereignty of a country to introduce reforms in particular of poor countries. Argentina has not developed this argument, nor justified on what basis Argentina would be considered a poor country, nor specified the reforms it sought to carry out at the time. Argentina in its allegations has relied on *Tecmed* as an example to follow in terms of considering the purpose and proportionality of the measures taken. The Tribunal observes that these considerations were part of that tribunal's determination of whether an expropriation had occurred and not of its determination of compensation. The Tribunal further observes that Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty.

**c) Method of Valuation**

355. The Claimant has proposed that compensation be calculated on the book value of the investment and that *lucrum cessans* be arrived at through discounting an estimate of profits calculated as a percentage of the revenues that SITS would have received if the Project would have run its course on the basis of the prices for its services set forth in the Contract. Usually, the book value method applied to a recent investment is considered an appropriate method of calculating its fair market value when there is no market for the assets expropriated. On the other hand, the DCF method is applied to ongoing concerns based on the historical data of their revenues and profits; otherwise, it is considered that the data is too speculative to calculate future profits. Normally the two methods are regarded as alternative means of valuing the same object. Here, however, Siemens's expert has applied the two in tandem because, under the terms of the Contract, all Siemens' costs would be incurred before the first peso of revenue would be realized. Therefore, Siemens has calculated its claimed loss of profits by applying a notional profit percentage to its projected future net revenues under the Contract, and then discounting those claimed profits to their present value via the DFC method, to which it then has added the

book value of its costs actually incurred, i.e., its “sunk costs”, which due to the actions of Argentina never will be able to produce the projected (or any) revenues. In other words, Siemens claims: (i) the present value of its estimated lost profits or *lucrum cessans*, plus (ii) the costs it actually incurred, which were “wasted” in the effort to produce the revenues from which those profits would have been derived.

356. Siemens has defended its approach on the basis that SITS had already by May 18, 2001 incurred most Project development costs, the future costs could be estimated with reasonable certainty based on existing service contracts, and the prices for the delivery of SITS’ services were known as were the number of DNIs to be produced. For these reasons, Siemens has argued that an estimate of the present value of future profits could be calculated to complement the book value of the investment. In this respect, the Lemar Report uses the rate of profits on sales projections presented to the board of Siemens at the time the Project was proposed for approval. At that time, the estimated profit rate was 18%. Expert Lemar reduces it to 16% because of developments during the first year of the Contract. Furthermore, Siemens’ expert compares this estimated profit rate to other companies operating in Argentina with prices subject to State regulation, substantial upfront infrastructure investment cost to deliver the service, and the intention of the Government that they would produce a reasonable return to the owners of the investment.<sup>137</sup> For this purpose, the expert uses information from the Argentine *Comisión Nacional de Valores*, Bloomberg Services and the National Gas Authority of Argentina. Mr. Lemar arrives at a cross-sector average profit rate of 16%.<sup>138</sup> Thus similar to that projected by Siemens as adjusted.

357. While the Tribunal understands the reasons for the admittedly unusual approach followed by Siemens and considers that it has merit in the particular circumstances of this case, it has some concerns, as later explained, about how the valuation has been calculated, including the valuation of the *lucrum cessans*.

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<sup>137</sup> Expert Lemar Report attached to the Memorial (“Lemar Report”), p. 23.

<sup>138</sup> *Ibidem*.

**d) Evidence**

358. The parties have taken different approaches in respect of what is the adequate evidence of Siemens' investment. For the Claimant, the audited financial statements of SITS are sufficient evidence of the amounts invested. For Argentina, there is a need to show how each dollar or peso was spent and relate each dollar or peso to the item financed with it. Argentina has insisted that the Tribunal use an expert to analyze the accounts of SITS and ensure that the amounts spent by SITS were spent for purposes of carrying out the Project.

359. The Claimant has pointed out that the Project consisted of a made-to-order integrated system to be carried out by a single purpose company –SITS- as required by Argentina itself. Siemens contends that the financial statements properly audited are sufficient evidence of Siemens' investments, that the financial statements of SITS were audited by KPMG, and that no evidence has been presented to question KPMG's audit.

360. The approach advanced by Argentina responds to the need to assess the value to Argentina of Siemens' investment for purposes of applying Decree No. 669/01. The Tribunal has to apply customary international law. Accordingly, the value of the investment to be compensated is the value it has now, as of the date of this Award, unless such value is lower than at the date of expropriation, in which event the earlier value would be awarded. It is not the value of the investment to Argentina but the value of the investment in terms of the sums invested in the Project. The Project had started to operate and no convincing evidence has been submitted showing that the funds intended for the Project made available to SITS, as loans or equity, were not used for the intended purpose. The valuation made by the Respondent was made from a perspective different from that required under customary international law months after the Contract was terminated. For these reasons, the Tribunal saw no merit in prolonging the proceedings and engaging an expert to analyze the accounts of SITS and where the funds had been invested.

**e) Currency of Compensation**

361. Argentina has argued that the Contract is denominated in pesos and that it had not guaranteed to Siemens the parity of the peso in effect at the time it entered into the Contract. This assertion is correct but it has to be considered in the context of the requirement that the consequences of the illegal act be wiped out. It would be hardly so if the parity of the currency would be added as yet another risk to be taken by the investor after it has been expropriated. In the instant case, the Claimant has pleaded that the Tribunal accept May 18, 2001 as the date of expropriation. The Tribunal has considered that the issuance of Decree 669/01 was determinant for purposes of its finding of expropriation and it is also the date that would be in consonance with Article 15 of the Draft Articles on the date of occurrence of a composite act. On May 18, 2001, the peso was at par with the dollar. If such obligation would have been met, the Claimant would have been compensated in pesos convertible at that rate. Therefore, the Tribunal concludes that compensation shall be paid in dollars.

**f) Amount of Compensation**

362. Siemens claims \$283,859,710 as the book value of the investment to May 17, 2001.

363. Under the Contract (Annex VIII), SITS committed itself to invest \$201,486 million ("Plan de Inversiones" dated June 25, 1998 ("the Investment Plan")) and the variable costs such as satellite links, distribution costs of documents, overheads and operational expenses listed in page 2, paragraph 1.1 of Annex VIII. It is clear from the Contract that the total investment would include the items for which an amount is specified in the Investment Plan and those variable costs for which no estimated amount is given.

364. At the time of the 2000 SWIPCO audit, financed by SITS but carried out for the account of the Respondent, SITS had spent 126,235,000 pesos compared with the 241,486,000 envisaged in the Investment Plan. Both figures are exclusive of the variable costs for which no amount was specified in the Investment Plan.

365. After termination of the Contract and for purposes of the valuation carried out by the TTN, SITS claimed to have invested AR\$158,106,542. As explained in the report of the TTN of December 27, 2002,<sup>139</sup> AR\$47,237 pesos of that amount correspond to subcontractors' invoices and the remainder to invoices of companies in the Siemens group. In addition, SITS claimed "non-productive expenses" (AR\$44,452,193), interest on investments and "non-productive expenses" (AR\$25,260,008 and AR\$8,332,985, respectively), capital contributions (AR\$27 million), close-down costs (AR\$31 million), certain paid and unpaid invoices (AR\$13,100,000), subcontractors' claims (AR\$40 million) and *lucrum cessans* (AR\$254,942,070), for a total in excess of AR\$444 million. The TTN considered, pursuant to the terms of Decree 669/01, only the AR\$158,106,542 on account of investments and valued them at AR\$72,161,510.

366. Argentina in its comments of November 23, 2005 on the accounting information provided by Siemens asserts that the investment made reached AR\$107,472,398.23. The Claimant disputes the amount and currency of the latest value attributed to the investment by Argentina, and of the valuation of the TTN. The Claimant also points out, *inter alia*, that "non-productive expenses" and interest have been excluded, notwithstanding the submission of the related invoices by SITS to the Ministry of the Interior on July 22, 2001.

367. Mr. Lemar, the Siemens' expert, has concentrated on the financing of SITS and has calculated the book value by adding Siemens' capital contributions, the loans made to SITS and the corresponding interest, as recorded in SITS's financial statements for 2001. Mr. Lemar concludes that the book value of Siemens' investment at May 17, 2001 was \$283,859,710.

368. The Tribunal observes, that except for Mr. Lemar's, none of the valuations listed above respond to the criteria that need to be applied by the Tribunal and, as explained forthwith, the Tribunal has difficulty in accepting the value of the investment as calculated by Mr. Lemar. The Tribunal will use as a starting point SITS' audited financial statements. They have been audited by a highly qualified firm of independent auditors, which confirmed the reliability of the

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<sup>139</sup> Exhibit 161 to the Counter-Memorial.

accounting records, and no evidence has been submitted to the Tribunal which proves otherwise. Mr. Lemar has capitalized all interest paid by SITS. *Prima facie*, capitalization of interest during the development phase of an investment is normal practice. However, the financing of the Project was highly leveraged. Siemens paid-in 27 million pesos in equity and financed the rest primarily by three-month credit at 12.08% in 1999, twelve-month credit at 9% in 2000 and again with three-month credit at 14% in 2001. The high interest charged to the Project and the short-term nature of the credit raise the issue of the extent to which it is appropriate to recognize the full amount of interest claimed as part of the value of the investment since it is a way of building into book value what otherwise would have to be earned as profits. The Tribunal considers that it is appropriate to capitalize interest on loans made to SITS for the Project, but in case of loans made by Siemens or its subsidiaries such interest should reflect the actual cost of funds to Siemens because the Tribunal's task is to determine the loss of Siemens itself. Therefore, the Tribunal will proceed to calculate<sup>140</sup> the respective percentage of loans made to SITS by third parties, and Siemens and its subsidiaries and the costs of funds to the latter.

369. According to the funding data in the table in paragraph 3.7 of the Lemar Report, total loan funding by Siemens and its subsidiaries was AR\$224,906,029 and loan funding by others AR\$12,194,531 up to April 30, 2001, and AR\$225,726,812 and AR\$17,241,306 up to May 31, 2001. The Tribunal has adjusted these figures to May 17, 2001 by assuming that debt funding by Siemens, its subsidiaries and third parties increased at a steady daily rate during the month of May. The result is debt funding to May 17 of AR\$225,356,136 by Siemens and its subsidiaries, and AR\$14,962,117 by third parties. Therefore, Siemens and its subsidiaries provided 93.8% of all loans made to SITS and third parties provided 6.2%.

370. For purposes of determining an appropriate interest rate on loans made by Siemens or its subsidiaries, the Tribunal observes that, as a general matter, corporations of Siemens' size and creditworthiness hedge a substantial portion of the interest rate risk inherent in their fixed rate borrowings through

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<sup>140</sup> Amounts have been rounded to the nearest integer.

floating interest rate swaps. Hence, the cost of borrowing that should be taken into account is the floating rate that Siemens could have achieved using interest rate swaps during the life of the Contract from November 26, 1998 to May 17, 2001. The average of such interest rate during this period was 2.35%.<sup>141</sup>

371. Now the Tribunal turns to the percentage of interest payments made to Siemens and its subsidiaries that would be appropriate to capitalize based on the assumed cost of funds to Siemens in addition to interest payments paid to third parties. To arrive at such percentage, it is necessary to calculate the ratio of 2.35% to the annual average interest rate charged to SITS as reflected in SITS' financial statements.<sup>142</sup> Thus, 2.35% is: (i) 18.35% of 12.08% (the average interest rate charged in fiscal year 1998-1999), (ii) 26.11% of 9% (the average interest rate charged in fiscal year 1999-2000), and (iii) 16.78% of 14% (the average interest rate charged in fiscal year 2000-2001). Therefore, the percentage of interest payments to be capitalized out of payments made to Siemens and its subsidiaries is 18.35% in 1998-1999, 26.11% in 1999-2000 and 16.78% in 2000-2001.

372. As recorded in its financial statements, SITS paid on account of interest: AR\$150,828 in fiscal year 1997-1998, AR\$1,383,596 in fiscal year 1998-1999, AR\$12,156,499 in fiscal year 1999-2000 and AR\$16,950,704 up to May 17, 2001,<sup>143</sup> for a total of AR\$30,642,627. Of that amount, 93.8% would correspond to payments made to Siemens and its subsidiaries: AR\$1,297,813 in fiscal year 1998-1999,<sup>144</sup> AR\$11,402,796 in fiscal year 1999-2000 and AR\$15,899,760 in fiscal year 2000-2001 up to May 17, 2001, for a total of AR\$28,600,639. The remainder AR\$2,041,988 was paid by SITS to third parties. The Tribunal will now apply to the amounts paid by SITS to Siemens and its

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<sup>141</sup> Calculation based on data published by Bloomberg.

<sup>142</sup> Annex C of the financial statements.

<sup>143</sup> During the full fiscal year 2000-2001 SITS paid AR\$27,017,497 on account of interest. This amount needs to be adjusted to May 17, 1981 because SITS' fiscal year ran until September 30. For this purpose, the Tribunal has assumed that interest accrued at the same rate each day, divided the amount of interest payments made by 365, multiplied the daily rate by the number of days between May 17 and September 30 -136 days- and deducted the result -AR\$10,066,793- from the amount of interest paid that fiscal year. This brings the amount of interest payments between October 1, 2000 and May 17, 2001 to AR\$16,950,704.

<sup>144</sup> No interest payments to Siemens and its subsidiaries are recorded in the financial statements for fiscal year 1997-1998.

subsidiaries the yearly percentages arrived at in the preceding paragraph with the following results: AR\$234,255 represents 18.35% of the interest paid to Siemens and its subsidiaries in fiscal year 1998-1999, AR\$2,977,270 represents 26.11% of such payments made in fiscal year 1999-2000 and AR\$2,667,979 represents 16.78% of those made in fiscal year 2000-2001 up to May 17, 2001. These three items add up to AR\$5,879,504. The Tribunal will allow that amount of interest paid to Siemens and its subsidiaries plus AR\$2,041,988 paid to third parties for a total of AR\$7,921,492 to be capitalized for purposes of the calculation of the book value of Siemens' investment. Therefore, the book value calculated by Siemens' expert Lemar should be reduced by the difference between the aggregate amount of interest payments made to Siemens and its subsidiaries - AR\$28,600,369 - and AR\$5,879,504, namely, AR\$22,720,865.

373. The book value calculation by Mr. Lemar includes two other items that the Tribunal finds inappropriate. First, in note 5 to SITS' financial statements for fiscal year 2000-2001 under the heading of "Resultados extraordinarios", there is an entry on "Constitución previsión de otros créditos" with an amount of AR\$42,253,305. This item cross-refers to note 4.5, which explains that this amount corresponds to tax credits that have been provisioned in full because of the uncertainty regarding their recoverability and have been charged as extraordinary losses. The Tribunal holds the opinion that it is incorrect to include this amount in the book value of SITS for purposes of compensation. Indeed, the tax credits had not been realized because of SITS' lack of revenues. Hence, the amount of AR\$42,253,305 should also be subtracted from the calculation of the book value.

374. Second, the Tribunal refers again to note 5 to the financial statements of SITS for fiscal year 2000-2001 and to the item on "Constitución previsión para riesgos relacionados con la rescisión del contrato" under the heading of "Resultados extraordinarios." An entry of AR\$10,445,000 is listed on that account. Since the Tribunal has allowed compensation for consequential damages, as explained later, the provisioning for risks related to Contract termination would lead to double counting and is disallowed for purposes of the book value calculation.



375. To conclude the book value calculation, the Tribunal decides that such value is the value claimed by Siemens minus the amounts disallowed above on account of excessive interest rates, tax credits and risks associated with Contract termination. The amounts corresponding to these items add up to AR\$75,419,170, which when subtracted from AR\$283,859,710 claimed by Siemens reduce the book value of the investment to AR\$208,440,540.

376. As the Tribunal has noted, it has been a matter of controversy whether to use funds invested as a measure of the value of the investment or how these funds have been used. The Tribunal has looked into the use of funds as recorded in the financial statements themselves and the result of such examination confirms the adjusted book value set forth above. The Tribunal has taken into account the items in the financial statements that correspond to the Project as such, “bienes de uso”, intangible assets and “project cost”. It emerges from note 5 to SITS’ 2001 audited financial statements (“Estado de resultados” under the heading of “Resultados extraordinarios”) that, in 2001 and because of the termination of the Contract, SITS wrote off AR\$39,777,220 of intangible assets, AR\$49,678,876 of “bienes de uso” and AR\$123,127,297 of “project costs”. These three items add up to AR\$212,583,393.

377. The audited financial statements reflect the financial situation of SITS on September 30, 2001 and the Tribunal has the task to value the investment of Siemens at May 17, 2001. Therefore, the Tribunal has considered it appropriate to compare the aggregate amount of funds applied to “bienes de uso”, intangible assets and “project cost” between September 2000 and September 2001, to assume that these funds were applied at the same daily rate through the period, and to subtract from the difference the amount corresponding to the 136 days between May 17 and September 30, 2001. These assumptions correspond, *mutatis mutandis*, to those applied by expert Lemar to the sources of funds to calculate the value of the investment to May 17, 2001. The financial statements for 2001 show that SITS spent AR\$20,741,994 in “project cost” during the year and AR\$8,973,678 on “bienes de uso” (no funds were applied to intangible assets). These two items add up to AR\$29,715,672. This amount prorated by 365 days results in a daily application of funds to such items of

AR\$81,412.8, which multiplied by 136 is equal to AR\$11,072,140. The subtraction of this amount from AR\$212,583,393 (the sum expended on account of “bienes de uso”, intangible assets and “project cost”) results in AR\$201,511,253, which the Tribunal considers a reasonable approximation to the amount applied to “bienes de uso”, intangible assets and “project cost” up to May 17, 2001. When the allowed capitalized interest of AR\$7,921,492 is added to this amount we arrive at AR\$209,432,745. A result slightly higher than the book value, which can be explained by the adjustments that need to be made to reflect the value of the investment on May 17, 2001.

378. Siemens further claims \$124,541,000 on account of loss profits before taxes.

379. The Tribunal considers that the amount claimed on account of lost profits is very unlikely to have ever materialized for the following reasons:

380. First, in considering the estimated rate of profit on sales, the Tribunal recalls that the calculation of the Claimant assumes the issuance of 33 million DNI. The Tribunal considers that this amount is excessive taking into account that the Claimant accepted to make the investment with a guaranteed minimum of 24 million DNI (Article 16(b) of the Contract).<sup>145</sup> Therefore, the estimated amount of revenues of AR\$889,147,000 calculated by the Claimant needs to be reduced by AR\$270 million (30 pesos per each DNI multiplied by 9 million) to AR\$619,147,000.

381. Second, the amount of AR\$619,147,000 includes a 21% value added tax (Article 4.4 of the Contract) equal to AR\$107,455,000, which needs to be subtracted and results in AR\$511,692,000. Applying to this amount the 16% profit rate results in profits before applicable taxes of AR\$81,870,000 over the life of the Contract.

382. Third, the discount rate to be applied to the estimated profits should reflect the cost of money and the country and business risks. According to Siemens' own expert, this should be a rate within a range of 11% and 15%. Mr.

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<sup>145</sup> The TTN points out in its report that the license of Printrak that SITS held to print DNIs was valid for printing only 24 million documents. Exhibit 161 to the Counter-Memorial, folio 15.

Lemar himself has offered a calculation using a rate in the middle of such range - 13%. The Tribunal considers this rate appropriate taking into account the country and business circumstances of the operation and the cost of funds.

383. Fourth, Siemens' expert has discounted the profits over the expected life of the Contract assuming that it would not be extended. It was possible for the Contract to be extended for an additional six years. It would not be unreasonable to assume that delays would have occurred in the normal course of Project operation given the novelty and complexity of the Project; it is undisputed by the parties that it was the first of its kind. Furthermore, the analysis performed by Mr. Lemar to take into account the three-month delay in Project start-up shows the sensitivity of profits to delays in the timing of revenues. A delay of three months resulted in a drop of 2% in the profit rate notwithstanding the addition of AR\$29 million in revenues for printing of electoral roles which had been underestimated in an earlier calculation. An extension of the Contract to 9 or 12 years would have had devastating effects on the profit rate.

384. Fifth, the profits would have been subject to a corporate profits tax.

385. For these reasons, the Tribunal concludes that Siemens is not entitled to any compensation on account of profit loss.

386. Additionally, Siemens has claimed \$9,178,000 for post-expropriation costs incurred by SITS in continuing a skeleton operation, \$219,899 for unpaid invoices by the Government in relation with the voters list of 1999, \$44,678,462 for sub-contractors' claims, and the return of the performance bond.

387. The Tribunal considers that the claim on account of post-expropriation costs is justified in order to wipe out the consequences of the expropriation. As regards the sub-contractors' claims, Argentina has affirmed to have taken the necessary measures to ensure that these claims are transferred to Argentina. The Tribunal acknowledges this affirmation and decides that Argentina shall hold the Claimant, its subsidiaries and affiliates, wherever located, harmless from, and indemnify same in respect of, any claims heretofore

or hereafter asserted against any of them by any of the following subcontractors to SITS in relation to the Contract: Boldt S.A., Correo Argentino S.A., Printrak International/Printrak de Argentina S.R.L., Imaging Automation Inc., Impsat S.A., SWIPCO Argentina S.A., Mojacar S.A., Indra Spain and Indra Argentina, and Oracle.

388. Since the Contract was terminated on grounds other than performance, it is congruent that the performance bond be returned promptly to Siemens or SITS, as its agent for this purpose. Should the bond not have been returned 30 days after the date of this Award, Argentina shall pay the Claimant the amount of the bond.

389. As for the amount claimed on account of services rendered and unpaid, the Tribunal considers that, since such amount is not disputed and would normally be considered an asset forming part of the value of the investment, the Respondent shall compensate Siemens for the full amount claimed.

**g) Interest**

390. The Claimant has requested that the Tribunal award compound interest at the rate of 6% per annum and that interest accrue as from May 18, 2001 for compensation on account of the expropriated investment and as from the date costs were incurred in the case of compensation for additional damages. The Lemar Report takes into account a number of options before arriving at the conclusion that 6% would be an appropriate rate to apply based on the consideration that this is the rate that Siemens used as its average corporate borrowing rate in appraising investments and in considering funding costs in 2001-2003. The rate of 6% has also been advanced in Professor Schreuer's opinion on the basis of arbitral practice.

391. In its Counter-Memorial, the Respondent does not comment on the issue of the applicable rate of interest. In its Rejoinder, Argentina simply disputes the rate of interest claimed since the Treaty provides that interest be paid at "the usual bank rate." No alternative interest rate is proposed nor is any reason adduced to question how the Claimant has arrived at that rate. Argentina

seems to presume that “the usual bank rate” would be different but without specifying what this bank rate should be.

392. In its Rejoinder, the Respondent objects to the award of compound interest, it considers that this is an inappropriate case for awarding compound interest without offering reasons why this would be so, and responds to the Claimant’s assertion that compounding of interest is in line with the principle of full damages as follows:

“That may theoretically be the case if in fact the investor has borrowed elsewhere to make good the loss of the money which it is said it should have received. But nowhere is it claimed that this Claimant was obliged to make good any financial losses by itself borrowing money at compound interest rates from banks. Thus, the claim for loss of the interest on interest which it is said would have been earned is unfounded in fact as well as being entirely speculative. This element of the Claim amounts to an attempt by the Claimant to unjustly enrich itself in the circumstances of this case.”<sup>146</sup>

393. Argentina further objects to the date of May 18, 2001 as the date from which interest would accrue. It argues that, since the Treaty is silent on this point, it would be artificial to attribute most losses as from that date and speculative and complex to establish dates when the additional damages occurred.

394. The Tribunal will address first the applicable rate of interest, then turn to the questions of the date as from which interest should accrue and whether interest should be simple or compounded.

395. As an expression of customary international law, Article 38 of the Draft Articles states:

“1. Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

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<sup>146</sup> Rejoinder, para. 727. Footnote deleted.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”

396. Thus, in determining the applicable interest rate, the guiding principle is to ensure “full reparation for the injury suffered as a result of the internationally wrongful act.”<sup>147</sup> The Tribunal considers that the rate of interest to be taken into account is not the rate associated with corporate borrowing but the interest rate the amount of compensation would have earned had it been paid after the expropriation. Since the awarded compensation is in dollars, the Tribunal considers that the average rate of interest applicable to US six-month certificates of deposit is an appropriate rate of interest. The average of such rate from May 18, 2001 to September 30, 2006 is 2.66%.<sup>148</sup>

397. For purposes of erasing the effects of the expropriation, interest should accrue from the date the Tribunal has found that expropriation occurred, namely, May 18, 2001, in respect of the book value of the investments made for the Project up to that date. Compensation for post-expropriation costs incurred after May 18, 2001 should accrue interest as from the date on which they were incurred. Since this would not be practical for calculation purposes given the multiple dates involved, the Tribunal considers that interest on post-expropriation costs shall accrue as of January 1, 2002, date by which most of these costs had been incurred (\$9,339,863 out of a total claimed of \$9,807,638). As for interest on unpaid Government bills, interest should accrue from January 1, 2000 since they relate to services rendered in 1999.

398. In the eventuality that Siemens or any of its affiliates or subsidiaries would be held liable for any of the claims of the sub-contractors related to the Contract, interest shall accrue from the date of payment of any such claim. Furthermore, in the eventuality that the performance bond is not returned by the Respondent within 30 days of the dispatch of this Award to the parties, interest shall accrue on the amount of the bond as from 30 days after the

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<sup>147</sup> J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (2002) p. 239.

<sup>148</sup> Calculated on the basis of data published by Bloomberg.

date of dispatch of this Award to the parties and until such amount has been fully paid.

399. As regards compounding of interest, the question is not, as argued by Argentina, whether Siemens had paid compound interest on borrowed funds during the relevant period but whether, had compensation been paid following the expropriation, Siemens would have earned interest on interest paid on the amount of compensation. It is in this sense that tribunals have ruled that compound interest is a closer measure of the actual value lost by an investor. As expressed by the tribunal in *Santa Elena*:

“[w]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.”<sup>149</sup>

400. Similarly have held the tribunals in *Metalclad* and *Wena Hotels*. The *Ad Hoc* Committee in *Wena Hotels* decided that it was within the tribunal’s power to take the option of compound interest as an alternative compatible with the objectives of prompt, adequate and effective compensation and compensation that reflects the market value of the investment immediately before the expropriation.<sup>150</sup>

401. For these reasons, the Tribunal concludes that interest shall be compounded and be compounded annually.

### **VIII. Costs**

402. In order to take into account that the Claimant has not fully prevailed in these proceedings, the Tribunal determines that each party shall bear its own legal costs, and that Argentina and Siemens shall be responsible for 75% and 25%, respectively, of the fees and expenses of the Tribunal and the costs of the ICSID Secretariat.

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<sup>149</sup> *Santa Elena*, para. 104.

<sup>150</sup> *Wena Hotels*, paras. 52-53.

## **IX. Decision**

403. Having carefully considered the parties' arguments in their written pleadings and oral submissions and for the reasons above stated the Tribunal unanimously decides:

1. that the Respondent breached Article 4(2) of the Treaty by expropriating Claimant's investment without complying with its terms;
2. that the Respondent breached Articles 2(1) and 4(1) of the Treaty by failing to accord fair and equitable treatment and full protection and legal security to the investment of the Claimant;
3. that the Respondent has breached Article 2(3) of the Treaty by the arbitrary measures taken in respect of the investment of the Claimant;
4. that the Respondent shall pay forthwith to the Claimant compensation in the amount of \$208,440,540 on account of the value of its investment, \$9,178,000 on account of consequential damages and \$219,899 on account of unpaid bills for services rendered by SITS to the Government;
5. that the Respondent shall forthwith, and in no event later than thirty (30) days from the date of dispatch of this Award to the parties, deliver to Claimant (or SITS as its agent for this purpose) the Contract performance bond provided by SITS (insurance policy No. 000589772) for an amount of \$20 million);
6. that the Respondent shall hold the Claimant, its subsidiaries and affiliates, wherever located, harmless from, and indemnify same in respect of, any claims heretofore or hereafter asserted against any of them by any of the following subcontractors to SITS in relation to the Contract: Boldt S.A., Correo Argentino S.A., Printrak International/Printrak de Argentina S.R.L., Imaging Automation Inc., Impsat S.A.,



SWIPCO Argentina S.A., Mojacar S.A., Indra Spain and Indra Argentina, and Oracle;

7. that the Respondent shall pay to the Claimant interest compounded annually on the sums listed in point 4 of this decision at the rate of 2.66%, which is the average rate applicable to US six-month certificates of deposit from May 18, 2001 to September 30, 2006; such interest to accrue as from May 18, 2001 in the case of compensation on account of the value of the investment, January 1, 2000 in the case of compensation on account of unpaid bills by the Government, and January 1, 2002 in the case of compensation on account of consequential damages, all until the date of dispatch of this Award to the parties;
8. that, in the eventuality that the Respondent had not paid in full the sums referred to in this decision thirty (30) days after the date of dispatch of this Award to the parties, the Respondent shall pay to the Claimant interest compounded annually on the unpaid sum at the rate set forth in point 7 of this decision; such interest to accrue as from thirty (30) days after the date of dispatch of this Award to the parties until such amount has been fully paid;
9. that the Respondent shall, in the eventuality that the Respondent has not delivered the bond referred to in point 5 of this decision to the Claimant (or SITS as its agent) thirty (30) days after the date of dispatch of this Award to the parties, forthwith pay to the Claimant the full amount of the bond. Such amount to bear interest compounded annually at the rate set forth in point 7 of this decision until fully paid;
10. that the Respondent shall, in the eventuality that Siemens or any of its affiliates or subsidiaries would be held liable for any claims of the sub-contractors listed above, pay interest

compounded annually at the rate set forth in point 7 of this decision on any amount paid to satisfy such liability; such interest to accrue from the date of payment of any such amount;

11. that any funds to be paid pursuant to this decision shall be paid in dollars and into an account outside Argentina indicated by the Claimant and net of any taxes and costs;
12. that each party shall bear its own costs and counsel fees;
13. that the Respondent and the Claimant shall be responsible for 75% and 25%, respectively, of the fees and expenses of the arbitrators and the costs of the ICSID Secretariat; and
14. that all other claims are dismissed.

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

*(signed)*  
Judge Charles N. Brower  
Arbitrator

*(signed)*  
Professor Domingo Bello Janeiro  
Arbitrator

Date: 4 Jan. 2007

Date: 11 enero 2007

*(signed)*  
Dr. Andrés Rigo Sureda  
President

Date: January 17, 2007