

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding between

**URBASER S.A.**  
**AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAI A UR PARTZUERGOA**

(Claimants)

and

**THE ARGENTINE REPUBLIC**

(Respondent)

ICSID Case No. ARB/07/26

**Decision on Jurisdiction**

Rendered by

**Professor Andreas Bucher, President**  
**Professor Pedro J. Martínez-Fraga, Arbitrator**  
**Professor Campbell McLachlan QC, Arbitrator**

*Secretary of the Tribunal:* Mr. Marco Tulio Montañés-Rumayor

*Representing Claimants:*

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D. Enrique del Carril  
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*Zabalía Lagos*  
Madrid, Spain

*Representing Respondent:*

Dra. Angelina María Esther Abbona  
Procurador del Tesoro de la Nación  
*Procuración del Tesoro de la Nación*  
Buenos Aires, Argentina

Date: December 19, 2012

## Table of Contents

I.	Background .....	1
A.	Procedure.....	1
B.	The nature of the dispute .....	7
1.	Claimants' claims on the merits .....	7
2.	Respondent's position and objections to jurisdiction .....	11
C.	The legal framework.....	12
II.	Respondent's First Objection: Claimants failed to meet the requirements set forth in Article X of the Argentina-Spain BIT .....	16
A.	Preliminary matters .....	16
B.	The Parties' analysis of the requirements of Article X (2) and (3) of the BIT .....	18
1.	Respondent's position .....	18
2.	Claimants' position .....	22
C.	The Tribunal's findings .....	31
1.	The purpose and relevance of understanding the 18 month rule .....	31
2.	The requirement of submission of the "dispute" to the "competent tribunals" of the Host State .....	49
a)	The effects of the emergency laws on the operation of Argentina's courts .....	49
b)	Competence of local courts requires Claimants' <i>jus standi</i> .....	51
3.	The nature of the "dispute" to be decided "on the substance" within 18 months .....	54
a)	The "substance" cannot be reached through proceedings of an ancillary nature. ....	55
b)	The "substance" cannot be reached pursuant to summary or expedited proceedings... 57	
c)	The "substance" cannot be reached by a declaratory judgment.....	57
d)	What <i>fora</i> for claims for compensation of damages? .....	61
e)	The 18 month requirement with respect to ordinary court proceedings .....	64
4.	Conclusion .....	68
III.	Respondent's Second Objection: Claimants have no legal standing to bring claims for legal rights that belong to another entity .....	69
1.	Respondent's position .....	69
2.	Claimants' position .....	74
3.	The Tribunal's findings.....	78
IV.	Respondent's Third Objection: The investment invoked by Claimants is not a protected investment under the Argentina-Spain BIT .....	84
A.	Preliminary matters .....	84
B.	The transfer of AGBA shares held by Dycasa S.A. to URBASER S.A. ....	87
1.	Respondent's position .....	87
2.	Claimants' position .....	88
3.	The Tribunal's findings.....	89
C.	CABB's shareholder interest in AGBA and its participation agreements concluded with third parties.....	95
1.	Respondent's position .....	95
2.	Claimants' position .....	97
3.	The Tribunal's findings.....	99
D.	CABB's legal standing as a public entity not acting with the authorization of the Kingdom of Spain .....	102
1.	Respondent's position .....	102
2.	Claimants' position .....	104
3.	The Tribunal's findings.....	105
V.	Decision.....	111

## **I. Background**

### **A. Procedure**

1. On July 20, 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Arbitration (“the Request”) dated July 6, 2007, presented in the Spanish language (“Solicitud de Arbitraje”) and submitted by URBASER S.A. AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAI A UR PARTZUERGOA (“Claimants”, respectively “URBASER” and “CABB”) against the ARGENTINE REPUBLIC (“Argentina” or “Respondent”). The Claimants submitted the Request pursuant to Article X of the Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain signed on October 3, 1991<sup>1</sup> (“Argentina-Spain BIT” or “the BIT”).

2. On October 1, 2007, the Acting Secretary-General of ICSID registered the Request and notified the Parties of its registration.

3. Claimants and Respondent (the “Parties”) agreed to waive the nationality requirement as provided in Article 39 of the ICSID Convention (the “Convention”). Respondent selected the formula provided for in Article 37(2)(b) of the Convention regarding the constitution of the Tribunal. Claimants agreed to this choice, subject to the provisions of Article 38 of the Convention.

4. On December 18, 2007, Claimants appointed a national of Spain as arbitrator and proposed the designation of another arbitrator as president of the Tribunal. Respondent rejected the latter proposal on December 28, 2007, and suggested another candidate to become president. Claimant objected to this new proposal on January 3, 2008. On February 15, 2008, Respondent appointed an arbitrator of Argentine nationality and advanced a new proposal for president of the Tribunal. Because both arbitrators proposed by the Parties shared the nationality of Claimants and Respondent, respectively, pursuant to Article 39 of the Convention the agreement of all parties was required to confirm these appointments. On June 18, 2008, Claimants rejected both proposals that Respondent had raised.

5. On September 29, 2008, Claimants withdrew their initial appointment of an arbitrator and instead appointed Professor Pedro J. Martinez-Fraga, a national of the United States of America, as Arbitrator. The Parties were informed on October 30, 2008 that Professor Martinez-Fraga had accepted his appointment.

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<sup>1</sup> Acuerdo para la promoción y protección recíprocas de inversiones firmado por la República Argentina y el Reino de España el 3 de octubre de 1991.

6. Respondent stated on December 18, 2008 that an agreement had been reached between the Parties to accept the appointment of a national of a party pursuant to Article 39 of the Convention. On January 20, 2009, Claimants requested that the two remaining arbitrators be appointed by the Chairman of the Administrative Council, one of them to serve as the Tribunal's president. By letter dated February 13, 2009, the Centre confirmed that in the absence of an agreement between the Parties, no party could designate an arbitrator having the nationality of either Party.

7. On February 23, 2009, Respondent appointed Sir Ian Brownlie, a national of the United Kingdom, as arbitrator. On February 26, 2009, the Centre confirmed that Sir Ian had accepted his appointment.

8. On May 26, 2009, Respondent rejected and Claimants accepted a proposal by the Centre for the appointment of a president of the Tribunal. A new proposal by the Centre on June 9, 2009 was accepted by Claimants on June 16, 2009 and rejected by Respondent on the same day. A further proposal submitted by the Centre on July 10, 2009 was refused by both Parties on July 17, 2009.

9. The Centre then considered Claimants' earlier request to have the third presiding arbitrator appointed by the Chairman of the ICSID Administrative Council as provided for in Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules. By letter dated July 30, 2009, the Centre informed the Parties that it intended to propose the appointment of Professor Andreas Bucher, a national of Switzerland and a member of the ICSID Panel of Arbitrators, as the third arbitrator and President of the Tribunal. In an additional letter dated August 21, 2009, the Secretary-General of ICSID responded to Respondent's objections to the proposed appointment by concluding that these objections were not compelling.

10. On August 25, 2009, Respondent agreed to the appointment of another Swiss national that the Centre earlier had suggested and to which Claimants had agreed on May 26, 2009. When the Centre stated that it was going to seek this appointee's acceptance, on September 1, 2009, Claimants stated that their earlier acceptance was no longer in effect and that they were opposed to Respondent's attempt to have Professor Bucher's designation replaced upon its unilateral initiative.

11. On October 13, 2009, the Parties were informed that the Chairman of the ICSID Administrative Council had appointed Professor Andreas Bucher as the President of the Tribunal. On October 16, 2009, the Parties were further informed that Professor Bucher as well as Sir Ian Brownlie and Professor Pedro J. Martinez-Fraga had accepted their respective appointments and that accordingly, the Tribunal was deemed to be constituted and the proceedings to have begun on that date.

12. In view of the first session of the Tribunal that was envisaged to be held in Paris on December 16, 2009, the Parties submitted an agreement on multiple issues listed on that meeting's provisional agenda. By letter dated December 10, 2009, the Tribunal offered additional suggestions for the Parties' consideration. As the Parties were making progress in resolving outstanding issues, the meeting in Paris was cancelled, based on the expectation that agreement would be reached on the outstanding issues listed on the provisional agenda within a few days between the Tribunal and the Parties.

13. On January 3, 2010, Sir Ian Brownlie passed away. Pursuant to Arbitration Rule 10(2), the proceeding was thus suspended and the Argentine Republic was invited to appoint an arbitrator.

14. On February 26, 2010, the Argentine Republic appointed Professor Campbell McLachlan QC, a national of New Zealand as arbitrator. On March 8, 2010, the Centre informed the Parties that Professor McLachlan had accepted his appointment and that therefore, in accordance with Arbitration Rule 12, the proceeding resumed the same day from the point it had reached at the time the vacancy occurred.

15. On March 18, 2009, Claimants filed with the Centre a Proposal to disqualify ("Propuesta de Recusación") Professor McLachlan as Arbitrator pursuant to Article 57 of the ICSID Convention. The same day, the Centre confirmed receipt of the Proposal and declared that in accordance with Arbitration Rule 9(6) the proceeding was suspended until a decision on the Proposal for disqualification was taken.

16. On April 16, 2010, Respondent filed a submission in response to the disqualification proposal. Invited thereupon to make his own statement on the matter, if any, Professor McLachlan submitted such statement by letter dated May 5, 2010. The Parties all filed a further response to this statement on May 14, 2010.

17. Considering the Proposal for disqualification submitted by Claimants in accordance with Arbitration Rule 9(4), Professor Pedro J. Martinez-Fraga, Arbitrator, and Professor Andreas Bucher, President, decided on August 12, 2010 to dismiss the Proposal.

18. As of the date this Decision issued, *i.e.* August 12, 2010, the proceedings resumed. By letter of August 18, 2010, the Tribunal raised remaining procedural issues. By their respective statements of September 2, 2010, the Parties confirmed that all outstanding items had been clarified and agreed upon. On September 23, 2010, the Tribunal received the Parties' joint Agreement on the issues included in the first meeting's Agenda that had been convened for December 16, 2009, both in Spanish and in English. By letter of September 27, 2010, the Tribunal approved the Parties'

Agreement on the issues listed on the first meeting's Agenda and declared the first session closed.

19. In accordance with the rules contained in that Procedural Agreement and within the time limits fixed therein and later amended in part, the Parties filed submissions as follows:

- Claimants' Memorial on the Merits dated January 27, 2011
- Respondent's Memorial on Objections to the Jurisdiction of the Centre and the Competence of the Tribunal dated April 12, 2011
- Claimants' Counter-Memorial on Objections to Jurisdiction dated June 22, 2011
- Respondent's Reply on Objections to the Jurisdiction of the Centre and the Competence of the Tribunal dated August 15, 2011
- Claimants' Rejoinder on Objections to the Jurisdiction of the Centre and the Competence of the Arbitral Tribunal dated September 29, 2011.

These submissions were presented in Spanish and completed by a translation in English. A selected number of the attached documents and legal authorities were provided in English, either as originals or as translations.

20. Each Party filed supporting documentation together with the submission to which it relates. Further, on July 27, 2011, and in addition to a request contained in its Memorial on Objections to Jurisdiction, Respondent requested the Tribunal to order Claimants to submit additional documents that (a) were mentioned in Legal Opinions filed by Claimants but not submitted; (b) would allow to determine the standing and legal representation of CABB; and (c) relate to Claimants' shareholding in AGBA and to the transfer of those shares. In their letter of August 4, 2011, Claimants rejected this request. After several complementary exchanges of letters submitted by the Parties, the Tribunal's decided on August 15, 2011 not to rule on this matter before the exchange of briefs on jurisdictional issues concluded. Taking account of the documents filed by Claimants together with their Rejoinder on Objections to Jurisdiction, Respondent submitted a new request on October 21, 2011, containing a shorter list of documents requested, to which Claimants replied through their letter of November 3, 2011. In its Procedural Order of November 14, 2011, the Tribunal requested Claimants to submit a number of documents referred to in Prof. Manóvil's Report but not submitted, while it declined to make an order on Respondent's request in relation to other documents, *i.e.* "accounts in participation agreements" concluded by CABB and financial statements of Aguas de Bilbao S.A., which Claimants had refused to produce because they related to third parties alien to these proceedings. In reply, Claimants indicated in their letter of November 24, 2011 that one of the

documents requested in fact had never existed and that in relation to all others those that were available already had been submitted, while the remaining documents to be searched could not be found and were, in any case, not necessary to resolve the matter submitted to arbitration. Respondent addressed these propositions that Claimants advanced in a letter dated December 5, 2011, that requested the Tribunal to draw a negative inference from Claimants' position with respect to the contents of the share transfer agreements and related documentation that was not submitted. Respondent further reiterated its request that Claimants submit the accounts contained in the participation agreement concluded by CABB with Aguas de Bilbao S.A. and confirm that there are no other accounts in participation agreement relating to AGBA. In their comments dated December 19, 2011, Claimants rejected Respondent's requests and denied the relevance of the documents Respondent still sought to file with this Tribunal.

21. The Parties having agreed that it would be appropriate to hold a jurisdictional hearing, it was so decided. In accordance with Arbitration Rule 13(3), the Parties agreed to hold such hearing in Paris.

22. This hearing on the jurisdictional matters raised through Respondent's objections to the jurisdiction of the Centre and the competence of this Tribunal was conducted in Paris on February 6-8, 2012. The following Experts had presented written statements and were examined at that occasion:

- Prof. Dr. Ismael Mata, presented by Respondent
- Prof. Dr. Ricardo Augusto Nissen, presented by Respondent
- Prof. Dr. Rafael Mariano Manóvil, presented by Claimants
- Prof. Dr. Alberto B. Bianchi (Second Opinion), presented by Claimants
- Prof. Dr. Tomás Ramón Fernández, presented by Claimants

Prof. Mata was examined through videoconference between Paris and Buenos Aires. All other Experts were examined in Paris. The second part of the hearing was devoted to the presentation of the Parties' closing statements. At the end of the hearing, Respondent and Claimants declared that they had no remaining objection in respect of the conduct of this proceeding since this Tribunal's constitution.

23. Complementary documentation was filed after the hearing in compliance with decisions made on agreed terms by the Tribunal at the close of the hearing, as follows:

- Copies of a sample of decisions rendered by courts of the Argentine Republic, initially submitted on a CD-Rom exclusively, completed by

an English summary of each decision prepared by Respondent, and commented upon by Claimants in a Note submitted on March 20, 2012;

- English translation of a claim of annulment, offer of evidence and reservation of rights filed with the La Plata Contentious Administrative Court No. 2 on December 4, 2006, concerning which Respondent prepared some corrections, which were reviewed in turn by Claimants who did not raise on their side a need to make any more specific observation or clarification;
- Claimants' English translation of Exhibits to the Request for Arbitration;
- Copies of slides used by Claimants during their closing statement at the hearing of February 8, 2012. While Respondent submitted its set of slides at the hearing, the Tribunal was of the view that Claimants' filing occurring after the hearing was, under the circumstances, not detrimental to any of Respondent's procedural rights or positions.

24. The hearing held in Paris was recorded and a transcript prepared both in Spanish (hereinafter: TR-S, Day page/line) and in English (TR-E Day page/line). Unfortunately, the audio recording of the hearing covering part of Claimants' closing presentation in Spanish contained serious technical defects, rendering it inoperable in most part. The English version, performed by the interpreters, was recorded correctly and completely. A translation of this version in Spanish was provided. Respondent then objected to the filing of a brief entitled "Cierre" and described in Claimants' letter of March 20, 2012 as "[a] written note in support of the claimants' closing statement." The Tribunal recognized that this Note has the effect of duplicating somehow the oral presentation given by Claimants. This is not what the procedural rules agreed upon by the Parties and the complementary provisions adopted in preparation and during the conduct of the hearing had permitted. The presentation of each Party in support of its position concerning Respondent's objections to the Tribunal's jurisdiction was to be made orally and recorded in the transcript. No rule authorized a Party to submit a written brief covering a matter presented orally and available as recorded in the transcript. However, the Tribunal had to adopt a solution that would be fair to Claimants in light of the fact that no fully accurate transcript of their presentation in Spanish is available. Therefore, the Tribunal accepted Respondent's objection in part and decided to disregard this document for the remainder of this proceeding to the extent it contains statements that are not present in equivalent terms in the English transcript. The Parties were advised accordingly by letter dated May 17, 2012. Claimants submitted on June 12, 2012 corrections to the English and Spanish transcripts of their closing statements, to which Respondent declared not to have comments.

25. At the end of the hearing in Paris and in its letters of February 8 and 24, 2012, the Tribunal submitted to the Parties a series of questions they were invited to comment upon, which was done by March 20, 2012.

26. On August 24, 2012, the Parties filed with the Tribunal declarations regarding their costs incurred respectively in this proceeding in relation to its jurisdictional phase.

27. The Tribunal had a deliberation on September 1, 2012.

B. The nature of the dispute

1. *Claimants' claims on the merits*

28. Summarized and reduced to its basic elements in reliance on Claimants' presentation, the dispute's history starts when CABB, as a member of a consortium also composed of Sideco Americana S.A., Impregilo S.p.A. and Iglys S.A., was successfully submitting a bid for the provision of drinking water and sewage services in the Province of Buenos Aires. The successful bidders were required to set up a company in Argentina, to act as Concessionaire. Thus, AGUAS DEL GRAN BUENOS AIRES S.A. (AGBA), organized on December 2, 1999, became the holder of the concession for the provision of a drinking water supply and sewage services in the Region B of the Province of Buenos Aires, based on the Concession Contract it had concluded with the Province of Buenos Aires on December 7, 1999.

29. URBASER became stockholder of AGBA soon after its constitution, when it first acquired shares through Urbaser Argentina S.A. and then directly. Dycasa S.A. also became shareholder at that time. Actually, URBASER entities hold a stake of 27.4122% in AGBA's capital stock. Of this shareholder participation, 26.3435% is directly owned by URBASER. The remaining 1.0687% is held by Urbaser Argentina S.A., an Argentine company. URBASER is the owner of 100% of Urbaser Argentina S.A. It directly owns 98% of Urbaser Argentina, and holds the remaining 2% through Transportes Olivos S.A.C.I. y F. an Argentine company. Transportes Olivos S.A.C.I. y F. in turn is 98% held by Urbaser Argentina S.A. URBASER holds a 2% interest in Transportes Olivos S.A.C.I. y F. CABB holds 20% of AGBA's capital stock. Other shareholder interests in AGBA were held by Impregilo S.A., Iglys and Sideco. The Employee Stock Ownership Program ("Programa de Participación Accionaria del Personal"- PPAP) holds a 10% shareholder interest in AGBA.

30. On March 27, 2002, pursuant to Decree No. 757/2002, Sideco was authorized to transfer its shares to Impreglio and Iglys. At that time URBASER, Urbaser Argentina, and Dycasa were approved for purposes of securing shareholder status in AGBA.

31. Thus, URBASER and CABB collectively acquired an interest of 47.4122% in the water supply and sewage concessionaire for 7 districts in the Province of Buenos Aires. URBASER is the environmental arm of the ACS Group, Actividades de Construcción y Servicios and is a leader in the management of public utility services. CABB is a Spanish entity almost exclusively engaged in the provision of water and sewage services, which is characterized by Claimants as having independent legal status and capacity, whose members include a great number of Municipalities and the Basque Government. It is the entity responsible for the primary network management in the Province of Bizkaia (Basque Country). It serves more than 70 Municipalities and, as Claimants note, it is also authorized to carry out such activities in other countries.

32. Claimants assert that the dispute arose when AGBA was proscribed from charging tariffs in conformance with its own internal decision-making. The dispute further ripened when the concession was taken away on July 14, 2006, and the Province notified AGBA of the early termination of the Concession. This notification was issued pursuant to Decree 1666 dated July 11, 2006. Claimants assert that the prohibition to calculate the tariffs in US-\$ and to review them by reference to US price indexes was of great importance. The state of emergency legislation prevented operation, maintenance, and amortization costs from being computed in US-\$, as provided for in Law 25.561 of January 6, 2002. This legislation also was adopted in the Province of Buenos Aires pursuant to Law 12.858, dated February 28, 2002.

33. The tariffs were converted from US-\$ into Pesos, using an exchange rate of 1:1, during a time when the Peso had depreciated by more than two thirds of its value. Concessionaire's obligations, however, remained constant; AGBA had to endure the reduction and freezing of its tariffs to one third of their initial value without that value ever reverting to its initial levels or even increasing at all as of the termination date. In the fourth year, the Province enacted a new law that caused the reversal of privatization of services, which actually took place at the seventh year of the Concession. This legislation was to be applied without the prior adaptation of the contract. The new regulatory framework included provisions that materially altered the rules relied upon by the Claimants at the time of the investment. Moreover, the investors were faced with clearly uncooperative behaviour on the part of the Executive Branch of the Province of Buenos Aires (the Grantor) and the Buenos Aires Water Regulatory Agency (ORAB). Both authorities adopted measures and decisions or refrained from taking action so as to ensure that the economic burden on the users would be minimized or mitigated, and they prevented AGBA from applying the

established tariffs and from adopting any procedure intended to collect amounts that could constitute a nuisance to delinquent users who were also their constituency at the voting polls. The economic equilibrium of the Concession was thus disrupted and the investment lost. The Grantor took formal actions only and did not consent to the adoption of any methodology designed to contribute to the readjustment of AGBA's Concession Contract. The Grantor never seriously committed to any renegotiation process. In fact, the Grantor itself terminated the Contract. The termination was no more than the final act of a death foretold that divested Claimants from any remaining value of an investment that already had been materially devaluated.

34. While AGBA's requests to increase the tariffs and to restore a distorted economic equation were rejected, other service concessionaires, and particularly the entity that would replace AGBA in the concession area (Aguas Bonaerenses S.A., ABSA), were granted tariff increases and subsidies that had been dismissed with respect to AGBA. Similar events concerning other water service reverse-privatization processes in Argentina also took place.

35. AGBA is undergoing liquidation because the concession was terminated and as a result of having been prevented from charging the tariffs. The investors have waited a long time and have not been paid any compensation at all. Impregilo S.p.A. is another AGBA shareholder who has initiated an ICSID arbitral proceeding that led to issuance of an Award on June 21, 2011.<sup>2</sup>

36. It is Claimants' position that the Argentine Republic is the party responsible for the actions and omissions of the Federal Government and the Province of Buenos Aires, being both the legislature and the executive branches of the Federal Government and the Province of Buenos Aires, including their actions as Grantor and those of the Regulatory Agency.

37. Claimants contend that the Argentine Republic is responsible for the actions of the Province under BITs and customary international law. In the instant case, its responsibility is based on the Spain-Argentina BIT of October 3, 1991. Article I(2) of this BIT makes reference to the "territory" in which the investment is located, and Article I(4) defines "territory" as the "land territory of each Party." In Argentina, such territory comprises all Provinces.

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<sup>2</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17. The Award is pending before an *ad hoc* Committee constituted on January 30, 2012.

38. Claimants' Prayer for Relief is stated in their Memorial on the Merits and has been confirmed as follows:

"1. A declaration that the Argentine Republic breached the provisions of the Bilateral Investment Treaty executed between the Argentine Republic and the Kingdom of Spain on October 3, 1991 and, in particular, the following obligations of the referred Treaty: Article III.1 on the obligation to protect foreign investments and the prohibition to adopt unjustified or discriminatory measures; Article IV.1 on the obligation to afford fair and equitable treatment to the referred investments; and Article V, which forbids any illegal and discriminatory expropriation of foreign investments and imposes the obligation to compensate the investor in the event of expropriation or any other measure of similar characteristics and effects.

2. An order for the Argentine Republic to compensate CABB and URBASER for all damages caused by the referred breaches and, consequently, to pay the following amounts:

2.1 To URBASER, S.A., the sum of USD 101,758,797 (ONE HUNDRED AND ONE MILLION, SEVEN HUNDRED AND FIFTY-EIGHT THOUSAND, SEVEN HUNDRED AND NINETY-SEVEN U.S. DOLLARS).

2.2 To CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BIZKAIA UR PARTZUERGOA, the sum of USD 109,449,861 (ONE HUNDRED AND NINE MILLION, FOUR HUNDRED AND FORTY-NINE THOUSAND, EIGHT HUNDRED AND SIXTY-ONE U.S. DOLLARS)

3. An order for the Argentine Republic to pay interest to the Claimants, as accrued in the amounts established in sections 2.1 and 2.2 above, at an annual compound interest rate of 15% (FIFTEEN PER CENT), computed from December 31, 2010 up to the date of actual payment.

4. An order instructing the Argentine Republic to make any additional compensation as may be required to remedy the damages caused to the Claimants, as deemed just and adequate by the Tribunal.

5. The mandate for the Argentine Republic to bear the costs of this arbitration, including the fees payable to the ICSID, the fees and costs incurred by the Arbitral Tribunal and all legal costs, experts' fees, and any other expenses incurred by the Claimants in this proceeding under the concept of full compensation.

This request for relief and payment of interest contemplates any amounts resulting from the evidence produced in this arbitration, as deemed appropriate by the Arbitral Tribunal.

The Claimants hereby expressly reserve the right to supplement, add to or amend the claims asserted in this Memorial, according to the circumstances

considered in the course of the arbitration proceeding, pursuant to Article 46 of the ICSID Convention.”

39. Claimants have submitted their claims to ICSID arbitration without resorting first to the competent courts of the Argentine Republic, as provided for in Article X (2) of the BIT. They assert that they were authorized to proceed directly to international arbitration by virtue of the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the BIT. They maintained this position in this proceeding and reject Respondent’s objection to jurisdiction based on this ground and other premises that Respondent has raised.

2. *Respondent’s position and objections to jurisdiction*

40. In general, Respondent rejects Claimants’ claims in their entirety and contends that Claimants have not asserted a plausible or *prima facie* case for violation of any of the provisions of the Argentina-Spain BIT. Whereas it did not address the substance of Claimants’ claims in its written submissions on the matter of jurisdiction, Respondent advised the Tribunal in its introductory statement at the hearing that the whole case is a “story of a total failure to comply with the expectations that the State had.”<sup>3</sup> Even before the emergency measures were taken, the Concessionaire was not able to meet its obligations under the operative agreements concerning the provision of services. Respondent further asserts that it was fundamental for the Argentine Republic to know who was awarded the Concession and this knowledge in particular was important with respect to the company acting as the Technical Operator. There were clear rules pertaining to the transfer of shares that have not been observed neither by URBASER nor by CABB. The Authorities of the State had not been informed of several transfers of shares that had actually been made. In this connection Respondent further avers that Claimants violated the legal framework to which the investment was submitted.

41. Respondent has raised three objections to the Tribunal’s jurisdiction in the instant case, all of them being invoked in order to re-assess the basic importance of consent and of complete compliance with the terms of such consent.

42. First, Respondent objects that the condition set forth in Article X (2) and (3) of the BIT requiring that disputes between a Contracting Party to the BIT and an investor of another Party be first submitted to the local courts of the Host State had not been complied with. Claimants admit that there was no such submission. Respondent asserts that this is a jurisdictional requirement and cannot be circumvented by using the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the underlying BIT.

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<sup>3</sup> TR-E, Day 1, p. 12/12 s.

43. Second, Respondent requests that the Tribunal reject Claimants' claim because neither general international law, the Argentine-Spain BIT, the ICSID Convention, nor Argentine law provide for indirect or derivative shareholder actions. Respondent observes that Claimants assert that both URBASER and CABB are shareholders of AGBA. Their respective investments are limited to shares in AGBA. Consequently, Respondent asserts, their claims must be confined to the protection of rights arising from those shares. The rights Claimants seek to enforce are derived from the Concession Contract and are not held by Claimants but rather belong to AGBA.

44. The third objection to the Tribunal's jurisdiction states that URBASER had proceeded to an acquisition of shares contrary to the laws of Argentina when it acquired all Dycasa's shares in AGBA. Similarly, Respondent further avers that CABB also had engaged in illegal transfer of shares when it transferred its shares to third parties through participation agreements that imply serious violations of the law governing the holding and transfer of shares in AGBA. Moreover, Respondent objects that CABB had no standing to resort to ICSID arbitration because it had not obtained the prior express authorization of the Kingdom of Spain.

45. Respondent's Prayer for Relief is stated in its Memorial on Objections to the Jurisdiction of the Centre and the competence of the Tribunal. It requests the Arbitral Tribunal to:

“(1) *decide*, pursuant to Arbitration Rule 41(4), *to admit* this *Objection to Jurisdiction* and to grant the request for production of documents made in Section E;

(2) *order*, in accordance with the arguments presented by the Argentine Republic, a second round of pleadings (reply and rejoinder) at this jurisdictional stage; and

(3) *declare*, pursuant to Rule 41(5), that the Centre has no jurisdiction and that the Tribunal has no competence over this dispute and, therefore, *reject* this claim, taxing costs and fees against Claimants, in accordance with Arbitration Rule 47(1)(j).”

C. The legal framework

46. The Tribunal at the outset notes that under Article 41(1) of the ICSID Convention, it is “the judge of its own competence” and hence has to arrive at its own conclusion regarding Respondent's objections.

47. The Tribunal's jurisdiction, if any, is based on an agreement between the Parties to this proceeding to submit the dispute framed by Claimants to ICSID arbitration. The agreement of the Republic of Argentina is contained in Article X of the Spain-Argentina BIT. More precisely, this provision contains an offer of each Contracting State of the BIT to submit disputes to arbitration, which an investor may accept. Such acceptance is often contained in an investor's request for arbitration. This acceptance is what happened in the instant case, as both Claimants decided to submit the dispute to arbitration under the Argentine-Spain BIT. Additionally, Claimants suggest that by virtue of the MFN clause in Article IV(2) they also invoke the provisions on dispute resolution contained in the BITs concluded by the Republic of Argentina with Chile and France, respectively, which do not require prior submission of the dispute to the domestic courts of the Host State.

48. The issues to be dealt with in this Decision, as they arise based on Respondent's jurisdictional objections, relate to the scope and the content of the offer to arbitrate contained in Article X of the BIT. In very broad terms, the issues before this Tribunal relate to each Claimant's standing as investors under the BIT and to the requirements that must be met in order for this ICSID Arbitral Tribunal to have jurisdiction pursuant to Article X of the BIT.

49. The arbitration clause offered and invoked in this case is contained in a treaty. The interpretation and meaning of its terms must therefore follow the principles and rules of interpretation of the law of treaties. This law is settled in the Vienna Convention on the Law of Treaties 1969, to which both Spain and the Republic of Argentina are Parties.<sup>4</sup> The applicable principles and rules are contained in Articles 31 to 33 of this Convention, which do not need to be reproduced here in full. The primary principle is stated in Article 31(1) providing 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."

50. The broad purpose of the Argentine-Spain BIT is stated in its Preamble as the aim of the Contracting Parties in the following terms:

"Desiring to intensify economic cooperation for the benefit of both countries,  
Intending to create favourable conditions for investments made by investors  
of either State in the territory of the other State, [and]  
Recognizing that the promotion and protection of investments in accordance  
with this Agreement will encourage initiatives in this field."

While focusing on the treaty's object and purpose is important as a general guideline for the understanding of the BIT, attention also must be accorded to the interpretation

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<sup>4</sup> Argentina ratified the Vienna Convention on 5 December 1972; Spain acceded to it on 16 May 1972.

of each particular provision. The Contracting States adopted the provisions of the BIT with the broad intention of creating favourable conditions for foreign investments. Nevertheless, the Contracting States may have adopted concrete solutions that may be considered as not favourable enough in such a perspective, in particular when looking at prevailing investment policies of today. In such a case, the favourable conditions as they were understood, negotiated and expressed in legal terms by the Contracting States when they signed the treaty must prevail, unless in a particular legal framework the BIT leaves room open for an interpretation based on more recent developments in the realm of investment protection law. Such an “open window” allows, however, only little air to come in because the interpretation of the BIT language must be made in accordance with the ordinary meaning to be given to the terms of the BIT in their context.

51. The Tribunal notes that it has not received information on the preparatory work undertaken by the Contracting States. The Parties have not referred to any relevant agreement or instrument of the kind referenced to in Article 31(2) of the Vienna Convention, nor to any “subsequent practice” of the kind referred to in Article 31(3)(b) that would establish an agreed interpretation of the BIT between the two Contracting States. Also, there is no authentic interpretation agreed to between the Parties to the BIT. The Argentine Republic had referred to the position taken by the Kingdom of Spain before the *Maffezini* Tribunal,<sup>5</sup> but such argumentation merely shows what had been argued by counsel at that time on Spain’s behalf in that particular arbitration. It does not allow a broader understanding concerning an interpretation shared by the Spanish Government in general pertaining to the application of certain provisions of the BIT. Were such an agreement or understanding to be deemed legitimately binding, it would require a mutual agreement between Spain and The Republic of Argentina.

52. When considering the purpose either of the BIT as a whole or of a particular provision, the Tribunal has to give such purpose an understanding that comports with the equally important principle of effectiveness (or principle of *effet utile*). Any treaty rule is to be interpreted in respect of its purpose as a rule with an effective meaning rather than as a rule having no meaning and effect. This principle is one of the main features of the law of treaties and has been applied by many ICSID Tribunals.<sup>6</sup> It is given effect within Article 31(1) of the Vienna Convention by virtue of the requirement to interpret in good faith. Effectiveness of a treaty rule denotes the need to avoid an interpretation which leads to either an impossibility or absurdity or empties the provision of any legal effects.

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<sup>5</sup> *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000.

<sup>6</sup> Cf. *CEMEX Caracas investments B.V. v. Bolivarian Republic of Venezuela*, ICSID/ARB/08/15, Decision on Jurisdiction of December 30, 2010, No. 107, with further references.

53. The interpretation of the BIT in light of its objective and purpose must be further contextualized with the “mother” treaty to which most BIT’s (including that in the instant case) relate, *i.e.* the ICSID Convention. As well stated in its preamble, the broad and fundamental purpose of this Convention is the promotion of and support for private international investment. However, at this level as well, this goal is embedded in a policy that seeks to foster a reasonable and tempered balance between the interests of the investors and those of the Host States. This objective was plainly stated in the Report of the Executive Directors in the following terms:

“While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States.”  
(para. 13)

While this proposition is true for the ICSID Convention, it must also be true for the BITs that have been developed based on this treaty.

54. With respect to the applicable law, the Tribunal has to premise the legal foundation of its decision on the ICSID Convention, the Argentine-Spain BIT and, where appropriate, on other sources of international law, with priority accorded to the Vienna Convention on the Law of Treaties. Article X(5) of the BIT contains a provision on applicable law which reads as follows:

“The arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.”

While this provision is primarily directed to the applicable law on the merits of the dispute, it may have a role to play in connection with certain specific issues to be examined concerning jurisdiction, *e.g.* where the operation of Article X (2) and (3) of the BIT requires consulting of the Host State’s domestic law.

55. The Tribunal briefly notes the double layer structure for examining the Centre’s jurisdiction and this Tribunal’s competence. Both of these fundamental aspects and their most important constituent elements, as are the concepts of investment and the requirement for consent, must be based, respectively, on the ICSID Convention and on the Spain-Argentina BIT.

56. When considering the question of its jurisdiction, the Tribunal’s task is not to examine the merits of Claimants’ claims. At a minimum, and according to generally accepted practice, the Tribunal is requested merely to examine whether on a *prima*

*facie* basis the facts alleged by Claimants are sufficient that they may support a finding of possible breaches of the provisions of the BIT and the claims submitted.<sup>7</sup>

57. Claimants have filed with the Tribunal an extensively documented Memorial on the Merits of their claims. These claims arise out of a legal dispute. The Tribunal finds that, *prima facie*, the facts as alleged, if established, may constitute possible violations of at least some of the provisions of the BIT invoked by Claimants, that could justify a claim for compensatory damages. This level of averment is sufficient to allow a ruling affirming the Tribunal's jurisdiction. Whether Claimants' recitation of the facts is proven will, to the extent necessary, be examined at the merits stage of this proceeding if the Tribunal's jurisdiction is affirmed. The *prima facie* test does not preclude the Tribunal from making legal determinations concerning jurisdiction.

## **II. Respondent's First Objection: Claimants failed to meet the requirements set forth in Article X of the Argentina-Spain BIT**

### **A. Preliminary matters**

58. Respondent's first objection is focused on the terms set forth in Article X (2) and (3) of the BIT requiring that disputes between a Contracting Party to the BIT and an investor of another Party first be submitted to the local courts of the Host State. The same objection includes the position that this requirement cannot be circumvented by using the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the BIT.

59. Claimants' basic position in this respect is that they did not and had no juridical obligation to submit their claims to courts of the Argentine Republic, because of the MFN clause which Claimants assert to be equally applicable to the terms of the dispute resolution clause in Article X of the BIT. As a subsidiary issue, Claimants contend that it would have been impossible, in any event, to have the dispute resolved by the local courts in the Argentine Republic in the 18 month period prescribed by Article X(3)(a) of the BIT before its submission to an international arbitral tribunal.

60. The Tribunal will separate the two related issues raised by Respondent's objection and first examine the requirement for the investor to submit the dispute to the local courts of the Argentine Republic (hereinafter also referred to as the "18

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<sup>7</sup> Cf. *Phoenix Action Ltd. v. The Czech Republic*, ICSID/ARB/06/5, Award of April 15, 2009, No. 58-64; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID/ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, No. 84-91; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID/ARB/03/3, Decision on Jurisdiction of April 22, 2005, No. 235-254, 263-281. For a case where jurisdiction was denied because the *prima facie* test failed, cf. *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID/ARB/04/15, Award of September 13, 2006, No. 34, 68-80.

month rule”), standing on its own terms in Article X (2) and (3). It is only in the case that this requirement, as properly construed, was not met or to be met by Claimants that a related query ripens. The second question would be whether the MFN clause has the effect of permitting Claimants to submit their dispute to international arbitration without first addressing the Host State’s local courts. This second question is moot unless the 18 month rule applies and was not met, or had to be met, in this case.

61. Before articulating the 18 month rule, Article X(1) of the BIT requires that the Host State and the investor shall attempt to settle amicably the dispute “as far as possible.” Article X then defines the rule on prior submission of disputes to the local courts of the Host State as follows:

“2. Where a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties to the dispute instigated it, it shall, at the request of either party, be submitted to the competent tribunals of the Party in whose territory the investment was made.

3. The dispute may be submitted to an international arbitral tribunal in any of the following circumstances:

(a) At the request of either party to the dispute, when no decision has been reached on the substance 18 months after the judicial proceeding provided for in paragraph 2 of this article began or

When such a decision has been reached, but the dispute between the parties persists;

(b) When both parties to the dispute have so agreed.”

62. As a matter of fact, the dispute was formally notified to the Government of the Argentine Republic by separate letters with similar content from CABB, dated December 21, 2005, and from URBASER, dated January 24, 2006. Both letters requested the formal commencement of negotiations in order to reach an amicable solution within the framework of Article X of the BIT. In the Attorney General’s reply of March 24, 2006 it was stated that Claimants must first submit the dispute to an Argentine Court, prior to resorting to international arbitration. It also was noted that the investor’s direct standing to sue was denied with respect to rights that are to be claimed by AGBA and not by its shareholders. Pursuant to letters dated September 5 and 6, 2006, Claimants observed that the six month term stated in Article X(2) of the BIT had elapsed without the dispute having been settled. They then requested the commencement of arbitration proceedings under the ICSID Convention. The Attorney General replied on September 27, 2006 stating that no actual proposal or claim had been submitted by the investor in order to have the controversy settled and that their reference to the negotiation period appeared as a pure formality; therefore, unless the investors change their position, the amicable negotiation period provided by the BIT “may not start running.”

63. In their letters sent on October 11, 2006, Claimants noted that there had not been any attempt on Argentina's part to conduct negotiations and that because the six month term for reaching an amicable settlement had been met, arbitration proceedings could now commence. As arbitration was requested in early September of 2006, the three months period fixed by Article X of the BIT had long elapsed when the Request for Arbitration was filed with the ICSID Centre on July 6, 2007. The Tribunal notes that in the course of this proceeding, Respondent did not again raise an objection asserting that the six month negotiation period never had started running. In fact, there is in Article X no formal requirement other than that the dispute had to be "instigated" by one of the parties. This predicate did undoubtedly take place pursuant to Claimants' letters of early September 2006.

B. The Parties' analysis of the requirements of Article X (2) and (3) of the BIT

1. *Respondent's position*

64. Respondent explains that Article X establishes a sequential dispute settlement system: (1) Disputes will have to be amicably settled. (2) When six months have elapsed with no settlement being reached, the dispute shall then be filed, upon request by one of the parties, with the competent courts of the Host State. (3) The dispute may be submitted to international arbitration if (i) a period of 18 months has elapsed after submission of the dispute to domestic courts, or (ii) a final decision has been rendered but the Parties are still in dispute.

65. The prior submission to the local courts is a jurisdictional requirement that may not be unilaterally set aside. It does not reflect merely a waiting period because it imposes an obligation to submit the case to domestic courts. The rule contains two elements: an obligation *ratione fori* and an obligation *ratione temporis*. The rule requires that international arbitration is subject to the prior submission of the dispute to the Argentine Courts for a term of 18 months or until a decision is rendered on the merits of the case, whichever comes first.

66. The purpose of the requirement is to offer a concrete opportunity for the courts of the Host State to provide for a suitable remedy. The BIT does not require that the dispute be resolved, but merely that it be submitted to the domestic courts for the specified period of time. Thus, these courts would have the opportunity to attempt to resolve the dispute before the Host State's responsibility is discussed at the international level. Respondent also notes that the rule of Article X(2) is akin to the

rule of exhaustion of local remedies in international law; the State where the violation occurred should have an opportunity to redress it by its own means.

67. By its nature, the 18 month rule is a jurisdictional requirement that is part of the offer to arbitrate, which includes that condition and that cannot unilaterally be modified. Claimants are third parties to the BIT. Therefore, they may not alter it and have to comply with its provisions as they stand. The requirement that disputes be first submitted to local courts is an essential prerequisite and an integral part of the “standing offer” to arbitrate. The option for an investor to omit this step is simply not provided for in the BIT. This requirement is closely related to the consensual nature of arbitration. As regards a BIT, the respect for the State’s consent is an essential element. In the BIT at issue in the instant case, the requirement for prior submission to local courts constitutes an important element of such consent.

68. Claimants have failed to comply with this obligation and they have acknowledged non-compliance since the time at which they filed their Request for Arbitration.

69. Respondent objects to Claimants’ contention that the requirement first to resort to local courts is exceptional. Respondent submits that it is not. It is a common provision in BITs and was included in a dozen BITs. The 18 month clause was specifically negotiated by the Argentine Republic. This intent on the part of Respondent is demonstrated by the fact that, after entering into treaties that did not include the 18 month clause, the Respondent continued to execute treaties that included this provision in certain cases. Such a clause was included in the BITs with Italy (1990), Belgium/Luxemburg (1990), the UK (1990), Germany (1991) and Switzerland (1991). Then, the Argentine Republic concluded BITs with France, Poland, and Chile, all in 1991, that did not contain the 18 month rule. The Republic of Argentina reverted to its older practice in the BITs concluded with France (1993), Spain (1991), Canada (1991), Austria (1992), the Netherlands (1992) and South Korea (1995). But even if the rule were exceptional, it would not in any way change its binding nature as far as concerns the Argentine-Spain BIT, as it applies in this case.

70. Nothing prevented Claimants from filing legal claims. A number of decisions have been rendered by courts of the Argentine Republic within the 18 months period. As further explained by Respondent’s Expert, Prof. Mata, the domestic legal system of the Argentine Republic provides for a wide range of possibilities for Claimants to submit their dispute to the local courts in an expedited fashion and to have such claims decided within the term established in the Treaty.

71. In its Answer to questions raised by the Tribunal at the conclusion of the hearing, Respondent stated at the outset that there is no doubt that it was possible for

Claimants to bring the instant dispute before Argentine Courts, at least for three reasons: First, under Article 18 of the Constitution every person has a constitutionally guaranteed right of access to justice. Second, under Article 20 foreigners enjoy all the civil rights of the citizen. Third, Article 75, paragraph 22, provides that treaties are superior to laws, which also means that Article X(2) of the BIT is directly enforceable in Argentina. Any provision that would deny Claimants access to justice would be unconstitutional.

72. Claimants did bring the dispute before this Arbitral Tribunal notwithstanding non-compliance with a fundamental condition attached to Argentina's consent to international jurisdiction. Respondent points to the recent decision of the US Circuit Court of Appeals for the District of Columbia in the case *Republic of Argentina v. BG Group plc*, decided on January 17, 2012, which affirmed that the Contracting Parties to the UK-Argentine BIT provided that an Argentine court would have eighteen months to resolve a dispute prior to resort to arbitration. Whatever an Argentine Court decided on the admissibility and/or merits of the claims, it would not have prevented Claimants from subsequently pursuing their claims before an arbitral tribunal.

73. Respondent adds that nevertheless, the fact that Claimants could have brought this dispute before domestic courts does not mean that, in turn, Argentina – as a party to such potential lawsuit – would not have the right to raise any objection it may have against, for example, Claimants' *jus standi* or otherwise.

74. In the referenced Answer, Respondent addressed a selection of different actions as suitable to comply with the requirements of Article X(2) of the BIT. The first of several alternatives could have been a motion for merely a declaratory judgment, based on Article 322 of the Federal Code of Civil and Commercial Procedure, which would allow for a "declaration of unconstitutionality of laws," based on a violation of an international treaty, which is in itself unconstitutional. The investor could argue that a given measure taken by the Government or one of its subdivisions adversely affects its rights under the BIT, and that it requests a judicial decision on the conformity of such measure with the BIT. As to Claimants' objection that this action does not allow for the submission of a claim for damages, Respondent replies that Article X(2) only requires that the dispute submitted to the domestic courts be the same as the one subsequently submitted to international arbitration, but that nothing prevents a party in this latter proceeding from requesting additional remedies such as compensation for damages, not included in the action before the domestic courts provided that it is the same dispute. This scenario would result, as Respondent explains in its Answer, when damages deriving from the contested measures did not exist at the time the dispute was submitted to domestic courts. Thus, a motion for a declaratory judgment may be filed in order to prevent the occurrence of damages, which complies with the purpose of Article X(2) of the BIT. Whatever the domestic

courts may finally decide within the framework of a motion for a declaratory judgment, the investor would have complied with the requirement of prior submission to local courts.

75. Second, Respondent mentions as another means, albeit in some vein comparable to a declaratory judgment, the possibility for a Spanish investor to resort to an *Amparo* action for the purposes of complying with the requirements of Article X(2) of the BIT. Such a proceeding is based on Article 43 of the Constitution and can be initiated by any person (including a shareholder or investor) concerning any act or omission of the public authority and rights or guarantees recognized by a treaty. Respondent has submitted summaries of a large number of actions brought before domestic courts, which include many *Amparo* actions and decisions rendered in less than 18 months. An *Amparo* action mainly seeks a declaration but does not exclude in actual practice a court ruling ordering banks to return funds to their customers. In any event, as stated above, a claim for damages is, in Respondent's view, not indispensable in order to comply with the requirement of prior submission. Such an action before domestic courts may be filed in order to prevent damages. Respondent also cites a precedent showing that an *Amparo* action can deal with complex issues, *e.g.* relating to the telecommunications market.

76. Respondent further asserts that no comparison can be had with the action brought by AGBA before administrative courts. This action, so Respondent contends, was not brought by Claimants but by AGBA who is not an investor protected by the BIT. In addition, it is further averred that the claim expressly states that it must be distinguished from potential actions brought by AGBA's shareholders under BITs. Therefore Respondent concludes, this action is irrelevant for purposes of compliance with the requirement contained in Article X(2) of the BIT.

77. Finally, Respondent explained in yet another answer to a question raised by the Tribunal, that neither the Emergency Law nor Decree No. 214/2002 precludes the filing of actions. Article 12 of the Decree only ordered a stay for 180 days and exclusively for actions concerning financial and foreign exchange matters. This provision was amended by Decree No. 320/2002 dated February 15, 2002, which stayed the "compliance with precautionary measures" and the "enforcement of judgments" but again did not preclude the filing of actions. The decree referred solely to lawsuits relating to the financial and foreign exchange system and the stay only remained in force for 180 days in 2002.

## 2. *Claimants' position*

78. Claimants stated in their Request for Arbitration that the request was filed “without taking the action to the internal courts of the Argentine Republic”, and have done so pursuant to the MFN clause contained in Article IV(2) of the Spain-Argentina BIT.

79. Claimants agree that consent is of course essential to all arbitral jurisdiction and that Article X constitutes an integral part of the offer to arbitrate. However, they contend that the MFN clause of Article IV(2) also is contained in that offer. There is no normative juridical principle, Claimants advance, that MFN clauses do not apply to jurisdictional issues. This expansive construction is all the more relevant where, as in the instant case, the Spain-Argentina BIT’s MFN clause provides that it applies to “all matters governing this Agreement.”

80. Numerous BITs signed by the Argentine Republic do not require that the dispute be first submitted to the courts of the host country. That is the case with the BITs of Argentina with Perú (Art. 10.2), Chile (Art. X), USA (Art. VII, 2 and 3) and France (Art. 8.2). Claimants invoke these BITs and especially the ones with Chile and France to the extent that those treaties permit the foreign investor to resort to international arbitration directly without any need of first filing a complaint with Argentina’s domestic courts. Simply stated, were this requirement imposed on Spanish investors they would be accorded a treatment less favourable than the treatment that the Republic of Argentina extends to Perú, Chile, the U.S., and France. According to Claimants, the requirement to resort first to the local courts of the Host State is an exceptional condition. As stated by the Tribunal in the *Plama* case, it is “curious.”

81. Claimants explain that Concessionaire AGBA brought several challenges before Argentina’s domestic courts, mostly seeking reversal of the decisions made by the Regulatory Agency and the Grantor. For the most part, these remedies are still pending, more than four years after the termination of the Contract. AGBA also brought an action for annulment of Decree No. 1666/06 which ordered the termination of the contract. The action was brought before the Contentious Administrative Branch No. 2 in and for the City of La Plata on December 4, 2006. The proceeding is still in the evidentiary phase. Therefore, it is asserted that Claimants’ decision to resort directly to the arbitral tribunal is also fully justified on grounds of diligence and efficiency. It had to be assumed that it would be impossible to have a dispute resolved by the local courts in the period prescribed in the BIT. The possibilities of securing a court decision within 18 months are non-existing.

82. More generally, Claimants place great weight on their contention that the failure of Argentine Courts to settle investment disputes promptly is both well chronicled and beyond cavil. The wide range of opportunities to submit such a dispute to local courts, as affirmed by Respondent, are merely hypothetical and of no practical moment.

83. Claimants point to a press article where Mr. Rosatti, Respondent's Attorney General, explains that it was absolutely impossible for the Argentine courts to settle disputes similar to investment disputes within the 18 month period.<sup>8</sup> Mr. Rosatti's statement was based on a study conducted by the Auditing Division of Argentina's Attorney General, at a time when Mr. Rosatti was acting Attorney General. That study analysed 1,600 proceedings commenced against the Federal Government of the Republic of Argentina during the five year period of time from 1985 to 2000. The disputes considered in the study were similar to disputes arising from the violation of a BIT in as much as the amounts claimed were significant and also because that they concerned adversarial proceedings that entailed a trial phase or final hearing. Based on this study the average duration of a proceeding would be six (6) years and one month. Claimants produce a letter from the "Dirección Nacional de Auditoría" dated September 7, 2011, suggesting that a request made by a lawyer (not acting on Claimants' behalf) for delivery of a copy of the research was denied purportedly because the relevant documentation was not available in the archives of that institution. It was also stated that the research had to be expanded to a much broader sample of decisions, which in turn gives rise to logistical concerns, as well as issues pertaining to the protection of fiscal and banking secrets.

84. Claimants observe that Respondent remained silent when faced with these facts and did not even try to object or to offer more recent and favourable statistics that somehow mitigate the proffered evidence. Claimants in this connection further aver that because Respondent is perfectly aware of the futility of pursuing judicial remedies in local courts within an 18 month timeframe, Respondent attempts to convince the Tribunal that the 18 month target may be reached through other means, *i.e.* remedies *other* than ordinary proceedings.

85. Claimants note that Respondent relies in large part on Prof. Mata's description of a number of remedies to secure the protection of an investor, completed by further explanations given at the hearing. However, they also observe that Prof. Mata confuses the remedies available to AGBA with the rights of the investors under the BIT. The investors lack standing to bring any of the expedited summary actions under the Concession Contract signed with AGBA. Those remedies, which are available

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<sup>8</sup> Horacio D. Rosatti, Los tratados bilaterales de inversión, el arbitraje internacional obligatorio y el sistema constitucional argentino, *in* La Ley, Buenos Aires, October 15, 2003, footnote 18.

before domestic courts, are intended to be used by the Concessionaire and not by the investors. Moreover, as AGBA's experience in pursuing such claims demonstrates, neither the administrative nor the court proceedings would have been at all adjudicated within 18 months. Prof. Mata also misses the point that Claimants do not want to prevent or avoid damages; they seek damages for the violation of the BIT. As of the time that the Contract had been terminated and the service transferred to the new concessionaire, one of the fundamental assumptions at the basis of Prof. Mata's Report became moot.

86. The first category of possible remedies listed in Prof. Mata's Report is an action for the protection of constitutional rights (action for *Amparo*). Such proceeding is, in principle, reserved for the prompt adjudication of clear violations of constitutional rights, laws or treaties. It does not extend to pecuniary claims. Claimants further explain that an *Amparo* action is inadmissible in the absence of obvious arbitrariness or illegality, in cases requiring a protracted final hearing and the extensive analysis of evidentiary issues. The expedited procedures governing *Amparo* actions are to be adjudicated only for purposes of addressing simple and clear legal issues. As the file demonstrates in this case, only by proffering considerable oral (witness) and documentary evidence will the Claimants be able to air all relevant issue pertaining to liability and damages and thus prosecute a comprehensive action seeking relief for the loss of their investment.

87. According to Prof. Mata the subject matter of an *Amparo* action is defined as the remedy suitable to restrain obvious unlawful or arbitrary conduct. Prof. Mata's understanding of an *Amparo* proceeding clearly established that such a proceeding could hardly be suitable for an action as has been filed before this Tribunal although Prof. Mata does not so testify. After the crisis of 2001/02, the courts hearing those actions solely decided on the return of funds in US\$ to bank customers, but they did not order the payments of any interest or grant of any relief for damages. Bank customers seeking such relief had to resort to independent ordinary proceedings. Indeed the Argentine Supreme Court has ruled that an *Amparo* action is not appropriate for purposes of assessing complex factual disputes or the application of law to facts whether a plaintiff suffered pecuniary or liquidated damages. Prof. Mata confirmed at the hearing that in cases of losses to be compensated through compensatory damages, relief only could be sought pursuant to ordinary proceedings before a court of law. An *Amparo* action cannot be brought where the claimant seeks damages.

88. Section 43 of the Argentine Constitution of 1994 establishes the restrictions on *Amparo* actions and the proscription against bringing such a claim where damages are sought. Such a proceeding may be brought as to acts or omissions on the part of the State that "presently or imminently harm, restrict, alter or threaten to violate, with

obvious arbitrariness or illegality, rights or guarantees recognized in this Constitution.” An *Amparo* action may be brought against wrongful government actions of the type described. Its purpose is to avoid the effects of such actions rather than to compensate the aggrieved parties for wrongs caused by their effects.

89. Claimants assert that at the hearing, Prof. Mata further explained that an *Amparo* action can do more than address the protection of constitutional rights. It can also be used to seek a declaration that an administrative decision is null and void because it is unconstitutional. An *Amparo* proceeding also can suspend the effects of such an administrative decision and even allow economic compensation.<sup>9</sup> Such compensation, however, does not extend to a compensation of damages. It refers to cases where banks were required to return deposits that they held in accounts. Such judgments had been rendered only against banks and were limited to the return of property. Claimants assert that Respondent’s expert cannot instruct the Tribunal on a single *Amparo* action concerning the compensation of damages payable by the State. Claimants point to the Expert’s statement excluding such an action from those capable of providing protection and resulting in a damages award.

90. Claimants also recall that if an *Amparo* action is used to annul an administrative decision claimed to be unconstitutional, such a proceeding is materially different from an action brought before an arbitral tribunal under a BIT. A claim under a BIT under no analysis of law or fact can seek the annulment of an administrative ruling. Therefore, Claimants conclude, an *Amparo* action seeking such a declaration is inapposite to Article X(2) of the BIT.

91. Claimants further explain that from a procedural perspective as well, an *Amparo* action is not an adequate means to file claims that investors would assert. The *Amparo* action is restricted to acts or omissions by public authorities impairing with manifest arbitrariness or illegality constitutional rights or guarantees that require no significant debate or analysis of evidence. Because of the complex nature and character of an investment dispute, it is impossible for an *Amparo* action to be suitable for the airing and resolution of a matter of this nature. Examples of this proposition can be found in the set of judgments that Respondent presented. For instance, in the case No. 220/04, it is ruled that an *Amparo* action is reserved for clearly exceptional circumstances. There are excluded from its scope any dispute requiring discussion and evidence, and any other dispute for which other suitable means are available for the Respondent’s protection. Numerous other judgments that Respondent presented contain similar statements. In 2006 AGBA filed an *Amparo* seeking to obtain a declaration of unconstitutionality, but the judge decided that the subject-matter of the dispute only gave rise to an ordinary administrative action. AGBA also filed a nullity

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<sup>9</sup> TR-E, Day 1 p. 136/16-137/2.

action at the same time, which again was only of a purely declaratory nature. Both actions have been pending for more than five years and, to Claimants' knowledge both still remain in the evidentiary phase of the proceedings.

92. The second category of possible actions that Respondent presented relates to expedited summary proceedings, which constitute an exceptional procedural means arising from a claim brought against an act or omission committed by a private party. In the instant case Claimants are seeking damages for the alleged actions of the Provincial Government: Therefore, such procedure would be inapposite. The investors had no opportunity to bring an expedited summary proceeding before an Argentine Court based upon allegations of discriminatory and expropriatory actions. Claimants note that Prof. Mata admits that ordinary proceedings are the proper procedural means for purposes of bringing such a case, as a more extensive trial and evidence phases are required.

93. Claimants also note that at the hearing Prof. Mata admitted that the only cases in which such actions were permitted are those established pursuant to Action 321 of the Argentine Code of Civil and Commercial Procedure. According to Prof. Mata, these cases may include actions based on the law of a treaty if the treaty so provides; he added that the 18 month rule of the BIT "points to an expedited summary solution to obtain compensation for damages."<sup>10</sup> Claimants observe that nothing in the BIT provides that any claim under the BIT may be brought pursuant to summary proceeding. The 18 month rule does not imply such a commitment because it does not compel Argentine Courts to settle a dispute within this period of time; it merely states that if the courts fail to reach a decision within this timeframe, the investor can refer the matter to international arbitration. Based on the description provided in Prof. Mata's Report, such an expedited summary action is by far incompatible with the complexities endemic to an investment claim. Such an action is neither suitable nor viable as an alternative to be filed before an Argentine Court.

94. As indicative of a third type of an alternative court procedure Prof. Mata mentions the principle of useless procedural steps ("ritualismo inútil") that would allow avoiding the filing of an administrative claim before bringing an action against the Province for the violation of the BIT. Indeed, in the Argentine Republic, before bringing an action against the State, the plaintiff must first file an administrative claim. There exists a number of exceptions, none of which are applicable, in Claimants' view, to the instant case. Therefore, if the investors had decided to bring an action for damages arising from the violation of the BIT before an Argentine Court, they would have had to exhaust all administrative remedies available to them as a condition precedent to bring such action. Thus, such an ordinary proceeding and the

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<sup>10</sup> TR-E, Day 1, p. 91/16-19.

prior administrative action would have to come to closure in less than 18 months. Prof. Mata explains that while in principle an administrative claim must be filed before the filing of a complaint, this might be avoided under the “useless procedural step” doctrine, which could also apply when litigation would take at least 5 years to be resolved, instead of the 18 months as required in the BIT. Claimants state, however, that even such acceleration, purely hypothetical in the absence of case law relating to investment disputes, could not at all sustain a claim for damages within an 18 month window. They also note that the concept was excluded by Prof. Mata at the hearing when he admitted that the doctrine does not apply to claims filed before courts. It simply refers to a possible elimination of prior administrative proceedings required before going to court, which does not at all concern any aspect of Claimants’ claims under the BIT. It would also be a pure speculation to think that such a device would offer an exemption from costs, which Prof. Mata confirmed were of 3%, a percentage that in Claimants’ view would result in the amount of U.S. \$ 6 million.

95. In a fourth category Prof. Mata affirms that the shareholders had standing to bring possessory actions or actions *in rem* (“acciones posesorias y reales”) against a disturbance of their property by the Provincial State. However, in this case, AGBA as Concessionaire is the property, and it holds the property that is the subject-matter of the Concession. Accordingly, Claimants could not have brought a possessory action against the State unless the disturbance of their possession is a discriminatory and arbitrary action without any legal title, even where such actions were apparent and elaborate evidentiary proffers were not necessary. The termination decree deprived AGBA of the bare possession of the property. Although it has been challenged, this Decree is presumed legally valid until annulled in court. Therefore, a possessory action could not apply because the Decree constituted a legal title. The Province took possession of the property of the Concession after the termination of the Contract. The validity of the termination and the damages arising from such termination must therefore be addressed in a proceeding other than through a possessory action. After the termination of the Contract neither AGBA nor its shareholders could refuse to return the items held in possession, while reserving their rights to challenge such a measure and to seek damages. Faced with the Decree terminating the Contract, AGBA had no means to resist the deprivation of the use of the property of the Concession. Claimants further assert that Prof. Mata also rejected this methodology at the hearing as inadequate for purposes of framing a claim for damages. While explaining the potential usefulness of such an action under specific circumstances, Prof. Mata admitted that it has nothing to do with relief in the form of compensatory damages. Claimants admit that such an action would be available for the Concessionaire who has been deprived of its assets, but not for Claimants who do not expect to recover any assets pertaining to the Concession.

96. As a fifth possible procedural recourse, Prof. Mata mentions an action for a declaratory judgment of certainty (“acción declarativa de certeza”). Its mere description disqualifies it as an available remedy. Indeed, it is a residual action, when no other judicial remedy is available. It is an action that seeks to do away with an uncertainty of law by virtue of a declaratory judgment. The action thus has a preventive nature. It does not require the existence of an actual harm and it does not open the door for petitioning a damages award. Prof. Mata explained at the hearing that this action merely seeks issuance of a declaratory judgment that may serve as a basis for establishing damages at a subsequent stage. Claimants state that the issue here is different because the dispute involves defining whether the BIT was violated and, if so, determining the damages to be paid to the investors in the form of compensatory damages.

97. The sixth category of purportedly prospective actions consists of prohibitory injunctive relief (“prohibición de innovar”), also called, as occurred at the hearing, “precautionary measures” (“medidas cautelares”). Prohibitory injunctive relief or *medidas cautelares* must derive from a pending underlying action. *Medidas cautelares* alone cannot constitute a cause of action or proceeding. Furthermore, the underlying proceeding must be one where damages as such are sought. It is axiomatic that a *medida cautelar* cannot serve as a condition precedent to any action, nor can it constitute a decision on the merits as referenced to in Article X(3)(a) of the BIT. While Prof. Mata confirmed at the hearing that in certain cases damages may be awarded, such award would be exceptional and provisional, because such measures (i) are always ancillary to a main legal action, (ii) do not entail a decision on the merits and (iii) are contingent on the final judgment rendered in the main legal action.

98. Finally, in a seventh category Claimants close the enumeration of the instruments Prof. Mata identifies in his Report as would be potential suitable remedies for Claimants by referencing the *Amparo* action for administrative default or delay (“amparo por mora administrativa”). This proceeding is a specific type of *Amparo* action that applies where administratively no response issues to a properly filed complaint. Claimants opine that it is hard to see how this remedy may be considered as the predicate action under the BIT. For such an *Amparo* action to meet the condition precedent requirement, the investor first should have brought an administrative claim, which would then have been left unanswered. The nature of such an administrative claim remains undefined, nor is it at all clear how this additional remedy would provide for any abbreviation of 18 month window under the BIT. At the hearing Prof. Mata acknowledged that it did not constitute a judicial proceeding but rather a method designed to elicit a response from an otherwise unresponsive administrative rubric. The proceeding bears no relationship to a judicial proceeding.

99. Claimants thus state in sum that none of the remedies described in Prof. Mata's Report satisfies their right to claim damages for the losses suffered based on violations of the BIT, nor could any such remedy satisfy the requirement to settle the dispute within 18 months. They also observe that in light of Prof. Mata's explanation at the hearing, based on his own testimony, of all of the expedited proceedings provided for under Argentine law only the "expedited summary action" was open to Claimants. He introduced an additional remedy consisting of direct recourse to the Supreme Court noting that, apart from these remedies, only an ordinary proceeding would be viable.

100. Claimants advance that the alternative of an original action brought before the Supreme Court came to light (*i.e.* was raised) for the first time during the hearing. It had not been contemplated or otherwise raised or suggested in Prof. Mata's Report as one of the expedited procedural remedies. Prof. Mata's Report referred to Article 117 of the Argentine Constitution, but the Republic of Argentina is not mentioned in that Article as a possible defendant. Only the provinces are mentioned. According to the Supreme Court practice, it is not possible to bring an action directly before the Supreme Court against both the sovereign and a province. The Supreme Court may only exercise appellate jurisdiction as provided by Article 116. A proceeding directly initiated before the Supreme Court pursuant to Article 117 would be an ordinary proceeding that is incapable of being settled within 18 months. Hence, an action directly brought to the Supreme Court is not a suitable remedy for purposes of meeting the predicate under the BIT.

101. Consequently, Claimants conclude that Prof. Mata's Report and his testimony at the hearing demonstrate that a claim of the kind pending in this proceeding can only be brought in ordinary judicial actions and before an administrative court in the City of Buenos Aires. Argentine laws provide for two types of proceedings regarding claims against the Government. Some claims may be brought before administrative authorities where they are handled by a Government agency and not by a court. Such an action does not comply with Article X(2) of the BIT because it is not submitted to a "competent tribunal." A claim against the sovereign has to be heard by the Federal Administrative Courts. These courts exercise exclusive jurisdiction as to such claims. Thus, the prerequisite for submitting the dispute to a domestic court as provided in Article X (2) and (3a) of the BIT consists of filing a claim with an Argentine federal administrative court. Yet, as has been amply demonstrated, no judgment can be obtained in that tribunal in the first instance within 18 months.

102. Prof. Mata found support for the possibility of reaching a decision within 18 months in Sections 34 and 36 of the Argentine Code of Civil and Commercial Procedure, which provide for expedited court proceedings. Claimants observe that the resulting obligation to render a prompt decision has been in force since 1968 and has yet to prove that it may mitigate overburdened dockets. The provisions of the BIT

may not be used to argue that a decision can be obtained within 18 months because of the particular diligence Argentine courts exercise when faced with a BIT based claim. This likelihood is all the more so because Article X of the BIT does not impose an obligation on Argentine courts to settle the dispute within 18 months. When affirming that this deadline somehow shall be met, both Respondent and Prof. Mata base their conclusion on pure hypothesis and speculation.

103. In their Answer to questions raised by the Tribunal at the end of the hearing, Claimants also affirmed that prior recourse to local courts can only make sense if the action is deemed by the investor to be capable of satisfying its interests. Obtaining a mere declaration of a breach is hardly enough; the investor needs a decision that binds the breaching State to pay compensation. The requirement of first resorting to local courts would be both senseless and futile if, upon compliance, the investor would still fail to obtain what it lawfully pursues, *i.e.* compensation for damages. In such a case or any other, the purpose of prior recourse to local courts would never be achieved if the actions filed before the local courts and before the arbitral tribunal were different. A local judge cannot possibly adjudicate a dispute if the claim to be settled is not before him or her. Therefore, if the claim before the arbitral tribunal is for damages, it would be insufficient to seize a domestic court with a declaratory action only. The action referred to in Article X (2) and (3) must be of the same kind.

104. In any event, even where it is assumed that Respondent's arguments are true and accurate, Claimants still would be fully denied access to domestic courts. As early as when Respondent received the notices of dispute in 2005/06 it first asserted in its very answer that only AGBA would have legal standing to bring an action in its capacity as Concessionaire. Claimants underscore that Respondent's position is inconsistent, initially arguing that the AGBA shareholders could not bring their own claims before courts, but now asserting that Claimants have multiple remedies available to resort to litigation in Argentina. This is an additional factor showing that the effective submission of the dispute to the Argentine Courts is hypothetical.

105. In response to another question posed by the Tribunal, Claimants explain that the emergency laws caused proceedings before the local courts to be suspended and this suspension prevented the enforcement of any possible award of damages. As this issue also was mentioned by Prof. Mata, it is noted that Decree 214/2002 was issued 10 years ago. The provisions of Article 12 on suspension of proceedings remained effective for 180 days. The emergency now has been extended until December 31, 2013.<sup>11</sup> The emergency laws did not hinder thousands of *Amparo* claims from being presented. Precautionary measures were suspended as well as enforcement against the Federal State for 180 days. The Government deemed that any judicial claim would be

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<sup>11</sup> Law 26,729, cf. TR-E, Day 1 p. 45/19-22, 46/1-9.

inconsistent with the “preservation of social peace,” referred to in one of the recitals to Decree 320/2002 dated February 15, 2002, which amended Section 12 of Decree 214/2002, restricting the possibility of bringing legal action that were deemed contrary to social peace. Such limitations also were applicable to agreements concluded with concessionaires’ shareholders, Decree 1090/2002 and Resolution 308/2002 prohibited access to renegotiation to all who filed claims before local courts. In light of these provisions of the emergency legislation it cannot be asserted that foreign investors were allowed to resort without any restrictions to local courts. It is hypothetically possible that Claimants might not have been prevented from filing a claim in an ordinary proceeding in 2006 or in 2007. However, in such a scenario, it is impossible to imagine that a claim would have been solved within 18 months. For Claimants, the situation would not have been any different than it was when it was presented by the *Abaclat* Tribunal.<sup>12</sup> At that time the *Abaclat* Tribunal admitted that any claim for compensatory damages was doomed to fail because the emergency laws prevented the State from reaching any in-court or out-of-court or private settlement. Indeed, even were the claimants to obtain a favourable judgment from the local courts, the Government would be prevented from paying it.

C. The Tribunal’s findings

1. *The purpose and relevance of understanding the 18 month rule*

106. The Parties have expressed diverging views over the importance and the purpose of the 18 month rule.

107. When considering the purpose of the 18 month rule as it is emerging from the analysis of the BIT and the explanations provided by the Parties, the Tribunal has to start by referencing the fundamental principle contained in Article 31 of the Vienna Convention providing that a treaty be “interpreted in good faith and in the light of its object and purpose” and that such interpretation must be in accordance with the terms of the treaty in their context. This principle based on purpose and good faith gives rise to the principle of effectiveness requiring an interpretation that has an effective meaning in relation to the objective of the legal provision under examination. Article X (2) and (3) of the BIT thus have to be interpreted according to these principles.

108. Article X(2) does not set a mandatory obligation. When stating that “the dispute [...] shall [...] be submitted to the competent tribunals” of the Host State, it

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<sup>12</sup>*Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 586 and 588.

seems to require that once a dispute had been raised, and the time period for negotiating a settlement had elapsed, the dispute must be brought to court at the initiative of either party. But such an understanding goes too far. What these words mean is enlightened by the provisions of Article X(3). Indeed, based on letter *a*), recourse to local courts is a requirement for access to international arbitration. But it is not more. The party raising the dispute can also decide not to go before domestic courts and to run the risk that later access to international arbitration might be denied. As stated in letter *b*), the parties can also agree to accede directly to international arbitration, in which case they dispose of the requirement of Article X(2). These points are sufficient to show that the 18 month rule is different from a requirement to exhaust local remedies, even if some analogy is possible on other points.<sup>13</sup>

109. Before considering the meaning of Article X (2) and (3), it becomes necessary to determine whether Respondent is not prevented by the principle of estoppel or any similar rule based on the fundamental principle of good faith to raise an objection based upon non-compliance with the requirement of Article X(2) when Respondent itself had the opportunity to bring the dispute before its competent tribunals but failed to do so. The provision states indeed in clear terms that the dispute shall be submitted to domestic courts of the Host State “at the request of either party.”<sup>14</sup> Therefore, based on the plain meaning of this language, Respondent not only had an actual opportunity but also an obligation itself to take the initiative to get its own courts involved.

110. Nonetheless, even if the requirement of Article X(2) is not applicable to Claimants alone, it would still follow from the terms of Article X(3) that there is a bar to international arbitration if none of the parties comply with the 18 month rule. If Respondent has not done so, Claimants are not thus provided with free leave to move to arbitration. Accordingly, it also follows that one party cannot claim that it is not or no longer bound by the requirement of Article X(2) because the other party did not take any action. This provision opens an alternative possibility to bring the dispute before local courts, but it does not say more. Moreover, the Argentine Republic had drawn Claimants’ attention to this provision at a very early stage of the proceeding, in response to Claimants’ filing of the notice of dispute, in the Attorney General’s letters sent to each Claimant on March 24, 2006. The point remains, however, that Respondent had an opportunity to request from its local courts at least a declaratory judgment, which in Claimants’ view was insufficient for them because their claim is based primarily on an action for the compensatory damages. Because Respondent has

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<sup>13</sup> For the Tribunal in *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 104, and for the Tribunal in *Gas Natural SDG S.A. v. The Argentine Republic*, ICSID/ARB/03/10, Decision on Preliminary Questions on Jurisdiction of June 17, 2005, No. 30, the rule is not comparable to the local remedies rule, whereas for the *Wintershall* Tribunal it is, cf. *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 124-126.

<sup>14</sup> Prof. Mata acknowledged that it would be possible for the State to introduce “action of *lesividad*” and request that a decree considered as not legitimate or illegal be rescinded; TR-E, Day 1, p. 141/3-142/4.

a right to seek a declaratory ruling, it does not appear convincing for Respondent to then turn around and object to Claimants' position that they could have asked for such a judgment when this form of relief clearly did not meet their interests, which are focused on pecuniary damages.

111. Under the circumstances of this case, submission to domestic courts of the Argentine Republic appears, on the face of the terms of Article X(2) of the BIT, as a necessary precondition for the right to submit the dispute to international arbitration. This reading of Article X(2), however, does not answer the question of whether in light of its meaning, (i) this provision was applicable to Claimants, and (ii) did in fact impose on them an obligation to comply with its terms if they wanted to have access to international arbitration.

112. This question has been understood as raising a point of debate concerning the distinction to be made between a jurisdictional issue and a question of admissibility of a claim brought before an international arbitration tribunal generally and before an ICSID tribunal more particularly. It is contended that jurisdiction is an element pertaining to the tribunal and not of a claim. Conversely, admissibility is an element of a claim but not one that pertains to a tribunal.<sup>15</sup> Jurisdiction is fixed by treaty and cannot be altered by the parties to the dispute.<sup>16</sup> The parties, however, may acquiesce in any breach of a requirement of admissibility; such acquiescence would "cure" the breach.<sup>17</sup> In other words, defects as to admissibility can be waived or cured by acquiescence, while jurisdictional insufficiencies cannot be equally remedied.<sup>18</sup> However, even if such categories were to be adopted, which appears to be an extremely delicate proposition as a matter of comparative law,<sup>19</sup> the question whether a particular legal issue falls in one and not the other is contingent on the meaning of the relevant provisions of the BIT. This latter consideration is all that matters.

113. Developing such categories may have theoretical appeal but adds nothing to the interpretation of the provisions on dispute resolution of BITs. Thus, the *Hochtief* Tribunal inquired whether the 18 month period is a requirement of the kind which the Host State could accept or otherwise acquiesce to its non-compliance, and whether it

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<sup>15</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 90.

<sup>16</sup> *Ibid.*, No. 92.

<sup>17</sup> *Ibid.*, No. 94.

<sup>18</sup> *Ibid.*, No. 95.

<sup>19</sup> Thus, it is stated in *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 90, that a claim might be taken as "inadmissible" on the ground of *lis alibi pendens* or *forum non conveniens*. This had also been suggested as an analogy in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID/ARB/02/6, Decision on Objections to Jurisdiction of January 29, 2004, No. 170, footnote 95. However, if this appears correct from a Common Law perspective, it is certainly more than doubtful as a matter of Civil Law where the *lis alibi pendens* exception clearly affects jurisdiction. In *Benvenuti et Bonfant v. The Government of The People's Republic of Congo*, ICSID/ARB/77/2, Award of August 8, 1980, No. 1.13 and 1.14, *lis pendens* was considered as a problem of jurisdiction.

had in fact done so. The Tribunal determined that it deemed this provision as one “going to the admissibility of the claim rather than the jurisdiction of the Tribunal.”<sup>20</sup> Significantly, the Tribunal does not articulate the reasons for its conclusion that the 18 month rule constitutes a matter of admissibility. It further concluded that the limits of its jurisdiction are set by the Argentina-Germany BIT, but that on the basis of the MFN clause contained in that BIT, claimant had the right to rely on the procedures set out in the provision on dispute resolution of the Argentina-Chile BIT (including the “fork in the road provision”).<sup>21</sup>

114. For this Tribunal, there is no reason to adhere to the conclusion and findings of the *Hochtief* Tribunal and to shift the 18 month requirement from a jurisdictional issue to question of admissibility and then to conclude that it cannot be complied with by virtue of an agreement or by acquiescence. The 18 month rule of the Argentine-Spain BIT is part of the offer to arbitrate contained in Article X and, upon its acceptance by the investor, would trigger the jurisdiction of this Tribunal were all requirements complied.<sup>22</sup>

115. The distinction has been developed in greater detail by the *Abaclat* Tribunal in its Decision on Jurisdiction.<sup>23</sup> The approach chosen by that Tribunal merits examination and strict scrutiny.

116. The *Abaclat* Tribunal observes that a salient feature of admissibility demonstrates that a lack of admissibility means that the claim was neither fit nor mature for judicial treatment, while a lack of jurisdiction *strict sensu* means that the claim could not at all have been brought before the body called upon.<sup>24</sup> Such a distinction contributes more to the confusion than to any elicitation of the issue. If the claim is not mature for judicial treatment it cannot be brought before the designated judicial body either, which means that it satisfies both requirements of unavailability and irredeemably dilutes the suggested distinction.

117. The *Abaclat* Tribunal also suggests that want of admissibility may “usually” not be subject to review by another body, but the non-review suggested by this “usually” does not apply to a decision refusing arbitral jurisdiction.<sup>25</sup> The correctness of such a general statement should be tested within the framework of the applicable legal provisions governing review of arbitral decisions. In the ICSID system, a

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<sup>20</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 96.

<sup>21</sup> *Ibid.*, No. 99.

<sup>22</sup> In *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011, No. 91, 94, the similar requirement in Article 8(3) of the Argentina-Italy BIT was qualified as a “jurisdictional requirement.”

<sup>23</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011.

<sup>24</sup> *Ibid.*, No. 247(i).

<sup>25</sup> *Ibid.*, No. 247(ii).

decision stating that a claim lacks admissibility may be brought before an annulment committee based on one of the grounds listed in Article 52(1) of the Convention and in particular when the claimant alleges that the tribunal had “manifestly exceeded its powers” (lit. b). This feature of ICSID practice renders both the distinction wrong in theory and useless in practice.

118. The *Abaclat* Tribunal further expanded on the issue by contending that in case admissibility is refused the defect giving rise to refusal may be cured and the claim resubmitted, while the same does not hold true when jurisdiction has been denied by the same Tribunal.<sup>26</sup> Again, the practical utility of this theoretical distinction at best is suspect. If an ICSID Award is issued holding that the claim is not admissible, it may be indeed possible to cure the defect and to resubmit the case. The “re-submitted” claim, however, will be aired before a new tribunal. But where jurisdiction has been denied, the same procedural outcome is possible if the denial was caused by a lack of consent that was later granted, thus allowing for the case to be filed before a different tribunal. The *Waste Management II* Tribunal highlights and underscores the proposition that a jurisdictional insufficiency can be redressed pursuant to a new filing:

“In international litigation the withdrawal of a claim does not, unless otherwise agreed, amount to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights: *if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant State recommencing its action.*”<sup>27</sup> (emphasis supplied).

Similar reasoning led the *TSA* Tribunal to observe that from a formal point of view, a claim prematurely filed in an ICSID proceeding where the 18 month requirement in the Dutch-Argentina BIT had not yet elapsed could be rejected for lack of jurisdiction and then resubmitted as an ICSID arbitration upon maturation of the term. While the Tribunal perhaps understandably rejected such a solution as “highly formalistic,” it dealt with the issue as jurisdictional and not an admissibility concern.<sup>28</sup>

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<sup>26</sup> *Ibid.*, No. 247(iii).

<sup>27</sup> *Waste Management, Inc. II v. United Mexican States*, ICSID/ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings of June 26, 2002, No. 36, also quoted in: *Cementownia Nowa Huta S.A. v. Republic of Turkey*, ICSID/ARB(AF)/06/02, Award of September 17, 2009, No. 109.

<sup>28</sup> *TSA Spectrum de Argentina S.A. v. The Argentine Republic*, ICSID/ARB/05/5, Award of December 19, 2008, No. 110-112.

119. The *Abaclat* Tribunal, however, found the distinction to be pivotal when analysing predicate conditions to the filing of an international arbitration. The Tribunal's language commands consideration:

“[...] that the negotiation and 18 months litigation requirements *relate to the conditions for implementation of Argentina's consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration*. Thus, any non-compliance with such requirements may not lead to a lack of ICSID jurisdiction, and only – if at all – to a lack of admissibility of the claim, [...]”<sup>29</sup> (emphasis supplied)

The Tribunal further concluded:

“The negotiation and litigation requirement provided in Articles 8(1) and (2) of the BIT does not condition Argentina's consent to ICSID jurisdiction and arbitration, and merely relates to the circumstances under which such consent is to be given full effect and be implemented.”<sup>30</sup>

120. The Tribunal in that case saw a distinction between conditioning consent to ICSID jurisdiction to the fulfilment of a precondition, and conditioning the effective implementation of such consent, *i.e.*, the possibility to resort to ICSID arbitration upon fulfilment of such a precondition.<sup>31</sup> But as the Tribunal rightly noted, the first part of that distinction makes “little sense” in light of Argentina's adherence to the ICSID Convention and its acceptance of ICSID arbitration in the BIT.<sup>32</sup> All that matters is whether Argentina's consent was subject to preconditions, irrespective of whether they are of a general nature or limited to particular cases, or the extent to which they relate to “circumstances” concerning consent. Nothing is added in qualifying such preconditions as relating to the consent's “effective implementation” – a novel term or conceptual category that the *Abaclat* Tribunal confects but does not fully articulate, let alone engage in any sustained analysis concerning the term's juridical genesis. In this same vein, the term “implementation” is nowhere defined and only appears to serve as a foundation for the inference that consent is to be assumed. Similarly, the manner, if any, in which “implementation” of consent, in sharp relief with the question of whether there is actual consent, touches or concerns the nature of the conditions precedent also remains obscured by the analysis. Put simply, no guidance is offered suggesting how such implementation is subject to “circumstances” that should be understood as different from the consent's underlying conditions.

121. When analysing Article 8 of the Argentina-Italy BIT, as did the *Abaclat* Tribunal, or Article X of the Argentina-Spain BIT, it becomes clear that the conditions

<sup>29</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 496.

<sup>30</sup> *Ibid.*, No. 500(iii), 501(v).

<sup>31</sup> *Ibid.*, No. 494.

<sup>32</sup> *Ibid.*, No. 495.

or preconditions for triggering access to international arbitration are enunciated in the relevant sub-paragraphs of these provisions. There is no indication whatsoever on whether any of these requirements should be qualified as a fundamental exigency, and therefore as jurisdictional, or merely as relevant for the consent's "effective implementation," and therefore to be dealt with as a matter of admissibility only.<sup>33</sup> Indeed, neither Article 8 of the Argentina-Italy BIT nor Article X of the Argentina-Spain BIT at all reference the word "implementation." The plain meaning and language of the respective Articles is silent as to the nature and character of the conditions precedent to the filing of an international arbitration as "jurisdictional."

122. Finally, the *Abaclat* Tribunal inquires whether in light of the undisputed fact that claimants had not submitted their dispute to the Argentine courts "whether Claimants should have done so"<sup>34</sup> and after examination of the matter it concluded that "[...] the disregard by Claimants of the 18 months litigation requirement does not preclude them from resorting to ICSID arbitration."<sup>35</sup>

123. Thus, "resorting to ICSID arbitration" clearly means "access to ICSID jurisdiction" after compliance with jurisdictional requirements. The 18 month rule, whether it has to be observed or may be disregarded under particular circumstances, is a prerequisite for arbitral jurisdiction and not merely a "circumstance" for providing full effect and implementation for a consent *a priori* determined as valid and enforceable. In fact, the *Abaclat* Tribunal does not show otherwise when arriving at the interpretation of the relevant elements of the 18 month rule.<sup>36</sup>

124. Similarly, the *Desert Line* Tribunal began by classifying the *res judicata* objection of the fork in the road rule as "one of admissibility rather than jurisdiction", which does not affect the tribunal "having jurisdiction" but raises the question whether it should decline to exercise it.<sup>37</sup> Having adopted an "approach to jurisdictional issues",<sup>38</sup> the Tribunal concluded that the objection "does not bar the Arbitral Tribunal from having jurisdiction in the present case."<sup>39</sup>

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<sup>33</sup> When explaining the legal power to exercise the judicial or arbitral function, the Minority Arbitrator in the *Abaclat* case noted: "Any limits to this power, whether inherent or consensual, i.e. stipulated in the jurisdictional title (consent within certain limits, or subject to reservations or conditions relating to the powers of the organ) are jurisdictional by essence." Cf. *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, Dissenting Opinion of Prof. Abi-Saab, No. 126. He also noted that requirements that under general international law are considered as requirements of admissibility become conventionally jurisdictional when they are inserted in the jurisdictional title (No. 23).

<sup>34</sup> *Ibid.*, No. 576.

<sup>35</sup> *Ibid.*, No. 590, also No. 580.

<sup>36</sup> On one other point, the *Abaclat* Tribunal seems to have been misguided by its focus on the nature of a ground for admissibility attributed to the 18 month rule, when stating that the wording of Article 8 of the Argentine-Italy BIT "does not suffice to draw specific conclusions with regard to the consequences of non-compliance with the order established by Article 8." It clearly does because it then precludes access to international arbitration, but it does so in terms of jurisdiction and not of admissibility of claims as the Tribunal wanted to understand the issue.

<sup>37</sup> *Desert Line Projects LLC v. The Republic of Yemen*, ICSID/ARB/05/17, Award of February 6, 2008, No. 128.

<sup>38</sup> *Ibid.*, No. 132.

<sup>39</sup> *Ibid.*, No. 138.

125. Jurisdiction in the judicial or adjudicative context means the authority to render legal decisions. It includes consideration of the sphere of such authority, *i.e.* the scope of the judicial competence. Whether such jurisdiction and competence is awarded in a particular factual setting depends upon the applicable legal provisions. If the exercise of such authority requires compliance with certain conditions, these conditions are prerequisites to the exercise of a tribunal's jurisdiction and competence. This principle also must apply when a particular condition relates to the nature of a claim and thus raises a question as to the claim's admissibility. If the applicable provision on dispute resolution qualifies such condition as a requirement to be complied with before the tribunal can affirm its jurisdiction, the provision then must also pertain to jurisdiction.<sup>40</sup> No theoretical assumption can remove from that condition its jurisdictional character merely by qualifying it pursuant to a legal fiction a condition of admissibility with the effect that any form of non-compliance could be waived or cured by acquiescence. This jurisdictional element is all the more present when jurisdiction is based on consent, as it must be under the ICSID Convention.

126. Moreover, the ICSID Convention does not contain a concept akin to "admissibility" of claims.<sup>41</sup> The Convention distinguishes between jurisdiction and the merits of claims. To the extent that the lack of "admissibility" is asserted as an objection at the jurisdictional stage, it is dealt with at that stage within a jurisdictional framework or in the context of the Tribunal's competence with respect to at least one or all of its elements (*rationes temporis, loci, personae, et materiae*).<sup>42</sup> If it is not so addressed, it is merged with the merits, and thus examined, if at all, at that stage.<sup>43</sup>

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<sup>40</sup> Cf. *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 262, stating that a failure to respect a precondition to the Host State's consent to arbitrate "cannot but lead to the conclusion that the Tribunal lacks jurisdiction." The same point was made in *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 36.

<sup>41</sup> As stated in *CMS Gas Transmission Company v. The Argentine Republic*, ICSID/ARB/01/8, Decision on Objections to Jurisdiction of July 17, 2003, No. 41: "The distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence." These terms are repeated in *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID/ARB/01/3, Decision on Jurisdiction of January 14, 2004, No. 33.

<sup>42</sup> Such hypothesis seems to be covered by the words "for other reasons" contained in Arbitration Rule 41(1) in relation to an objection that would be directed, not against the jurisdiction of the Centre, but against the competence of the Tribunal.

<sup>43</sup> This is the outcome in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID/ARB/02/6, Decision on Objections to Jurisdiction of January 29, 2004, where the Tribunal accepted its jurisdiction under the BIT with respect to a contractual dispute but had to address the effect of an exclusive jurisdiction forum selection clause contained in the contract and "affecting the substance of SGS's claim" (No. 149). For the Tribunal, the question was not whether it had jurisdiction, but whether it was proper to allow the parties to comply with the contractual forum clause (No. 154). When so holding, the Tribunal considered that its own decision on SGS' claim to payment to be brought before the chosen court would be "premature" (No. 155, 162) and that it must await the determination of the amount payable in accordance with the contractually-agreed process (No. 163). Accordingly, it decided to stay the proceeding pending this determination (No. 175). Thus, while affirming its jurisdiction without reservation, the Tribunal decided to abate the proceeding on the merits of the contractual claim as long as one of its issues was not yet resolved through the contractually agreed process of litigation. Similarly, in *The Rompetrol Group N.V. v. Romania*, ICSID/ARB/06/3, Decision on Objections on

127. Therefore, there is no point in classifying the 18 month rule as a matter of admissibility governed by procedural rules that could be modified by the Tribunal according to the needs and specificities of each particular proceeding.

128. There is also no moment to subscribe to the proposition that “procedural obstacles” are not jurisdictional requirements and “may be disregarded where appropriate.”<sup>44</sup> The *Wintershall* Tribunal aptly rejected this premise labelling it an “unqualified formulation,”<sup>45</sup> and observed that when the 18 month rule imposes an obligation and not a mere option, non-compliance “cannot possibly be described as a mere ‘defect of form.’”<sup>46</sup> It also rightly observed that the cases usually referred to in support of the proposition that a condition precedent may readily be disavowed with prejudice relate to provisions on periods reserved for purposes of reaching a settlement and not to mandatory terms requiring the pursuit of remedies in local courts.<sup>47</sup> Even in the case of a provision requiring a negotiation period it has been concluded that such condition precedent is “very much a jurisdictional one.”<sup>48</sup>

129. When misguided theoretical constructs are set aside, the determinative issue is plainly reduced to the object and purpose of the system provided for in Article X (2) and (3).<sup>49</sup> The core question can be posed in two ways; (i) were Claimants required to submit the dispute to the competent tribunals of the Republic of Argentina before resorting to ICSID arbitration? or (ii) “was Argentina deprived of a fair opportunity to address the dispute within the framework of its own domestic legal system because of Claimants’ disregard of the 18 months litigation requirement?”<sup>50</sup>

130. For the present Tribunal, the clear wording of the relevant provisions of Article X and the equally lucid suggestion as to its purpose that Respondent has advanced (to which Claimants did not object *per se*), lead to the conclusion that resort to domestic courts is a precondition to be met before resorting to international

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Jurisdiction and Admissibility of April 18, 2008, No. 112-114, an objection as to the admissibility of the substantive content of claimant’s complaint was merged with the merits.

<sup>44</sup> As asserted by Prof. Schreuer when acting as claimants’ Expert before the *Wintershall* Tribunal, cf. *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 133.

<sup>45</sup> *Ibid.*, No. 143.

<sup>46</sup> *Ibid.*, No. 139.

<sup>47</sup> Cf. *Ibid.*, No. 133-153.

<sup>48</sup> *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID/ARB/01/3, Decision on Jurisdiction of January 14, 2004, No. 88. Non-compliance with such condition precludes jurisdiction to consider the claim, cf. *Antoine Goetz et consorts c. République du Burundi*, CIRDI/ARB/95/3, Award of February 10, 1999, No. 93, using the term “irrecevable” (in French). The jurisdictional nature of the requirement is also supported and extensively discussed in light of other, supporting but also diverging ICSID decisions, in *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID/ARB/08/4, Award on Jurisdiction of December 15, 2010, No. 140-157.

<sup>49</sup> Cf., in similar terms, with respect to Article 8 of the Argentina-Italy BIT, *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 580.

<sup>50</sup> As addressed in *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 581.

arbitration. As stated by the *ICS* Tribunal when considering the UK-Argentine BIT, the words “shall be submitted” leave “no ambiguity as to the mandatory character” of the rule,<sup>51</sup> which “cannot be satisfied by anything less than what it explicitly calls for”.<sup>52</sup> In the words of the *Wintershall* Tribunal addressing a counterpart provision, Article 10(2) of the Argentine-Germany BIT:

“Thus, the submission of the dispute to an International Arbitral Tribunal is conditional upon prior fulfilment of the provision contained in Article 10(2) unless the parties to the dispute agree otherwise.”<sup>53</sup>

The Tribunal further writes:

“[...] it becomes a condition of Argentina’s ‘consent’ – which is, in effect, Argentina’s “offer” to arbitrate disputes under the BIT, but only upon acceptance and compliance by an investor of the provisions *inter alia* of Article 10(2); an investor (like the Claimant) can accept the ‘offer’ only as so conditioned.”<sup>54</sup>

The referenced pronouncements notwithstanding, any construction of the prescribed terms of the 18 month rule must comport with the language’s context and also needs to be harmonized with the purpose and objective of the clause, as prescribed in Article 31(1) of the Vienna Convention. Even where it is acknowledged that this rule imposes an obligation on the investor, it must still be applied in a way that allows its meaning to prevail so that its intended purpose and objective are preserved and not frustrated. Such obligation cannot be imposed on the investor if it does not serve its purpose in the context of the whole system of access to arbitration provided in Article X.

131. The 18 month rule is a second step on the procedural progression towards international arbitration. It would be void of meaning if it were merely duplicative of the first step articulated in Article X(1). This latter provision offers the Parties an opportunity to reach an amicable settlement. It does not require the taking of any action or, if it were to be construed as requiring a minimum of a good faith effort, it nevertheless does not prescribe any sanction or penalty in the event of non-compliance. If the 18 month rule is to be accorded a reasonable interpretation, the requirement of Article X(2) must demand more from each party. If its operational is to be achieved, it requires that the investor submit the dispute to the competent courts of the Host State. But it also requires that the Host State allows its courts to operate in a manner that the opportunity to reach a suitable remedy is provided in efficient terms.

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<sup>51</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 247.

<sup>52</sup> *Ibid.*, No. 251.

<sup>53</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 122, and for the development No. 116-122.

<sup>54</sup> *Ibid.*, No. 116.

The requirements embodied in Article X(2) are, and should be, bilateral. If the Host State shall not be deprived of a “fair opportunity”<sup>55</sup> to address the dispute through its own courts, the same objective must be ensured in favour of the investor, who equally cannot be deprived of a “fair opportunity” to have the dispute examined by the competent domestic courts. In the words of the *TSA Tribunal*, the remedy available to the investor must “give him a fair chance of obtaining satisfaction at the national level within the said time frame.”<sup>56</sup> Thus, the proper interpretation of the meaning of the 18 month rule is that it requires more from the Host State than merely to avoid that the rule becomes “completely ineffective” or represents a “futility” or even an “obvious futility”, or “futility or otherwise,” as the terms are used by the *ICS Tribunal*.<sup>57</sup> The Host State must assume it's part of the obligation embodied in the 18 month rule, which places the threshold above the floor requirement of avoiding “futility or otherwise.”

132. Contrary to Respondent’s arguments, the record before this Tribunal demonstrates that the 18 month rule is not supported by a policy of high priority. When studying the series of BITs signed by the Argentine Republic and submitted to the Tribunal, it is evident that in fact there was no BIT concluded after the BIT with Spain that contained a comparable 18 month rule. Hence, any assertion that the 18 month rule is one of great public importance and policy, simply is belied by the very chronological history of BITs that the Republic of Argentina has executed. The Tribunal understands that such a rule was included in the Argentina-Germany BIT of 1993,<sup>58</sup> and in two other BITs executed with the Netherlands in 1992 and with the Republic of Korea in 1994,<sup>59</sup> none of which form part of the Tribunal’s record. Moreover, even as of the time that the Spain-Argentina BIT was executed in 1991, other BITs were executed that did not contain any such rule.<sup>60</sup>

133. When analysing treaty law retrospectively with the benefit of hindsight, the preferred solution is manifestly the “fork in the road” system. This scenario would be akin to having the Argentine Republic abandon the 18 month rule as of the execution

<sup>55</sup> In the terms of *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 581.

<sup>56</sup> *TSA Spectrum de Argentina S.A. v. The Argentine Republic*, ICSID/ARB/05/5, Award of December 19, 2008, No. 110.

<sup>57</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 269, 273. Adopting such a low and unrealistic threshold, the *ICS Tribunal* did not proceed with an analysis of the availability of remedies within the Argentine legal system, although it had obtained reports that “extensively analyse this issue”, causing an “open and legitimate debate” between the Parties’ experts (No. 269).

<sup>58</sup> Cf. *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 1, 121.

<sup>59</sup> Cf. Annex 1 to *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012.

<sup>60</sup> Which was understood as a “lack of consistency” by the Tribunal in *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 105.

of its BIT with Spain.<sup>61</sup> From this same perspective, it would make sense to conclude that such rule was considered useless or even futile. This line of reasoning, however, is of no moment to this Tribunal, which is called to interpret the 18 month rule of Article X (2) and (3) of the Argentine-Spain BIT as agreed upon by these two Contracting States.<sup>62</sup> This rule is to be taken as it stands, notwithstanding the precise degree of priority accorded to it since 1991 and placed on it today as a matter of investment policy between these states or beyond.

134. There is little to add to what already has been stated by the *Maffezini* Tribunal:

“the Contracting Parties to the BIT – Argentina and Spain – wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration.”<sup>63</sup>

This Tribunal has no reason to doubt that a similar statement, as stated by Respondent before other ICSID Tribunals<sup>64</sup> and again in the instant case, represents the original intention of the Contracting States of the Argentina-Spain BIT. There is no possible doubt either that the deference to domestic courts of the Host State is an “obstacle” on the way to reach the level of international arbitration. But this is what the Contracting States wanted when negotiating and signing their BIT.

135. When further considering the purpose of the 18 month rule, the Tribunal has to consider the principle of *effectiveness* as a complementary focus for the interpretation of this provision. Respondent agrees that the system provided by Article X(2) is not to be compared to a simple “waiting period.” Any interpretation must entail a formal submission to the domestic courts so that these tribunals may effectively analyse the dispute. In further analysing the provisions of Article X(3)(a), such domestic proceedings must be of a nature to possibly reach a decision on the substance within 18 months. This provision does not require an adjudication to issue.<sup>65</sup> Yet, a party must be granted an opportunity or a chance to have the court reach an adjudicatory phase, otherwise the entire system would be meaningless.

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<sup>61</sup> This is the conclusion drawn in *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 57, adding that for Spain, it was not the preferred solution (No. 57-59).

<sup>62</sup> See, for the same position, *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 128.

<sup>63</sup> *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 35.

<sup>64</sup> Cf., among others, *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 104, where the Tribunal says that it “concurs” with Respondent in recognizing this intention, but nevertheless objects that Argentina had not presented any evidence beyond its affirmations of such policy (No. 105).

<sup>65</sup> *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 28 s., 30.

136. If there is no such opportunity of an adjudicatory ruling, the provision would not only impose an additional waiting period for no ostensible purpose, but it would also have the added prejudice of causing claimants to disclose the evidence underlying their claim while the Host State would be allowed, as another tribunal put it, “to assess the claim, gather evidence, and prepare a defence to a possible international arbitration claim.”<sup>66</sup> In addition to the mere result of having to wait another 18 months, Claimants would also have to suffer unequal and unfair treatment, as they would be required to present their case, while Respondent would be free from having to disclose its legal and factual defences to the claim, and simultaneously allowed to gather evidence supporting the investor’s case in preparation of the prospective and likely arbitration. Certainly, such a reading of the 18 month rule would be conducive to asymmetrical treatment advantaging the Host State to the claimant’s detriment, a result not contemplated by the Article X rubric.

137. This reading of the rule also establishes that as far as this Tribunal is concerned, any interpretation of the 18 month rule cannot be based on a theoretical musing pursuant to which the rule is deemed useless and, therefore, to be disregarded because it “is difficult to see the rationale for imposing, in the terms used in Article 10(3)(a), a duty to spend a period of 18 month with the dispute listed on the docket of domestic courts as a precondition for the reference to arbitration.”<sup>67</sup> Certainly, the rule may not be disregarded based upon the likelihood of a “pointless litigation” even were the parties to spend 18 months in a proceeding where one or both may decide in advance to reject any decision that a court may issue.<sup>68</sup> And what if, under the circumstances, it would appear that a domestic court would not just let the parties “spend a period of 18 months” with their case merely listed on the docket? And why should the requirement be lifted merely because the investor is not willing to agree to a suitable remedy even if the domestic judge makes an effort to reach such a result?

138. The Contracting States to the BIT were certainly aware of the difficulties arising in most cases where a claimant would find itself in the courts of a Host State. These challenges notwithstanding, the parties agreed to include this requirement in their treaty and to defer access to international arbitration accordingly. This remedy may be considered an option less favourable to arbitration, but this consideration is not what matters. What matters is that the 18 month rule is part of the dispute resolution provision of the Argentine-Spain BIT. In any event, the Decision on jurisdiction issued by the *Hochtief* Tribunal cannot serve as persuasive authority

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<sup>66</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 269, footnote 298, *in fine*. The Tribunal adds that such purpose, among others, would go “beyond resolving the dispute”, thus admitting that it has nothing to do with the purpose and objective of the 18 month rule.

<sup>67</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 50, referring to Article 10 of the Argentine-Germany BIT.

<sup>68</sup> *Ibid.*, No. 51.

because in that case Tribunal advised that it did not need to decide the point of whether domestic litigation should always be an essential precondition or whether there exists an “implied right of unilateral reference to arbitration.”<sup>69</sup> In the absence of such a right a “problem arises”<sup>70</sup> whenever the precondition contained in the 18 month rule applies, although “its meaning is clear.”<sup>71</sup> This suggested questioning implies a hypothetical understanding of the rule that does not comply with its wording and purpose.

139. This Tribunal recognizes that the 18 month rule suggests the presence of an obstacle before access to international arbitration is granted and that it does not represent the most favourable option with respect to the efficient protection of international investment. It may even be said that it is “unusual,”<sup>72</sup> although it also has been suggested that it is “by no means an unusual clause” in BITs.<sup>73</sup> But such considerations have no weight when it comes to determining the meaning and best interpretation of a provision that the Contracting States agreed upon and that constitutes treaty law as long as it is in force.

140. The 18 month rule is also not susceptible to any interpretation that may only benefit an investor. The *Hochtief* Tribunal viewed the 18 month litigation period as “[providing] no inherent benefit [...] to the other party” other than the imposition of a period in which the parties may refine and reflect upon their respective positions.<sup>74</sup> While the *Hochtief* Tribunal duly accepts respondent’s position that the 18 month period provides the courts with an opportunity to resolve the dispute as being “true,” it nonetheless notes that the arbitrary limit of 18 months and the removal of any duty to accept the judgment of the local courts render the rule “to some extent perfunctory and insubstantial.” Additionally, adherence to the 18 month rule “would bring no necessary benefit” and “no necessary result other than the delay of the arbitration proceedings,” facts from which the Tribunal “derives some encouragement to believe that its decision is correct,”<sup>75</sup> which consists of accepting the MFN clause contained in the Argentina-Germany BIT with the effect of rendering inapplicable the 18 month requirement. The Tribunal’s reasoning is not supported by evidence relating to the

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<sup>69</sup> *Ibid.*, No. 54.

<sup>70</sup> *Ibid.*, No. 53.

<sup>71</sup> *Ibid.*, No. 52. The Dissenting Opinion of Arbitrator Chr. Thomas recalls that the 18 months period “is plainly a product of compromise between the States Parties” and that their choice of a period of 18 months, described as “arbitrary” by the Majority (No. 88 of the Decision) had the purpose to permit a Contracting Party’s legal system to at least have an opportunity to address the dispute (No. 7).

<sup>72</sup> *Ibid.*, No. 54. Another Tribunal thought useful to qualify the requirement as “curious” and “nonsensical from a practical point of view”, although the Tribunal had no reason to address the issue and did therefore not proceed to a serious examination of the matter; cf. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID/ARB/03/24, Decision on Jurisdiction of February 8, 2005, No. 224.

<sup>73</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 125.

<sup>74</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 87.

<sup>75</sup> *Ibid.*, No. 88 (for all quotes).

possible operation of the 18 month rule before Argentina's domestic courts. And while it is focusing on the benefit available to the investor, it does not take into account the Host State's position that the local courts will thus be granted an opportunity to find a suitable remedy, although that position is characterized as "true."<sup>76</sup>

141. While it is correct to understand that the meaning of the 18 month rule has to be determined in light of the efficiency of the rule, there is no point in interpreting this provision on the extent to which it provides the investor with a "benefit." This rule was agreed upon in order to reach a common purpose that the Contracting States sought to achieve, albeit as an "obvious compromise."<sup>77</sup> There is no indication, however, that such purpose or objective is exclusively focused on the interests of or possible benefits to the investor. As detailed above, while the ICSID Convention and the BITs are certainly leading instruments for the promotion of private international investments, they also have as their objective and purpose to provide for a reasonable and negotiated balance between the interests of prospective investors and those of the Host States. As the *CMS* Tribunal observed, the scope of a given bilateral treaty "should normally be understood and interpreted as attending the concerns of both parties."<sup>78</sup> A unilateral approach that benefits investors does not comply with the prevailing understanding of investment treaty law.

142. Having canvassed the basic meaning of the purpose and objective of the second step towards a potential arbitration under Article X, the Tribunal, before proceeding with the examination of more specific elements, must raise the question whether different or additional canons of interpretation must be applied in order to establish a different balance or relationship between the respective interests of the Host State and of the investor, other than the one resulting from this analysis. ICSID case-law establishes yet another effort to interpret the 18 month rule conducive towards a result favouring easier access to international arbitration, in some cases even rendering it possible for the investor to disregard the requirements set by these provisions.

143. Indeed, for the *Abaclat* Tribunal, the question of whether investor's non-compliance with these requirements deprives the Host State of a "fair opportunity" to have the dispute examined by its domestic courts, "in turn requires a weighting of the

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<sup>76</sup> The Dissenting Arbitrator Chr. Thomas states that "one cannot rule out the possibility that the local court could uphold the investor's claim that the measures complained of violate municipal law or that a contested legal right claimed to exist under that law does in fact exist. Even if such findings did not lead to a settlement, they would enhance the prospects of success in any subsequent international claim." (No. 8)

<sup>77</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 57.

<sup>78</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID/ARB/01/8, Award of May 12, 2005, No. 360.

interests of the Parties,” which includes, on the part of the investor, consideration of claimants’ interest “in being provided with an efficient dispute resolution mechanism.”<sup>79</sup> In a first step, it is stated correctly that the opportunity to address the dispute through the domestic judicial system must not be theoretical, “but there must be a real chance in practice that the Host State [...] would address the issue in a way that could lead to an effective resolution of the dispute.”<sup>80</sup> For the present Tribunal, however, to reach this understanding, there is no need to introduce any further “weighting of the interests of the Parties,” in addition to what results in any way from the purpose and the required efficient meaning of the provision.

144. For the *Abaclat* Tribunal, a step further would be the alternative hypothesis of an acceptable disregard of the 18 month rule and of the opportunity it provides for an examination of the dispute by local courts, “where, based on the overall circumstances of the case, it appears that such opportunity [...] could not have led to an effective resolution of the dispute within the 18 month time frame.” In such a case, “it would be unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement,” because “such disregard would not have caused any real harm to the Host State.”<sup>81</sup> A claim brought before local courts would have been suited only if this could have been done “in such a way as to effectively resolve the dispute.”<sup>82</sup>

145. First, this Tribunal is compelled to underscore that this interpretation does not comport with the plain language of the 18 month rule (whether contained in the Argentine-Italy BIT or the Argentine-Spain BIT), which does not impose an obligation on the part of local courts or the Host State in general to adjudicate the merits of a judicial proceeding within 18 months. This objective is a goal and the implementation of the provisions of Article X (2) and (3) shall not prevent such a result from being achieved, but it is not a requirement that must be met in order to render the 18 month rule applicable. The interpretation suggested does not comply with the rule’s purpose, which is to offer the domestic judicial system an opportunity to find a suitable remedy, and nothing more.

146. Secondly, and more importantly, the *Abaclat* Tribunal does not state any legal reasoning, juridical principle, or precedent that would ascribe a normative component for the “weighing of the interests of the Parties” test to be added to the application of the 18 month rule. Neither the purpose, objective, nor policy underlying the rule give rise to the propriety of such a standard. In fact, the Tribunal engaged in its own

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<sup>79</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 582.

<sup>80</sup> *Ibid.*, No. 582.

<sup>81</sup> *Ibid.*, No. 583.

<sup>82</sup> *Ibid.*, No. 585.

exegesis beyond its own balancing of interests test in stating that claimants' interest to be protected concerning their claim was "their interest of being able to submit it to arbitration"<sup>83</sup> and that such interest was satisfied only when it was possible to address the claim in such a way "as to effectively resolve the dispute."<sup>84</sup> If these premises constituted the underlying conditions of Article X (2) and (3), resort to local courts could never occur and the interests of the Host State would be disregarded. Indeed, the dispute resolution system would be rendered dysfunctional. This interpretation could always be understood as restricting the investor's ability to submit the claim to arbitration because it would never be established from the very commencement that the dispute would be "effectively resolved."

147. As far as this Tribunal is concerned, if there is to be any "weighing of the interests of the Parties" to be considered for purposes of interpreting Article X (2) and (3) of the BIT, it is the weighing of interests as negotiated and approved by the Contracting States of the BIT. These Parties to the BIT have made an assessment of the terms that best suited them at the time of the negotiations and most effectively met their needs with respect to an international dispute resolution system that could attach to contentions arising from investments within their national territory. Perhaps the Contracting States may decide in the future that such a brand of dispute resolution should yield to a change galvanized by a more expansive policy favouring access to arbitration. Decisional-law constructs, however, such as the "weighing of the interests" test cannot merely be imposed as an amendment to treaty language that an Arbitral Tribunal elects to engraft. As the *ICS* Tribunal warned, "judicially-crafted exceptions must find support in more than a tribunal's personal policy analysis of the provisions at issue."<sup>85</sup>

148. If it is thus accepted that the system of Article X (2) and (3) of the BIT contains a treaty obligation for the investor to submit its dispute to domestic courts, it must also be accepted that as far as the Host State is concerned, the same system contains a treaty obligation to keep its courts available for this purpose. This bilateral requirement is more than just part of the required effectiveness of the 18 month rule. It also forms part of a requirement based on the acknowledged principle of good faith. In the context of the 18 month rule, this principle of bilateralism holds that the Host State is precluded from insisting on the investor's obligation to resort to domestic courts if the investor is not able to fulfil such obligation because of the unavailability of courts capable of handling such disputes that may reasonably contemplate on adjudication on the substance of the dispute within 18 months.

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<sup>83</sup> *Ibid.*, No. 584.

<sup>84</sup> *Ibid.*, No. 585.

<sup>85</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 265.

149. The issue concerning what constitutes the relevant timeframe for performance of the requirements contained in the 18 month rule is now ripe for discussion. While it is one thing to conclude that the interpretation of Article X (2) and (3) must in good faith be based on the object and purpose that constituted the guiding factors for the Contracting States when they negotiated and concluded the BIT, it is yet another thing to determine the time-frame in which the requirements contained in the 18 month rule must be fulfilled. The moment when the Contracting Parties' intent and purpose emerged and was fixed in its legal form in Article X of the BIT is not the time when the requirements of the 18 month rule are to be performed. The *Wintershall* Tribunal holds that the "principle of contemporaneity" is not relevant.<sup>86</sup> This is basically correct when the issue under consideration relates to the meaning of the rule. But such principle, if adopted, must govern the conduct of the Parties as to the workings of the 18 month rule. On this point, the reasons articulated by the *Wintershall* Tribunal are not convincing to this Tribunal. In that case it was stated that claimants did not proffer any evidence that "when the BIT was entered into" the 18 month rule was "incapable of being complied with (at the start) for the reason that the legal system or the judiciary in Argentina was not efficient or receptive to claims by foreign investors," while the state of the legal system or the state of the courts in Argentina from January 2002 onwards "is of little relevance."<sup>87</sup> If this proposition were adopted as true, the consequences would be absurd, *e.g.* Argentina could have rendered its courts completely unavailable shortly after 1993, when the Argentina-Germany BIT was concluded and the German investors would have been obligated *ad infinitum* to submit their case to these courts and to bear on the economic burden of such useless proceedings. Clearly, the *Wintershall* Tribunal did not examine the obligations implied in the 18 month rule as one to be performed by the Host State's judicial system.

150. The *ICS* Tribunal decided that it "simply cannot conclude that recourse to the Argentine courts would have been completely ineffective at resolving the dispute."<sup>88</sup> The record before this Tribunal is materially distinguishable in large measure because this issue relating to the bilateral obligations of the 18 month rule has been presented to this Tribunal in the form of pleadings and expert-witness testimony (written and oral).<sup>89</sup> Further, the Parties were given an opportunity to address questions on this matter presented by the Tribunal during and after the hearing. This matter has to be more closely examined in the following sections.

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<sup>86</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 129.

<sup>87</sup> *Ibid.*, No. 129.

<sup>88</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 269.

<sup>89</sup> In the proceeding before the *ICS* Tribunal, no cross-examination of expert witnesses had apparently taken place at the Jurisdiction Hearing (cf. *Ibid.*, No. 38, 42, 269).

2. *The requirement of submission of the “dispute” to the “competent tribunals” of the Host State*

151. The first element of importance is the reference in Article X(2) to the obligation (“shall”) of the party to the dispute to submit it to the “competent tribunals” of the Contracting Party where the investment was made, with the possible segway, referred to in Article X(3), so that the tribunal seized with the matter may reach a decision “on the substance” within 18 months. The correct understanding of the concept of “competence” is important in this respect. As further confirmed in Article X(3)(a), the proceeding conducted before the competent tribunals must be a “judicial proceeding.” The term “competence” therefore only refers to an institution exercising the functions of a court or a comparable body having jurisdiction.

152. In order to have the 18 month rule effectively put in operation it must be possible to submit the dispute to a tribunal having “competence” in all respects necessary to allow a litigation to proceed on the “substance.” Even when not proceeding at this stage with the aim of reaching a full definition of this latter term, the Tribunal has to make a first step here in stating that in order to allow exercising jurisdiction with respect to the “substance,” the party required to submit the dispute to domestic courts must be able to find a court having “competence” without being left with doubts and legal uncertainty, and this in respect of all aspects of competence *ratione loci, temporis, materiae et personae*.

153. There is no dispute on the competence *ratione loci* of courts available in the Province of Buenos Aires. The controversy dividing the Parties relates to the availability of such courts notwithstanding the emergency laws; the admissibility of an action brought by Claimants in their capacity as investors and shareholders of AGBA; and the nature of actions that might possibly be submitted to such courts. The first issue raises a question pertaining to the competence *ratione temporis* of the Argentine courts, which for designated time-frames were not permitted to exercise jurisdiction as a result of the country’s state of emergency (a). The second issue concerns the local courts’ competence *ratione personae* regarding actions brought by parties acting as investors and shareholders of AGBA (b). The third aspect relates to the nature of the dispute to be submitted to domestic courts under Article X of the BIT, which is closely linked to the concept of “substance” of the dispute as used in this provision; this matter will be addressed in the next section (3).

- a) The effects of the emergency laws on the operation of Argentina’s courts

154. The *Abaclat* Tribunal identified two reasons for its view that the investors’ disregard of the 18 month requirement did not preclude them from resorting to ICSID

arbitration, both grounds related to the Emergency Laws. First, it noted that claims seeking compensatory damages were destined to fail (and therefore presumably would never be part of a merits hearing) because these Laws and the related legislation “prohibited the Argentine government from entering into any juridical, extra-juridical or private transaction.” Thus, even were claimants to have prevailed, the government would still have faced the impossibility of performance, *i.e.* fulfilling the liquidated judgment.<sup>90</sup> Assuming this assertion to be correct, it goes far beyond the requirements of Article 8 of the Argentina-Italy BIT and of those of Article X of the Argentina-Spain BIT. There is indeed no requirement of a possibility to reach a transaction or of the ability of the Host State to approve such a settlement. Neither is the obligation to submit the dispute to local courts subject to a requirement that the Argentine Government would have the wherewithal, means, or ability (physical or juridical) to tender the payment in compliance with a judgment. Such requirements are all the more disconcerting because they do not apply as conditions to effective submission to international arbitration either.

155. The question thus to be addressed is whether the emergency legislation prevented Argentine courts from exercising their jurisdiction with respect to a dispute arising from an investment governed by the Argentine-Spain BIT. The Tribunal has received no evidence to the effect that the emergency legislation would have precluded Argentina’s Courts from examining such a dispute. This legislation certainly had the effect of restricting the range of possible outcomes, at least in as much as the State was bound not to enter a settlement nor to accept any enforcement of a liquidated damages judgment. Article 12 of Decree 214/2002 suspended compliance with any precautionary measure in a legal action initiated against the Government and it also suspended the enforcement of any judgment. However, this suspension was limited to 180 days as of the date of the Decree’s entry into force. It has not been demonstrated that the extension of the state of emergency also had the effect of extending this 180 day time frame. Moreover, such suspension of court measures and decisions was exclusively directed at the financial industry sector concerning specific transactions such as loans, debts, bonds, deposits or financial rescheduling, thus not covering disputes over investments like the one in the instant case. There also may have existed provisions proscribing access to any renegotiation, as contended by Claimants in their Answer to the Tribunal’s question: a stage where new documentary evidence was no longer admissible. But such restrictions do not demonstrate that submission of Claimants’ dispute to domestic courts was impossible or did not provide any opportunity to reach a fair result. There is insufficient evidence demonstrating that the Government “was seeking to prevent any judicial interference with the emergency legislation,” thus causing a “serious problem” were an investor

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<sup>90</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 585.

required to “go to domestic courts to challenge the very same measures,” as affirmed by the *BG Group* Tribunal in light of its finding that BG Group’s claims were admissible for arbitration although BG Group had not submitted the dispute to local courts as provided for by Article 8 (1) and (2) of the UK-Argentina BIT.<sup>91</sup> Indeed, when this conclusion was reached, the 180 day suspension period had long since elapsed, and the Tribunal did not explain whether the dispute under consideration related to the financial system which was at the core of the preservation provisions of the emergency legislation.

156. In light of the limited evidence received covering all of the practical aspects, consequences, and implications of the emergency legislation, it does not appear inconceivable that Claimants possibly may have initiated a proceeding seeking a declaration that the emergency law was unconstitutional regarding the prosecution of a claim arising from the Argentina-Spain BIT.<sup>92</sup> Such a proceeding would have been, however, a far cry from one satisfying the requirement for a “fair opportunity” to reach a decision on the substance according to the provisions of Article X of the BIT. At the outset, such a declaration would have to be completed and conceptually complemented by another declaration stating that the measures taken with respect to Claimants’ investment did not comply with the protective provisions of the BIT. Second, a claim for compensation could have been brought only after both such declarations had issued. This effort was not only “highly unlikely”<sup>93</sup> but actually impossible based upon the operational time frame of ordinary local courts, as shall be explained below.

b) Competence of local courts requires Claimants’ *jus standi*

157. Respondent contends that because Claimants had the opportunity to bring this dispute before domestic courts does not mean that, in turn, Argentina – as a party to such potential lawsuit – would not have the right to raise any objection it may have against, for example, Claimants’ *jus standi* or otherwise. That Respondent may have such a right under the laws of the Republic of Argentina may be correct. If so,

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<sup>91</sup> *BG Group Plc. v. The Argentine Republic*, Final Award of December 24, 2007, No. 153, 156. The Award was vacated by the US Court of Appeals, District of Columbia Circuit, on January 17, 2012 (No. 11-7021), for lack of “arbitrability”, Claimant having failed to submit the dispute to judicial proceedings in Argentina and to wait 18 months before filing for arbitration.

<sup>92</sup> There is no reason to mitigate somehow such an initiative by contending that the “Argentine Government could have arranged for an examination of the constitutionality of the Emergency Law”, but “did apparently not see the need to proceed with such examination”, as stated in *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 586. This had been “arranged” long ago by the Argentine judiciary when seized with thousands of claims under *Amparo*. As to decisions rendered by the Supreme Court, cf. *CMS Gas Transmission Company v. The Argentine Republic*, ICSID/ARB/01/8, Award of May 12, 2005, No. 215 s.

<sup>93</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 585.

however, the proposition merely begs the question of whether such a proceeding would have met the strictures of Article X(2) of the BIT.

158. For this Tribunal, it clearly does not. Access to a “competent tribunal” as provided for in Article X(2) necessarily implies access to a “competent” court *ratione personae* to hear the dispute, which means that Claimants’ *jus standi* is admitted and cannot be denied on a ground based on domestic law, which would find no legal support in the BIT. It does not make sense to assert that Claimants were under an obligation to submit the dispute to domestic courts (under circumstances to be further examined below) only to object to the exercise of the courts’ competence based on lack of *jus standi*. Admissibility is a prerequisite for compliance with the obligation set forth in Article X(2), the content of which will have to be further addressed below.

159. Article X(2) requires as one of its operational features that the competent tribunal where an investment dispute would have to be submitted prior to access to arbitration must be a tribunal where the investor is admitted as a party having *jus standi* to proceed. This requirement does not preclude a domestic court, *arguendo*, from denying Claimants’ capacity as an investor within the meaning of the BIT. But such a court cannot object to Claimants’ standing under the BIT for reasons exclusively based on domestic law. In other words, there is no point for the Host State to argue that remedies are available to the investors before domestic courts while also arguing that the same investors have no *jus standi* to resort to litigation before these very same domestic courts.

160. The requirement of submitting the dispute to the competent tribunals of the Host State is intended, as strongly and correctly advocated by Respondent, to provide for an opportunity to arrive at a suitable remedy to the dispute. In order to allow for this objective, the proceeding to be followed before those tribunals must have the effect of bringing to the court for purposes of adjudication the substance of the dispute. The provisions of Article X clearly support such an understanding. Article X(3)(a) provides leave to an international arbitral tribunal, at the request of either party to the contention, “when no decision has been reached on the substance 18 months after the judicial proceeding provided for in paragraph 2 of this article began.” The party seeking to submit the dispute to local courts must act accordingly only to the extent that it has access to a tribunal that is competent to exercise jurisdiction over the “substance” of the dispute. The same provision also means, together with Article X(2), that the requesting party is entitled to have access to a local court competent to hear the dispute on the merits. Such right is directly based on Article X of the BIT and cannot be restricted or rendered a theoretical construct on the basis of additional requirements derived from the domestic law.

161. This analysis leads to the proposition that the local court requirement cannot compel an investor-claimant to submit its case to a tribunal before which it has no access or where there is a risk that access may be successfully opposed by the adverse party. This proposition does not raise an issue of access as Respondent referenced in its Answers to the questions raised by the Tribunal. There is no doubt left that a foreign investor has “access” in the traditional meaning of the term, as guaranteed by the Constitution to every citizen. Respondent suggested, however, that Claimants would have to accept as a condition precedent within the meaning of Article X(2) submitting the dispute to a local court where Respondent then could object to Claimants’ *jus standi*. In this connection, Prof. Mata stated at the hearing that the investor would have to demonstrate that, before an Argentine local court, in addition to his quality as an investor, “he has a legitimate standing to take action.”<sup>94</sup> As stated in the discussion of the concept of “competence” of local courts, such a hypothesis is excluded because the framework of Article X (2) and (3) require such tribunal to be able to exercise jurisdiction with respect to the “substance” of the dispute. Claimants cannot be required to submit their dispute to courts where they do not enjoy *jus standi* under the local law applicable to such courts. This proposition also stands in striking contrast to Respondent’s statement on the basic purpose of the provision concerning access to local courts in an effort to arrive at a suitable remedy that may avert international arbitration. This objective would be impossible to achieve *ab ovo* were the Host State allowed to invoke from the very commencement of the litigation that the investor has no *jus standi* before the court and succeed in this assertion. Even if such an objection could be invoked and subsequently rejected, the time expended in the proceeding would have to be calculated as falling within the 18 month time frame and would thus render the timely issuance of a decision on the merits all the less likely.

162. Throughout the course of this proceeding, it has been Respondent’s position that Claimants lack standing to sue before Argentine’s Courts as investors under the BIT concerning rights that belong to AGBA. Respondent referred to Section 75, paragraph 22, of the Argentine Constitution to assert that treaties are superior to laws and that therefore, Article X(2) of the BIT is directly enforceable in Argentina. Nonetheless, Respondent also has affirmed as early as in the letters sent on May 24, 2006, *i.e.* prior to the date on which local court proceedings could have been brought pursuant to Article X(2), that nothing in the very same provision, together with Section 31 of the Constitution, “can lead to the conclusion that a foreign investor is thereby granted standing to sue,” which means that “in this case, in view of the rights claimed, the action must be brought by AGBA.”

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<sup>94</sup> TR-E, Day 1, p. 63/24 s., 109/17-19, 134/17 s.

163. This position has been confirmed and it is reflected in Respondent's second objection to the Tribunal's jurisdiction. The arguments that Respondent asserts in support of this objection include the proposition that under Argentine domestic law, Claimants as shareholders of AGBA lack standing to act in their own name in support of rights that are considered to belong to AGBA and not to the shareholders. Indeed, Respondent asserts that no provision of Argentine corporate law allows a shareholder to bring a claim on behalf of the corporation. The ownership of shares in AGBA does not authorize Claimants to bring any derivative action by invoking the rights of the company. The necessary consequence is that Claimants *jus standi* would have been denied before the competent courts of the Argentine Republic, with the effect that their claim would not have been heard on the merits for this reason.<sup>95</sup> Such position affirmed under the Argentine domestic law renders ineffective and thus useless any attempt to resort to domestic courts for purposes of finding a suitable remedy on the substance of the dispute that Claimants brought as investors and shareholders. In the opinion of the Tribunal, the Respondent cannot have it both ways. By advancing and continuously maintaining this position, it effectively denied that its courts were competent to entertain the Claimants' claim under the BIT. It cannot now contend otherwise.

3. *The nature of the "dispute" to be decided "on the substance" within 18 months*

164. After stating in paragraph 2 of Article X that the "dispute" shall be submitted to the competent tribunals of the Host State, paragraph 3(a) prescribes submission of the dispute to an international arbitral tribunal if "no decision has been reached on the substance" and this "18 months after the judicial proceeding provided for in paragraph 2 of this article began." This requirement may only make sense when the court seized had been accorded the opportunity to adjudicate the substance of the dispute. This requirement contemplates that the tribunal before whom the case is pending, shall have jurisdiction to preside over the substance of the alleged BIT infractions. Put simply, the fundamental architecture and objective of Article X (2) and (3) would be frustrated were the local courts foreclosed procedurally from a merits adjudication. The meaning of the term "decision on the substance" constituted a point of contention for the Parties and, therefore, shall be submitted to sustained analysis.

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<sup>95</sup> When he was asked whether it is possible that shareholders can bring an action before Argentine courts on the basis of damages sustained in their investment, Respondent's Expert, Prof. Nissen, answered: "On the basis of the corporation law of Argentina, which is the one legislative norm that governs this and governs every single resident of Argentina, the answer is no." TR-E, Day 2, p. 179/14-18.

- a) The “substance” cannot be reached through proceedings of an ancillary nature.

165. A “decision on the substance” as in keeping with Article X(3) of the BIT must relate to the dispute as submitted in an effort to reach a settlement as provided for in paragraph 1. The rule on prior submission to domestic courts has as its objective allowing courts the opportunity to fashion a suitable remedy based upon the relief requested by Claimants.

166. Therefore, an adjudication that only yields a provisional or precautionary measure does not in any way constitute a proceeding within the meaning of Article X (2) and (3) of the BIT. Likewise, an action for injunctive relief (“medidas cautelares”) is subordinate to an action for damages and, therefore, cannot constitute a condition for the filing of an Article X proceeding. The procedural significance of such a measure is materially different from the decision making of a local court under the conditions of Article X (2) and (3) of the BIT. Even if, under extraordinary circumstances a tribunal may sometimes award, according to Prof. Mata, compensation for damages (as a temporary advance payment) when the award for damages might not be payable when the final decision issues as happens in practice,<sup>96</sup> a tribunal shall refrain from thus proceeding “when it comes to contracts and investments.”<sup>97</sup> In light of this expert testimony, such precautionary measures will under any analysis not reach the substance of a dispute.

167. The same analysis and conclusion applies with respect to declaratory relief.<sup>98</sup> Declaratory relief is inapposite to the case before this Tribunal. Here Claimants seek damages for past acts and not a decree proscribing future conduct. As Prof. Mata stated at the hearing, such an action can be settled through an expedited procedure and it serves to challenge the validity of actions undertaken by the administration, but it cannot include an award of damages, which would have to be requested in another and subsequent procedure.<sup>99</sup>

168. Already when Claimants first gave notice of their dispute on December 21, 2005 and on January 24, 2006, they sought, *inter alia*, compensation for damages caused as a result of the actions of the Respondent from 2002 onwards, which, Claimants alleged, had breached the rights under the BIT. By the time that notice of intention to commence arbitral proceedings was given on September 5 and 6, 2006, Claimants referred in addition to the fact that, by decree, the Governor of the Province of Buenos Aires had terminated the Concession Contract with AGBA. Thus, “the

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<sup>96</sup> TR-E, Day 1, p. 98/12-21; Prof. Mata’s Report, No. 55.

<sup>97</sup> TR-E, Day 1, p. 98/14 s.

<sup>98</sup> Cf. Prof. Mata’s Report, No 42-47.

<sup>99</sup> Cf. TR-E, Day 1, p. 96/8-25 – 98/2.

dispute” referred to in Article X was, from the outset, a dispute concerning compensation for damages allegedly caused to the Claimants’ investments protected under the BIT as a result of the actions of the Respondent. The dispute concerned actions that had already been taken by the Respondent, which, if found to give rise to breaches of the BIT, could only be redressed by compensatory damages and not by precautionary or injunctive relief.

169. Equally of no relevance is the *Amparo* action for administrative default or delay, which serves to accelerate an answer to be provided by the administration to the requesting party. This has nothing to do with an investment dispute brought before local courts and not before an administrative agency. Moreover, it requires prior submission of a claim, which is not the subject matter of this case: a proceeding relating to Article X of the BIT. As Prof. Mata confirmed at the hearing, it has nothing to do with a judicial action.<sup>100</sup>

170. Similarly, the principle of “useless step” is of no moment in this case. There is no ordinary proceeding preceded by a prior administrative claim that then may be circumvented by dint of asserting that it constitutes a “useless” procedural step. As Prof. Mata very candidly acknowledged, this remedy has “nothing to do with a judicial procedure,”<sup>101</sup> and “does not reduce the time required for judicial procedures.”<sup>102</sup>

171. A proceeding otherwise ancillary to an action brought by an investor is a possessory action or action *in rem*, or *quasi in rem* which would be available for the Concessionaire who has been deprived of its assets, but not to Claimants when seeking compensation for damages and not recovering lost assets. As Prof. Mata testified, such a proceeding “has nothing to do with compensation for damages.”<sup>103</sup>

172. Prof. Mata thus acknowledged that none of these so-called alternative remedies is suitable to be tried by a foreign investor before the local courts of Argentina. The Expert recognized the hypothetical nature of the alternatives he had identified. He further admitted that they did not constitute a judicial proceeding capable of giving rise to a judgment for compensatory damages, as here pursued by Claimants. The Tribunal shares Prof. Mata’s conclusion.

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<sup>100</sup> TR-E, Day 1, p. 99/18-22.

<sup>101</sup> TR-E, Day 1, p. 94/12 s.

<sup>102</sup> TR-E, Day 1, p. 94/18 s.

<sup>103</sup> TR-E, Day 1, p. 95/25 – 96/1.

- b) The “substance” cannot be reached pursuant to summary or expedited proceedings.

173. The remedies mentioned above and noted in Prof. Mata’s oral and written testimony are unavailing as to Article X(2) of the BIT because they are based on expedited procedural rules requiring abbreviated procedural junctures that are inimical to the complex configuration of most investment disputes. This fundamental procedural incompatibility is particularly patent in proceedings for injunctive relief or expedited summary actions.<sup>104</sup> Indeed, Prof. Mata testified:

“The action taken before court can be a very expedited action and the judges, under article 36 of the judicial code, can simplify litigation and require little evidence in fact.”<sup>105</sup>

Referring to the same provision, Prof. Mata confirmed:

“that judges do have the possibility, and they have very powerful means at their disposal to expedite matters.”<sup>106</sup>

“They have the duty to provide for the economy of the procedure in all cases.”<sup>107</sup>

However, no explanation was given by the Expert on how such an accelerated procedure would comply with a judicial examination of an investment dispute like the one in the instant case, which requires an extensive trial stage and an important amount of evidence. A decision “on the substance” as mandated in Article X(3)(a) requires manifestly a full examination of the rights invoked upon penalty of limiting the analysis of contested factual and legal issue to a surface treatment that would deny the parties of the appropriate due process consideration.

- c) The “substance” cannot be reached by a declaratory judgment.

174. The remaining question to be addressed is whether a decision on the substance of the dispute may be reached where the judgment would only award declaratory relief. Respondent vigorously answers this query in the affirmative in its Answer to one of the questions raised by the Tribunal, asking whether “an action leading to a declaratory judgment on the merits” complies with the requirements of Article X(2) of the BIT. A motion under Article 322 of the Federal Code of Civil and Commercial Procedure would allow an investor to submit to local courts the claim for a declaration

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<sup>104</sup> For the examination of such actions, very short periods of time and few procedural acts are provided for, and the dispute must require urgent judicial consideration. Cf. Prof. Mata’s Report, No. 27-30.

<sup>105</sup> TR-E, Day 1, p. 112/3-7. While this statement refers to lawsuits at the national level, similar solutions are to be found in the procedural law of the Province of Buenos Aires; cf. Prof. Mata’s Report, No. 77.

<sup>106</sup> TR-E, Day 1, p. 114/11-13.

<sup>107</sup> TR-E, Day 1, p. 129/1-3.

that a given measure taken by the Government or one of its subdivisions adversely affects its rights under the BIT, and that it requests a judicial decision on the conformity of such measure with the BIT. When further explaining such proceeding, Respondent refers, however, to situations where additional remedies, as compensation for damages, are not claimed at that time because damages deriving from the contested measures did not exist when the dispute was submitted to domestic courts.

175. To be sure a motion for a declaratory judgment would comply with the stricture and objective of Article X(2) of the BIT where the motion seeks to prevent damages from occurring. This would be the case *e.g.* when a declaratory judgment claim is filed before damage has been caused as a result of the impugned governmental action. Prof. Mata distinguished between two sets of proceedings. A first set included all administrative and judicial remedies available to prevent damage. A second set of three or four procedures were identified that contemplate compensatory damages.<sup>108</sup>

176. The prosecution of a cause seeking the prevention of damages, most likely in the form of prohibitory injunctive relief is poles apart from the case *sub judice*. It does not answer the question how such motion for a declaratory judgment on an alleged violation of the BIT could comply with Article X(2) where the dispute, as pled by the claimant, includes, as in the instant case, from the very beginning of the submission of the notice of dispute, a claim for compensation of damages.

177. The *Amparo* action for the protection of constitutional rights (including treaties) has been extensively cited and commented as a device most useful with respect to Article X (2) and (3) of the BIT. Such a proceeding is of a purely declaratory nature. According to the practice briefed to the Tribunal, it does not encompass relief for damages or payments except in the cases where banks were ordered to return funds to customers.<sup>109</sup> The purpose of such an action is to avoid harm and the risk of future damages. It in no way represents an actual claim for pecuniary damages. By nature, proceedings for injunctive relief operate on short notice and contemplate limited parameters for the development and presentation of evidentiary issues.<sup>110</sup> The Tribunal has not found any material support for a more expansive construction of *Amparo* actions in Respondent's submissions on this issue, as this shall be further explained below. Moreover, an *Amparo* action, if adopted, and as stated in Section 43 of the Constitution, can go no further than to declare that a particular law or legal rule is unconstitutional or that it breaches a treaty and violates

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<sup>108</sup> TR-E, Day 1, p. 111/25 – 112/10, 115/20-23.

<sup>109</sup> Cf. Prof. Mata's statement at the hearing, TR-E, Day 1, p. 136/16 – 137/2.

<sup>110</sup> As Prof. Mata explained, this is an "extraordinary action, which is characterized by minimum procedural requirements and little need for debate" (Report, No. 19).

for this reason the Constitution. Such a declaration does not include a statement in regard of its effects on the legal relationship involved in the particular case.

178. In describing declaratory actions as suitable proceedings for purposes of Article X, Respondent seems to distinguish between the claim asserting the prayer for relief and the “dispute” representing the operative facts from which the actual claims emerge. The Tribunal notes, however, that Article X of the BIT does not support such an interpretation. The “dispute”, as referred to in paragraph 2, is the “dispute within the meaning of paragraph 1”, and this definition remains the same in paragraph 3. It is thus the dispute that is submitted by a Contracting Party or by the investor to the other party in an attempt to reach an amicable settlement. When such a dispute includes a request for compensatory damages, as it does in this case, the claim necessarily is included in the subject matter of the dispute to be submitted to local courts if the effort to reach an amicable settlement failed after six months.

179. Article X (2) and (3), when referring to “the dispute”, address the subject matter of the contention in its entirety. It does not entail a reference only to a part of the dispute. If it had referred only to part of the dispute, then, after maturation of the 18 month process before local courts based solely on a motion for a declaratory judgment, Claimants again would find themselves in the awkward posture of having to reinitiate anew the entire six month and 18 month process with the remaining parts of the claim. In short, piecemeal submissions are not contemplated by the Article X rubric and in any event would only be conducive to redundant and inefficient proceedings. Article X, neither expressly nor implicitly, provides for this scenario. Throughout its text, the dispute as the core concern of this Article is used in the singular form and there is no suggestion whatsoever that a claimant would have to submit claims to competent local tribunals on multiple occasions. In this case the dispute has been articulated by Claimants in its broadest sense as early as the date of the notices of dispute with emphasis placed on the losses suffered by Claimants. If Article X(2) is to be accorded full force and effect, the entire dispute must be brought before Argentine Courts in order to provide for a decision on the “substance.”

180. The *Wintershall* Tribunal noted, without further elaborating the matter, that the 18 month rule of the Argentina-Germany BIT does not mention the type of relief that should be sought before domestic courts. The Tribunal also observed that the BIT does not require that it should be the same or similar to the relief sought in international arbitration.<sup>111</sup> This general statement may be correct to a certain extent only because procedural requirements may have the effect that the remedy sought before a domestic judge may differ from an application to an arbitral tribunal. But this

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<sup>111</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 118, 196.

proposition is not the decisive point. The key-concept in Article X of the BIT is the “dispute”, not the relief requested. There is no indication whatsoever that the investor should not be entitled to present its dispute “in full” before a domestic court. The *Wintershall* Tribunal therefore correctly noted that the 18 month rule is premised on the submission of “the *entire dispute* for resolution in local courts.”<sup>112</sup>

181. Likewise, a distinction may be made between the “dispute” and a claim or cause of action. Article X of the BIT does not require that the same cause of action must be brought before the domestic court and the subsequent international arbitral tribunal. As the *Maffezini* Tribunal observed, the submission of a dispute does not necessarily have to coincide with the presentation of a formal claim.<sup>113</sup> It also has been noted that the action brought before a local court need not allege a breach of the BIT; it is sufficient that the dispute relates to an investment made under the BIT. The claim before the local courts must be “coextensive” with a dispute relating to investments made under the BIT.<sup>114</sup> The nature of the “dispute” brought before domestic courts may be broad. The objective of the judicial filing is indeed to provide the domestic court with an opportunity to fashion a suitable remedy that may obviate international arbitration. For such a result to be reached, it is not necessary for the domestic court to adjudicate the claim within the framework of the BIT. What is required, however, is that the cause of action to be adjudicated at the domestic level be of such a nature as to allow for the resolution of the dispute to the same extent as if the claim had been brought before an international arbitration under the BIT. As the *Wintershall* Tribunal stated, it must be possible to bring the “entire dispute” before the competent local court.

182. This Tribunal therefore concludes that to the extent the dispute as raised by a party entails a request for compensatory damages, in addition to a claim for a declaration on an alleged violation of the BIT, both categories of the claim constitute part of the same dispute. When the investor is required to observe the obligation to submit the dispute to local courts pursuant to Article X, this requirement only can be met when both the declaratory and the compensatory claims are susceptible to submission before the domestic courts of the Host State. This predicate does not necessarily require that the same court would have to address both claims so long as it can be reasonably expected that the 18 month timeframe will be respected.

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<sup>112</sup> *Ibid.*, No. 160(2, *in fine*), emphasis added.

<sup>113</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 97.

<sup>114</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID/ARB/97/3, Decision on Annulment of July 3, 2002, No. 55.

d) What *fora* for claims for compensation of damages?

183. When asked to explain the relevance of the various remedies suggested in his Report in light of the Article X(2) requirements, Prof. Mata acknowledged that for purposes of securing an adjudication on a compensatory damages claim before Argentine domestic courts, only an expedited summary action would be available.<sup>115</sup> He added an action based on the BIT and brought directly before the Supreme Court.<sup>116</sup> He also noted that “perhaps a precautionary measure could be obtained,”<sup>117</sup> adding: “but truly I believe that in order to obtain compensation of their damages, the most important remedies are the ones I mentioned.”<sup>118</sup>

184. When invited to address the issue of injunctive relief (precautionary measures), Prof. Mata first mentioned the scenario where such a measure would be of a preventive nature and that courts would be amenable to expediting a decision, but he also admitted that such measure is subject to the final recognition of the claim by the court.<sup>119</sup> Ultimately, such measure would still have to be followed by a proceeding on the merits.

185. Second, another alternative would be for Prof. Mata to raise the precautionary issue autonomously within the 18 month period.<sup>120</sup> With respect to the possibility of a decision on the merits where damages are included, Prof. Mata testified that he “would resort to the expedited procedural remedies.”<sup>121</sup> This alternative is not to be understood as a type of provisional measure but rather as an expedited summary action that would permit, in Prof. Mata’s words, “that the local court would have to try and uphold the terms of the treaty and come to a decision through some sort of expedited remedy.”<sup>122</sup>

186. Prof. Mata acknowledged that his Report was not focused on the issue of compensatory damages:

“In the range of different procedural avenues I referred to in my report, I was not referring to things that are related specifically to damages, rather I was referring to all of the different avenues of recourse available to the subjects of public administration.”<sup>123</sup>

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<sup>115</sup> TR-E, Day 1, p. 85/1-23.

<sup>116</sup> TR-E, Day 1, p. 85/13-23.

<sup>117</sup> TR-E, Day 1, 86/5-10.

<sup>118</sup> TR-E, Day 1, p. 86/10-13.

<sup>119</sup> Cf. TR-E, Day 1, p. 87/6 – 88/5.

<sup>120</sup> TR-E, Day 1, p. 88/5-14.

<sup>121</sup> TR-E, Day 1, p. 88/14-18. See also Prof. Mata’s Report, No. 27-30.

<sup>122</sup> TR-E, Day 1, p. 89/12-14.

<sup>123</sup> TR-E, Day 1, p. 96/25 – 97/5.

187. When asked to identify the remedies that would allow courts to settle on damages, Prof. Mata testified:

“In a final decision, yes, the three I mentioned; in other words, very expedited action, original action before the court, or even an ordinary judgment, with a special requirement that the decision would have to be made within 18 months. The other remedies available are in order to prevent damages, but there, as well as in the protection of constitutional rights, you can obtain precautionary measures with a provisional setting of damages.”<sup>124</sup>

188. An expedited action would be based on Article 321 of the Code of Civil and Commercial Procedure, which requires a legal ground allowing for the prosecution of the claim pursuant to this provision. In this connection, Prof. Mata referenced the article of the BIT that mentions the 18 months, “which in any way points to an expedited summary solution to obtain compensation for damages”.<sup>125</sup> This premise notwithstanding, Prof. Mata had to admit that the BIT neither provides for an obligation to be placed on Argentina’s Courts to fashion a remedy within 18 months nor does it require that an adjudication on the merits necessarily comprise compensatory damages.<sup>126</sup> Therefore, Article X of the BIT cannot constitute a basis for requiring local courts of the Host State to act through a summary or expedited proceeding. The Tribunal has to conclude that the evidence is extremely weak to support a position that there would have been a reasonable chance that the claims brought by Claimants, as initially defined in the notices of dispute, would have been adjudicated on the merits pursuant to an expedited summary proceeding. Moreover, this conclusion is further bolstered when considering the nature and complexity of a claim brought under a BIT and the investor’s fundamental right that its action be processed consonant with due process. While insisting that Argentina’s courts enjoyed the means with which to expedite a proceeding, Prof. Mata did not at all examine whether such an approach was compatible with the requirement for proper and fair handling of complex cases concerning international investment law.<sup>127</sup>

189. When Prof. Mata referred to an “original action before the court,”<sup>128</sup> he must have referred to a direct action brought before the Supreme Court under Article 117 of the Constitution.<sup>129</sup> This provision follows Article 116, which enumerates the cases that the Supreme Court is empowered to hear and those proceedings arising “under the treaties made with foreign nations.” According to the first part of Article 117, the Supreme Court shall have appellate jurisdiction in such actions. An appellate

<sup>124</sup> TR-E, Day 1, p. 116/25 – 117/10.

<sup>125</sup> TR-E, Day 1, p. 91/16-19.

<sup>126</sup> TR-E, Day 1, p. 91/20 – 92/4.

<sup>127</sup> Prof. Mata’s Report does not consider the dispute as it was brought before this Tribunal in relation to the expedited procedural remedies under Argentine Law. In light of his definition of the purpose of the Report (No. 2), he was not asked to do so.

<sup>128</sup> TR-E, Day 1, p. 117/2 s., 138/1-6.

<sup>129</sup> See also Prof. Mata, TR-E, Day 1, p. 85/19-23.

submission of an investment claim to the Supreme Court would not constitute a remedy pursuant to Article X(2) of the BIT. Article 117, however, contains an exception in its second part, which reads:

“but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party, the Court shall have original and exclusive jurisdiction.”

Addressing the issue admittedly “over and beyond what I have written in my report”, Prof. Mata explained:

“article 117 of our national constitution makes it possible for claims to be submitted when a party is a province or a foreigner, and this is a possible path which in my opinion was never resorted to in order to try to obtain the highest court of the land in intervening.”<sup>130</sup>

190. This statement is as clear as is Article 117 of the Constitution on the point that on the sovereign’s side, only a province can form part of a proceeding. Such a direct action before the Supreme Court cannot involve the State. Yet the State’s involvement is precisely what Article X(2) requires. The record before this Tribunal is devoid of any evidence suggesting precedent where an investor first filed a claim before Argentine local courts as a predicate to bringing the claim before an international arbitral tribunal. Prof. Mata’s testimony amply comports with the Tribunal’s understanding of the evidence before it:

“Unfortunately, in Argentina’s judicial experience, there is no existence of this direct claim brought by investors before Argentinian justice.”<sup>131</sup>

The Tribunal concludes that such an action before the Supreme Court is not a remedy to be considered as satisfying the requirements of Article X. An ordinary action before a competent local court is the only remedy available to a foreign investor seeking to bring a claim against the Republic of Argentina who is seeking to meet a local court jurisdictional predicate pursuant to a BIT. The question then remains whether such an action has any likelihood to be adjudicated within 18 months in keeping with Article X (2) and (3) of the BIT?

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<sup>130</sup> TR-E, Day 1, p. 66/22 – 67/4. See also a similar but less clear statement in TR-E, Day 1, p. 138/23 – 139/1, stating that “you would have to ask the province and you would have to ask the national state, and both of them would have to be brought before the court.”

<sup>131</sup> TR-E, Day 1, p. 133/23-134/1.

e) The 18 month requirement with respect to ordinary court proceedings

191. It is not contested that Article X(3)(a) does not place on a competent tribunal before whom an investment dispute is pending a requirement to render a decision on the substance within 18 months. This proposition is settled. The rule merely states that if an adjudication is not achieved within this time frame, either party (claimant or respondent) may submit the dispute to an international arbitral tribunal. There is uncertainty when the question is reformulated as whether such an adjudication on the substance would comply with the 18 month rule where the case is on appeal. The Tribunal is inclined to follow Respondent's understanding that the 18 month rule is limited to a first instance adjudication on the merits as a stricture extending to appellate recourse would likely have included appropriate language.<sup>132</sup> As to this narrow proposition, this Tribunal confirms the view taken by the *Maffezini* Tribunal.<sup>133</sup> In any event, the "finality" of a domestic decision is, without more, not by itself dispositive. Indeed, Article X(3)(a) provides for bringing the dispute to international arbitration if it "persists" although a decision on the substance had been reached at the domestic level. In other words, a decision rendered by a domestic court has no *res judicata* effect on an arbitral tribunal notwithstanding compliance with the test that would otherwise cause *res judicata* effect to attach under the domestic law of the Host State.<sup>134</sup>

192. The rule contains an additional element that is of consequence in this case. The procedure to be set in motion when the dispute is submitted to the competent domestic court should be of a nature that allows the issuance of a decision on the substance within 18 months. If no such result can be reasonably expected, such a proceeding would be of no moment because at the expiration of the 18 month period, the investor shall be free to pursue its claim in an international arbitration. An investor would certainly do so after not having reached an adjudication before local courts. Therefore, as a matter of principle, the requirement of Article X(2) can only impose a duty on an investor to the extent that the Host State can meet its obligation of making available a competent court capable of meeting the target of rendering a decision on the substance within 18 months.

193. However, this pronouncement must be coupled with the previously articulated acknowledgement that Article X(3) does not set forth an obligation compelling local courts to render a decision on the substance within 18 months. The plain language of Article X(3)(a), providing for international arbitration "when" no decision on the substance is reached within 18 months, clearly contemplates the possibility that

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<sup>132</sup> Cf. TR-E, Day 1, p. 152/7-17.

<sup>133</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 28.

<sup>134</sup> Cf. *Ibid.*, No. 27, 29, 33.

domestic courts may not dispose of the dispute within that timeframe.<sup>135</sup> Therefore, the correct ruling is that the mechanism provided for in Article X (2) and (3) can be required of an investor only to the extent that the investor is not excluded from filing a claim before a competent tribunal of the Host State, which in turn functions pursuant to rules and working conditions that under reasonable circumstances and given the complexity of an investment dispute may reach a decision on the substance within an 18 month period. If, to the contrary, there is no likelihood that even under the most favourable circumstances a decision on the merits shall not be forthcoming, even at first instance, the requirement in Article X (2) and (3a) would be deprived of its meaning and “effet utile.” If this latter outcome is one that an investor is to expect, it would not make any sense to file a proceeding that presumably would require evidentiary showings and extensive briefing. In this regard, the proceeding itself would be inconsequential and the time passed similar to a waiting period. Even Respondent admitted that the goal of the provisions in Article X (2) and (3) of the BIT did not purport to be a waiting period.

194. The question that the Tribunal considers must be addressed in this regard is quite different from an *a priori* assessment that the requirement of resort to local courts is “pointless” – to use the term employed by the *Hochtief* Tribunal<sup>136</sup> – or lacks utility. Rather, this Tribunal is seeking to determine the application of the Treaty language in Article X (2) and (3), which contemplates the availability of a competent tribunal of the Host State that may, upon the submission of the dispute to it, be expected to render a decision on the substance of that dispute within 18 months. The question whether there is such a tribunal is to be determined by this Tribunal on the basis of the evidence presented to it. The principle of effectiveness or “effet utile” thus mandates that this requirement be applied and not that it may be disregarded. With that observation in mind, it is now possible to turn to the evidence.

195. By reference to the remedies available for compensatory damages, Prof. Mata acknowledged that “we do not have any experience on compensation for damages before Argentinean courts.”<sup>137</sup> Respondent also acknowledged:

“[...] it is quite true that there was never a case of any investor who brought a claim under a BIT in order to comply with this requirement.”<sup>138</sup>

<sup>135</sup> As it was observed in *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 104, the rule does not require a prior final decision of the courts, nor even a prior decision of a court at any level. It simply requires the passing of time or the persistence of the dispute after a decision by a court.

<sup>136</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 51.

<sup>137</sup> TR-E, Day 1, p. 86/22-24. Prof. Mata also said that “in my professional experience I do [not] know that foreign investors, on the basis of what is provided for in the investment treaty, in other cases, have resorted to Argentinian justice within the deadline set in the treaty in order to submit a claim to local courts.” (TR-E, Day 1, p. 66/2-8). The Tribunal notes that the word “not” is to be added in the English version in light of the Spanish original: TR-S, Day 1, p. 79/13.

Thus, the debate about a filing of an investment claim before local courts becomes theoretical.

196. The Tribunal finds that Claimants have furnished important evidence based upon the results of a statistical study undertaken within the office of Argentina's Attorney General. Indeed, Mr. Rosatti commented on this study while serving as Argentina's Attorney General. The study covered about 1600 proceedings directed against the Federal Government from 1985 to 2000 similar in nature and complexity to investment disputes. The study yielded two significant propositions. First, the average time in which a ruling on the merits took place was six years and one month. Second, none of the cases considered was adjudicated on the merits at the trial court level within 18 months. It is important to note here that this evidence is uncontroverted. In fact, Respondent has not objected to its content. In addition, Respondent has not disputed the factual basis or any assumption upon which the study is premised. Respondent also has refrained from objecting to the study's methodology, content, conclusions, or quality. In this connection, Respondent did not offer a more recent study or analysis that would somehow mitigate the 1985 to 2000 findings with facts of more contemporary vintage. In light of this uncontested evidence, the Tribunal can draw no conclusion other than to admit that the average duration of proceedings involving the State far exceeds 18 months and that it is extremely rare, if not altogether impossible, to have a proceeding of the nature of an investment dispute conclude, even at the trial court level, within 18 months.

197. The Tribunal examined the collection of judgments filed by Respondent for purposes of demonstrating that claims as in this case can be handled by Argentine courts within 18 months. The Tribunal's own analysis does not allow for such a conclusion. In most copies of the original judgments the commencement date of the proceeding is simply not specified. Respondent has indeed referenced such based dates in the English language summary, but with no supporting information. Three of the ninety cases contained in that summary went over 18 months.<sup>139</sup> In four cases, the claim was declared moot and in four others it was admitted by Respondent. These cases are therefore useless to support Respondent's demonstration. The only case relating to a claim for damages appeared to be frivolous. That action lasted more than 16 months. The complaint concerned a dispute about a difference in the calculation of a compensation payment. The case eventually was dismissed.<sup>140</sup>

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<sup>138</sup> TR-E, Day 1, p. 152/24 – 153/2. The proceeding referred to (but not exhibited) by Claimants in their Answer to the Tribunal's Questions dated March 20, 2012 at No. 59 does not affect this admission, as it sought declaratory relief and not compensation for damages.

<sup>139</sup> No. 3, 31, 32.

<sup>140</sup> No. 53.

198. A considerable number of the judgments have as their subject matter precautionary measures, data protection, public employment, appeals, and *Amparo* actions for delay, none of which can be compared to proceedings designed to reach a (i) “decision on the substance” (ii) in an investment dispute as referred to in Article X of the BIT. More than half of the judgments filed were *Amparo* actions on a great variety of subjects, most of them involving requests for the enforcement and regulations of laws and requests to declare particular statutes unconstitutional. None of these represent cases at all comparable to the action *sub judice*. None of the *Amparo* judgments relate to violations of international treaties or BITs. Respondent at no time has averred that the cases submitted are comparable in complexity to the proceeding before this Tribunal. Contrary to Respondent’s broad assertions, which are nowhere supported by evidence pending before the Tribunal, the judgments thus filed in fact confirm that there does not exist any evidence from which a Tribunal may reasonably infer that an action would be capable of being processed in conformance with the 18 month rule. To the contrary, the record supports Claimants’ contention that it cannot. This Tribunal agrees with Claimants on this point and so holds.

199. The Tribunal also has the benefit of the experience arising from the judicial action that AGBA filed in 2006. While Respondent contends that these proceedings are of no relevance of reference and to the disposition of this case, it cannot deny that they represent a point of comparison. AGBA’s action of December 4, 2006, filed with the La Plata Contentious Administrative Court No. 2, primarily sought to have Decree 1666/06, which terminated the Concession Contract, declared null and void. The action was for declaratory relief as causes of action seeking compensatory damages were reserved for adjudication at a later time. Despite the very limited scope of that proceeding, the action is still pending after *five years*. Respondent did not object to this factual premise, nor did it attempt to demonstrate that this proceeding was exceptional in any regard and that therefore it was hardly representative of the norm. This “close to home” example demonstrates that a proceeding lasting 5 years is not to be understood as being extraordinary or otherwise somehow exceptional.

200. In light of the inadequacies of the alternative remedies suggested by Respondent and testified to by Prof. Mata in his Report, together with the lack of any evidence rebutting the results of the study undertaken within the Office of Argentina’s Attorney General (explicitly referenced in Mr. Rosatti’s article), the Tribunal must conclude that the Republic of Argentina has not undertaken any steps to make available proceedings before its domestic courts that would, even at a minimum level, meet the requirements of Article X (2) and (3) of the BIT.

201. A further topic sheds light on this lack of appropriate handling of investment disputes by domestic courts in the Argentine Republic. Actions where compensatory

damages are sought would be subject to a 3 per cent fee, as Prof. Mata testified,<sup>141</sup> which would correspond to an amount of US\$ 6.3 million based on the claim before this Tribunal.<sup>142</sup> The investor would have to pay this fee if the decision rendered by the Argentine court is adverse to him.<sup>143</sup> It follows for Prof. Mata that such liability would become part of the investor's claim for damages before an international tribunal.<sup>144</sup> However, this assertion is far from self-evident, as such claim does not find any legal support in any of the BIT provisions. Moreover, when asked about the attribution of costs in a scenario where no ruling has issued within the 18 month period, Prof. Mata testified that there is no legal text addressing the concern.<sup>145</sup> The issue concerning the attribution of costs in specific cases governed by a BIT containing an 18 month rule has been left unresolved. The absence of authority also confirms that the Republic of Argentina itself had not provided for the appropriate procedural framework to deal with claims to be submitted to its local courts under Article X(2) of the BIT.

#### 4. *Conclusion*

202. Based on the findings explained above, it appears that clearly none of the various possible alternative means for litigating before the domestic courts of the Argentine Republic, as presented by Respondent and supported by Prof. Mata, are suitable to meet the requirements of Article X (2) and (3) of the BIT. An investor-state dispute before the courts of Argentina would far exceed the 18 months fixed by Article X(3) of the BIT for purposes of reaching a "decision on the substance." A proceeding that can in no reasonable way be expected to reach that target is useless and unfair to the investor. Claimants were not required to engage in such a "proceeding" pursuant to the provisions of Article X (2) and (3) of the BIT. This conclusion is further supported by the Republic of Argentina's position under domestic law pursuant to which Claimants in any event would lack *jus standi* before the Republic's domestic courts because they are claiming rights allegedly belonging exclusively to AGBA and not to its shareholders. This matter has also to be examined in light of the Republic of Argentina's second objection to the Tribunal's jurisdiction.

203. In light of the foregoing conclusion, there is no need to examine whether the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the BIT is here applicable. As Claimants were not required to comply with the 18 month rule under the facts presented to this Tribunal, the question of the applicability of the MFN clause is moot.

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<sup>141</sup> Cf. Prof. Mata's Report, No. 71; TR-E, Day 1, p. 101/3-14.

<sup>142</sup> TR-E, Day 1, p. 101/9-14.

<sup>143</sup> Prof. Mata, TR-E, Day 1, p. 120/3-6.

<sup>144</sup> TR-E, Day 1, p. 120/6-9, 128/4-7.

<sup>145</sup> TR-E, Day 1, p. 127/15-19, 128/13 s.

### **III. Respondent's Second Objection: Claimants have no legal standing to bring claims for legal rights that belong to another entity**

#### *1. Respondent's position*

204. Respondent requests the Tribunal to reject Claimants' claim because neither general international law, the Argentina-Spain BIT, the ICSID Convention, nor Argentine law provide for indirect or derivative actions. Respondent notes that Claimants assert that both URBASER and CABB are shareholders of AGBA. These parties allege a series of breaches of the regulatory framework. They also acknowledge the contractual nature of the legal relationship on which their claims are based. They additionally contend that their investment in the Republic of Argentina consists of shares in AGBA. Claimants' investment is limited to their shares in AGBA and their claims must be confined to the protection of rights arising from those shares. The rights they seek to enforce do not belong to either Claimant but rather to AGBA. They are not parties to the Concession Contract.

205. Respondent also notes that Claimants assert that the investment is not limited to mere shares in AGBA. Specifically, Respondent asserts that Claimants failed to identify this additional part of the investment, simply because it does not exist. Claimants only complain, so the argument goes, over a series of guidelines and requirements established by the Government of the Province of Buenos Aires. But the resulting conditions were not imposed on Claimants. The purchase of Claimants' shares and attendant undertakings were voluntary acts. No one forced bidders to participate. Claimants knew and accepted the requirements and obligations in order to participate in that Concession.

206. Claimants contend that the investment consisted of AGBA stock and acknowledge that they are not asserting shareholder rights. Claimants' rights as Spanish investors persist. But they can only invoke their own rights. Claimants' attempt to disguise their claim as a "Treaty claim" when, in fact, it is a contractual cause of action over which this Tribunal has no jurisdiction. Respondent has prepared a list of the rights invoked by Claimants and has shown that all of them belong to AGBA. The only effort that Claimants have undertaken to demonstrate that their claims are Treaty claims is to quote BIT provisions. This is not enough. Claimants only have brought contractual claims that relate exclusively to AGBA's Concession Contract. Because they are claims concerning a Concession Contract to which Claimants are not parties and that contains a special forum selection clause, this Tribunal could not possibly have jurisdiction. The case submitted to an ICSID

Tribunal in *Impregilo* is largely identical to this case.<sup>146</sup> In that case the objection to jurisdiction in relation to contractual claims has been admitted. The *Impregilo* Tribunal did not find any element involving the Republic of Argentina's obligations under the BIT, nor evidence of a pattern of acts by State entities aimed at causing damage to *Impregilo* as an investor.

207. Respondent contends that Claimants are overlooking general international law that has excluded legal disputes whose essential basis is the performance of a contract as grounds for jurisdiction. A series of awards have confirmed this principle in the context of investment arbitration. State responsibility for breach of international law is distinct from the liability of a State for breach of contract.

208. Respondent understands Claimants' position as disregarding one of the most recognized and universally accepted general principles of law. All legal systems draw a distinction between companies and shareholders. Whenever a corporate right is undermined by a third party, it is the company, not the shareholder, that the law understands to have been affected. Claimants bring their claims based on alleged violations of rights that belong to AGBA. But they are legally separated from AGBA. Claimants have no legal standing to exercise certain rights vested in AGBA, of which they are but shareholders.

209. General international law does not provide for indirect actions. The rights invoked must be clearly vested in those who claim them. Claimants are not vested with the rights they claim because those rights belong to AGBA. A company's shareholders cannot complain of alleged violations of rights vested in the company in which they only hold shares. They are limited to bringing claims regarding direct damages to their specific rights. If this principle were not so, certain shareholders would be able to take advantage of potential benefits from derivative actions, to the detriment of other shareholders.

210. Respondent explains that the matter was considered in the *Barcelona Traction* case before the International Court of Justice. Even though *Barcelona Traction* was a diplomatic protection claim, Respondent submits that authority to be applicable to this dispute. Assuming that a distinction between diplomatic protection and investment protection is warranted, it bears no relation to the rights that can be asserted. Shareholders may only claim rights to which they were entitled as shareholders under domestic law. International tribunals have no jurisdiction over such rights. The European Court of Human Rights also has rejected the admissibility of indirect actions. Shareholders can only assert indirect where, in every single case, the claims are predicated on an express provision authorizing the filing of such claims. Indirect

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<sup>146</sup> Cf. *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011.

or derivative claims are *prima facie* inadmissible under general international law. They may be specially allowed, but these allowances constitute exceptions.

211. The extraordinary nature of such claims is recognized in NAFTA in a specific provision included in Art. 1117 NAFTA. Some BITs also include similar provisions. Such a rule would allow Claimants to invoke their indirect control in order to assert AGBA's rights. The Argentina-Spain BIT has no comparable provision. This BIT provides no room for modifying *sub silentio* the Host States' corporate law principles. While the BIT does protect shareholders, such protection does not imply that shareholders may claim rights to which they are not entitled. No provision in this BIT intends to modify the ownership of allegedly protected rights. The mere fact that the BIT has shares in companies identified as protected investments cannot mean that the corporate law of both States is being redrafted so as to allow shareholders to invoke the rights of the companies in which they hold shares.

212. Respondent further observes that the ICSID Convention does not allow for indirect or derivative claims to be filed. The scope of Article 25 may not be modified by the parties. The matter was considered during the Convention's negotiation, as many investors operate through domestic companies. But direct access to ICSID for controlling shareholders of domestic companies was rejected. Instead, Article 25(2)(b) was included, which provides for an exception in the case of locally incorporated companies under foreign control, in order to avoid leaving investors unprotected. If Claimants' claims were to be admitted, this provision would be futile.

213. In light of the referenced provision, the domestic company has legal standing if it is subject to foreign control. This provision cannot be deprived of its meaning. Indirect claims are thus contrary to the ICSID Convention. Claimants deny that this provision is the basis of their claim and argue that the language of this provision is not intended to preclude direct access to arbitration by shareholders. Respondent never has alleged this proposition. The shareholders categorically are precluded from invoking the rights of the company and Article 25(2)(b) does not provide for such authorization.

214. The Argentina-Spain BIT does not protect foreign investors who have indirect shareholdings in the companies on which the claim is based. The content of foreign investments is determined by the laws of the Host Contracting State. Article I(2) of the BIT only includes property and rights acquired by foreign investors. This BIT does not include indirect claims to be filed. Claimants may only rely on rights directly owned by them. The BIT refers to shares of stock or other forms of participation in companies. It does not protect mere shareholder interests in companies where they have an indirect shareholding. According to Respondent, Claimants' allegations are not grounded on any right but on their mere interests in AGBA. The Republic of

Argentina did not undermine any rights held by URBASER and CABB in their capacity as shareholders in AGBA. Claimants are insisting on rights not held by them but vested in AGBA. The BIT does not consider indirect shareholdings, controlled companies or owned by foreigners, or interests in companies to fall within the category of investments. Claimants' comments referred to cases that were not relevant or to BITs that include the term "indirect." The ICSID decisions on which Claimants rely are either irrelevant or they have been so rendered under BITs where the indirect shareholders and their interests in companies are expressly under the protection of the BIT. The BIT expressly states that "the content and scope of rights corresponding to the various categories of assets shall be determined by the laws and regulations of the Party in whose territory the investment is situated" (Art. I[2.2]). Claimants claim rights to which AGBA would be entitled, which would be derivative since they involve claims for rights of third parties to this arbitration. Neither the ICSID Convention nor this BIT provide for this type of action.

215. Respondent also argues that URBASER owns an indirect shareholding interest in AGBA through Urbaser Argentina SA. The BIT does not provide for such indirect shareholders or shareholder interests to be protected.

216. International law does not define shareholder rights. Resort should therefore be made to domestic law, as stated in *Barcelona Traction*. Claimants' shareholder interests in AGBA allows them to exercise the rights arising from the ownership of those shares, as defined by Argentine corporate law. But these rights do not comprise rights vested in AGBA.

217. The relevance of Argentina's law derives from Article 42 ICSID and Article I(2) of the BIT, as well as the decisions of the International Court of Justice. Argentine corporate law provides for a structural scheme of companies. The board of directors is responsible for the management and representation of the corporation. The board has legal standing to institute any proceeding that may be deemed fit to safeguard corporate assets. And the proceeds of corporate actions become part of the corporate assets. Only the corporation can defend its own interests. No provision of Argentine corporate law provides for a shareholder to bring a claim on behalf of the corporation. A derivative claim brought by a shareholder is an attempt to misappropriate assets belonging to the company and, therefore, is contrary to the interests of other shareholders and third parties. The ownership of shares in AGBA does not authorize Claimants to bring any derivative action pursuant to the doctrine of subrogation. Claimants' interests cannot be equated with AGBA's rights. Claimants brought neither a corporate action on AGBA's behalf, nor an individual action. Under the laws of the Republic of Argentina, it is not possible for anyone to subrogate their rights into the rights of another person, except under extraordinary circumstances. Argentine law does not allow for indirect claims to be filed. Respondent submitted a

Legal Opinion authored by Prof. Nissen that serves as a further explanation of these fundamental aspects of Argentine corporate law.

218. Respondent further argues that Claimants' claim is based on alleged breaches of contract that purportedly caused harm, mainly, to AGBA. But Claimants simply cannot ignore the relationships created between AGBA and its creditors, debtors, and third parties. AGBA's creditors fall into a category of persons who have a preferential right to be satisfied from corporate profits. Their claims are to be collected out of AGBA's assets. If Claimants' claim were to succeed, all rights held by AGBA's creditors would be undermined. Therefore, the collection of profits demanded by Claimants necessarily must go through a process where it is determined whether there are net profits of the company. Also, the shareholders must decide whether dividends must be paid from these profits. The principle that creditors have a preferential right to collect their claims is applicable to all corporations in a free market economy. Argentina's bondholders also have a preferential right. Claimants' strategy is to circumvent these corporate law principles. Were they to prevail before this Tribunal, Claimants would be allocated a share of those profits over which AGBA's creditors enjoy a preferential right. This would result in their unjust enrichment.

219. There is an actual risk that any amount recovered as a result of the claim would be added to the indirect shareholders' assets, resulting in direct harm to assets of AGBA (and all of its creditors, including bondholders and employees). Claimants' assets would increase, causing an unjust enrichment. Shareholders have no right to the preservation of the value of their interests. There is also a risk of double or multiple claims because AGBA was not precluded from filing an action before domestic courts in addition to Claimants' illegitimate claim. This could result in double recovery. Argentina corporate law proscribes such situations.

220. Every treaty admitting a type of action permitting shareholders to claim rights of a corporation in which they are serving as shareholders provides that both the investor and the domestic corporation shall (i) waive any other venue, and (ii) that any compensation awarded shall be payable to the domestic corporation. The Argentina-Spain BIT does not contemplate such an action, as Claimants initiated. The Tribunal must abide by the law applicable to this dispute, and only claims under such legislation should govern the rights of the Parties. If compensation is granted to Claimants, it will be detrimental to the rights of other shareholders. Claimants allege that they are merely seeking their respective pro rata share based upon their individual shareholder interest. This ad hoc solution does not comply with Argentine law. Shareholders do not hold rights *in rem* on a pro rata basis in relation to corporate assets. Claimants also argue that any detriment caused to an AGBA creditor give rise to liability on the part of the Province and not Claimants. This proposition misses the point that creditors' rights can only be exercised against AGBA. Directly

compensating indirect shareholders as if they had a preferential right over creditors has no legal ground. To the contrary, creditors have a preferential right to collect their claims. In any event, Claimants can only claim rights corresponding to them as shareholders under the Argentine law. This is not what they are doing in this case.

## 2. *Claimants' position*

221. Claimants argue that they prosecute their claim in their own name and based on the damage inflicted on their investment. The investment consisted of the acquisition and subscription of shares in AGBA in its capacity as Concessionaire. In most cases Claimants' acquisitions were made by them, but for a small percentage of URBASER's shares, their interest was acquired through its fully owned subsidiary in Argentina. The measures implemented by the Republic of Argentina had a detrimental effect on the concession granted to AGBA. The performance of the Concession Contract was AGBA's sole corporate purpose. Claimants assert no claim for the damages that AGBA itself sustained. Their claim arises from the damage they have suffered because their investment was destroyed. This damage, although related to AGBA, is separate and distinct from AGBA. Claimants' standing to sue does not exclude, nor is it incompatible with, a claim brought by the Concessionaire before a competent court. The Government exercised good faith and best efforts to promote privatization and investment. There can therefore be no dispute as to the standing of the investors to bring claims. The requirement to set up a local corporation and the corporation's incentives to attract investors would result in a material inconsistency were the shareholders not deemed to be investors for purposes of defending their interests pursuant to a legal dispute. CABB and URBASER were directly involved in the entire investment process. All stock subscriptions and acquisitions constitute one single investment made by Claimants.

222. The rights Claimants assert arise from the BIT and, even though part of the facts that have led to the filing of a claim also encompass breaches of contractual obligations by the Grantor, they constitute violations of obligations undertaken by the Republic of Argentina as a BIT signatory. Some of the actions that the Regulatory Agency and the Grantor have intentionally and systematically undertaken, so it is alleged, rise to the level of material breaches of contract. Additionally, they entail clear violations of the governing Regulatory Framework. Other measures complained of, as those arising from the Emergency Laws, are beyond the ambit of contractual disputes and are directly expropriatory. These violations of internationally acknowledged principles of protection are amply memorialized in the BIT.

223. In its analysis Respondent omits a significant part of the claims. The violations of the Regulatory Framework were breaches of contract, but they were also violations

of the rights of the investors under the BIT. The alleged breaches include the termination of the Concession Contract for political reasons and the adoption of emergency measures, plus the amendment to the Regulatory Framework approved in 2003. Claimants allege that no single element in their claim is “just a contract claim.” Respondent argues that a breach of contract may not be construed as a violation of a BIT. Respondent, however, acknowledges that the operative contractual instrument, the Concession Contract, forms part of the Regulatory Framework. This Framework had been presented to the investors as an incentivizing feature intended to attract their investment. Thus, the infringement of any of the contractual elements, so it is asserted, necessarily includes the violation of the Regulatory Framework applicable to the investment. Put simply, each forms part and parcel of one concept. It is hard to understand how Respondent intends to treat as mere contract claims what has been asserted as a material violation of the basic rights granted to the investors under the Regulatory Framework.

224. Respondent argues that Claimants are acting on behalf of the Concessionaire, AGBA. The investment was made in AGBA under the assumption and acknowledgement that AGBA was the Concessionaire. These are the indivisible elements of the same transaction. But Claimants do not fashion claims for the protection of their rights as shareholders. They act in furtherance of their own rights in their capacity as Spanish investors. Respondent refuses to acknowledge that Claimants act on their own behalf and in furtherance of their individual rights. It also refuses to note that Claimants’ legitimate expectations of benefits disappeared and that this frustration of expectations triggers the application of the BIT. Respondent elects to disavow all international awards that in similar circumstances have ruled for the investor and against the Host State. Many ICSID tribunals indeed have found that a breach of contract may as well be considered a breach of a BIT.

225. The Tribunal simply has to be satisfied that, if the Claimants’ allegations were proven to be correct, then the Tribunal has jurisdiction to consider them. Claimants have standing to bring an action under the BIT regardless of whether particular acts or omissions may be classified also as breaches of the Concession Contract. The primary classification of a dispute as an exclusively contract claim or referring to an investment matter depends on the Claimants’ allegations, unless such classification is *prima facie* unlikely. The facts as Claimants have presented them to this Tribunal allow for a *prima facie* case qualifying those alleged violations as likely related to an investment.

226. Respondent premises its allegations almost exclusively on the *Impregilo* Award that decided jurisdiction jointly with the merits. The position of this Tribunal is different. This Tribunal has to decide whether it has *prima facie* authority to hear the matters submitted to arbitration. The *Impregilo* Award limits the acceptance of the

objection that the Claimants' claim is only a contractual cause of action. Respondent ignores an important material fact in analysing *Impregilo* that is not present in this case. The *Impregilo* Award found that a jurisdictional clause in the Concession Contract does not prevent the parties from resorting to arbitration under a BIT. The existence of a jurisdiction clause in a contract in no way may affect the claims brought by the investors against the Host State of investment (which are not usually parties to that contract). The *Impregilo* Award resembles this case in as much as it states that the Argentine Republic's objection is upheld to the extent that contractual breaches do not simultaneously concern violations of rights under the BIT. Claimants disagree with *Impregilo* as to the existence of contractual claims separate and distinct from BIT violations. In this case, the Host State's conduct principally concerns violations of the investors' rights.

227. Claimants had no choice other than to purchase shares in a company organized in the Republic of Argentina. Claimants were free, but their choice and decision to invest were affected by the promises, representations, and commitments made to them as investors. The formula on how to set up the investment was designed and implemented by the Grantor. An Argentine corporation was to be incorporated within the Host-State's territory. This corporation's shares would be subscribed by the winning bidder. This procedure was so structured under the Bidding Terms and Conditions, and it was reiterated in the Concession Contract. That contract prescribed that the Concessionaire's sole purpose would be to perform the Contract. Respondent's position is that such a structure deprives foreign investors of the rights enshrined in the BIT signed by the Republic of Argentina. CABB took part in the bidding process and became the awardee; it was required to invest through the subscription of AGBA's stock. URBASER was subject to the same promises, representations, and commitments when it acquired stock. It did so at a very early stage, before takeover by the Concessionaire on December 15, 1999. URBASER's investment also is protected by the BIT.

228. Respondent does not offer juridical support for its argument that the ICSID Convention does not allow indirect or derivative claims to be filed. Respondent's reliance on *Barcelona Traction* is erroneous at its starting point, considering that the investors' claims for damage sustained directly by them in their investment are indirect claims. Respondent argues that a general principle of customary international law may not be repealed other than expressly, but it relies solely on *Barcelona Traction* for this proposition. It does not acknowledge that these are precisely the rights under the BIT. The purpose of Article 25(2) ICSID is to broaden the scope of jurisdiction. The partial indirect investment is for 1.0687% of AGBA only, which belongs to Urbaser Argentina SA. That entity in turn is entirely owned by URBASER. Respondent's position has been repeatedly rejected by other Arbitral Tribunals. For Respondent, the only distinction is that for diplomatic protection the State of

nationality of the aggrieved party files the action, whereas in a case of investor protection, it is the aggrieved party itself that does so. A doctrine exclusively based on diplomatic protection does not apply.

229. The rights of investors are regulated in the BITs. The Argentina-Spain BIT provides Claimants with their investor status. The BIT contains an international rule which allows claims by shareholders, even where they hold a minority stake.

230. Claimants' position is that the BIT protection applies to both direct and indirect participations in companies. Claimants further assert that Respondent is confusing indirect participations with indirect claims. When discussing derivative claims, Respondent refers to damage caused to AGBA. When discussing indirect participations, Respondent refers to Claimants' indirect shareholding in AGBA. CABB has a direct 20% interest, and URBASER 26.3425%, to which an indirect interest of 1.0687% is to be added. All of these shareholder interests are BIT-protected. Only this 1.0687% constitutes an indirect stake of URBASER, held by a company that in turn is fully owned by URBASER. Indirect share interests also are protected as investment. The word "directly" used in Article 25(1) ICSID refers to the relationship between the dispute and the investment, not to the relationship between the investment and the claimant investor. The language of Article 25(2)(b) is not intended to preclude direct access to arbitration by shareholders. The language of the Argentina-Spain BIT makes no such distinction. It leaves room for all types of assets and all forms of participation in companies.

231. Respondent places considerable emphasis and weight on the definition of investments in the Argentina-Spain BIT. Respondent argues that the BIT exclusively refers to "shares and other forms of participation in companies" (Art. I[2]), whereas Claimants' indirect claim is not grounded on any right but on their mere interest in AGBA. Claimants note, however, that the rule quoted above includes "other forms of participations as investments" and the definition on top of that provision refers to "any kind of assets." No distinction between "direct claims" and "derivative claims" is made or otherwise suggested by the operative BIT provisions. Respondent's distinction is, so say Claimants, consequently groundless.

232. Claimants emphasize that their claim is not based on their shareholder rights but rather on their investor rights. Respondent denies shareholder standing to assert a claim in its own name for rights that belong to the company in which the shares are held. But as Claimants are not asserting shareholder rights and claims, then it follows that the jurisdictional challenge cannot be based on arguments that relate to shareholder rights and claims. Respondent chose to distort the terms of the claims.

233. Respondent argues that stockholders or the creditors would sustain damages were Claimants' claim allowed to succeed. This proposition, however, rests on a slim reed. The Republic of Argentina signed BITs. Respondent's domestic law provisions cannot preclude protection afforded by an international treaty or otherwise authorize treaty violation pursuant to organic law or executive decree. Respondent cannot rely on AGBA and the rights its mere existence creates as to third parties in order to deprive the investors of their rights under an international treaty. These issues have no bearing on jurisdiction. The fact that the Concessionaire was affected and harmed does not keep the investors from filing a claim under a BIT. This Tribunal has jurisdiction notwithstanding and without prejudice to the jurisdiction of the local courts, over a different type of action that may be brought by other parties or by the investors themselves but in their capacity as shareholders, asserting shareholder rights. Thus, claims filed by other shareholders or actions based on preferential rights and the avoidance of double recovery are issues to be dealt with in the framework of domestic law, but they cannot be raised as obstacles to the investor's protection as safeguarded by the BIT and to be protected by the Host State.

234. Damages are not equal to dividends. Claimants seek damages from the person who caused the damage. When assessing the losses sustained by the shareholders, the Concessionaire's obligations are to be taken into account, as with any other responsibility regarding third parties, no differently. Claimants invested in the Republic of Argentina under a Regulatory Framework that has been repeatedly violated. They claim the strict repair of damage directly affecting their equity as compensatory damages arising from breach of the commitments undertaken in the BIT. Thus, Claimants conclude therefore that Respondent's second objection must be dismissed.

### 3. *The Tribunal's findings*

235. The Tribunal notes at the outset that it is for Claimants to state the claims they are submitting to this arbitral jurisdiction. It is for them to say what they consider to be the "dispute" arising between them and the Republic of Argentina.

236. Claimants repeatedly have stated that they are prosecuting claims in their own names and in their individual rights. They have denied – and this has been acknowledged by Respondent – that they are asserting shareholder rights in AGBA of any kind. This is confirmed in the presentation of their claim in the Memorial on the Merits. Claimants' Prayer for Relief seeking compensation for damages is exclusively based on provisions of the BIT, *i.e.* Articles III(1), IV(1) and V.

237. Claimants also deny that their claim is at all derived from claims AGBA may have against the Republic of Argentina, the Province of Buenos Aires, or any other third party. Respondent insists on the derivative or indirect nature of Claimants' claim. Respondent's objection, however, is directed against a claim that is not before this Tribunal. Claimants repeatedly have stated that their claim is not based on any legal ground that would allow a shareholder of AGBA to raise a claim based on behalf of AGBA or pursuant to a hypothetical legal title that would allow a shareholder to raise in its own name a claim that is based on a relationship to which the company alone is party, and not the shareholders. Claimants have not brought such a claim before this Tribunal, nor did they assert any shareholder rights that would not be compatible with Argentine corporate law. This renders moot Respondent's extensively debated argument of asserting that Claimants were lacking title to invoke their shareholder rights for the purpose of bringing a claim before this Tribunal that belongs to AGBA and not to them.

238. In as much as Respondent's objection is taken as it stands, *i.e.* that Claimants have no legal standing to bring before this Tribunal indirect or derivative actions based on legal rights that belong to another person, as AGBA, it is sufficient to acknowledge that Claimants do not raise such a claim and therefore dismiss the objection.

239. Respondent's explanations demonstrate, however, that its objection has a broader scope. Respondent contends that Claimants not only have no title to claim legal rights belonging to AGBA, but that they have no other title to bring any of their claims before this Tribunal.

240. Respondent notes that Claimants' arguments and evidence in support of their claim show that their claim is entirely based on legal rights of a contractual nature over which this Tribunal has no jurisdiction. These rights are arising from alleged violations of the Concession Contract and/or based on changes in the Regulatory Framework, all of them constituting rights that belong to AGBA. For Respondent, this has been convincingly demonstrated in the Award rendered in the case brought by *Impregilo*, another shareholder of AGBA, before an ICSID Tribunal, where *Impregilo's* claims were considered in most part as purely contractual and therefore not under the Tribunal's jurisdiction as it is determined by the ICSID Convention and the Argentine-Spain BIT.<sup>147</sup>

241. However, in this regard as well, Respondent objects to Claimants' legal standing as to a claim that is not before this Tribunal. Claimants accept that part of the harm they have suffered and the corresponding relief to which they are entitled may

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<sup>147</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011.

be of a contractual nature. However, they have also argued that such contractual claims are not included in the relief requested from this Tribunal. Respondent objects that Claimants have no legal standing to claim for legal rights based on contract while Claimants have clearly stated that their claim does not comprise any such claim. Respondent's objection is therefore equally moot in this regard and dismissed by the Tribunal.

242. This finding notwithstanding, Respondent's objection has another facet that is revealed when contending that Claimants' claim is purely contractual. This objection also means that because of its contractual nature, Claimants have no claim to submit to this Tribunal in their alleged capacity as investors under the Argentina-Spain BIT. Respondent submits that the investment made by Claimants comprises exclusively rights and assets related to their shareholder interest and that, in addition, their rights as shareholders do not include any title to claim for rights belonging to the company. As no such right to which AGBA is entitled exclusively is submitted to this Tribunal, Respondent concludes that Claimants are not holding any investment in relation to the Concession which would allow a claim to be brought under the BIT.

243. Respondent's position is that the Argentina-Spain BIT accepts as an investment made by a foreign national in the form of an acquisition of shares only the rights attached to shareholder status under the domestic laws of the Host State, whereas the assets used for such an acquisition are not considered as an investment to the extent they created rights and obligations to which the company is exclusively entitled, but not the shareholders. In this connection the shareholders receive the economic benefit of their funding, if any, pursuant to any increase in the value of their shares and the dividends attached to them. This position, argued on the basis of domestic corporate law, has the effect, however, that the foreign funder of the capital provided to allow the Concessionaire to operate under the Concession is not included in the range of the rules and guarantees for protection of the BIT because its funding does not qualify as an investment.

244. The Tribunal notes that Respondent's basis to argue this position is to be found in its understanding of the role of domestic corporate law governing investments by foreign partners, but modest consideration has been accorded to the purpose of the BIT and the need for economic support that investments require if a Host State wants to receive them. Indeed, setting aside black letter domestic corporate law, what is the economic likelihood of success of a position requiring foreign investors to operate in the Host State's territory through an investment vehicle structured under domestic corporate law, if this has the effect of taking the shareholders' investment out of the BIT's protection?

245. The question that remains to be addressed in connection with Respondent's second objection is whether Claimants have, as they assert, a legal title to submit a claim exclusively based on their status as investors under the BIT.

246. Article I(2) of the BIT is unequivocal in stating that an investment includes ("such as") "shares and other forms of participation in companies." The Contracting States did not limit the scope of this provision to cases where the foreign investor holds a 100% or otherwise controlling shareholder interest in a company incorporated in the Host State. This Article expressly states that any definition provided with respect to particular items is listed as being understood "but not exclusively."

247. In relation to Impregilo's shares in AGBA, the *Impregilo* Tribunal concluded from Article 1(1)(b) of the Argentina-Italy BIT<sup>148</sup> that if AGBA was subjected to expropriation or unfair treatment with respect to its concession "such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT."<sup>149</sup> As the Tribunal also noted, there is substantial case-law establishing that claims such as those presented by Impregilo enjoy protection under the applicable BITs. The issue before this Tribunal is identical to that case. And the fact that the pertinent provision of the Argentina-Italy BIT mentions expressly that the notion of "shares" and "participation in a company" includes "minority or indirect interest," does not appear in any way at variance compared with Article I(2) of the Argentina-Spain BIT, which, while not mentioning "indirect interest" as being included, clearly does not at all exclude such interest from the scope of the provision. Moreover, it uses the words "but not exclusively" before listing the investments "in particular." This BIT is thus comparable with the Argentina-Germany BIT that has been interpreted by the *Siemens* Tribunal as covering a wide gamut of "investments", including "indirect investments", further stating that the treaty does not require intermediate entities between the investment and the ultimate owner of the company.<sup>150</sup>

248. The fact that shares of a company represent legal rights and obligations in relation to the corporation does not preclude them from having other vested rights. Shares are qualified as a "kind of assets" and are therefore an investment which by definition is not limited to nor even focused on rights under corporate law. Article I(2) of the BIT does not restrict the rights attached to shares exclusively to shareholders' rights concerning the company and other shareholders. It merely states that "shares"

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<sup>148</sup> This provision is slightly more explicit than the corresponding rule in the Argentina-Spain BIT and reads as follows: "(b) shares of stock, interests or any other form of participation, including minority or indirect interest, in a company established in the territory of each Contracting Party."

<sup>149</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011, No. 138 and further No. 245 s.

<sup>150</sup> *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 137, 150.

are an “investment”, which means that they come under the protection guarantees of the BIT. The rights under the BIT have a legal standing of their own, which are governed exclusively by international treaty law and cannot be altered by the domestic law of the Contracting States. Therefore, the definition of “shares” as an “investment” holds irrespective whether under domestic law, the only rights attached to these titles are related to the company’s standing and operation.

249. Many other ICSID Decisions and Awards have considered this type of objection and rejected it. The leading ruling, often quoted in other decisions, appears to be the statement made by the *Siemens* Tribunal with respect to the Argentina-Germany BIT, which is on this point comparable to the Argentine-Spain BIT, as it does not contain an explicit reference to direct or indirect investment. It would be of little interest to repeat again what has been stated in all of these decisions, beyond of what has been noted above.<sup>151</sup>

250. Such an indirect investment also may be held through a subsidiary company holding shares in the local company that serves as the “investment vehicle” in practice.<sup>152</sup> The Tribunal further observes that because Claimants’ investment as shareholders of AGBA is covered by the BIT, this reasoning also must apply to URBASER’s holding of 1,0687 % AGBA’s shares by Urbaser Argentina S.A., a company which is under its 100% control. The Argentina-Spain BIT does not exclude from indirect investments shareholder interest in companies incorporated in the Host State that are holding in turn shares in another domestic company.<sup>153</sup>

251. This being said, the Tribunal also notes that if the rights related to shares include rights of their holders for protection of its investment under the BIT, they may

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<sup>151</sup> Cf., among others, *CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID/ARB/08/15, Decision on Jurisdiction of December 30, 2010 No. 149-158; *Joseph Charles Lemire v. Ukraine*, ICSID/ARB/06/18, Award of March 28, 2011, No. 39; *Sempra Energy International v. The Argentine Republic*, ICSID/ARB/02/16, Decision on the Request for Annulment of the Award of June 29, 2010, No. 102 s.; *Ioannis Kardassopoulos v. Georgia*, ICSID/ARB/05/18, Decision on Jurisdiction of July 6, 2007, No. 124; *Continental Casualty Company v. The Argentine Republic*, ICSID/ARB/03/9, Decision on Jurisdiction of February 22, 2006, No. 76-86; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID/ARB/03/19, Decision on Jurisdiction of August 3, 2006, No. 46-51; *Gas Natural SDG S.A. v. The Argentine Republic*, ICSID/ARB/03/10, Decision on Preliminary Questions on Jurisdiction of June 17, 2005, No. 34; *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID/ARB/01/3, Decision on Jurisdiction of January 14, 2004, No. 38-49; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID/ARB/01/8, Decision on Objections to Jurisdiction of July 17, 2003, No. 36-68; *Azurix Corp. v. The Argentine Republic*, ICSID/ARB/01/12, Decision on Jurisdiction of December 8, 2003, No. 59-66, 73 s., Decision on the Application for Annulment of September 1, 2009, No. 76-130.

<sup>152</sup> Cf. *CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID/ARB/08/15, Decision on Jurisdiction of December 30, 2010 No. 156-158; *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID/ARB/01/3, Decision on Jurisdiction of January 14, 2004, No. 50-56.

<sup>153</sup> This makes a significant difference in comparison to the Award of April 21, 2006, *Berschader v. Russian Federation*, Stockholm Chamber of Commerce, No. 080/2004, where foreign shareholders were holding their shares in a foreign company which was itself entitled to claim protection under the BIT (No. 129, 135, 140-150). This had been noted in *CEMEX Caracas investments B.V. v. Bolivarian Republic of Venezuela*, ICSID/ARB/08/15, Decision on Jurisdiction of December 30, 2010, No. 154.

include other rights that are of a nature purely based on domestic law, for which this Tribunal has no competence. Claimants do not claim such rights. Indeed they assert that their claims exclusively are based on the BIT. The crucial point here is that Claimants are acting under their own rights as investors through shares acquired in AGBA under the BIT, rights that are different from any rights attached to their shares under domestic law.

252. The Tribunal equally dismisses this objection to the extent that it purports to assert that Claimants' claims are of a purely contractual nature and unrelated to rights under the BIT, all the more as this BIT does not contain an umbrella clause. These claims, if qualified as contractual in "nature", could not be brought by Claimants as they would involve matters dealt with in the Concession Contract to which neither Claimant is a party. There would be no basis in the BIT for examining such claims by this Tribunal and that is why Claimants contend that they are not raising any such claims.<sup>154</sup> Claimants also argue, however, that their investment had suffered from unjustified or discriminatory measures, was not afforded fair and equitable treatment, and was subject to illegal and discriminatory expropriation – all these concerns raising issues under the BIT, to which the dispute resolution provision of Article X of the BIT fully applies. BIT provisions are triggered even though certain issues may also raise contractual rights or obligations under domestic law that are not within the competence of this Tribunal. This finding also means that exclusively contractual claims do not come under this Tribunal's competence; however, such an issue, if included in Respondent's objection, is moot as it is admitted by Claimants that they do not raise such claims before this Tribunal.

253. The Tribunal is aware of the risk that the proceeding in the instant case and the parallel proceedings initiated by AGBA before domestic courts in the Republic of Argentina could lead to a recovery for damages in both proceedings, which could ultimately, at least theoretically, raise an issue of double recovery in favour of Claimants as investors and shareholders of AGBA, as well as a conflict in interest with AGBA's other creditors who are not parties, at least, to any of the referenced proceedings. Such a risk, however, is inherent in many investment disputes that also raise, directly or indirectly, a possible option for recovery on the purely domestic level. This configuration does not in any way constitute a restriction on the jurisdiction of this Tribunal pursuant to the Argentina-Spain BIT. Hence, as stated by the *Impregilo* Tribunal,<sup>155</sup> if compensation were granted to AGBA at the domestic level, this would affect the claims brought under the BIT, and conversely, compensation under the BIT may affect claims submitted by AGBA before Argentine

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<sup>154</sup> The situation on this point is the same as for the Tribunal in *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011, No. 185.

<sup>155</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011, No. 139.

courts.<sup>156</sup> The issue will, if necessary, be addressed at a later stage of this proceeding, along with the merits of the dispute.

254. In reaching this conclusion, the Tribunal wishes to emphasize that while its jurisdiction is limited to claims brought by Claimants under the BIT for damage suffered by them arising from their investment in the form of shares in AGBA, the Tribunal does not have jurisdiction over any AGBA claims, any claims arising from damage suffered by AGBA, or any claims premised on damages suffered by other AGBA shareholders. Although AGBA is not a party to this proceeding, the Tribunal has nevertheless jurisdiction to consider and issue factual findings regarding the conduct of the parties to the Concession Contract, including AGBA, to the extent that such findings may be relevant to the Tribunal's consideration of arguments advanced by either Claimants or Respondent.

#### **IV. Respondent's Third Objection: The investment invoked by Claimants is not a protected investment under the Argentina-Spain BIT**

##### **A. Preliminary matters**

255. This last objection is divided into three parts. First, Respondent contends that URBASER's investment was not in compliance with the laws of Argentina when it acquired all of Dycasa's shares in AGBA through an agreement concluded on September 28, 2001, although part of these shares had been classified as non-transferable for a period of six years after the entry into force of the Concession Contract, subject to authorization from the Grantor to that effect. Second, Respondent stated in its Reply on Objections to Jurisdiction that it recently had learned that CABB also had engaged in an illegal transfer of AGBA's shares when it transferred its shareholder interest to URBASER S.A., Aguas de Bilbao S.A., BBK and Sociedad para la Promoción y Reconversión Industrial (SPRI) through participation agreements that imply serious violations of the law governing the holding and transfer of shares in AGBA. Third, Respondent objects that CABB had no standing to resort to ICSID Arbitration without the prior express authorization of the Kingdom of Spain, which it did not request nor obtain.

256. Claimants assert as a preliminary matter that these objections had been untimely raised. While the first objection was raised in Respondent's Memorial on Objections to Jurisdiction, the other two objections were submitted in Respondent's

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<sup>156</sup> Cf. also *Azurix Corp. v. The Argentine Republic*, ICSID/ARB/01/12, Decision on Jurisdiction of December 8, 2003, No. 101, Decision on the Application for Annulment of September 1, 2009, No. 113 s.

Reply on Objections to Jurisdiction only, in such a manner that their belatedness is even more serious. Claimants note that Arbitration Rule 41(1) provides that objections to jurisdiction must be raised as soon as possible. When the Parties agreed upon a time frame for the filing of submissions on jurisdictional objections, according to Claimants the Parties had stipulated and agreed that these submissions would relate to the two objections Respondent had mentioned at an early stage in its response to the Request for Arbitration and not for the purposes of raising new jurisdictional issues for the first time. In Claimants' view, these grounds suffice to dismiss all of these objections as untimely according to Arbitration Rule 41(1).

257. The Tribunal observes that the Parties had agreed, with the Tribunal's approval, that this proceeding would be governed by the ICSID Convention, the Arbitration Rules and the provisions of the Procedural Agreement, as well as any other agreement that the Parties may reach in the future (No. 5 of the Procedural Agreement). Claimants rightly observe that for Arbitration Rule 41(1) the primary rule is that jurisdictional objections be made "as early as possible." However, the secondary rule is that such objections shall be raised no later than at the end of the time-limit for the counter-memorial. This second rule overrides any possible sanction of an objection for not having been raised as early as possible but still within this second time-limit. In any event, the applicable rules in the instant case are those of the Procedural Agreement, where, under Number 14, the sequence of the filing of the Parties' submissions is stated. It is provided in that paragraph of the Procedural Agreement that the Republic of Argentina shall file its Memorial on Objections to the Jurisdiction of the Centre sixty days following receipt of the Claimants' Memorial on the Merits (sub-para. 3). Further, "once the objections to the jurisdiction have been raised," Claimants may file a Counter-memorial on Objections to Jurisdiction (sub-para. 4). No determination is made concerning which objections specified by Respondent at an earlier stage shall be dealt with exclusively in the Memorial on Objections to the Jurisdiction. It was therefore proper for Respondent to include in this Memorial any jurisdictional objection it elected to raise.

258. The next question is then whether Respondent's Reply could properly raise new objections to jurisdiction not previously raised. The Procedural Agreement provides that only upon the request of a party and after consultation with the other party, will the Tribunal decide whether a second exchange of briefs shall take place at the jurisdictional stage (sub-para. 5). In the absence of any further indication as to the possible content of Respondent's Reply, it cannot be concluded that the Procedural Agreement did prevent Respondent from raising additional jurisdictional objections in its second submission on this matter. Moreover, Respondent contends that it did find support for parts of its objections in documents only very recently made available, that triggers application of Arbitration Rule 41(1) *in fine*. All parts of Respondent's Third Objection are therefore to be examined by the Tribunal. It may be added that under

Arbitration Rule 41(2), in any event, “the Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.”<sup>157</sup>

259. Respondent’s basic position in this respect is that compliance with the laws of the Host State is a fundamental requirement of the Argentina-Spain BIT, as contained in Article I(2), which states that the term “investment” shall mean “any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment.” Similar terms can be found in Article III of the BIT. Respondent adds that the reference to its laws must include administrative regulations, court decisions, as well as the Bidding Terms, the Concession Contract, and the Regulatory Framework, which are all part of Argentine law.

260. The Tribunal is fully aware of the basic requirement that an investment is required to be made in compliance with the laws of the Host State in order to be accorded the protection provided by the BIT. The Tribunal is also aware of the fact that the illegal or irregular exercise of rights attached to assets representing an investment under the BIT cannot lead to a disqualification as a valid investment, but must be dealt with through the pertinent mechanisms for the resolution of disputes that may be applicable under the circumstances. The requirement for compliance with the laws of the Host State is focused on the entry and the initiation of the investment. The subsequent conduct and operation of the investment is relevant within the framework of the application of the BIT and comes under the Tribunal’s jurisdiction on the merits. The borderline of the distinction to be drawn is not always easy. As the explanations detailed below establish, this Tribunal does not need to develop abstractly the analysis of this matter.

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<sup>157</sup> Cf. *Azurix Corp. v. The Argentine Republic*, ICSID/ARB/01/12, Decision on Jurisdiction of December 8, 2003, No. 68.

B. The transfer of AGBA shares held by Dycasa S.A. to URBASER S.A.

I. *Respondent's position*

261. Respondent explains that on September 28, 2001, URBASER acquired all of the shares held by Dycasa S.A., a company governed by the laws of the Republic of Argentina, in AGBA. URBASER accordingly became the holder of 27.42% of AGBA's shares, in violation of the legal provisions of the Concession. This Contract provided in Article 2.3.3 as follows:

“Additionally, fifty-one per cent (51%) of the voting share capital of the concessionaire, including the minimum percentage required to be owned by the Operator and excluding the shares allocated to the ESOP, shall be represented by nominative shares which may not be transferred during the first six (6) years of the Concession, unless upon the prior and express approval of the Executive Branch. This authorization shall not be granted, however, for the transfer of the percentage of shares owned by the Operator pursuant to Article 2.3.2. The aforementioned restrictions shall also apply to any increases in the Concessionaire's capital.”

A similar provision was contained in the Bidding Terms and in AGBA's By-laws (Art. 4.5 and 4.6). In Respondent's view, Claimants' argument that the shares were transferable but subject to approval is misleading. The applicable provisions establish the requirement of a prior and express approval. There is no reference to a tacit or tolerated approval.

262. Respondent notes that URBASER acknowledged that it had purchased from Dycasa 2,099,052 non-transferable shares and had informed the Grantor of said transfer, while ORAB merely had been notified. There was thus no authorization neither requested nor granted. AGBA's letter to ORAB of September 30, 2002 explained that it was a mere reorganization of the same group, not requiring authorization. This shows at least that URBASER was aware of the requirement, as AGBA submitted the matter to ORAB for advice. On October 21, 2002, however, the Rules and Regulations Department of ORAB rendered an opinion and did raise objections. ORAB noted that prior and express approval should have been granted not by ORAB but by the Executive Branch of the Province of Buenos Aires.

263. The transfer of these shares was supposed to be made no earlier than on December 7, 2005, when the six year term had elapsed. The agreement with Dycasa was completed on September 28, 2001. In Respondent's view, URBASER was aware of its illegal behaviour when it stated in a Note describing AGBA's successive stock transfers that Dycasa had to remain formally the shareholder of record of the 2,099,952 non-transferable shares. It is thus established for Respondent that this

transfer of shares took place in September 2001, when it was illegal. URBASER increased its share interest in AGBA in an illegal and fraudulent manner. Respondent concludes that the Tribunal should declare its lack of competence regarding a claim arising from such an unlawful manoeuvre.

## 2. *Claimants' position*

264. Claimants state in reply that there was no illegal transfer of Dycasa's shares in AGBA. Claimants note at the outset that Respondent wrongly states that URBASER acquired Dycasa's shares and thus became the holder of 27.42% of AGBA's shares, all of which were obtained in violation of the Concession. Before September 28, 2001, URBASER already was the holder of 16.8748% shares; and from Dycasa's shares, 2,641,878 were free-transferable and only 2,099,952 subject to authorization, representing 4.66656% of AGBA's equity. Therefore, the challenge only is limited to 4.66656%, leaving the remaining 22.74564% unaffected.

265. Claimants observe that Respondent focuses mainly on an opinion issued by the Rules and Regulations Department of ORAB of October 21, 2002, stating that approval was to be given by the Grantor and was still missing. But this opinion does not say more than that approval is also required for transfers of shares among companies of the same group. Respondent fails to make reference to other opinions and documents that demonstrate that URBASER acted with diligence and transparency, that there was a general opinion in favour of the transfer, and that any decision became useless as after six years following the takeover shares could be freely transferred.

266. Moreover, Claimants refer to a Report of the Under-Secretary of Public Services dated February 5, 2003 (*sic*, not 2002 as stated in the document),<sup>158</sup> noting that granting such request would not pose a problem. The Report of the Government's General Advisory Office dated February 28, 2003<sup>159</sup> explained that the Executive may issue the relevant Decree. Claimants did find in AGBA's file further documents showing that no objection was raised regarding the transfer of shares, but merely that information was requested. Consequently, ORAB's Note of April 21, 2003 stated that the Agency was aware that the transfer occurred and it requested information so that the Grantor may assess whether the authorization should be granted. In response to another Note from ORAB, dated November 10, 2003, further information was supplied in AGBA's Note of May 11, 2005. Through a Note of ORAB of July 29, 2005, the case was then filed with the Under-Secretary of Public Services. There was no subsequent request for documentation or resolution. And six years after the

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<sup>158</sup> Cf. TR-E, Day 2, p. 218/5-22, 280/16-25, 288/5-7, 289/4-10.

<sup>159</sup> On the corrected identification of that date, cf. TR-E, Day 2, p. 220/16-22, 280/11-13, 289/11-15.

takeover, during which time the approval for the transfer was taking place, the approval was no longer required. As such, the Grantor rendered no decision.

267. In a Note of March 31, 2006, AGBA informed of this the Under-Secretary of Public Services of the Province of Buenos Aires, identifying each of its shareholders along with its share interest. CABB appeared holding 20%, URBASER 26.3434% and Urbaser Argentina 1.0687%. The Concessionaire also stated that since January 4, 2006, the distinction between transferable and non-transferable stock was inapplicable. The Under-Secretary agreed with this last remark in its Note to ORAB of April 20, 2006, relating to Impregilo, stating that the original request has become moot. The Grantor was fully aware of the transfer and ultimately concluded that the approval was no longer required. The acquisition of shares of Dycasa by URBASER was completely transparent. In Claimants' view, Respondent's challenge is groundless.

### 3. *The Tribunal's findings*

268. The Tribunal finds it important to distinguish clearly between the agreement reached between Dycasa and URBASER, where Dycasa undertook to transfer its shares in AGBA to URBASER, and the actual transfer of the same shares with the effect of transferring shares from Dycasa to URBASER.

269. From the Parties' submissions and the references contained in various documents, it appears that the agreement on this transfer of shares as concluded between these two companies is contained in a document dated September 28, 2001. This document, however, has not been produced and does not form part of the Tribunal's record. The same transfer of shares is referred to in a letter sent to the AGBA Board of Directors on November 28, 2001 by companies having share interests in AGBA, according to which they represent that they consent to the transfer of 4,741,829 class "D" shares from Dycasa to URBASER, and to another transfer of class "C" shares from Impregilo S.p.A. and Iglys S.A. to Impregilo International Infrastructures N.V. This letter has been submitted by Claimants. It necessarily implies that the agreement between the shareholders involved had been reached prior to this communication sent to AGBA on November 28, 2001.

270. The Expert Report presented by Prof. R.M. Manóvil also stated that on September 28, 2001, URBASER and Dycasa entered into a stock purchase and sale agreement concerning class "D" shares of AGBA (No 4.16). The Expert further explained that the shareholders' information concerning this transaction and other transfers of shares was sent to AGBA on the same day (No. 4.18, 5.18). When faced with the request to produce this document, Claimants explained that Prof. Manóvil in

fact actually intended to refer to the letter dated November 28, 2001, and that the agreement in relation to the transfer of shares of September 28, 2001, albeit mentioned in his Report, had not been provided to him. At the hearing, Prof. Manóvil acknowledged the confusion<sup>160</sup> but stated that it had no impact on his conclusions because the mechanics involved are the same, *i.e.* the execution of a stock purchase agreement being followed by the notification to the corporation of the transfer of shares.<sup>161</sup>

271. Claimants also submitted to the Tribunal a “Letter describing AGBA’s successive stock transfers.” This document does not present any letter format, as it lacks any indication concerning the author, the addressee, and its date. It was declared to be a summary prepared by Claimants.<sup>162</sup> It contains a detailed listing of the changes in AGBA’s share ownership between 1999 and 2006; its conclusions explain the specifics of URBASER’s shareholder interest in AGBA and the fact that this company qualifies as an investor. The document indicates that a stock purchase agreement was signed on September 28, 2001 between URBASER and Dycasa for the transfer of 4,741,829 of AGBA’s class “D” shares, and that this document was followed by a letter by AGBA’s shareholders dated November 28, 2001, informing of the transfer of shares (which is then described).

272. Although the Tribunal did not see the agreement of September 28, 2001, there is clear evidence that such agreement was concluded on that date and then followed by a communication of the details of the transfer of shares agreed upon as addressed to the company AGBA two months later, on November 28, 2001. This level of knowledge also suggests that the Tribunal has not been presented with the details, if any, of the agreed transfer of Dycasa’s shares and, in particular, the 2,099,952 shares qualified either as non-transferable or as being subject to authorization, representing 4.66656% of AGBA’s equity. Other documents provide clarification.

273. In the letter sent by the shareholders to the Board of Directors of AGBA on November 28, 2001, it was stated that it was the understanding of the undersigned:

“that the Authorization of the competent authority overseeing AGBA’s Concession Contract (the ‘Concession Contract’) shall be solely required for the transfer of the following shares subject matter of the transfers, subject to the limitations set out in Article 4.7 of the Bylaws and Section 2.3 of the Concession Contract, [...]: (i) with regard to the Transfer from DYCASA to URBASER, 4.666560%; [...]” [The omitted parts relate to the transfer of shares of Impregilo].

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<sup>160</sup> TR-E, Day 2, p. 200/23-203/9, 203/21-205/2, 213/17-214/7, 237/11-246/11, 265/13-24.

<sup>161</sup> TR-E, Day 2, p. 212/15-17, 214/12-20.

<sup>162</sup> TR-E, Day 2, p. 257/1-20, 258/16-22.

It was thus the understanding of the authors of the communication, including Dycasa S.A. and URBASER, that the transfer of the 2,099,952 shares held by Dycasa was subject to authorization within the limits contained in Section 2.3 of the Concession Contract and Article 4.7 of the Bylaws. These facts also establish that the agreement of September 28, 2001 could not on its own operate the transfer of these shares, assuming that this would have been its content. As stated by Prof. Manóvil, such authorization was a condition for the enforcement of the agreement, *i.e.* to have the ownership of the shares actually transferred and rendered effective vis-à-vis the corporation.<sup>163</sup>

274. This was also the understanding of Mr. O. P. Biancuzzo, Executive Vice President of AGBA, when he wrote on September 30, 2002 to the Agency (ORAB) to inform it about the transfer of shares between Dycasa and URBASER. In this respect, the letter drew a distinction, stating that Dycasa S.A. “(1) has transferred 2,641,877.2 non-endorsable nominative Class D shares [...]” and “(2) intends to transfer 2,099,952.1 non-endorsable nominative shares [...],” these latter shares being “subject to an agreement to keep a non-transferable interest in AGBA.”<sup>164</sup> When describing the details of the operation, the letter again explains that Dycasa had transferred to URBASER all of its freely transferable shares, while URBASER “intends to acquire Dycasa’s non-transferable interest,” represented by 2,099,952.1 shares. The letter further states that the transfer of shares agreed upon by Dycasa and URBASER does not amount to a change in AGBA’s share ownership, because it takes place as part of a mere restructuring of the business group to which both of these companies belong. The author of the letter concludes that he understands that the intended transfer of a non-transferable interest is but the corollary of the transaction previously considered and approved by the Bidder and that he believes that no subsequent authorization under the Concession Contract should be required. AGBA’s representative did not conclude, however, that he considered the transfer as authorized and thus to be finalized. He stated that he did submit the matter to ORAB for its consideration, or through it to the consideration of the body empowered to analyse the question.

275. In its reply dated October 21, 2002, ORAB stated that prior and express approval of the transfer of these shares should be granted not by ORAB but by the Executive Branch of the Province of Buenos Aires. Claimants quote various other official statements, referred to above, which support, more or less clearly, the granting

<sup>163</sup> TR-E, Day 2, p. 212/15-17, 214/15-20.

<sup>164</sup> The distinction between the given numbers of transferable and non-transferable shares of Dycasa S.A. has not been disputed before the Tribunal. Under the Bidding Terms, the non-transferable shares had to represent 51% of the voting capital stock (Sec. 3.2) and the details of the stock participation of each bidding member was to be determined in a relationship agreement between the members, which had to be filed with the Prequalification Bid (Sec. 4.2.1[h]) and listed in Annex 5 (Sec. 3.2). The respective portions of non-transferable shares were identified in AGBA’s By-laws (Sec. 4.5). Dycasa S.A. became holder of a portion of such non-transferable shares when it became shareholder of AGBA through the acquisition of the stockholding of Sideco Americana S.A., as authorized by Decree No. 757 dated March 27, 2002 (cf. also the Report of Prof. Manóvil, No. 4.8-4.15).

of such authorization. However, none of them actually issued such authorization or officially declared that it was not required. The certificate provided by AGBA confirming that Dycasa and URBASER were part of the same economic group did not produce such effect either, nor did the suggestion prevail, as supported by Prof. Bianchi,<sup>165</sup> that there did not exist a restriction on transfer of shares where it occurred between those who were already AGBA's shareholders.

276. The documents submitted to the Tribunal provide evidence that by letter dated "November 2002" Dycasa S.A. informed AGBA that it had transferred 2,641,878 class "D" shares to URBASER and that it requested this transfer to be recorded in the Shareholder Register. By virtue of decisions taken by AGBA's Board of Directors and recorded in its Minutes, this was done on December 4, 2003, when Stock Certificate No. 12 was issued in favour of URBASER for 2,641,878 class "D" shares, while Stock Certificate No. 11 was delivered to Dycasa S.A. for its remaining 2,099,951 shares. Consequently, Stock Certificate No. 6, representing Dycasa's initial holding of 4,741,829 shares was cancelled.

277. Hence, Dycasa S.A. in 2003 remained an owner of 2,099,951 shares that were only transferable upon authorization. The Tribunal's record is devoid of any evidence that would show a change of the ownership structure of AGBA until 2006. Claimants' Note describing AGBA's successive stock transfers does not record any movement in 2004 and 2005. It explains the events occurring in 2006, which are supported by the documents submitted to the Tribunal. By letter of February 13, 2006, Dycasa S.A. informed AGBA that it had transferred 2,099,952 class "D" shares to URBASER and that it requested this transfer to be recorded in the Shareholder Register. Based on the Board of Directors instructions of March 14, 2006, Stock Certificate No. 11 was revoked and Stock Certificate No. 13 issued in the name of URBASER, and representing the same number of shares. Through its letter dated March 27, 2006, AGBA informed ORAB accordingly, stating that the six year time limit provided for in the Concession Contract had passed and that therefore, these 2,099,952 shares had become freely transferable, raising URBASER's participation in AGBA's shareholding to 26,34%. As well, Prof. Manóvil observed that in the registry of shares there was no inscription or entry concerning the transfer of shares requiring authorization before the time period of six years had elapsed, which means that no violation of a legal norm occurred.<sup>166</sup>

278. The conclusion to be drawn from these factual findings is that the transfer of these 2,099,952 shares from Dycasa to URBASER became effective on March 14, 2006 only. To the extent this transfer implies an increase in URBASER's investment in

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<sup>165</sup> Prof. Bianchi's Second Opinion, No. 29-39; TR-E, Day 2, p. 294/8-295/10.

<sup>166</sup> TR-E, Day 2, p. 224/18-225/3.

AGBA, it took effect not earlier than at this date. It follows that no violation of Article 2.3.3 of the Concession Contract and of the parallel provisions in the other instruments relating to the Concession did occur, as the six year time limit had elapsed when the transfer of these shares became effective. The Tribunal also finds that these provisions did apply to the transfer of shares only; they did not in any way prohibit or declare illegal a contractual undertaking concluded earlier in view of such transfer to become operative when possible in the future.

279. In light of these factual elements relating to the transfer of shares and the actual handling by the shareholders involved, the Tribunal finds that Respondent's objection based on an alleged abuse or fraud must fail. The transfers as realized and as envisioned regarding the non-transferable shares of Dycasa was transparent and known to AGBA and the Agency in the years 2001/02. No objection based on fraud or similar grounds had ever been raised on anyone's part or behalf. The Grantor was entitled to invoke its right under Section 14.1.3(o) of the Concession Contract to terminate the Contract by reason of a non-authorized transfer of shares. If it did not so act it may be assumed that this omission was justified because there was no ground for such termination and certainly no cause for any suspicion of fraud possibly committed by AGBA's shareholders.

280. In its descriptive Note on the AGBA's shareholder changes, Claimants admit that in relation to the transfer of shares agreed upon on September 28, 2001, "the truth is that the transfer of only 2,641,878 shares – those that could be freely transferred – was actually formalized, and 'on paper' Dycasa was required to keep title to the other 2,099,952 non-transferable shares until the restriction was no longer effective, that is, until February 2006." They add that because this "privately-executed agreement" was "unenforceable against third parties (the Grantor and the ORAB, among others) in terms of ownership of the non-transferable shares, Dycasa continued to appear as a shareholder solely for formal corporate purposes, as stated in the duly submitted stock purchase agreement." The same Note adds as a legal interpretation not developed in Claimants' submissions that nevertheless, URBASER had acquired on September 28, 2001 Dycasa's whole interest in AGBA, on the basis of an agreement governed by Section 35 of the Corporate Law whereby Dycasa S.A. brings in as a third party a partner with respect to the interest that this shareholder owns in the company. In Claimants' view, this statutory concept of a "partner's partner" would make possible the qualification of URBASER as an investor in terms of Article I(2) of the BIT, which includes in the concept of investment "shares and any other form of participation in a company." Proceeding on this same line of argument, Prof. Manóvil referred to the concept of the partner's partner<sup>167</sup> and to a sort of internal partnership ("sociedad

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<sup>167</sup> Report No. 5.26-5.32; TR-E, Day 2, p. 251/19-22.

accidental o en participación”),<sup>168</sup> with the effect that the transfer of shares was actually carried out between the parties, while with regard to AGBA, it had to be completed by an authorization, the notification of this authorization to the company, and its inscription in the registry of shares.<sup>169</sup>

281. The Tribunal does not share this view. As it is admitted in the same Note, the share transfer concerning the 2,099,952 shares was unenforceable against third parties and it could not, therefore, constitute an investment in the relation to the Republic of Argentina as Host State under the BIT, as long as the transfer did not become legally valid and effective. And for such transfer to take place, the registration on the shareholders’ registry was required.<sup>170</sup> Even if one would qualify URBASER as “partner” of Dycasa S.A. when this company was still holding its second package of shares, such partnership would exclusively relate to the internal relations between these two companies, but not create any “form of participation” in AGBA for which such agreement would be, based on Claimants’ own admission, unenforceable. Further, the legal construction presented in the above mentioned Note necessarily supports the ill-advised conclusion that it would be possible for the same group of shares to be held by two different investors, one who is holding the property and another who appears as its “partner.” This scenario certainly is not one that Article I(2) of the BIT intends to cover. There is no language whatsoever in the BIT that regards this scenario as an asset within the meaning of Article I(2), which asset has to be acquired by a prospective and not-yet confirmed transferee of AGBA’s shares. Therefore, URBASER S.A. cannot be considered to be a shareholder in relation to shares in which it had an “economic interest” only, as long as their transfer had not been undertaken legally and effectively. As Prof. Nissen told the Tribunal, there is no distinction between shareholder rights that are undisclosed and formal shareholders in Argentine corporate law.<sup>171</sup> In any event, Claimants’ argument on this line of reasoning is moot because the stock purchase agreement that would constitute the legal basis for such a transfer of an “economic interest” has not been submitted to the Tribunal.

282. The Tribunal thus arrives at two conclusions. First, the acquisition of the shares of Dycasa S.A. by URBASER was legally carried out. No illegal act was committed regarding the transfer of the initially non-transferable 2,099,952 shares, because such transfer became effective in March 2006 only, after the moment when the six year term during which an authorization was required had elapsed. In this respect, Respondent’s objection must be dismissed.

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<sup>168</sup> TR-E, Day 2, p. 269/17-271/13.

<sup>169</sup> Report No. 5.15-5.21, TR-E, Day 2, p. 246/17-247/19, 250/2-251/18, 272/9-20, 333/18-335/7.

<sup>170</sup> Cf. Prof. Manóvil and Nissen, TR-E, Day 2, p. 333/24-335/14.

<sup>171</sup> TR-E, Day 2, p. 174/1-11.

283. Second, the fact that this transfer occurred in March 2006 only also means that the increase in the investment of URBASER that was represented by these 2,099,952 shares became effective after the January 24, 2006 date, when URBASER's Notice of the dispute was filed with the Government of the Republic of Argentina, but still more than a year before the Request for Arbitration was filed in July 2007. The Tribunal finds that the relevant date for determining the assets composing the investment is the filing of the Request for arbitration. The fact that URBASER had chosen to commit itself contractually with a third party to make such an investment at an earlier stage in no way affects this point, which is concerned with the date on which the investment was actually made for the purpose of Article X of the BIT. This means that the 2,099,952 shares transferred to URBASER in March 2006 are part of the latter's investment and, consequently, included in the scope of this Tribunal's jurisdiction. Whether, and if so, to what extent, there were thereafter alleged breaches of the BIT that did actually have an effect on the value of these shares, as registered in March 2006, and caused harm to URBASER is to be determined at the merits phase of this proceeding.

C. CABB's shareholder interest in AGBA and its participation agreements concluded with third parties

I. *Respondent's position*

284. Respondent notes that CABB was the Technical Operator of the Concession granted to AGBA. The identity of the Operator was very important because it was holding a key-position in the operation of the Concession. It was in line with this role that the Operator was required to hold a 20% interest in the capital and voting rights, and that its shares were absolutely non-transferable, no authorization being possible for any transfer. The share interest of the Operator is addressed in Section 2.3.2 of the Concession Contract, which reads:

"Operator is required to be the holder of a minimum 20% of the nominative shares and voting rights of the Concessionaire, which shall be non-transferable for the first six (6) years. After the expiration of said term, Operator may reduce its holding with the prior approval of Grantor, provided Operator holds no less than 10% of the nominative shares and voting rights of the Concessionaire. After the first 12 (twelve) years of the Concession, Operator may freely transfer its holding. The restrictions set forth herein shall also apply in the event of increases in Concessionaire's capital."

For Respondent, the importance of the *intuitu personae* of the Technical Operator's identity cannot be sufficiently stressed. Its unique standing is the reason why its

shares must represent a 20% minimum holding that shall not be transferred during the first 6 years of the Concession.

285. Respondent was thus surprised when it learned that CABB had proceeded to arrange transfers by means of participation agreements in favour of Urbaser, Aguas de Bilbao SA, the Consorcio Bilbao Bizkaia (BBK), and Sociedad para la Promoción y Reconversión Industrial (SPRI). In Respondent's view, CABB acted in blatant bad faith when entering into such agreements with companies of unknown technical competence behind the Agency and the Grantor. On the basis of the information recently discovered, Respondent declares to have sufficient grounds to assert that CABB violated the laws applicable to the Concession. Respondent further avers that CABB concealed those agreements. The documentation that Claimants have yet to submit, in Respondent's view, shall confirm these illegal transfers.

286. Respondent learned that these agreements had been concluded by a publication in *El País* of January 9, 2006, where BBK and SPRI were named as shareholders in AGBA. Respondent concluded from this information that CABB transferred its responsibility to pension funds, thus emphatically violating all its commitments.

287. Respondent also discovered in the 2001 Audit Report of the Basque Court of Accounts on Consorcio de Aguas Bilbao-Bizkaia ("Informe de Fiscalización"), issued on March 17, 2003, that the Consortium's budgets have contemplated no allocation of funds to complete the referenced acquisitions:

"[...] los presupuestos del Consorcio no han contemplado consignación presupuestaria alguna para hacer frente a la citada toma de participación."  
(page 55)

Thus, more than two years after the Concession was granted, CABB still had not allocated any funds. This hiatus is reflected in the Minutes of CABB's General Assembly of February 22, 1999 where it was decided that no funds from the Consortium would be allocated in the event the concession were to be granted:

"indica el Presidente que, tal como se acordó por la Asamblea, en ningún caso se aportará capital procedente del Consorcio en la sociedad a constituir en caso de resultar adjudicatarios."

The Audit Report explains that CABB entered into 10 participation agreements with various companies for a total amount of 3,735 million pesetas. Respondent complains that these transactions were not disclosed to the Province of Buenos Aires for information nor authorized by CABB's General Meeting (as this should have been done under CABB's bylaws). It further explains that the Audit Report states that CABB had subscribed for 22.2% of the stock capital, which, in violation of the

Concession, was transferred in full to third parties, such as URBASER, Aguas de Bilbao SA, BBK, and SPRI, to such an extent that CABB's actual participation was zero.

288. Respondent explains that the Report demonstrates that CABB never paid for its shares in AGBA. CABB explained to the Court of Accounts that the acquisition was made by means of participation agreements, with no funds coming from the Consortium's budget. The acquisitions were formal, all rights and obligations being assigned to companies that were notably solvent. CABB admitted before the highest regulatory agency of the Basque Country that it made no contribution in connection with its shareholder interest in AGBA regarding its interest in AGBA as a matter of mere formality, while the actual shares were in the hands of "other companies." Respondent submits that this conduct violates Sections 2.3.1 and 2.3.2 of the Concession Contract. CABB also incurred in significant legal irregularities. The Basque Agency noted that CABB's activities in Argentina were not accompanied by the compulsory legal and economic reports, the participation agreements were not approved by the General Meeting, and that CABB was banned from participating in the bidding process for the Concession in question because it could only act within the scope of the municipal districts it comprises.

289. Respondent complains that CABB intentionally withheld from the Republic of Argentina and this Tribunal the existence of side agreements with Urbaser, Aguas de Bilbao SA, BBK, and SPRI. CABB did not have its holding of 20% that it assigned to third parties, without informing the authorities in Argentina. Claimants' failure to submit the documentation requested on July 27, 2011 evidences their deliberate intention of concealing these participation agreements and shows their bad faith. CABB overtly infringed the laws applicable to the Concession, committing wilful fraud against the Grantor. Had CABB's violations risen to the Grantor's attention, it would have constituted sufficient grounds for termination of the contract because of the Concessionaire's fault (Section 14.1.3).

290. Respondent concludes that CABB manifestly acted in violation of the laws of the Republic of Argentina and the provisions of the Concession Contract. Respondent thus objects to CABB's alleged standing as an investor protected by the BIT.

## 2. *Claimants' position*

291. Claimants reject Respondent's objection by stating that CABB did not transfer its shares in AGBA. Respondent's whole argumentation fails because accounts in participation agreements, governed by Spanish law, do not require the transfer of shares, which are held by the managing partner who is the only person to have a relationship with respect to the other shareholders and the Concessionaire. These

types of agreements represent just another kind of financing that belongs to CABB's internal affairs. The operation based on such agreements was held legally valid and it did not have the effect of transferring CABB's shares in AGBA to any third party. Respondent's objection is therefore totally inadmissible.

292. Claimants explain that accounts in participation agreements are a means of financing and a legitimate practice expressly admitted and governed under Spanish Laws, recognized by Spanish courts, and widely used in business. Such an agreement is entered into by a managing entity and a non-managing entity pursuant to which the former receives capital contributions from the latter, for purposes of dedicating them to its business or commercial activity. There are at least two parties, a manager or managing partner, and a participant. Based on Sections 239-243 of the Spanish Commercial Code, the key elements of the legal regime are: (i) contributions of funds that become the property of the managing partner; (ii) no formal or material type of publicity; (iii) the managing partner retains the ownership of its business; (iv) a right of the participant to share in the profits earned in such percentage as may be agreed. Essential is the existence of one single managing partner who retains ownership of the business. It follows from this that such participation agreements do not grant to the participant management powers or any capacity to act as a shareholder. It does not take part in the decision-making process of a company at any level. The participant has the same relation with the company as that of a bank that grants a loan to one of the company's shareholders, which means that it has no relation at all.

293. Claimants have submitted one account in participation agreement, concluded between CABB and URBASER on May 23, 2000, retaining all others because they involve third parties (presumably Aguas de Bilbao SA, BBK, and SPRI). It is submitted that this agreement is sufficient to demonstrate that it is nothing more than a source of financing.

294. Referring to Respondent's position, which leads to the idea that the purpose of such agreement was to maintain formal ownership of shares, while its true title has been transferred to a third party, Claimants note that quite to the contrary, the participation agreement between CABB and URBASER expressly states that the management of the activity shall be exclusively vested in CABB. Participants (like URBASER) are not allowed to participate in the management of the business. They may have a share in the profits/losses of the business, but not in the business itself. No transfer of ownership or change in the shareholder's identity is contemplated. The participant does not take part in the decision-making process. The business remains in the hands of the manager-owner.

295. Claimants note that CABB always has remained the owner of its shares in AGBA. The agreement concluded with URBASER S.A. refers to CABB's actual

ownership and states in Recital 2 that CABB's actual interest in AGBA is of 22.22% (which corresponds to 20% when ESOP is excluded). CABB had made direct contributions to AGBA's capital out of its bank accounts. CABB took an active role in the Concessionaire by serving on its Board of Directors and as Operator. Claimants note that since 2000, the annual accounts of CABB evidence this shareholder interest (Sec. 6.3, 6.4).

296. Claimants observe that Respondent's challenge is based on the Audit Report of the Basque Court of Accounts dated March 17, 2003, which had to be prepared in compliance with Spanish law. The BIT only provides that the investment be made in accordance with the legislation of the Host State. Respondent is therefore not entitled to go beyond the requirements of that legislation. The irregularities to which Respondent pointed were not considered important. In the Report of 2008 it was stated that the gaps and deficiencies noted earlier had been reduced to a significant extent. Moreover, CABB's auditors raised no objections concerning the investment and the relevant records in CABB's accounts.

297. Claimants further underscore that CABB's General Assembly, at a special meeting dated February 24, 1999, approved CABB's participation in the bidding process. The acquisition of AGBA's shares has been authorized by CABB's General Assembly.

298. When Respondent refers to the February 1999 Assembly where it was said that no funds pertaining to CABB should be allocated to the Company, it referred to a remark of the President, which in fact meant that CABB would finance its contribution in AGBA with external funds. Accordingly, the contribution was not to be made out of CABB's budget. As of December 31, 2001, it was accounted as extra-budgetary funds. Starting in 2002, it was also recorded as budgetary funds.

### 3. *The Tribunal's findings*

299. This second part of Respondent's third objection concerns CABB's title as shareholder in AGBA, which is among other things (in Respondent's view) a prerequisite for its legal standing in this proceeding. Both Argentine authorities and AGBA acknowledge that CABB operated since the beginning of its involvement as one of AGBA's shareholders, and, even more specifically, as its Technical Operator. The dispute relates to the conclusion drawn by Respondent from the accounts participation agreements that had, in Respondent's view, the effect of causing CABB's shareholder interest to be transferred to the beneficiaries of these agreements who also assumed the burden of financing CABB's participation in AGBA. As to the actual payment for CABB's shareholder interest tendered to AGBA, Respondent has

not in any way rebutted Claimants' statement and evidence that CABB had tendered this contribution to AGBA's capital from its own bank account.

300. While Respondent mentioned ten such agreements, the Tribunal recognizes only two of them, and expresses its regret that Claimants were not willing to submit more than one of those exemplars. The figure of ten agreements was gleaned from the 2001 Audit Report issued by the Tribunal Vasco de Cuentas Públicas of March 17, 2003. That Report referred to all of CABB's involvements based on such agreements, also covering participations relating to CABB's investment in Uruguay. The part of the list relating to AGBA mentions only two such participation agreements, one with URBASER, presented to this Tribunal, and the other with Aguas de Bilabao S.A., a company in which CABB kept a 51% shareholder interest. In light of the presentation of these participation agreements, which can be found in various other similar reports, the Tribunal finds that they certainly contain the same financial and legal characteristics, and that from the two agreements concerning CABB's involvement in AGBA, the one submitted to the Tribunal and executed with URBASER can be construed as offering sufficient evidence of the content of such agreements, in addition to the information contained in CABB's financial statements.

301. The surprise that Respondent voiced does not seem fully realistic to the extent that it relates to the simple fact that CABB's financing with respect to its shareholder interest was sourced by third parties. Indeed, this outsourcing of CABB's participation in AGBA was expressly stated in the Minutes of the General Assembly of CABB dated February 24, 1999, which are of public record. The same Assembly was expressly mentioned in the recitals of AGBA's By-laws, which were set up on December 2, 1999, making clear that it was at this Assembly that CABB's participation in AGBA was decided. The Board of Directors of AGBA, the Agency as AGBA's controlling authority, and the Grantor were at liberty to request access to those Minutes for consultation.

302. There could be no surprise either regarding the existence of legal arrangements that CABB undertook as to this third party funding. When submitting to strict scrutiny the accounts participation agreement concluded with URBASER, it appears clearly that the undertakings agreed upon related primarily to the financial contribution of URBASER S.A. as participant ("Cuentapartícipe"), including both the provision of funds and the sharing of benefits in proportion to 11.11% of CABB's involvement (Art. 1 and 2). This participation also includes the sharing of losses in the same proportion (Art. 6.3). CABB was not permitted to encumber its shareholder interest in any way without URBASER S.A.'s authorization, CABB was bound to have the shares deposited with URBASER S.A.. To the extent that the deposit was legally impossible, the deposit was to be made with a third-party that URBASER S.A. was to designate (Art. 4.2).

303. Contrary to Respondent's allegations, this agreement does not contain any provision providing for a full or even partial transfer of shares in AGBA to URBASER S.A. as the funding participant. Respondent's submissions do not contain any analysis of that agreement. Similarly, Respondent has not directed the Tribunal to any specific provision that might be in conflict with CABB's position as investor and Operator.

304. In particular, Respondent's assertion that all of CABB's rights and obligations had been assigned to third parties and that the actual shares were in the hands of "other companies", and that therefore CABB had violated Sections 2.3.1 and 2.3.2 of the Concession Contract, finds no support in the accounts participation agreement. Indeed Respondent does not point the Tribunal to any provision that would have had such effect. There has been no indication either that CABB in this regard had violated an obligation to disclose information, which would have provided the Grantor with the right to terminate the Concession Contract (Sec. 14.1.3[i]), as sustained by Prof. Mata.<sup>172</sup> This Expert did not mention any such provision, nor that CABB was not a party to this Contract.

305. Moreover, the agreement expressly provided that any management activity remained exclusively in CABB's hands (Art. 5.1). Under AGBA's by-laws, the exercise of such activity, in particular when related to its position as Technical Operator, required CABB to hold a minimum 20% interest in AGBA's shares. CABB had never abandoned even a part of such an interest in AGBA and Respondent does not go as far in arguing its objection that CABB had released its "actual stockholding" to any third party. Further, even if it were assumed that there was a hidden third party governing CABB's participation in AGBA, as seems to be Respondent's understanding, this Tribunal has found no factual support whatsoever for such contention: Respondents contention is all the more implausible because any activity within AGBA was expressly defined as CABB's responsibility.<sup>173</sup> There is therefore no possible comparison with the case submitted to the *Inceysa* Tribunal where the investor engaged in fraudulent conduct.<sup>174</sup> Likewise, this case can be meaningfully distinguished from the facts before the *Fraport* Tribunal. The cases are materially distinguishable and, therefore, inapposite. In that proceeding, the investor secretly

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<sup>172</sup> TR-E, Day 1, p. 79/11-80/1.

<sup>173</sup> It may be noted that the "intuitu personae" determination of the Technical Operator is not as strongly confined to CABB as contended by Respondent when taking account of the provisions of Section 3.3.4 of the Bidding Terms allowing the requirements to be met by the Operator to be fulfilled by other member companies of its same economic group.

<sup>174</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID/ARB/03/26, Award of August 2, 2006, No. 240-244.

arranged for the management and control of the investment and this conduct was deemed egregious and in violation of the laws of the Host State.<sup>175</sup>

306. For these reasons, Respondent fails in its objection that CABB had arranged transfers of its shares to third parties by means of participation agreements. As no such transfer of shares had been undertaken, be it *de facto* or *de jure*, Respondent also fails in its contention that CABB had violated Sections 2.3.1 and 2.3.2 of the Concession Contract. While it asserts that CABB acted in violation of the laws of the Argentine Republic, Respondent does not refer to any provision, other than rules of the Concession Contract governing the transfer of shares. Indeed, this Contract, AGBA's by-laws and the Bidding Terms do not contain any provision precluding arrangements made by shareholders concerning the funding and sharing of benefits or losses in connection with their respective shares. Consequently, Respondent's objection based on an allegedly concealed transfer of shares by CABB to third parties must be dismissed.

307. As to the mere funding of capital supporting CABB's shareholder interests, it may be added that neither the BIT nor the ICSID Convention contain any restriction requiring any qualifying the origin of funds. Article I(2) of the BIT covers "any kind of assets," irrespective of whether the asset was the product of outsourcing. The ICSID Convention does not require either an "investment" to be financed from capital of any particular origin.

D. CABB's legal standing as a public entity not acting with the authorization of the Kingdom of Spain

I. *Respondent's position*

308. Respondent states that CABB is a constituent subdivision or agency of the Kingdom of Spain. It follows that, according to Article 25 (1) and (3) ICSID Convention, Spain as a Contracting State had to consent to submit this controversy to arbitration, if it had not notified the Centre that previous consent was not necessary. Both appointment and State approval requirements must be met if a constituent subdivision or agency is acting as claimant or respondent in an ICSID arbitration. In case of an agency acting as a separate entity but entrusted with official governmental functions, what matters is whether the agency performs public functions on behalf of the Contracting State or of one of its constituent subdivisions.

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<sup>175</sup> *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID/ARB/03/25, Award of August 16, 2007, No. 394-404. This Award, referred to by Respondent, has been annulled on December 23, 2010.

309. Respondent contends that CABB is included in these two concepts and falls under Article 25(3) ICSID. It should have been appointed by Spain and must have its approval. Because neither condition ripened, CABB's claim is fatally compromised.

310. Respondent further explains that under the special territorial organization of the Spanish State, municipalities enjoy autonomous self-government as to their respective interests and have full legal capacity. Their autonomy is guaranteed. Municipalities are territorial public administrations and more than just geopolitical subdivision. Thus, they are vested with a public character that is autonomous or quasi-autonomous. As stated in Section 25.2.1 of Law No. 7/1985, their ambit of autonomous authority includes water supply and sewerage and waste water treatment. Section 85 of Law No. 7/1985 provides that municipalities may adopt different forms of organization. Here, the limited consortium form has been chosen (Sec. 87 of Law No. 7/1985).

311. Regional Law No. 3/1995 for Bizkaia governs the nature of consortia as public agencies, and their purpose, which is to pursue public interest by performing public functions (Sec. 2.1). Consortia have legal personality (Sec. 2) and administrative powers (Sec. 4). CABB was created in 1967 between a series of municipalities of the Bizkaia territory for the installation and management of the local interest services. In 1972 its objectives were broadened. Ultimately, the by-laws were governed by Regional Law No. 3/1995. The by-laws state that the consortium is formed by a series of municipalities and that it will remain a local entity as it has been since its inception (Sec. 1). It includes a long list of administrative powers (Sec. 4) and its economic regime is subject to the rules of local entities (Sec. 31).

312. Respondent adds that municipalities have the obligation to provide supply and sewerage public services within their territory. They may provide such services directly or by creating a series of entities contemplated in Section 85 of the Law on Basis of Local Regime. In this case, it was decided to create a consortium as an administrative cooperation mechanism to join efforts in order to reduce costs that could not have been assumed by small municipalities. The consortium adopted the legal form enunciated in Section 87 of Law No. 7/1985 and Section 110 of Decree No. 781/1986 and it was admitted territorially in Bizkaia through Regional Law No. 3/1995. Such rules highlight its nature as a local public entity with territorial and administrative organizational purposes, focusing on a group of municipalities and consequently integrated in the organization of the Spanish State.

313. CABB is a local public entity created for inter-municipality administrative cooperation purposes and integrated in the territorial organizational structure of the State. It is not a private entity driven by trade, commerce, or other business purpose, or by a profit motive. Therefore, concludes Respondent, it is not admitted to ICSID

arbitration without the previous approval of the Kingdom of Spain. The lack of approval is hardly controverted. Its normative status as a condition precedent is also not questions. It must of necessity follow that because there was no such approval forthcoming, CABB has no legal standing in this proceeding.

2. *Claimants' position*

314. Claimants explain that CABB's participation in this arbitration cannot be framed under the concept or characterization of a political subdivision or public agency within the meaning of Article 25 (1) and (3) of the ICSID Convention, as Respondent argues. The political subdivisions and public agencies that are subject to consent under Article 25 (1) and (3) are those of the Host State. As Article 25(1) expressly states, these provisions only apply to subdivisions/agencies of the Host State. They refer to subdivisions or agencies of the Host State as opposed to those of the Claimant's investor state. The "national of another Contracting State" is the investor. The fact that the same provision applies to claimant and to respondent does not mean that it applies equally when a political subdivision or public agency participates in a dispute as an investor. The cases where the prior authorization of the State is required are those where subdivisions/agencies wish to initiate proceedings against an investor.

315. Claimants note that Respondent's objections are based on other considerations concerning CABB that are not correct. CABB is a public agency as stated in the Request for Arbitration. Its by-laws so state. Until it submitted its Reply, after five years, CABB's public nature had never caused Respondent a problem. The public nature of CABB does not preclude it from taking part as Claimant in this case, as it is acting as subject to private law. CABB is not integrated in the territorial structure of Spain. Municipalities are so integrated, but consortia are not. CABB did not act as an agent of Spain but on an equal footing with any other private individual or legal entity. This status had been examined and confirmed by several reports prepared in relation to the investment in Uruguay. The Report submitted by Prof. D. Tomás Ramón Fernández in this proceeding equally confirms this nature of CABB's activity. Indeed, CABB pursues a private activity subject to the same law as applies to other private persons with whom it may compete. CABB acted within the scope of private law and did not act in the exercise of any public duty or as an agent of Spain.

316. Claimants note that in order to determine an investor's standing it is not its nature that matters, but the capacity in which it acts. CABB has standing in this arbitration. It is an entity with legal personality which is distinct and separate from that of its constituents, the municipalities and the Basque Government. Its activities coincide with those of private entities. The fact that the Concessionaire's activity

meets a public interest does not prevent private entities from being awarded the concession. Moreover, award of the concession does not foist on the activities a public nature. What is relevant are the concrete actions giving rise to this arbitration. CABB is entitled to carry out activities of this type outside the territory of the member municipalities provided that it does so under private law. To such extent, CABB's actions in Argentina are the same as those of any individual investor. Therefore, CABB appears in this arbitration with the same rights and duties as any other private investor.

317. Claimants further explain the regularity and legality of the investments made by CABB abroad. They note that the same issue was raised when CABB took part in a bidding process in Uruguay, when CABB's capacity to operate outside its territory was challenged by other companies. CABB followed the advice of legal experts at that time and was then convinced that it had the required capacity also to invest in Argentina. In fact, its participation was never questioned in the bidding process in the Republic of Argentina or by the Province. A recent expert opinion filed by Claimants with this Tribunal and prepared by Prof. Tomás Ramón Fernández confirms the same position.

318. Claimants also affirm the regularity of CABB's consent to submit the dispute to arbitration. In its submission of July 27, 2011, Respondent requested documents on this point, *i.e.* the Minutes of the General Assembly approving the decision to submit the dispute to arbitration and to grant powers of attorney to the undersigned lawyers. Claimants complain that the Republic of Argentina did so more than four years after it received the Request for Arbitration. The requested document already was attached to this Request as Exhibit 2. CABB's by-laws were attached to the Memorial on the Merits. Further approvals to form part of this arbitral proceeding can be gleaned from the Minutes of the Meeting held by CABB's Board of Directors on December 20, 2005, the Minutes of the General Assembly of October 30, 2006, and from an official Decree included in the notary document issued on December 5, 2006. The Annual Report for fiscal year 2006 also refers to the arbitration. Claimants reassert that both CABB's Assembly and Board of Directors are acquainted with this arbitration proceeding.

### 3. *The Tribunal's findings*

319. Respondent's objection places great weight on what it understands to be the public nature of CABB's principal purpose and activities, *i.e.* the installation and management of the local interest services in the Bizkaia region. The Parties admit that CABB's legal personality and capacity to act are governed by the rules of private international law of the Republic of Argentina and Spanish Law. CABB's roles as

shareholder of AGBA and as its Technical Operator were subject to the laws of the Republic of Argentina. However, these facts hardly give rise to the full picture. Indeed, in order to understand CABB's legal status in the Republic of Argentina, there must be acknowledgement of actions undertaken in connection with acts made and the recognition of CABB's legal status in this country. The Tribunal first refers to AGBA's by-laws contained in a notary's deed dated December 2, 1999,<sup>176</sup> where the capacity of CABB's representative and its authority to incorporate AGBA as a domestic investment vehicle was amply recognized. The validity of this legal document and its content concerning CABB never has been contested or made the subject of an annulment proceeding: It is not included in Respondent's objection relating to CABB's authority to participate in this proceeding. Second, the Tribunal also takes note of the notary certificate of May 26, 1999 recognizing CABB as a legal entity admitted for registration in conformity with Article 123 of Law 19.550 in the Province of Buenos Aires. The Tribunal has no reason to doubt the authenticity of this document. If this document were illegal or otherwise deprived of its legal effect, it would seem that it should become the object of a proceeding leading to its annulment. It retains its legal status unless otherwise decreed by a competent authority. No such proceeding has been reported to the Tribunal or otherwise forms part of this cause. Moreover, Respondent did not object to the existence or to the validity of this document. Therefore, these two legal documents, both drawn up as authentic instruments administered by notaries admitted to act under the laws of the Republic of Argentina provide legal confirmation based on Argentine Law that CABB had and still has the legal capacity to act under the laws of Argentina and particularly as shareholder of AGBA and, at all times material to this proceeding, as Technical Operator of this corporation.

320. The Tribunal further observes that Respondent never raised objections to the capacity of CABB to be involved within the national territory of the Republic of Argentina and in particular as a shareholder and Technical Operator of AGBA. When CABB acted as bidder, it could do so only when it had full legal capacity to undertake commitments under the terms of the Bidding Conditions (Sec. 3.1.1) and to contract in the Province of Buenos Aires (Sec. 3.4.2): The documentation of the Bid had to include a certified copy of the current by-laws or corporate charter (Sec. 4.2.1[i]), as well as evidence of the decision to participate in the bidding competition made by the competent corporate representatives in accordance with the by-laws (Sec. 4.2.1[k]), all these requirements being applicable "separately and independently" (Sec. 4.2.1, opening part) to each member of a group of bidders filing a joint application. Moreover, for foreign companies or entities acting as members of the Awardee, it was required that they demonstrate that they had followed the procedure as required in

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<sup>176</sup> It can be assumed that AGBA's by-laws were recorded in a public registry and thus accessible to the public, as this is standard procedure for all by-laws of companies (cf. Prof. Nissen, TR-E, Day 2, p. 191/16-192/1).

Article 123 of Law No. 19.550 (Sec. 7.2.2[a] and 8.1). This was the purpose of the notary certificate recognizing CABB as a legal entity admitted for registration as mentioned above. Thus, at that time already, Respondent had the opportunity to receive full documentation to ensure that CABB was acting within its own statutory framework. CABB's bid for its becoming part of the Licensee and its role as the Technical Operator was accepted. This acceptance could not have taken place if the Granting Authority had not received all of the required confirmations or validations. CABB's selection was then confirmed in Decree No. 2907 of October 22, 1999 of the Executive Branch of the Province of Buenos Aires, where the joint attribution of Region B of Concession Area No. 2 to CABB and three other companies was decided.

321. In light of this overwhelming evidence, there is no room left to argue, from the perspective of Argentine law, that CABB had somehow acted “ultra vires” and illegally to the extent it engaged in activities outside the territory of its member municipalities. CABB's legal capacity to do so was fully recognized and effective within the territory of the Republic of Argentina. If it has been contested, it was so for the single purpose of this arbitral proceeding only.

322. In any event, the Tribunal observes that even if at its inception CABB's activities may have been wholly focused on services to be provided to its member municipalities, there does not exist any legal prohibition for CABB to develop activities beyond such territorial scope. Respondent argues on the general level of the public nature of CABB's main purpose and activity and confers to this entity a strictly territorial and state-integrated function concerning water supply. But Respondent does not demonstrate that, and if so in which manner, the Spanish Government was involved in this activity as part of CABB.<sup>177</sup> Also, it does not establish nor contend that as a matter of international law CABB appears from a structural as well as a functional point of view, as a company placed under the control and management of the Kingdom of Spain.<sup>178</sup>

323. Even a surface glance at CABB's by-laws shows a different picture. Thus, while Article 6 on CABB's General Purposes defines in paragraph 1 that the provision of water supply and sewerage to the member municipalities constitutes its “primary mission,” the same Article goes on to say that it can also do so for the benefit of “other local public services” (para. 2). It further states that CABB also can carry out supplementary or derivative activities that may enhance the effective fulfilment of the general purposes (para. 3) and that are subject to the General Assembly's approval (Art. 19 No. 15). Article 8 includes in the list of “competencies” services in non-

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<sup>177</sup> An involvement that has been firmly denied by Prof. Fernández, cf. TR-E, Day 2, p. 353/8-354/10.

<sup>178</sup> Cf., on this matter, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID/ARB/02/13, Decision on Jurisdiction of November 9, 2004, No. 30-35; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 71-89.

member municipalities (No. 10) and “the provision of advisory and assistance services and the construction, implementation, and running of facilities, the drawing up of reports and similar actions concerning the matters of water supply and sewage at the request of any public or private entity under conditions set up by the Director’s Committee” (No. 11).<sup>179</sup> While one may insist, as Respondent does, on CABB’s focus on the local scale of operation to the benefit of its member municipalities, it does not constitute a ban for services provided above that range, including those performed abroad, as this had been done in Uruguay and Argentina. The Legal Opinion filed by Respondent and written by Attorneys Ana-María Fernández Rico and José Manuel Gómez Piñeda, states “with total respect and consideration to any dissenting view,” and does not offer a different proposition. The authors insist on CABB’s public nature and affirm that CABB is “integrated into the organization of the Spanish State,” but they do so merely by referring to the fact that the municipalities forming the entity belong to a territory that is part of Spain. They neither mention nor discuss Articles 6 and 8 of the by-laws, which address the standing of the entity to provide services outside its main sphere of activity.<sup>180</sup> These provisions are examined in the Expert Opinion of Prof. Tomás Ramón Fernández, filed by Claimants.

324. This Opinion also focuses on a different aspect, excluded by Respondent and its Experts. Indeed, even when admitting, *arguendo*, that CABB’s representatives would have acted above the range of activities based on its by-laws, this conduct does not demonstrate that CABB would lack legal capacity to participate in legal undertakings concerning such activities above its competencies as defined in the by-laws. CABB’s full legal personality and capacity to engage in commitments as stated in Article 3 with reference to Spanish Law is not restricted to activities and contracts covered by the objectives defined in its by-laws. Article 3.2 of Regional Law No. 3/1995 for Bizkaia, to which Article 3 of CABB’s by-laws refer, does not contain any such restriction. If its representatives are acting beyond CABB’s legitimate scope, they may have to assume responsibility within the entity, but it would not affect the validity of the undertakings made with third parties. This issue need not be further discussed, as Respondent did not address it, nor did Respondent affirm that it raised concerns in relation to the validity of CABB’s undertakings. In any event, as demonstrated above, CABB’s legal personality and capacity to enter into agreements relating to its shareholder configuration and the technical operation of the Concession have been fully recognized in the Republic of Argentina. This is all that matters.

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<sup>179</sup> As Prof. Fernández explained at the hearing, it is “an additional activity or derived from the main mission assigned to the consortium” (TR-E, Day 2, p. 350/19 s.).

<sup>180</sup> Prof. Mata’s explanations contained in his Report do not go beyond what has been stated in the Opinion provided by these two Spanish Attorneys (cf. No. 132-135). He confirmed at the hearing that he does not qualify as an Expert as to the issues raised under Spanish Law (cf. TR-E, Day 1, p. 105/5-16). He nevertheless testified orally that he had no doubt that a public agency can act under of private law (TR-E, Day 1, p. 107/12-14), but that, when doing so, its identity as a public agency remains (TR-E, Day 1, p. 123/21-23).

325. When Respondent's objection to CABB's legal standing is interpreted more narrowly as contesting CABB's capacity to participate and to be represented in this proceeding as governed by the ICSID Convention, the rules pertaining to the conduct of such a proceeding have to be examined.

326. In this regard, Respondent's objection implies a most singular reading of Article 25(3) of the ICSID Convention, that is strictly based on the literal understanding of the terms "constituent subdivision or agency of a Contracting State," which, taken in isolation, could refer to such subdivision or entity irrespective of whether it belongs to the Host State or to the State of the investor. However, as the provision also sets forth, it applies to the "consent" of such subdivision or entity. The basic rule on consent to ICSID jurisdiction is Article 25(1), where the expression "constituent subdivision or agency of a Contracting State" is related exclusively to the Host State. In relation to the Contracting State of the investor, the same rule does not use these terms and merely refers to "a national." It results clearly from the combined reading of both provisions that the approval requirement set out in Article 25(3) can relate only to subdivisions and entities of a Contracting State involved in an ICSID arbitration as Host State of an investment. If such approval is required it is because the subdivision or agency concerned will become a party to the proceeding in addition or instead of the Contracting State to which it belongs. This scenario has no parallel setting on the investor side

327. Therefore, this Tribunal finds that the requirement of prior approval as stated in Article 25(3) does not apply to CABB. This interpretation also must have been Respondent's position when it received the Notice of Arbitration and did not object that it contained no mention of an approval based on Article 25(3) as this would have been required by Article 2(1)(c) Institution Rule if Respondent's more recent understanding were correct.

328. This does not mean that CABB's standing generally is such that it need not secure approval to participate in ICSID arbitration. It is less than clear whether Respondent's objection addresses CABB's purported failure to receive authorization to bring an arbitration claim before ICSID also concerns this aspect of the question relating to CABB's legal standing. If it does, it would be deprived of any basis on the face of the act dressed up by the Notary Public of Bilbao recording the Board of Directors' decision to submit the dispute involving CABB to arbitration under the ICSID Convention and to grant the necessary power of attorney. This document was filed with the Secretary-General of ICSID together with the Request for Arbitration. It had as its objective the compliance with Institution Rule 2(1)(f) and 2(2), which provides, in case the requesting party is a juridical person, that it has taken all necessary actions to authorize the request and to deliver the supporting documentation together with the Request. The decision of the Board of Directors of April 24, 2007

was attached to the notaries act exhibited with the Request for Arbitration. Neither at that time nor at any time later did this document attract any opposition, be it from the Secretary-General under its scrutiny in view of the registration of the Request, nor later by Respondent. Therefore, Respondent's objection also fails in this issue.

329. The Tribunal therefore arrives at the conclusion that CABB has legal standing in this ICSID proceeding and that the third objection raised by Respondent accordingly must be dismissed.

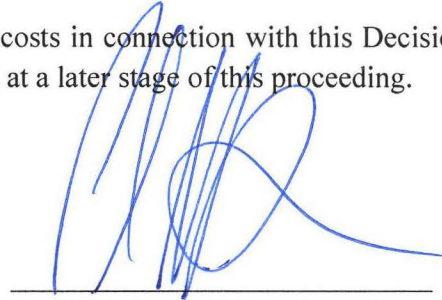
**V. Decision**

330. Based on the reasons stated, the Tribunal decides:

1. To reject all of Respondent's objections and to assert that the Centre has jurisdiction and the Tribunal has competence over this dispute.
2. The determination and attribution of costs in connection with this Decision is reserved for a decision made by this Tribunal at a later stage of this proceeding.



Professor Campbell McLachlan QC  
Arbitrator



Professor Pedro J. Martinez-Fraga  
Arbitrator



Professor Andreas Bucher  
President of the Tribunal