Date of dispatch to the parties: September 28, 2007

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

IN THE PROCEEDING BETWEEN

SEMPRA ENERGY INTERNATIONAL
(CLAIMANT)

AND

ARGENTINE REPUBLIC
(RESPONDENT)

CASE NO. ARB/02/16

AWARD

Members of the Tribunal

Professor Francisco Orrego Vicuña, President
The Honorable Marc Lalonde P.C., O.C., Q.C., Arbitrator
Dr. Sandra Morelli Rico, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Representing the Claimant:

Mr. R. Doak Bishop
Mr. Craig S. Miles
Mr. Roberto Aguirre Luzi
Mr. Wade Coriell
King & Spalding LLP
Houston, Texas 77002

Representing the Respondent:

Dr. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Procuración del Tesoro de la Nación Argentina
Buenos Aires-Argentina

THE TRIBUNAL

Composed as above,

After deliberation,

Makes the following Award:

A. Introduction

1. The Claimant, Sempra Energy International (Sempra), is a company established under the laws of the State of California, United States of America. It is represented in this proceeding by:

Mr. R. Doak Bishop
Mr. Craig S. Miles
Mr. Roberto Aguirre Luzi
Mr. Wade Coriell
King & Spalding LLP
1100 Louisiana, Suite 4000
Houston, Texas 77002

2. The Respondent Argentine Republic (Argentina) is represented in this proceeding by:

Dr. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Procuración del Tesoro de la Nación Argentina
Posadas 1641
CP 1112 Buenos Aires
Argentina

3. On July 19, 2007 the Secretary of the Tribunal informed the parties that the Tribunal had declared the proceeding closed in accordance with Rule 38(1) of the

ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules). This Award contains the Tribunal's Award on the merits rendered in accordance with Arbitration Rule 47, as well as a copy of the Tribunal's Decision on Objections to Jurisdiction. In rendering its Award, the Tribunal has taken into account all pleadings, documents and testimony in this case insofar as it considered them relevant.

B. Summary of the Procedure

1. Procedure Leading to the Decision on Jurisdiction

4. On September 11, 2002, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from Sempra a Request for Arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) against Argentina. The Request concerned Sempra's investment in two natural gas distribution companies, together serving seven Argentine provinces, and a number of measures adopted by the Argentine Republic which, in the Claimant's view, modified the general regulatory framework established for foreign investors under which Sempra made its investment.

5. Sempra invoked in its request the provisions of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic (hereinafter the "Argentina-U.S. bilateral investment treaty" or "the BIT").[1]

6. On September 12, 2002, in accordance with Rule 5 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), the Centre acknowledged receipt of the Request and, on September 13, 2002, sent copies thereof to the Argentine Republic and to the Argentine Embassy in Washington, D.C.

7. By letter of October 25, 2002, the Centre asked Sempra to provide additional information in connection with references made in the Request to claims being disputed

[1] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments, signed on November 14, 1991, which entered into force on October 20, 1994.

before fiscal agencies and the Argentine Federal Supreme Court. Sempra responded by letters dated October 28 and November 5, 2002.

8. On December 6, 2002, the Acting Secretary-General of ICSID registered the Request pursuant to Article 36(3) of the ICSID Convention. On the same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

9. On March 4, 2003, the parties agreed to constitute a single tribunal to hear Sempra's claims together with another request for arbitration submitted by Camuzzi International S.A. ("Camuzzi"),[2] also a shareholder in the gas distribution companies in which Sempra had invested. The proceeding instituted by Camuzzi has been suspended by agreement of the parties thereto, communicated to the Centre on June 7, 2007 and approved by the Tribunal on June 21, 2007. The parties also agreed that this tribunal would comprise one arbitrator appointed jointly by Sempra and Camuzzi, one arbitrator appointed by the Argentine Republic, and a third arbitrator, who would serve as the President of the Arbitral Tribunal, who would be appointed by the Secretary-General of ICSID.

10. On March 10, 2003, Sempra appointed The Honorable Marc Lalonde P.C., O.C., Q.C, a Canadian national, as an arbitrator. By letter dated April 3, 2003, Argentina appointed Dr. Sandra Morelli Rico, a Colombian national as an arbitrator. After consultation with the parties, Professor Francisco Orrego Vicuña, a national of Chile, was appointed as President of the Arbitral Tribunal by the Acting Secretary-General of ICSID.

11. On May 5, 2002, the Acting Secretary-General, in accordance with Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that therefore the Tribunal was deemed to have been constituted and the proceedings to begun on that date. On the same date, pursuant to ICSID Administrative

[2] Camuzzi's Request for Arbitration was registered by the Acting Secretary-General of ICSID on February 27, 2003 as ICSID Case No. ARB/03/2.

and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Tribunal.

12. The first session of the Tribunal with the parties was held on July 3, 2003, at the seat of the Centre in Washington, D.C. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect.

13. During the first session, the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. Also during the first session, the Tribunal, after ascertaining the views of the parties on the matter, fixed the following time limits for the written phase of the proceedings: Claimant would file a memorial within ninety (90) days from the date of the first session; Respondent would file a counter-memorial within ninety (90) days from its receipt of the Claimant's memorial; Claimant would file a reply within forty-five (45) days from its receipt of the Respondent's counter-memorial; and Respondent would file a rejoinder within forty-five (45) days from its receipt of the Claimant's reply.

14. During the first session, the Tribunal noted that, in accordance with the applicable ICSID Arbitration Rules, the Respondent had the right to raise any objections to jurisdiction it may have no later than the expiration of the time limit fixed for the filing of its counter-memorial. For the case that Argentina were to raise objections to jurisdiction, a further schedule was agreed upon: Claimant would file a counter-memorial on jurisdiction within sixty (60) days from its receipt of the Respondent's memorial on jurisdiction; Respondent would file a reply on jurisdiction within thirty (30) days from its receipt of the Claimant's counter-memorial; and finally, Claimant would file a rejoinder on jurisdiction within thirty (30) days from its receipt of the Respondent's reply.

15. In accordance with the agreed time limits, the Claimant submitted to the Centre a memorial on the merits, with accompanying documentation, on September 3, 2003. As agreed, the memorial comprised both the claims of Sempra and Camuzzi.

16. On December 31, 2003, the Respondent filed a memorial with objections to the Centre's jurisdiction and the competence of the Tribunal. By letter of January 14, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with Arbitration Rule 41(3).

17. Respondent received a copy of the Claimant's counter-memorial on jurisdiction and accompanying documentation on March 18, 2004. On May 6, 2004, the Claimant received a copy of the Respondent's reply on jurisdiction, with accompanying documentation. On June 3, 2004, the Respondent received a copy of the Claimant's rejoinder on jurisdiction, with accompanying documentation. All these pleadings were made jointly with the concurrent case in respect of Camuzzi.

18. On July 1, 2004, Mr. Francisco Ceballos, ICSID, replaced Mr. Gonzalo Flores as Secretary of the Tribunal. Mr. Ceballos having left ICSID in March 2005, Mr. Flores was reappointed as the Secretary of the Tribunal.

19. The Tribunal, having reviewed the parties' pleadings on jurisdiction, considered necessary holding a hearing, which, with the agreement of the parties, took place in Paris on November 29 and 30, 2004. The Claimant was represented at the hearing by Messrs. R. Doak Bishop and Craig S. Miles (King & Spalding LLP, Houston). Mr. Santiago F. Albarracín was also present on behalf of Sempra. The Argentine Republic was represented by Ms. Cintia Yaryura, Ms. Gisela Makowski and Mr. Gabriel Bottini, from the Procuración del Tesoro de la Nación Argentina. The hearing encompassed the parallel cases of Sempra and Camuzzi.

20. During the hearing, Messrs. Bishop and Miles addressed the Tribunal on behalf of the Claimant. Ms. Yaryura, Ms. Makowski and Mr. Bottini addressed the Tribunal on behalf of the Respondent. The Tribunal posed questions to the representatives of the parties, in accordance with Rule 32(3) of the ICSID Arbitration Rules.

21. On May 11, 2005, the Tribunal, after due deliberation, issued its unanimous Decision on the Objections to Jurisdiction raised by the Argentine Republic. In its Decision, which forms part of this Award, the Tribunal rejected all of the Respondent's

objections, concluding that the dispute fell within the jurisdiction of the Centre and the competence of the Tribunal, in accordance with the ICSID Convention.

22. Certified copies of the Tribunal's decision were distributed to the parties by the Secretary of the Tribunal. A copy of the Tribunal's Decision on Jurisdiction is attached to the present Award as an integral part of such.

2. Procedure Leading to the Award on the Merits

23. On May 11, 2005, the Tribunal, following its Decision on Objections to Jurisdiction, issued, in accordance with Rules 19 and 41(4) of the Arbitration Rules of the Centre, Procedural Order No. 1 on the continuation of the proceeding on the merits. In that Procedural Order the Tribunal referred to the time table fixed during the July 3, 2003 first session of the Tribunal with the parties, directing the parties to file their remaining written pleadings on the merits of the dispute, as follows: Respondent to file a counter-memorial on the merits within forty-five (45) days from the date of the Order; Claimant to file a reply on the merits within forty-five (45) days from its receipt of Respondent's counter-memorial; Respondent to file a rejoinder on the merits within forty-five (45) days from its receipt of Claimant's reply.

24. The Order further contemplated that the Tribunal would shortly propose a date for a hearing on the merits.

25. On May 12, 2005, the Argentine Republic requested an extension for the filing of its counter-memorial on the merits of at least 60 days. By letter dated May 18, 2005, Claimant opposed to this request. The Tribunal, after careful consideration of the parties' positions in this regard, by letter from the Secretary of the Tribunal dated June 2, 2005, granted Argentina a 45-day extension for the filing of its counter-memorial on the merits. By same letter, the Tribunal informed the Claimant that if it wished to avail of a similar extension for the filing of its reply on the merits, the Tribunal would be prepared to consider such request.

26. On August 1, 2005, the Respondent filed its counter-memorial on the merits.

27. On August 2, 2005, the Tribunal, having consulted with the parties, fixed a date for the hearing on the merits.

28. On September 28, 2005, the Claimant filed its reply on the merits.

29. By letter dated October 24, 2005, the Argentine Republic requested the production of certain documents by the Claimant and requested that the time limit for the filing of its rejoinder on the merits begin to run upon receipt of said documents.

30. By letter dated October 28, 2005, the Claimant submitted observations to Argentina's request for production of documents.

31. By letter from the Secretary of the Tribunal dated November 2, 2005, the Tribunal informed the parties of its decision on (a) Argentina's request for production of documents; and (b) Argentina's request for a recalculation of the time limit for the filing of its rejoinder on the merits. In its decision, the Tribunal also addressed a request by the Argentine Republic, included in its counter-memorial on the merits, to exclude the testimony of three witnesses enclosed with Claimant' memorial and reply on the merits. This decision provides as pertinent:

> "The Tribunal has carefully considered the Argentine Republic's requests and the Claimants' objections thereof. After due deliberation, the Tribunal has decided as follows:
>
> […]
>
> (5) In regard to Argentina's request for the exclusion of the testimonies of Messrs. Perkins, Mairal and Peacock, the Tribunal, in accordance with ICSID Arbitration Rule 34, decides to admit the witnesses' statements filed by the Claimants. The Argentine Republic will have the opportunity to cross-examine these witnesses during the hearing on the merits. The Tribunal will inform the parties shortly on the manner in which cross examination will be conducted. This decision does not prejudge the question of the probative value of such testimonies, which will be determined by the Tribunal in due time."

32. By letter dated November 10, 2005, the Secretary of the Tribunal confirmed the parties' agreement to hold the hearing on the merits in this case in Santiago de Chile.

33. On December 5, 2005, the Argentine Republic filed its rejoinder on the merits.

34. On December 22, 2005, the Claimant filed a request for provisional measures regarding the oral testimony of two of its witnesses.

35. On December 29, 2005, the Argentine Republic filed, upon the Tribunal's invitation, observations to the Claimant's request for provisional measures.

36. On January 16, 2006, the Claimant raised a number of challenges to the document entitled "Evaluación empresas Camuzzi Gas Pampeana S.A. y Camuzzi Gas del Sur S.A." submitted by Argentina on December 13, 2005, and requested further documentation from the Respondent.

37. On January 16, 2006, the Tribunal, through letter from the Secretary, informed the parties of its decision on the Claimant's request for provisional measures of December 22, 2005, as follows:

> 1. The Tribunal has carefully reviewed the Claimants' request of December 22, 2005, including the attached documentation (i.e. injunction rendered on November 24, 2005 by the Federal District Court in Civil and Commercial Matters No. 8 of the Argentine Republic, regarding the provision of witness statements by Mr. Patricio Carlos Perkins in this and other ICSID proceedings).
>
> 2. The Tribunal has taken note that the above referred injunction specifically states that Mr. Perkins should:
>
> > 'refrain from making written statements or giving testimony at hearings in cases filed against the Argentine Republic before the International Centre for Settlement of Investment Disputes (ICSID), or regarding any other dispute which, directly or indirectly, results in the disclosure of data, information, investigation, conclusion, recommendation or report included within the scope of the confidentiality obligation set forth in clause 11.2 of the Consulting Agreement entered into between YPF, acting on behalf of the *Subsecretaría de Combustibles* and the firm "Patricio C. Perkins y Asociados S.A. and/or related to his position as Executive Director regarding the privatization of Gas del Estado.'(Translation into English provided by counsel for the Claimants on December 29, 2005).
>
> 3. The Tribunal has also carefully reviewed the Argentine Republic's observations on this matter of December 29, 2005. The Tribunal notes that Argentina has stated for the record:
>
> > a. That Mr. Perkins was duly notified of the injunction, that he accepted such notice and that he did not raise any objection at the time of the notice;

b. That the injunction seeks compliance with the obligations set forth in a confidentiality contract concluded by Mr. Perkins and the Argentine Government, which remain valid today;

c. That the Argentine Republic has opposed to Mr. Perkins' testimony from the outset of these proceedings;

d. That any reference to Mr. Mairal's testimony are speculative; and

e. That Articles 21 and 22 of the ICSID Convention could not apply to the relationship between Mr. Perkins and the Argentine Republic.

4. The Tribunal notes that, by letter of January 6, 2006, the Argentine Republic indicated its desire to cross-examine Mr. Hector Mairal during the forthcoming hearing on the merits. The Tribunal thus understands that the Argentine Republic will avoid any conduct that may impair Mr. Mairal's ability to provide oral testimony in these proceedings;

5. The Tribunal notes that, under Articles 21 and 22 of the ICSID Convention, witnesses shall enjoy immunity from legal process with respect to acts performed by them in the proceedings irrespectively of their nationality;

6. The Tribunal also notes that, pursuant to Article 26 of the ICSID Convention, consent of the parties to arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy;

7. Finally, the Tribunal notes, in accordance with, ICSID Arbitration Rule 34(3) the parties shall cooperate with the Tribunal in the production of the evidence;

In light of the above, the Tribunal has accordingly decided to adopt the following Order:

1. Mr. Perkins' written statement is admissible;

2. The Argentine Republic shall adopt the necessary measures to ensure full compliance with the ICSID provisions referred to above;

3. In particular, the Argentine Republic shall refrain from any conduct or omission that may, in any way, impair Mr. Perkins' ability to provide oral testimony in these proceedings;

4. The compliance with this Order shall be assessed by the Tribunal in due course."

38. By letter dated January 17, 2006, the Claimant informed the Tribunal its decision to withdraw the testimony of two of its witnesses.

39. By further letter of January 30, 2006, the Tribunal also informed the parties of its decisions on the series of issues raised by them in the correspondence exchanged from January 23 through 26, 2006, as follows:

"I write on instructions of the President of the Tribunal in connection with the parties' recent exchange of correspondence regarding the arrangements for the forthcoming hearing on the merits in the present case.

The Tribunal, having reviewed the Argentine Republic's letter of January 23, 25 and 26, 2006 and Claimants' letter of January 23, 24 and 26, 2006, has decided as follows:

> i. The testimony of Professor Diego J. Dzodan is admissible, as the Tribunal wishes to have all the information pertinent to issues of valuation;
>
> ii. Because of the late filing of Professor's Dzodan expert report, Claimants' request to examine the expert Abdala and/or Spiller for one hour after the Respondent's experts, including Professor Dzodan, is admitted;
>
> iii. The Tribunal wishes to invite the parties to include in any post-hearing brief they may agree to produce, a brief final discussion of valuation issues;
>
> […]
>
> vi. Production by the parties of witness or expert transcripts made at other hearings is not admissible as contrary to the principle of confidentiality of proceedings."

40. The hearing on the merits was held, as scheduled, from Monday, February 6 through Tuesday February 20, 2005, in Santiago de Chile. Present at the hearing were:

Members of the Tribunal:

Prof. Francisco Orrego Vicuña, President

The Hon. Marc Lalonde, P.C, O.C., Q.C., Arbitrator

Dr. Sandra Morelli Rico, Arbitrator

ICSID Secretariat:

Mr. Gonzalo Flores, Secretary of the Tribunal

On behalf of the Claimant:

R. Doak Bishop (King & Spalding LLP)

Craig S. Miles (King & Spalding LLP)

Roberto Aguirre Luzi (King & Spalding LLP)

Wade Coriell (King & Spalding LLP)

Martin Gusy (King & Spalding LLP)

Carol Tamez (King & Spalding LLP)
Zhennia Silverman (King & Spalding LLP)
Luis Lucero (Fortunati & Lucero)
Esteban Leccese (Fortunati & Lucero)
Ramón Lanus (Fortunati & Lucero)

Dave Smith (Sempra Energy International)

Luigi Predieri (Camuzzi International S.A.)
Juan Rimoldi Fraga (Camuzzi International S.A.)

On behalf of the Respondent:

Osvaldo César Guglielmino, Procurador del Tesoro de la Nación Argentina
Adolfo Gustavo Scrinzi (Procuración del Tesoro de la Nación Argentina)
Jorge R. Barraguirre (Procuración del Tesoro de la Nación Argentina)
Gabriel Bottini (Procuración del Tesoro de la Nación Argentina)
Ignacio Torterola (Procuración del Tesoro de la Nación Argentina)
Florencio Travieso (Procuración del Tesoro de la Nación Argentina)
Adriana Busto (Procuración del Tesoro de la Nación Argentina)
Pablo Fernández Lamela (Procuración del Tesoro de la Nación Argentina)
Tomás Braceras (Procuración del Tesoro de la Nación Argentina)
Nicolás Stern (Procuración del Tesoro de la Nación Argentina)
María Victoria Vitali (Procuración del Tesoro de la Nación Argentina)
Carlos Winograd (Procuración del Tesoro de la Nación Argentina)
Alicia Federico (Procuración del Tesoro de la Nación Argentina)
Fernando Risuleo (Procuración del Tesoro de la Nación Argentina)

41. The hearing began, as scheduled, on Monday February 6, 2006 at 9:30 a.m. Messrs. Bishop, Miles and Coriell made opening statements on behalf of the Claimant. Messrs. Scrinzi, Travieso and Barraguirre made opening statements on behalf of the Argentine Republic.

42. During the hearing, testimony was heard from Mr. George Morgan, Mr. Santiago Albarracín, Prof. José Álvarez, Mr. Héctor Mairal, Mr. Manuel Abdala, Prof. W. Michael Reisman, Prof. Sebastián Edwards and Mr. Martín Juan Blaquier for the Claimant. Testimony was heard from Mr. Jorge Gustavo Simeonoff, Mr. Eduardo Ratti, Mr. Walter Kunz, Mr. Horacio Vera, Mr. Cristian Folgar, Prof. Gabriel Bouzat, Mr. Daniel Chudnovsky, Dr. Diego J. Dzodan, Prof. William Burke White and Prof. Nouriel Roubini for the Argentine Republic.

43. As scheduled, closing arguments were presented by the parties at the closing session of the hearing on February 14, 2006. Messrs. Bishop, Coriell and Miles addressed the Tribunal on behalf of the Claimant. Messrs. Guglielmino and Barraguirre addressed the Tribunal on behalf of the Argentine Republic.

44. By letter dated February 15, 2006, the Tribunal informed the parties of its decision on a number of matters raised during the February 6-14 hearing, as follows.

> "I write on instructions of the President of the Tribunal as a follow-up to the hearing on the merits in the above proceedings, held in Santiago, Chile on February 6 through 14, 2006.
>
> The Tribunal has taken note of Messrs. Patricio Carlos Perkins', Raúl D. Bertero's and Juan Carlos Fassi's nonattendance of the hearing. The Tribunal has also taken note of Mr. Bertero's letter dated February 3, 2006, accompanied by counsel for the Claimants during the hearing and of Mr. Fassi's letter dated February 8, 2006, accompanied by the Argentine Republic during the hearing.
>
> In this connection and as anticipated during the hearing, the Tribunal, having heard from the parties and after due deliberations, has decided as follows:
>
> > i. Notwithstanding Messrs. Bertero's and Perkins' absences, their written testimony is admitted, as their absence is due to circumstances beyond their control;
> >
> > ii. In the case of Mr. Fassi, his written expert testimony (the P.A. Consulting Group report) is also admitted, as the Tribunal considers this expert testimony necessary to have a full view of the parties' position on valuation of damages.
>
> At the closing of the hearing, the Argentine Republic asked the Tribunal to dismiss the testimony of Mr. Santiago Albarracin and the expert testimony of Professor José Álvarez. As agreed by the parties, Argentina will submit its arguments in support of this request by Tuesday, February 21, 2006, and Claimants will file their response by Tuesday, February 28, 2006.

> Also, in accordance with the parties' agreement, post hearing briefs will be filed, simultaneously, by the parties on Monday, April 3, 2006. The post hearing briefs will not exceed 35 pages.
>
> Finally, the Tribunal has taken note of the parties' *Agreement on the Discontinuance of the Treatment of Certain Claims* of February 3, 2006, accompanied by the parties during the hearing. In light of this agreement, the Tax Claims described in Chapter VI, Section F of the Claimants' Consolidated Memorial on the Merits are discontinued in the terms described in the *Agreement*. The Award will also take note of this discontinuance in due course."

45. In accordance with the Tribunal' instructions, the Argentine Republic submitted its arguments on its request to dismiss the testimony of Mr. Santiago Albarracín and the expert testimony of Professor José Álvarez on February 21, 2006. Claimant filed, as directed by the Tribunal, its response on February 28, 2006.

46. On April 3, 2006 the parties filed their post-hearing briefs.

47. By letter of April 3, 2006, the Tribunal informed the parties of its decision regarding Argentina's request for the dismissal of the testimony of Mr. Santiago Albarracín and of the expert testimony of Professor José Álvarez. By same letter, the Tribunal informed the parties of its decision to retain independent expert advice so as to better understand the underlying assumptions and methodology relied upon in the valuation reports offered by the parties' experts. The Tribunal's decision in this regard follows:

> "I write to you, on instruction from the President of the Tribunal, in connection with some pending matters in the above proceedings:
>
> > i. In regard to the testimony of Dr. Santiago Albarracín and the expert testimony of Professor José Alvarez:
> >
> > The Tribunal has carefully reviewed the parties' arguments on this matter, set forth in their letters of February 21, 2006 (Respondent) and February 28, 2006 (Claimants). After due deliberation, and in accordance with ICSID Arbitration Rule 34, the Tribunal has decided as follows:
> >
> > (a) Dr. Santiago Albarracín was presented as a factual witness by the Claimants. As such, Dr. Albarracín provided written testimony of what he considered to be true facts. In his oral testimony, Dr. Albarracín added understandings and qualifications to his recollection of the facts. The Tribunal, considering the capacity in which Dr. Albarracín has testified, has decided to admit his testimony only insofar as it refers to facts he claims to have witnessed. The Tribunal will disregard all the qualifications and

> understandings made by Dr. Albarracín during his oral testimony, as they exceed the scope of the testimony he was called to provide;
>
> (b) The Tribunal has also decided to admit Prof. José Alvarez' expert testimony. The Respondent's arguments have not persuaded the Tribunal that there is a legal impediment for Prof. Alvarez to provide expert testimony in these proceedings."

48. By letter dated June 29, 2006, on instructions from the President of the Tribunal, the Secretary sent to the parties a list of the documents in the record provided to the independent evaluation expert for the preparation of his report.

49. On July 25, 2006, the Secretariat transmitted to the parties a *Preliminary Methodological Report* prepared by the independent evaluation expert. By that same letter the Tribunal invited the parties to file their observations on the preliminary report by August 16, 2006. By letter dated July 25, 2006, the Argentine Republic asked for a 30-day extension for the filing of its observations on the preliminary report. Claimants opposed such request by letter dated July 26, 2006.

50. On October 30, 2006, the Secretary, on instructions from the President of the Tribunal, transmitted to the parties a copy of the independent evaluation expert's final report. By same letter, the parties were invited to submit observations by November 14, 2006.

51. On November 2, 2006, the Secretary, on instructions from the President of the Tribunal, transmitted to the parties a copy of a revised final report by the independent evaluation expert. By same letter, the Tribunal extended the deadline for the parties' observations to November 17, 2006.

52. By letter dated December 12, 2006, the Tribunal requested the parties to submit additional information regarding the tariff base being considered by Argentina's Ente Nacional Regulador del Gas (ENARGAS) by the end of 2001 (Second Quinquennial Tariff Review of RQT II). Claimant filed the requested information on December 18, 2006. On that same date, the Argentine Republic's representatives informed the Tribunal that it had asked ENARGAS for the requested information and that it would

provide it to the Tribunal upon receipt. The documents were received by the Centre on December 28, 2006, and shortly thereafter transmitted to the Tribunal and the Claimant.

53. On February 9, 2007, the Argentine Republic submitted to the Secretariat copies of a decision on liability issued in another pending ICSID case.[3] The Claimant opposed to this submission by letter dated February 22, 2007. On February 28, 2007, the Tribunal informed the parties on its decision on this matter as follows:

> "I write to you, on instructions from the President of the Tribunal, in connection with the Argentine Republic's letter dated February 9, 2007 and counsel for the Claimants' response thereof dated February 22, 2007.
>
> The Tribunal has carefully considered the parties' submissions above and, after due deliberation, has decided, in accordance with Rule 34 of the ICSID Arbitration Rules, not to admit the documents enclosed with Argentina's February 9, 2007 letter. The Tribunal will also disregard Claimants' observations included in their February 22, 2007 letter that go beyond the question of the admissibility of Argentina's submission.
>
> The Tribunal is mindful of the parties' wish and right to fully present their cases. The Tribunal also understands its duty to conduct the proceedings in an orderly and efficient manner. The Tribunal is confident that the parties in these proceedings have been given plenty of opportunities to fully present their arguments on each issue in dispute. Accepting Argentina's non-invited submission at this late stage of the proceedings would open the door for a never ending exchange of arguments, unduly burdening both parties.
>
> Having reached its conclusion for the reasons set above, the Tribunal does not consider necessary to review the relevance of the decision enclosed with Argentina's submission, which was rendered by a different tribunal, over a distinctive set of facts and in view of a likely different set of arguments and evidence.
>
> The parties are invited to refrain from filing any further non-invited submission in these proceedings."

54. By letter dated March 8, 2007, the Argentine Republic proposed the disqualification of the President of the Tribunal. In its letter, Argentina made reference to the February 28, 2007 decision of the Tribunal rejecting its submission of the decision on liability issued in the *LG&E* case. In its letter, Argentina also requested the President of the Tribunal to indicate which of his coarbitrators have joined him in this decision.

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[3] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1); Decision on Liability of October 3, 2006.

55. By letter dated March 12, 2007, the Claimant objected to the Argentine Republic's disqualification of the President of the Tribunal.

56. By letter dated March 13, 2007, the President of the Tribunal declined Argentina's request, referring to ICSID Arbitration Rule 15(1).

57. By letter dated March 16, 2007, the Argentine Republic proposed the disqualification of all Members of the Tribunal in accordance to Article 57 of the ICSID Convention.

58. By letter of March 22, 2007, the Secretary of the Tribunal invited the Members of the Tribunal to provide explanations regarding the disqualification proposal, as envisaged in ICSID Arbitration Rule 9(3). By same letter, the Secretary of the Tribunal confirmed the suspension of the proceedings pursuant to ICSID Arbitration Rule 9(6).

59. Professor Francisco Orrego-Vicuña and Mr. Marc Lalonde furnished explanations by respective letters dated March 23, 2007. Dr. Sandra Morelli furnished explanations by letter dated March 26, 2007. Copies of these letters were circulated by the Secretary of the Tribunal to the parties on April 4, 2007.

60. By letter dated April 12, 2007, Argentina submitted observations to the communications of the Members of the Tribunal. Claimants submitted observations on April 19, 2007.

61. By letter of May 2, 2007 Argentina, forwarded to the Tribunal the agreement between UNIREN and Camuzzi titled "Acta Acuerdo de Adecuación del Contrato de Licencia de Distribución de Gas Natural."

62. By letter dated May 4, 2007, the Argentine Republic requested the Arbitral Tribunal to review the Claimants' witness testimony of Mrs. María de los Ángeles Alcolumbre which disputes the veracity of the testimony of Mr. George Michael Morgan.

63. On May 15, 2007, the Secretary-General of ICSID wrote to the Members of the Tribunal requesting them to confirm her understanding that the Tribunal, like other ICSID tribunals, gives due consideration to published decisions, in particular, the Decision of Liability issued in ICSID Case No. ARB/02/01 (LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic).

64. On May 16, 2007, the President of the Tribunal, on behalf of the Tribunal, confirmed that the Decision on Liability has been considered by the Tribunal in its deliberations.

65. By letter dated May 18, 2007, the Argentine Republic submitted observations to the Tribunal's letter of May 16, 2007.

66. By letter of June 5, 2007, the Secretary-General of ICSID informed the parties that the Chairman of ICSID Administrative Council had rejected the Respondent's proposal to disqualify the Members of the Tribunal. In accordance with ICSID Arbitration Rules 9(6) the proceedings were resumed on this date.

67. On June 21, 2007, the proceeding between Camuzzi International S.A. and the Argentine Republic was suspended until January 31, 2008, following an agreement of the parties.

68. By letter of June 22, 2007, Sempra Energy International clarifies its definition of "interest."

69. By letter dated June 25, 2007, Argentina submitted a copy of a letter addressed to Mr. Abraham D. Sofaer by the U.S. State Department dated September 15, 2006, regarding the U.S. position on the interpretation of certain provisions in the U.S. Bilateral Investment Treaties.

70. By letter of July 2, 2007, Claimant objected to the submission of the State Department letter. With a letter of the same day Argentina commented on Claimant's letter of June 22, 2007.

71. By letter dated July 6, 2007, Claimant asked the Tribunal to declare inadmissible Respondent's submission of Ms. Alcolumbre's labor lawsuit documents and the submission on the merits.

72. The Tribunal continuously deliberated by correspondence, meeting for this same purpose on a number of occasions. Throughout the proceedings, the parties' numerous procedural applications were promptly and unanimously decided by the Tribunal.

3. Declaration of Closure of the Proceeding

73. ICSID Arbitration Rule 38(1) requires that when the presentation of the case by the Parties is complete, the proceeding shall be declared closed.

74. Having reviewed all of the presentations by the parties, the Tribunal, came to the conclusion that there was no request by a Party or any reason to reopen the proceeding, as is possible under ICSID Arbitration Rule 38(2).

75. Accordingly, by letter dated July 19, 2007, the Tribunal declared the proceeding closed, in accordance with ICSID Arbitration Rule 38(1).

C. Considerations

76. A number of awards issued by ICSID tribunals have dealt with many issues concerning the measures adopted by the Respondent which have also been brought before this Tribunal. In some instances, counsel for each side has been the same as in previous cases and memorials have been written in similar or identical language. Members of this Tribunal have also sat in other such cases. On occasion, the wording used in the paragraphs that follow resembles that of prior awards, particularly insofar as it concerns the explanation of the positions of the parties and some of the considerations relating thereto. The Tribunal, however, has examined every single argument and petition on the basis of their merits in this proceeding.

The Stamp Tax Claim (Discontinuance)

77. Claimant included in paragraph VI of its memorial on the merits (labeled "The Investment Dispute") a section named "Imposition of Illegal Taxes," concerning claims related to stamp taxes, provincial gross sales taxes and municipal taxes for the occupation of public domain ("the Tax Claims").

78. During the hearing on the merits of February 6-14, 2006, the parties agreed to discontinue the proceedings concerning the Tax Claims.

79. On February 15, 2006, at the end of the hearing on the merits, after having heard the position of the parties, the Tribunal issued a Procedural Order on Discontinuance of the Stamp Tax Claims embodying the parties' agreement on the discontinuance, without prejudice to the merits of the proceeding of the stamp Tax Claims.

80. The Procedural Order decides as follows:

> *[…] the Tribunal has taken note of the parties'* Agreement on the Discontinuance of the Treatment of Certain Claims *of February 3, 2006, accompanied by the parties during the hearing. In light of this agreement, the Tax Claims described in Chapter VI, Section F of the Claimants' Consolidated Memorial on the Merits are discontinued in the terms described in the Agreement. The Award will also take note of this discontinuance in due course.*

81. The Tribunal confirms in this Award the discontinuance of such Stamp Tax Claim in the terms of the Agreement noted.

The regulatory framework of Argentina's Privatization Program

82. Argentina's privatization program began in 1989 and developed gradually through the adoption of its basic governing legal and regulatory framework. One such basic instrument, introduced in 1991, was the Convertibility Law[4] which provided for the convertibility of the Argentine currency and, by means of its implementing Decree

[4] Law 23.928 of 1991 also known as the Convertibility Law.

(Decree 2128/91), fixed the Argentine peso at par with the United States dollar. Various other measures were directed at opening the economy to foreign trade and investment.

83. A second set of rules that is relevant specifically to the privatization of the gas industry, with which the present dispute is concerned, was introduced in 1992 by the Gas Law (Law 24.076) and the implementing regulations embodied in the Gas Decree (Decree 1738/92). Under this regulatory framework, gas transportation was separated from distribution and eight companies were established to conduct distribution activities. This dispute concerns the investment of Sempra International ("Sempra") in two companies, Sodigas Pampeana S. A. ("Sodigas Pampeana") and Sodigas Sur S. A. ("Sodigas Sur"), which in turn are the owners of two such distribution companies, Camuzzi Gas Pampeana ("CGP") and Camuzzi Gas del Sur ("CGS"), which obtained licenses as a result of the privatization effort.

84. A third set of rules relevant to this dispute is the Standard Gas Transportation License or "Model Licence" approved by Decree 2255/92. This includes the applicable Basic Rules. An "Information Memorandum" concerning the privatization of Gas del Estado, the former State-owned transportation and distribution company, together with a "Pliego" explaining the bidding rules and the pertinent legal and contractual arrangements, were provided to prospective investors in order to organize the bidding process. The parties dispute the legal significance of these information materials.

85. The Claimant explains that in making the decision to invest in CGS and CGP, it relied specifically on the conditions offered by these various legislative and regulatory enactments. The Claimant asserts that these conditions included: (i) a license for a term of 35 years, with a possible 10-year extension; (ii) the calculation of tariffs in U.S. dollars and their semiannual adjustment according to changes in the U.S. Producer Price Index ("PPI"); (iii) a commitment that there would be no price freeze applicable to the tariff system and, if one was imposed, that the licensee had a right to compensation; (iv) the commitment that the license would not be amended by the Government, in full or in part, except with the prior consent of the licensee; (v) a commitment not to withdraw the license except in case of specific breaches listed; and (vi) the principle of indifference in respect of subsidies granted by the Government so that the distributor's income would not be altered.

86. The Claimant maintains that all of the above were in turn related to the setting of gas tariffs at a level that would ensure that operators received revenues sufficient to cover all reasonable costs, taxes and depreciation, as well as a reasonable profit. In this context, the Claimant asserts, the Government of Argentina made additional representations concerning the immediate and automatic adjustment of tariffs in case the parity between the dollar and the peso experienced a variation, the use of the New York exchange rate for adjustments, and the passing through to consumers of all cost variations resulting from changes in tax provisions. It is further argued that these rights resulted in an allocation of risk with respect to currency fluctuations or devaluation that protected the Licensees from such risks.

87. The Government has a different understanding of the meaning and extent of these various elements of the legal and regulatory framework, as will be discussed further below.

The Claimant's investment in CGP and CGS

88. The Claimant explains that it indirectly owns 43.09% of the shares of Sodigas Sur and Sodigas Pampeana, which in turn, respectively, own 90% and 86.09% of the distribution licensees CGS and CGP. The investment began in April 1996 when the Claimant acquired a 12.5% interest in Sodigas Pampeana and Sodigas Sur from Citicorp Equity Investment for the amount of U.S. $ 48.5 million.

89. This participation was increased in March 1998 when the Claimant acquired an additional 9% interest in the Licensees from the Argentine company Loma Negra for an amount of U.S. $ 42.4 million, thus totalling an interest of 21.545%.

90. Ownership was further increased in October 2000 when the Claimant acquired shares in the Licensees for U.S. $ 159.4 million from Consolidated Natural Gas, thus doubling its participation to a total of 43.09%. Also in October 2000 Sodigas Pampeana acquired in auction from the Government of Argentina an additional 6.35% interest in CGP, totalling a 77.21% interest. On October 11, 2000, Camuzzi Argentina transferred

to Sodigas Pampeana an 8.88% direct interest in CGP, which increased Sodigas Pampeana's interest in CGP to the current 86.09%.

91. The Claimant also made in July 1999 a pro-rata share equity contribution of U.S. $ 32.3 million which was used to pay existing Sodigas Mid-Term Notes.

92. The Claimant asserts that its total investment amounts to U.S. $ 350 million, corresponding to U.S.$114 million for Sodigas Sur, U.S.$180 million for Sodigas Pampeana and U.S.$56 million loaned by Sempra to CGP and CGS. The Government of Argentina questions the real amount involved in the investment and its actual dates, a matter that the Tribunal will consider to the extent relevant in the context of valuation.

The measures complained of

93. The Claimant argues that a number of measures adopted by the Government of Argentina in the period 2000-2002 and thereafter have resulted in the permanent abrogation and repudiation of most of the rights it had under the regulatory framework and the License, and that these rights will not be restored. The Claimant asserts that this is particularly so in the case of the measures prohibiting PPI adjustments of tariffs, the derogation of the calculation of tariffs in U.S. dollars, the unilateral modification of the License by the Government without payment of compensation, and the failure to reimburse subsidies owed.

The legal claims

94. The Claimant's main argument in this case is that the various measures complained of have been adopted and implemented in violation of specific commitments made to the investors, and of the contractual obligations which the Government undertook under the Licenses, all in a manner contrary to the applicable legal and regulatory framework and the specific guarantees provided under the Argentina-U.S. bilateral investment treaty. All such commitments and guarantees were determinative of the decision to invest in CGS and CGP, the Claimant further asserts.

95. In the Claimant's view, the wrongful expropriation of the investment has followed from the above abrogation in the forms of direct and indirect, or creeping, expropriation. It is also claimed that fair and equitable treatment and legitimate expectations have been violated, arbitrariness and discrimination have characterized the measures adopted, full protection and security have not been provided to the investor, and the Treaty "umbrella clause" has been breached. It follows, according to the Claimant, that all of the guarantees provided under Article IV of the Treaty have been breached.

The legal defenses

96. The legal defense of the Republic of Argentina is based principally on the arguments that the legal and regulatory framework governing the privatization provided only for the licensees' right to a fair and reasonable tariff, and that the right to the calculation of the tariffs in U.S. dollars was a feature that could last only so long as the Convertibility Law was in force, but not if this law was abandoned.

97. The Respondent also argues that if the investors relied on the information conveyed by private consulting firms, such as that contained in the Information Memorandum, this cannot be attributed to the Government, which has expressly disclaimed any responsibility for such information.

98. In the Government's view, the legal and regulatory framework of Argentina has been strictly enforced through the adoption of the measures in question, and none of it involves a breach of the Licenses or the Treaty. Moreover, the Government maintains that its responsibility is excluded both under its legislation and jurisprudence on emergency, and also by the rules of international law governing the state of necessity, whether customary or contained in the Treaty.

99. The legal claims put forth by the Claimant, and the defenses opposed by the Respondent, will be examined in the necessary detail further below in connection with each of the specific measures complained of, and in the context of the applicable law.

The first claim: PPI adjustment of tariffs

1. The facts of the claim

100. Throughout the 1990s, the tariff system established under the regulatory framework and the License operated relatively smoothly. By the end of that decade, however, the situation began to change as economic, social and political difficulties in the Republic of Argentina became gradually evident. It is in this last context that Government officials met with industry representatives in late 1999 and early 2000 to discuss the suspension of tariff increases. As a result, an agreement was signed on January 10, 2000, postponing for six months the PPI adjustment due on January 1, 2000 and providing for the recovery of the deferred increase with interest for the period from July 1, 2000 to April 30, 2001.[5]

101. This agreement, however, would not last long. Within a few months, the Government had insisted that tariffs be frozen altogether for a two-year period. As a result, a second suspension agreement intervened on July 17, 2000, suspending PPI adjustments from July 1, 2000 through June 30, 2002. It further provided that the differences would be placed in an interesting-bearing stabilization fund, and that tariff increases would resume at the end of the suspension period, including with respect to the recovery of the deficits originating in these arrangements (Decree 669/00). The Government expressly stated in this last decree that investments connected to the privatization process were protected by the legislation in force, and especially by the bilateral investment treaties signed by the Government. It should be noted that while the Government considers the above-mentioned agreements to be the outcome of genuine consent by the Parties, the Claimant asserts that they were pressured by the Government into giving consent, and that the motivation behind these measures was political.

102. Not long after the second agreement was reached, a judicial injunction was requested by the Argentine Ombudsman ("Defensor del Pueblo de la Nación") against

[5] Enargas Resolutions 1472/00 for CGS and 1473/00 for CGP.

Decree 669/00 on the ground that it was both unconstitutional and contrary to Argentine law. The injunction was granted on August 18, 2000, suspending this decree pending a ruling on the legality of the PPI adjustment mechanism. The injunction was appealed by both the Government regulatory agency for the gas sector (ENARGAS) and the Ministry of Economy, on the ground that it would upset the economic balance of the license and alter the system of tariffs established in U.S. dollars and their PPI adjustment. Both appellants described the injunction as "arbitrary" and a "true legal outrage." The appeal was, however, rejected on October 5, 2000.

103. On the basis of this injunction, ENARGAS directed the licensees to suspend all PPI adjustments. It has also rejected all requests for adjustment made since then. This includes the PPI adjustment under the first agreement noted. As a result, no such adjustments have been made since 1999.

2. The Claimant's arguments

104. The Claimant explains that the PPI adjustment was an essential guarantee under Article 41 of the Gas Law that was directed at preventing any erosion of tariffs in U.S. dollars, and at establishing an incentive for attracting long-term dollar financing.

105. In fact, the Claimant argues in this respect that Article 41 of the Gas Decree provided for the adjustment of tariffs "in accordance with a formula based on international market indicators," a guarantee that was confirmed by the Basic Rules which, as explained in the Information Memorandum also invoked by the Claimant, was specifically related to the PPI. The Claimant asserts that it is a vested right and was so recognized under Decree 669/00 noted above in describing this adjustment as a "legitimately acquired right."

3. The Respondent's arguments

106. The Government has a different view about the meaning of this measure. The Respondent explains that the PPI adjustment no longer made sense in 2000 when the Argentine economy entered into recession and deflation, with lower costs and prices, and U.S. inflation became considerably higher than that of Argentina, thus making the PPI an unreasonable mechanism that would only lead to tariff increases at a time when the economy was experiencing serious difficulties and, later, when it ended up in a major crisis. Indexation of tariffs was, the Respondent maintains, meant only to reflect the change in the value of goods and services, as had been expressly envisaged in Article 41 of the Gas Law. This is what in the Respondent's view justifies the need for the agreements made with the licensees, and together with the interests of consumers was also the issue considered by the judge granting the injunction. In any event, it is asserted, the Government in suspending this adjustment was only complying with a binding judicial decision, even if did not agree with its terms.

107. The Respondent also argues in this connection that as the purpose of the PPI adjustment was simply to reflect the evolution of cost changes, it cannot be understood as a guarantee to ensure a given value of tariffs in U.S. dollars. The Respondent takes the view, contrary to that of the Claimant, that the costs envisaged include operational costs which are a part of the concept of fair and reasonable tariffs according to the Gas Law.

108. In any event, it is also maintained by the Respondent that the suspension of the adjustment was first agreed with the licensees and next ordered by the judicial injunction of August 2000. It is also maintained that the fact that the Government appealed the injunction with arguments shared by the Claimant does not mean that the Government should at present ignore the decisions of the Argentine judiciary in dismissing the appeal, in contravention of its duty under the Argentine Constitution and administrative law.

4. Additional discussions about the ENARGAS resolutions

109. The parties have also contested the meaning of the ENARGAS Resolution that ordered the observance of the judicial injunction of August 2000 (Resolution 3480/00). In the Claimant's view, the Resolution went beyond the judicial suspension, which referred only to the adjustments embodied in the second agreement (i.e., those due as from July 1, 2000), and not also to what had been agreed for the first semester in the first agreement. On these bases, the Claimant requested the reconsideration of the ENARGAS Resolution, but this request was denied. The Respondent explains that the Resolution in question established only that the injunction should be observed and the tariffs managed accordingly.

5. The Tribunal's findings on the first claim

110. The Tribunal observes at the outset that it is correct to argue that Article 41 of the Gas Law, while providing for the adjustment of tariffs in accordance with a formula based on international market indicators, also related this formula to the change in value of goods and services. The formula was not defined under the Law, however. This task was left to the Basic Rules of the License, which provided in this respect that tariffs were to be adjusted semi-annually in accordance with the PPI. This was the information also conveyed to investors by the Information Memorandum.

111. The Tribunal is persuaded that the Government shared this understanding at the time and indeed for almost a whole decade. This explains Decree 669/00, which dealt specifically with this mechanism and referred to the adjustment under it as a "legitimately acquired right", thereby expressing an unequivocal recognition of the existence of such a right.

112. It may also be noted that when the Chilean gas carrier *Colbún* pretended to pay in pesos for billings under export contracts on the ground that the PPI had been eliminated, and the case was taken to court, the view taken by ENARGAS and adopted by the Court of Appeals in that case affirmed that U.S. dollar-denominated tariffs and the PPI adjustment remained unaffected in respect of export contracts, and thus that

such a right was quite independent of the question of costs and even of the Convertibility Law, which by that time had been derogated.[6]

113. Even if the Information Memorandum was in fact prepared by private consultants and the Government expressly disclaimed responsibility for it, and even if there had been some error in this respect, what is unlikely in the case of highly prestigious consulting firms engaged by the Government to explain the privatization plan to prospective foreign investors, such errors would have passed unnoticed by competent government officials. Moreover, the Government would in such a situation have been duty-bound to issue a clarification to avoid the engendering of a false legitimate expectation. No such clarification was ever issued. It is thus the Tribunal's conclusion that the licensees had a right to enjoy the PPI adjustment under both the regulatory framework and the License.

114. This is not to deny the Government's sovereign authority to change its mind, as in fact it later did. Its rationale might have been perfectly reasonable in the light of changing economic conditions in the country, a matter which is not for the Tribunal to judge. But even to achieve this end, the Government had other mechanisms available under the License and the regulatory framework, including the quinquennial tariff revision (Revisión Quinquenal de Tarifas or RQT). Mr. Patricio Carlos Perkins, a witness for the Claimant who had important responsibilities during the privatization process and in the preparation of the License, has explained that under "a price cap regime, between every periodic tariff review, tariffs are solely adjusted based on automatic indexes … to assure the regulated company that the value of tariffs remain constant in real terms."[7] One such revision had already taken place ("RQT I") and another was begun to govern the tariffs precisely as from 2002 ("RQT II"), but this latter procedure was never finalized. If the Government decided to take a different route, this cannot be to the detriment of investors' rights.

115. The Tribunal understands the meaning of the ENARGAS Resolution in the context of the related judicial injunction of PPI adjustments and this latter action's

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[6] ENARGAS response and Court of Appeals decision of May 27, 2005 in *Colbún S. A. v. Ente Regulador del Gas*, both as introduced by the Claimant in cross-examination of the Respondent's expert Dr. Gabriel Bouzat.

[7] Additional Witness Statement of Mr. Patricio Carlos Perkins of May 2005, par 23.

object. While the Claimant is right to point out that the injunction did not refer to adjustments relating to the first agreement, it is clear that the injunction in question sought to suspend the increase of tariffs in general. ENARGAS cannot be faulted for having so understood it. It must be kept in mind that the first agreement's undertakings would have also begun to materialize during the second semester of 2000, the period with which the injunction was concerned.

The second claim: "Pesification of tariffs" under the Emergency Law

1. The facts of the claim

116. On January 6, 2002 the Government enacted Law No. 25.561, also known as the "Emergency Law." The essence of the Law's purpose was the elimination of the right to calculate tariffs in U.S. dollars, and the conversion of tariffs to pesos at the fixed rate of exchange of one dollar to one peso. The Law further authorized the Government to devalue the peso, which a few days later was fixed at a new exchange rate of 1.40 pesos per dollar. A month later, this rate was replaced by a floating exchange rate system.

2. The Claimant's arguments

117. The Claimant asserts that of the several tariff-related guarantees mentioned above, the one concerning the calculation of tariffs in U.S. dollars is paramount and was abrogated by the Emergency Law. The Claimant maintains that this guarantee against currency fluctuations was the central and essential protection offered to attract foreign investors to the privatization process. The Claimant further asserts that its claim is unrelated to the issue of devaluation, and is likewise unrelated to questions arising under the Convertibility Law, as the Respondent argues. The Claimant instead bases its claim on the alleged breach of guarantees made available to investors in order to keep them clear of the extreme fluctuations that had historically characterized the Argentine economy.

118. In support of this view, the Claimant invokes in particular Article 41 of the Gas Decree, which provides that "Transportation and Distribution Tariffs shall be calculated in Dollars." Similarly, Article 9.2 of the Basic Rules indicates that the "tariff has been calculated in US dollars." The tariff would then be expressed in pesos at the time of billing. The Claimant further contends that this understanding is confirmed by the minutes of a Privatization Committee meeting held on October 2, 1992, which state in connection with Article 9.2 of the Basic Rules that it "makes sufficiently clear that the tariffs are in dollars and that they are expressed in convertible pesos, and, therefore, in case of an eventual amendment to the Convertibility Law, they should be automatically re-expressed at the modified parity." In the view of the Privatization Committee, this understanding made it unnecessary to include additional rules in the License concerning this guarantee.

119. The Claimant further invokes a number of provisions in confirmation of this understanding, among which is the wording of Annex F of the Pliego, to the effect that tariffs "shall be adjusted immediately and automatically in the event that parity varies," and thus that the "quantity of Argentine currency necessary to acquire a US dollar in the New York market shall be applied."

120. The Claimant also invokes in support of its argument the opinion of several witnesses and legal experts. For example, Mr. Philip Dexter Peacock states in this context that the "assets simply could not be marketed unless tariffs were to be calculated in U. S. dollars," particularly because of the high risk of inflation in Argentina at the time of the privatization, and also due to the experience of the preceding years.[8] Although the Convertibility Law was in force at the time these arrangements were made, it was not in the view of Professor Hector Mairal relevant to the existence of the Licensees' rights to calculate tariffs in US dollars since that law concerned only the question of "peso holders to change their pesos into dollars, but not with the exchange rate between the peso and the dollar"[9] Mr. Perkins's witness statement in this respect will be considered further below.

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[8] Witness Statement of Philip Dexter Peacock of June 21, 2003 Cl. Exh. 7B, paras.14-15.

[9] Second Expert Report of Professor Héctor A. Mairal of September 14, 2005, Cl. Exh 188, para. 34.

121. The Claimant also maintains that while the Government has recognized the difficulties many companies are going through, and on occasion has been willing to authorize small emergency adjustments, these have been systematically blocked by court injunctions. The Tribunal must note in connection with this argument that the licensees in this case have reached in 2007 an agreement with the Government as to certain tariff adjustments which the Tribunal will examine further below. The Bill on National Public Utilities, introduced by the Government in Congress in 2004, has in the Claimant's view also been a cause of concern because, if approved, it would result in the final and complete abandonment of the regulatory system and the conditions governing the licenses. The Claimant also argues that a trusteeship arrangement established for the expansion of the gas transportation network does not benefit the existing licensees despite the inclusion of a tariff adjustment. To the contrary, the Claimant asserts, the new scheme benefits only new investors.

3. The Respondent's arguments

122. The Government attaches an entirely different meaning to the developments outlined above. It first explains that the crisis that erupted in full force in late 2001 has been among the most severe in world economic history, with dramatic consequences in social well-being and increased poverty, deep recession, deflation and unemployment, all of it leading to catastrophic political events and institutional collapse. The Respondent further explains that in this context, the Government had no other option than to enact the Emergency Law and abandon the convertibility regime. The Respondent points out that the pesification of contracts and financial obligations that followed was applied to the Argentine economic system as a whole and did not particularly target foreign investors in utility companies.

123. The Respondent believes that the essential provision governing this issue is embodied in Article 2 of the Gas Law, which provides that tariffs shall be fair and reasonable. This concept is also included in Article 2(6) of the Gas Decree in terms of the obligations which ENARGAS must ensure. The concept of a fair and reasonable tariff is connected, in the view of the Government, to the objectives of covering operating costs, taxes and depreciation, and earning a reasonable income, all within the

framework of an efficient operation providing satisfactory service at the least possible cost and a return similar to other activities of comparable risk.

124. In this context, the Respondent contends that the reference made to the calculation of tariffs in U.S. dollars, and the related PPI adjustment, could only be understood as being inextricably related to the Convertibility Law in that they were established in the normative framework governing the privatization of the gas industry. This is confirmed, the argument follows, by the express reference of Article 41 of the Gas Decree to the fact that tariffs shall be expressed in pesos convertible under the Convertibility Law, and taking into account the parity established in Article 3 of the Regulatory Decree of the Convertibility Law (Decree No. 2.128/91), namely the one-to-one parity between the peso and the dollar. The Respondent finds further confirmation of this link to the Convertibility Law in Article 9.2 of the License, which also referred to Article 3 of the Regulatory Decree of the Convertibility Law and its eventual modifications.

125. The Respondent asserts, moreover, that the mechanism envisaged only the possibility of a modification of the peso-dollar relationship under the Convertibility Law, but not a situation in which the Convertibility Law was altogether abandoned. In the Respondent's view, the modification of the parity under the Convertibility Law is different from the abandonment of the Law. The Respondent believes that in the latter scenario, the calculation of tariffs in U.S. dollars no longer made any sense, and explains that this was also the understanding of the Privatization Committee, which recorded in its minutes of July 17, 1992 that the parity should be adjusted in accordance with the New York market and that "the proposed adjustment is not based on the present exchange rate, but on the convertibility exchange rate." The Committee concluded that "as long as Argentina does not abandon the convertibility regime no adjustment of tariffs shall take place under this concept."[10]

126. The Respondent also reads the above-referenced minutes of the Privatization Committee of October 2, 1992 as expressly conditioning upon the Convertibility Law the adjustment of tariffs in case of modification of the parity. The Respondent argues

[10] Minutes of the Privatization Committee, July 17, 1992, Exhibit 43 to Argentine's counter memorial.

that this is so particularly because the Committee, in concluding that the License offered a sufficient guarantee in this respect, rejected a proposal by Mr. Perkins that would have provided for adjustment in case convertibility was abandoned. The Respondent further maintains that the Gas Decree makes no mention at all of the possibility of the Convertibility Law's abandonment.

127. Although the above-noted Annex F of the Pliego seems to convey a broader conception of tariff adjustment in case of parity modification, the Respondent points out that this Annex was held to be merely descriptive. The Respondent ascribes this same quality to the Information Memorandum, on which the Claimant also relies. The Respondent explains that this latter document is non-binding and was not prepared by the Government, which expressly disclaimed any responsibility for it.[11] It is further observed that in any event the Memorandum was prepared before the regulatory framework was enacted.

4. Discussion of the historical experience

128. The parties' views of this specific claim have also differed significantly in respect of their arguments concerning the historical experience of the privatization of ENTEL, the national telecommunications company. The Respondent asserts that this privatization confirms that the calculation of tariffs in U.S. dollars was inextricably related to the Convertibility Law.

129. ENTEL was privatized under the Law on the Reform of the State, albeit before the Convertibility Law was enacted. Tariffs had originally been set in "Australes," the Argentine currency at the time, and adjusted in accordance with the Consumer Price Index of Argentina (IPC). The Respondent explains that because the Convertibility Law froze tariffs and adjustments in pesos, the parties agreed to express tariffs in U.S. dollars and to adjust them on the basis of PPI variations. This was, however, done without specific reference to the Convertibility Law, unlike in the cases of CGS and CGP. The Respondent finds this evolving framework to be evidence that no exchange rate

[11] Legal Opinion of Mr. Gabriel Bouzat and Mr. Carlos F. Rosenkrantz, Rebuttal Opinion, paras. 20-23 filed with Respondent's Rejoinder. See also Argentina's counter memorial at para. 172-173.

assurance was given. Consequently, in the Respondent's view, the devaluation risk was not eliminated or shifted to the Government, as argued by the Claimant, and the Respondent received no compensation for any such currency risk.[12]

130. The Claimant draws the opposite conclusion about this historical experience. It first explains that even before any changes were made, the ENTEL tariffs included a U.S. dollar component to temper devaluation effects that was automatically triggered if certain ratios were met. The Claimant next maintains that the changes introduced after the Convertibility Law was enacted, were made precisely to ensure that no adverse effects would ensue for the investors, and thus to provide incentives for new investments.

131. The Claimant finds additional confirmation of the lack of relation between the system and the Convertibility Law in the fact that the tariffs calculated in U.S. dollars were to be billed in pesos at the exchange rate applicable at the time of billing. The Claimant also explains that underwriting arrangements made with banks, and the placement of the remaining shares of the telecommunications company in the New York and Buenos Aires markets, resulted in additional benefits to the Government that would not have been possible had the risk of currency fluctuation not been eliminated under the tariff system.

[12] Argentina's counter memorial, p. 65.

5. The discussion about country risk

132. Another issue dividing the parties is whether tariffs were higher because they included a premium for the risk that convertibility might be abandoned at some point in the future. The Respondent equates this "convertibility risk" with country risk or default risk, and argues that if the licensees were guaranteed that U.S. dollar tariffs would be converted to pesos at the prevailing exchange rate, they would be obtaining a double benefit since the tariffs were already set higher to offset this risk.[13]

133. In the Respondent's view, the establishment of the original tariffs took into consideration the debt bonds of the Argentine Republic (Bonex 1989), and resulted in a higher debt cost of 9.50%. RQT I also considered a 6.47% country risk, while RQT II envisaged a figure of 7.40% on this basis, with all of it leading to additional return over the invested capital. The Tribunal is mindful of the fact that RQT I was finalized and implemented while RQT II was in an advanced stage of preparation but did not materialize as a result of the emergency measures. The Respondent concludes from this that the Claimant cannot pretend at one time to charge higher tariffs for a risk, and later, if the risk actually materializes, argue that it should not bear such a risk.

134. The Claimant maintains that such an argument is wrong because country risk relates only to a default on sovereign debt, which is conceptually different from the risk concerning "pesification" and the freezing of tariffs. The latter was, in the Claimant's view, allocated to the Government through the License and the envisaged tariff system, for which the investors, not the Government, paid more for shares benefiting from this guarantee.

6. The Constitutional debate

135. The Respondent asserts on this distinct issue that gas distribution licenses entail a relationship governed by public law, which must take into account not only the interest of the parties concerned but also the public interest. To calculate tariffs in U.S.

[13] Legal Opinion by Experts Mr. Gabriel Bouzat and Mr. Carlos F. Rosenkrantz, Second Legal Opinion, paras. 32-35.

dollars independently of the Convertibility Law would in the Respondent's view be unconstitutional since it would be contrary to reasonableness, the Constitution and the Gas Law. In the view of a witness for the Respondent, were rates to have been denominated in U.S. dollars at a parity different from that of the Convertibility Law, "the exchange risk would have eventually passed on to the users, who are the least prepared to face the financial issues of the utility providers."[14] In any event, the Respondent maintains that it would be contrary to the Argentine legal system to keep tariffs in U.S. dollars in the context of a floating rate system.

136. In the Claimant's opposing view, the basic constitutional principle relevant to the situation is instead the respect of private property. The Claimant contends that this cannot be ignored by the Government after it enacted the rights and guarantees offered to investors pursuant to its own regulatory powers. It is additionally argued that a fundamental principle of the legal system is that if the economic equation of a contract is not respected, the resulting losses must be compensated.

7. Discussion about an incomplete regulatory framework

137. Still one other issue divides the opinion of the parties in connection with the meaning of the tariff system. In the Respondent's view, because the regulatory framework was incomplete and did not foresee what should be done in case the Convertibility Law was abandoned, it falls upon the Government to adapt the licenses to the new situation. The Respondent explains that this was done by means of the pesification of the whole economy, the dollarization of export-related tariffs, and the renegotiation of contracts and licenses.[15]

138. The Respondent maintains that this adaptation is the duty of the Government in respect of a public utility service, and that such regulatory powers are exercised in a discretionary manner, as is accepted practice in economic theory and judicial decisions in both Argentina and other countries, particularly in respect of adaptation necessitated by a major economic crisis. The Respondent also invokes Supreme Court decisions in

[14] Witness Statement of Mr. Cristian Folgar of July 2005, para. 48.
[15] Witness Statement of Mr. Cristian Folgar of July 2005, para. 40 *et seq.*

Argentina to the effect that there is no right to normative stability since no one is entitled to the maintenance of any law or regulation, and that the amendment of norms by other norms cannot be considered as being contrary to a right under the Constitution.

139. The Claimant contends in opposition that the regulatory framework cannot be considered incomplete because all of the assurances given were specifically related to the possibility that the Convertibility Law might be abandoned in the future. The only purpose of the Emergency Law in this context, it is maintained, was to unilaterally change the tariff system and its related aspects. Moreover, the Claimant argues, none of the mechanisms provided under the License to undertake a tariff revision were employed.

140. The Claimant also points out that the Argentine legislation itself provides all necessary guarantees in terms of fundamental safeguards of acquired rights and legitimate expectations, as has been repeatedly held by the Argentine Supreme Court. It is further argued that even the regulatory powers of governments which are recognized in cases of changed circumstances are limited and subject to specific conditions, and do not reach into questions of compensation and financial advantages. Least of all, the argument goes, do they alter the economic balance of the contract. The Claimant further asserts that it was precisely in order to provide for a clear limit to these powers that the Government included in the License the guarantee that it could only be amended with the consent of the parties, and that it could not be terminated except in very specific situations.

8. The Tribunal's findings on the US dollar calculation of tariffs

141. The Tribunal finds that the Claimant's arguments about the existence of a right to the calculation of tariffs in U.S. dollars are persuasive. This conclusion is based first on the examination of the legal and regulatory framework. If the Gas Law, Gas Decree and Basic Rules of the License all unequivocally refer to the calculation of tariffs in U.S. dollars, and if such feature was also explained in the same terms by the Information Memorandum, there cannot be any doubt that this is the central feature governing the tariff regime.

142. Given the emphasis that this regulatory framework placed on the stability of the tariff structure, it is not surprising that the calculation of tariffs in U.S. dollars, as well as the PPI adjustment, were assigned a significant role therein. While the possibility of devaluation intervening at some time was not ignored, it was hardly addressed from the viewpoint of stability being the principal aim or, as will be explained, from that of the problem being corrected by means of the automatic adjustment of tariffs to the new exchange rate level.

143. The Respondent has devoted particular attention to the link which it alleges exists between these clauses and the Convertibility Law. As previously noted, the Respondent believes that if tariffs were set in U.S. dollars independently of the terms of the Convertibility Law, this would result in a situation contrary to the Constitution. Sophisticated investors and their lawyers, it is further asserted, could not have relied solely on the information conveyed by unofficial documents, such as the Information Memorandum or Annex F of the Pliego, which were issued with an express disclaimer of Government responsibility for their content. A legal expert for the Respondent, asked at the hearing whether the Convertibility Law implied assurances in terms of the exchange rate, answered: "No, there were no assurances in terms of the exchange rate."[16] This expert and another also stated in their written opinion that the reply to the question of an exchange rate guarantee must be "firmly negative."[17]

144. The Respondent is correct in pointing out that the Gas Law provides that tariffs calculated in U.S. dollars shall be expressed in pesos convertible under the Convertibility Law, and that reference is made to the need to take into account the parity established under Decree 2128/91, which regulated the convertibility regime.

145. These provisions are not, however, inconsistent with a guarantee as to the calculation of tariffs in U.S. dollars. Convertibility, as the Claimant has argued in reliance upon the above-noted opinion of Professor Mairal, is of a different nature than the matter of a given parity or exchange rate. This is because convertibility relates simply to the right to buy a certain foreign currency with local currency. This view is

[16] Expert Statement of Mr. Gabriel Bouzat, Hearing Transcript, Vol. 4, February 9, 2006, pp. 707-708.

[17] Legal Opinion of Mr. Gabriel Bouzat and Mr. Carlos F. Rosenkrantz, Second Legal Opinion, para. 16.

shared by legal experts for the Respondent.[18] It is the exchange rate that will determine how much local currency you will need to buy a unit of the foreign one. Because the Convertibility regime was aiming at the stabilization of the Argentine economy following a period of galloping inflation and continued devaluation of the currency, it chose to do the two things at the same time. It first confirmed the right to convertibility of the currency, which has remained unaffected. It simultaneously pegged the peso to the U.S. dollar at the one-to-one parity, while also prohibiting indexation in pesos. This fixed parity is the one no longer available following the peso's devaluation and the adoption of a floating rate system.

146. This difference is reflected in the regulatory framework with which the Tribunal is concerned. The Gas Law indeed made a link to the first aspect by referring to pesos convertible under the Convertibility Law. The reference of the License to a given parity established under the convertibility decree was more qualified, however. In fact, Clause 9.2 of the License takes into account the fact that the parity and the ratio could be amended in the future, as it expressly refers to the eventual modifications of convertibility through Decree 2128/91. Further references of the Pliego to the New York market exchange rate must be understood in the same context.

147. The Tribunal must also note that the standing of the Pliego is not extraneous to the investors' understanding. While not an official document, it was reviewed by government agencies, and there appears to have been a shared understanding about its meaning at the time. The witness statement of Mr. Peacock explains that the Pliegos were certainly carefully reviewed by Sindicatura General de Empresas Públicas (SIGEP), the government agency responsible for the surveillance and auditing of State-owned enterprises. He further explains the process of their preparation:

> "Those of us who produced them were schooled in the U.S. system mandated by the Securities Act of 1933, and we undertook the drafting of the representations contained in the Pliegos with the same seriousness as we would have if we had been drafting a '33 Act prospectus. I myself considered that the Argentine Government was bound by the representations it made to prospective purchasers in the Pliegos, and I believe every person involved in the process, including especially the Argentines, believed so too."[19]

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[18] Legal Opinion by Mr. Gabriel Bouzat and Mr. Carlos F. Rosenkrantz, Rebuttal Opinion, para. 54.

[19] Witness Statement of Mr. Philip Dexter Peacock of June 21, 2003, para. 32.

148. In reaching this conclusion, the Tribunal is mindful of the economic context in which convertibility and the ensuing privatization were introduced. Precisely because these measures were preceded by a long period of economic turmoil, investors would not be attracted to participate in the privatization process unless specific assurances were given in respect of the stability of their arrangements. These were the specific guarantees envisaged in the calculation of tariffs in U.S. dollars, their conversion at the time of billing into pesos at the prevailing exchange rate and its PPI adjustment, and other stabilization mechanisms found in the contractual arrangements. Mr. George Michael Morgan, a witness for the Claimant explained that the "assurances that we were given were in the absence of a specific convertibility scheme."[20]

149. The Respondent requested the Tribunal on June 29, 2007 to exclude the witness testimony of Mr. George Michael Morgan on the ground that another prospective witness for the Claimant, Ms. María de los Ángeles Alcolumbre, had brought to the Respondent's attention a complaint that she had been pressured by officials of the Claimant company to provide a witness statement not in accordance with the truth, concerning in particular financial matters relating to this case, and having refused to do so her testimony was replaced by that of Mr. Morgan as her employment was terminated. Ms. Alcolumbre also began judicial proceedings against the Claimant in Argentina on such employment matters. The Claimant explained that Ms. Alcolumbre had been withdrawn as a witness on January 17, 2006, before the hearing, and that her complaints were directed to obtain better compensation after her dismissal. The Claimant also provided explanations on the substance of the financial questions complained of.

150. While the jurisdiction to hear the complaints by Ms. Alcolumbre is with the Argentine courts, this Tribunal has considered the request for excluding the witness statement of Mr. Morgan. The Tribunal does not believe that there is ground to exclude such testimony, first because the allegations against the witness need to be proven, and this again will be done before the courts to the extent related to her dismissal, and next because the issues on which Mr. Morgan has testified are also addressed by other

[20] Testimony of Mr. George Michael Morgan, Hearing Transcript, Vol. 1, February 6, 2006, para. 184.

witness statements and material in the record. Such testimony, while illustrative of the Claimant's view, is thus not determinative of the conclusions of the Tribunal.

151. The distinction drawn by the Respondent between the modification of the convertibility regime and its abandonment is unpersuasive. Guarantees and stabilization are meant to operate specifically when problems arise, not when business continues as usual. The tariff regime approved was devised as a permanent feature of the privatization, not a transitory one. If a temporary duration was actually intended, it should have been clearly indicated to prospective investors. Again, however, nothing of the sort was done. The regulatory and contractual arrangements were thus not incomplete, as has been argued. If such were the case, it would certainly not have passed unnoticed by competent officials, businessmen and lawyers.

152. The Tribunal must observe that the Privatization Committee's discussion of the matter was at times confusing. The Respondent has, as noted above, invoked in its favor the minutes of the Privatization Committee of July 17, 1992, which a few weeks after the enactment of the Gas Law made reference to the adjustment of tariffs, not at the actual exchange rate, but at the convertibility rate. They further stated that unless convertibility was abandoned there should be no adjustments on this basis. The minutes made additional references to the adjustment of parity in the New York market and to an understanding of the Committee to the effect that licensees should be assured of adjustment according to a realistic exchange rate if convertibility was abandoned.

153. While these minutes could be read as allowing for adjustment under the convertibility regime rather than upon its abandonment, a different reading is also possible. In fact, the Committee was discussing two different kinds of adjustment. It first discussed the notion of an automatic adjustment undertaken in accordance with the variation of cost structure expressed in pesos, but this was ruled out since it meant an indexation forbidden under the Convertibility Law. It is in relation to this cost adjustment that reference was made to the convertibility exchange rate. Reference was also made to the view that no adjustments should take place on this basis unless convertibility was abandoned, and if such were the case, a realistic exchange rate should then be found for the adjustment.

154. At the same time, the Committee discussed an adjustment related to the parity and its eventual modifications. This was the one that the regulatory framework and the License eventually included in their terms. This is the kind of adjustment that would follow the New York market exchange rate, and was expressly referred to as the "adjustment for parity." This was what the Committee later addressed in the minutes of October 2, 1992, which were invoked by the Claimant in support of its own view. The Committee was recorded in the minutes as deciding to reject a proposal referring expressly to the abandonment of the convertibility regime, on the ground that Clause 9.2 of the License embodied a sufficient guarantee in connection with the adjustment at the modified exchange rate.

155. The Tribunal also wishes to consider on this point the witness statement of Mr. Perkins who, as previously noted, was a key official in the privatization process and the author of the initiative that the Committee addressed on October 2, 1992. In referring to the approach followed by the Government officials at the time, Mr. Perkins explains that since indexation in pesos was prohibited under the Convertibility Law, assurances of U.S. dollar-denominated tariffs had become crucial to attract potential bidders, but that there were different views as to how to express this criterion. Some officials, like the witness himself, pressed for a clear reference to U.S. dollar tariff rates, while others considered that the reference to the Convertibility Law and its Decrees was sufficiently clear to this effect.[21] In the end, there was a compromise decision reached in the Privatization Committee to denominate tariffs in dollars and express them in local currency at the rate prevailing on the billing date. Mr. Perkins explains this decision as follows:

> "The guarantee that tariffs would be calculated in US Dollars was a matter of significant discussion within the Privatization Committee …. After significant discussion, it was eventually decided that including an express provision for a tariff adjustment in the event of a modification of the dollar-peso parity was redundant in view of the provisions of Section 9.2 of the draft License."[22]

156. The Tribunal would have wished that Mr. Perkins had been examined and cross-examined on this and other aspects of his testimony, and also that questions had been put to him. His participation in the hearing on the merits was, however, regrettably

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[21] Witness Statement of Mr. Patricio Carlos Perkins of June 2, 2003, paras. 288-290.

[22] Additional Witness statement of Mr. Patricio Carlos Perkins of May 2005, para. 16.

prevented by an injunction issued by an Argentine judge on November 24, 2005 at the request of the Government. In the Respondent's view, there had been contractual relations between the Government and Mr. Perkins that made his statement in this and other arbitrations inadmissible. The Tribunal draws no inference from this situation, but did decide that the witness's written statement was admissible and that Mr. Perkins enjoyed and continues to enjoy the immunities provided under Articles 21 and 22 of the ICSID Convention.[23]

157. The Respondent also objected on similar grounds to the statements of Mr. Peacock and the opinions of Professor Mairal, but these challenges did not ultimately prevent their admissibility or presentation before the Tribunal.

158. In the light of the above discussion, the Tribunal cannot conclude that there was an incomplete regulatory framework in respect of this matter, as the Respondent has argued. The Tribunal would reach the same conclusion independently of Mr. Perkins' witness statement. In fact, the dollar-denominated tariff was expressly included in the regulatory regime and the Licenses as an additional safeguard, as described by Mr. Perkins: "In agreeing to the language of Section 9.2 of the License, all involved recognized that the express provision for U.S. Dollar-denominated tariffs was an additional guarantee that would protect the Licensees in the face of an eventual modification of the Convertibility Law and devaluation in the local currency, such as the one that occurred following the Emergency Law in January 2002."[24] This guarantee, in the view of Professor Mairal, is "unconditional and has no limitations to it."[25] Such an allocation of risk is also quite evidently different from the operation of the country risk premium, as will be discussed further below.

159. It has also been explained by another witness that if anyone at the time had expressed the thought that the tariff system was dependent on the continuing existence of the Convertibility Law and the fixed exchange rate,

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23 Letter from the Centre to the parties dated January 16, 2006.

24 Additional Witness statement of Mr. Patricio Carlos Perkins of May 2005, par. 17

25 Expert Statement of Professor Héctor A. Mairal, Hearing Transcript, Vol. 4, February 9, 2006, p. 640; Claimant's Post Hearing brief of April 3, 2006, para. 5.

> "we would have advised that such a contorted construction renders the guarantee useless. The idea that a future Argentine legislature could rescind the guarantee simply by repealing the Convertibility Law makes the guaranty illusory, and the privatization would not have proceeded as it did. Every description of the dollarized tariffs in the privatization documents points to an entirely contrary interpretation."[26]

160. The Tribunal is likewise persuaded by the argument that if the tariff system had not intended to provide for a right to calculate tariffs in U.S. dollars in case of devaluation or currency fluctuation, or ultimately of the abandonment of the Convertibility Law, it would have been futile to resort to such a denomination because a peso-denominated tariff would have accomplished exactly the same result. A further confirmation of this view is found in Article 8 of the Emergency Law, which put an end to the right to U.S. dollar-denominated tariffs. Professor Mairal has explained in this connection that if:

> "Also if the end of convertibility brought about by Law 25.561 would have been enough to end the Licensee rights to dollar-based tariffs, section 8 of Law 25.561 would have been unnecessary. As enacted, said section 8 clearly terminates -as from the date of enactment of the law- a pre-existing right that -had section 8 not been included- would have remained unaffected by the end of the convertibility."[27]

161. In support of its view that the calculation of tariffs in U.S. dollars is inextricably linked to the Convertibility Law, the Respondent, as already noted, has invoked *inter alia* arguments concerning the historical experience surrounding the privatization of ENTEL. The conclusions which the Tribunal draws from that experience are not quite the same as those of the Respondent.

162. To begin with, it is an undisputed fact that because the Convertibility Law froze indexation in pesos and adopted other currency stabilization measures, the terms of the original ENTEL privatization were no longer viable and had to be adapted to the new economic policy. All the changes introduced were done in agreement with the licensee, which makes for an entirely different situation from the present one with the exception of the changes introduced by the 2007 Memoranda of Understanding. The ultimate meaning of a consented agreement was, as argued by the Claimant, to avoid adverse economic consequences for the licensees arising from the changed regulatory measures.

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[26] Additional Witness statement of Mr. Philip Dexter Peacock of September 16, 2005, para.6.

[27] Second Expert Report of Professor Héctor A. Mairal of September 14, 2005, Cl. Exh 188, paras. 37-38.

This is also a proposition that is different from the present one, with the exception indicated.

163. Without prejudice to the Claimant's argument that the original tariff structure included a U.S. dollar component and other stable value references, the fact that the new ENTEL agreement provided for U.S. dollar-calculated tariffs without reference to the Convertibility Law, far from proving that those tariffs were later inseparable from that law, as the Respondent alleges was also the case with the gas tariffs, rather proves the contrary. If tariffs were calculated in U.S. dollars and converted into pesos without reference to the Convertibility Law in the case of ENTEL, this can well be read as a confirmation of the conclusion that the reference to the Convertibility Law in later arrangements was not a guarantee conditioned to a given parity. On the other hand, the fact that ENTEL's tariff was unrelated to the Convertibility Law did not spare this company from the consequences of the Emergency Law and related measures.

164. The Tribunal is no more persuaded by the argument concerning the country risk premium. That such a premium was considered in the tariff structure and RQT I is undisputed. The issue is whether this premium and the guarantee of tariff adjustment in the case of a tariff freeze and pesification are compatible, or whether they should instead be considered as a kind of "double dipping" by the Claimant.

165. The Tribunal concludes in this respect that country risk or default risk is related exclusively to the risk of a given country's default on its foreign debt and, as such, relates to the question of the investment's financial structure. This makes borrowing more costly and is compensated by means of an additional premium. The guarantee concerning the calculation of tariffs in U.S. dollars addresses a different kind of risk and responds to a different rationale since it concerns the level of income and revenues of a company as reflected in the tariff system and its eventual adjustments. While these risks can be to some degree interlinked, for example by country risk increasing if the guarantees concerning the tariff system are altered, they operate independently from each other and are subject to different safeguards.

166. The Tribunal is also mindful of the arguments advanced by the parties in connection with the role of the Constitution in this dispute. The Tribunal will consider

issues arising under the Constitution and the law in connection with this dispute further below. It must at this point be noted, however, that besides the invocation of different Argentine Supreme Court decisions by both parties in support of their respective views, particular attention has been devoted to the *Maruba* case, which was concerned with the issue of a reduction in tariffs for port-towing services.[28] The Respondent invokes this decision to show that there was no entitlement to the original tariff, but only to a reasonable rate of return. The Claimant, meanwhile, distinguishes *Maruba* on the basis that the tariff system was different, was not established by contract, and contained no provisions for its amendment. The Claimant further points out that the Supreme Court held that while the tariff could vary during the concession period, the concessionaire had a right to receive compensation if the new prices altered the economic equation of the concession.

167. The observance of contracts, and the guarantees they embody, cannot be considered inconsistent with a long-standing Constitution such as that of the Argentine Republic. Quite to the contrary, the Argentine Constitution has enshrined the rule of law and guaranteed both the rights enjoyed by citizens and those of others who develop their business in that country. Prominent among these aspects are the right to property and limits placed upon the regulatory powers of the State. The Respondent has rightly noted that licenses and concessions do not depend exclusively on the rules governing private contracts because they have an important administrative component that reflects the nature of a public service. However, neither is this administrative law dimension in any way incompatible with the observance of contracts in the Argentine legal framework. This will be discussed further below.

168. The Tribunal's conclusion in respect of this claim does not mean that it ignores economic reality or the crisis that has recently affected Argentina. It is perfectly possible that economic conditions can change, as they in fact dramatically did. These changes can have a profound effect on the economic balance of contracts and licenses. In this context, the Respondent's argument that the Gas Law was concerned principally with a fair and reasonable tariff is not wrong. The regulatory framework provided for specific adjustment mechanisms, particularly if tariffs ceased to be fair and reasonable.

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[28] *Maruba Empresa de Navegación Marítima c. Ministerio de Obras y Servicios Públicos*, Fallos 321:1784, issued on June 30th, 1998, Argentina's Legal Auth. 17.

These included tariff reviews on a periodic basis and even the possibility of an extraordinary review. The issue then is not whether contracts should remain frozen forever, but whether they can be adjusted to such changing realities in an orderly manner, as is provided under the regulatory framework and the contract itself. Such methods include the negotiated modification of the license, the alternative being that such change will be accomplished by unilateral action of the Government.

169. The real problem underlying the claims is that the latter option was taken unreservedly. Broad as the regulatory authority of States and governments might be at present, it can only be exercised within the confines of the law and when duly taking into account the rights of individuals. It will be seen further below that the Argentine legislation and the decisions of that country's courts have carefully set out the limits of government regulatory power in the light of a long experience of economic crisis and emergency intervention.

The third claim: The breach of the License's stability clauses

170. The Claimant has also argued that the measures adopted by the Respondent resulted in other breaches of the License which concerned some basic guarantees about the stability of this instrument. This claim refers in particular to Clause 9.8, which prohibits the freezing, administration or control of prices, and provides that if prices are lower than the level resulting from the tariff because of controls, the Licensee shall be entitled to compensation for the difference. The claim further refers to Clause 18.2 of the License, under the terms of which the Licensor shall not amend the Basic Rules of the License, in whole or in part, without the written consent of the Licensee.

171. This claim relates to the discussion about the question of contractual rights and the meaning of the umbrella clause under the Treaty, which will be examined further below.

172. There is, however, an argument of the Respondent that the Tribunal must address at this point. The Respondent asserts that the prohibition of Clause 18.2 refers to the License not being modifiable by the Licensor. Since the Licensor is the

Executive Branch of the Government, the Respondent contends that any measures or effects arising from congressional action, such as the Emergency Law, or from judicial decisions, such as the PPI injunction, are not adopted by the Licensor and hence not envisaged in the prohibition on unilateral modification.[29] In support of this view, the Respondent relies on Clause 18.3 of the License, which refers to the event in which a given clause of the license is declared invalid or unenforceable by judicial decision. The Respondent further relies on this clause as establishing that every license clause is valid and enforceable to the fullest extent permitted by the applicable law.

173. There can be no doubt that a judicial decision can declare a given provision invalid, just as a law can alter the operation of a contract. The issue here is different, however. First, the provisions of Clause 18.3 relate to situations in which given individual clauses of a license are affected, and in addressing this question ensure that other provisions of the license will remain unaffected through the principle of "divisibility." It does not, however, envisage derogation from the contract or its abandonment. Second, and more important, the issue here does not concern the powers of the State to adjudicate or legislate. It only concerns the question of whether, if contracts to which the State is a party are affected due to executive, judicial or legislative action, any damage to the other party will have to be compensated under the very provisions of the contract or, in this case, under the Treaty. If contract rights were held at the mercy of the Executive or other branches of the State, the rule of law would be seriously in jeopardy. This view is not quite likely to be accepted in an arbitration that is governed at least in part by international law.

174. The Tribunal must also observe that Clause 18.2 of the License, in prohibiting the License's unilateral modification, makes special reference to the fact that even if an authorized modification under the Service and Tariff Regulations results in a favorable or unfavorable alteration of the existing economic and financial balance, the Licensee will have the right to request a pertinent adjustment of the tariff. It is that economic balance which the whole tariff regime purported to ensure.

[29] Respondent's Rejoinder, paras. 409-415; Respondent's Post Hearing, paras. 36-40.

The fourth claim: Failure to reimburse subsidies

1. The Claimant's arguments

175. The fourth claim before this Tribunal concerns the alleged failure of the Government to reimburse the subsidies set for residential customers in Patagonia. The Claimant explains that these subsidies ranged from 34% to 87% according to the area, and amounted to 54% of the annual income of CGS. The Claimant further explains that subsidies accounted for 38% of the annual revenues of CGS.

176. The Claimant asserts that these subsidies are governed by the "Principle of Indifference" described by Article 48 of Decree 1738/92 as one whereby the distributors' "income is not altered, nor must they bear financial costs, or have their regular flow of money collections … modified for such cause." The Decree also allows for compensation of the reduced income, or increase in financial costs, caused by subsidies during the fiscal year in which they arise.[30] The principle of neutrality has also been explained in the terms that "the Licensee cannot win as a result of the subsidies, nor can he lose money as a result of the subsidies."[31] The Claimant argues in this respect that while the Government has recognized its obligations to reimburse subsidies, it has consistently failed to pay Licensees in a timely manner. Various court injunctions were also issued so as to prevent the companies from charging the full tariff in cases of failure to reimburse the subsidies, as was allowed under Section 20.1 of the License.

177. The Claimant explains that an Agreement reached on December 12, 2001 ("Subsidies Agreement") to regularize the payment of AR$108,151,227.73 (including principal of AR$75,172,807.88 and interest of AR$32,978,419.85) was never approved, and that the schedule of payments was not observed. The Claimant further asserts that a Trust Fund established to compensate the Licensees as from May 2002 (Decree No. 786/02) was not properly implemented since its assets would not be recognized as

[30] Decreto 1738/92 –Apruébase la Reglamentación de la Ley N. 24.076 que regula la actividad de transporte y distribución de gas natural como servicio público nacional, September 18, 1992.
[31] Testimony of Mr. Walter Kunz, Hearing Transcript, Vol. 3, February 8, 2006, pp. 530-531.

separate and intangible, and could accordingly be diverted to other budgetary allocations. The Claimant contends that the Respondent owes subsidies accrued before October 2001, other subsidies accrued in the period October-December 2001, yet other subsidies corresponding to the period January-April 2002, and other payments due under the Trust Fund. Moreover, the Claimant puts forward its view that as subsidies were an integral part of the tariff, and because the tariff was calculated in U.S. dollars, the subsidies owed should be calculated in this last currency before devaluation of the AR peso took place, that is on a one-to-one basis.

2. The Respondent's arguments

178. The Respondent has a different understanding about the role of subsidies in this dispute. It explains that while subsidies were at first paid directly by the Government to the Licensees, since 1994 yearly budget credits have been transferred to the provinces for the payment of such subsidies, and the Trust Fund was established to regularize their payment as from March 2002. Budget transfers to the provinces were temporarily suspended during 2001 when Argentina's budgetary problems became acute, but the Government attempted to regularize even this by means of the Subsidies Agreement already noted. This Agreement was in the Respondent's view never formally approved by the required administrative acts, and hence does not entail any binding obligation.

179. The Respondent further asserts that with the approval of the 2002 budget law (Law 25.565), not only was the Trust Fund established to handle future payments, but specific schedules for the payment in installments of past subsidies owed were also approved to begin in 2003. The 2005 budget included other measures for the regularization of payments for the period October-December 2001. It is also explained that the amendments introduced through the Trust Fund's implementation were aimed at strengthening rather than weakening the availability of funds. The Respondent explains that the end result is that CGS and CGP have received more than AR$330 million in subsidies since December 2001, and that the situation is now entirely normal, to the point that there is at present a claim by CGS before the Ministry of Economy for only

3% in unpaid subsidies.[32] In the Respondent's view, subsidies have been always established in pesos, and so any payment due is to be calculated in that currency and not in U.S. dollars, as is argued by the Claimant.

3. The Tribunal's findings about the subsidies claim

180. The claim about subsidies has two aspects, and the Tribunal will consider each separately. There is first the question of a right to the subsidies, and particularly whether they are established in AR pesos, as argued by the Respondent, or in U.S. dollars, as argued by the Claimant. This question will be examined now. Thereafter, the Tribunal will examine the second question, which concerns the amounts owed, if any, and whether they are being paid or not. This shall be discussed in the context of valuation issues and related matters.

181. There is no doubt that the Claimant is entitled to the payment of subsidies accorded by the Government to residents of some defined provinces. This issue is not questioned by the Respondent. This was the policy followed by ENARGAS from the outset.[33] The regulatory framework allows for the granting of subsidies, and the License guaranteed in Clause 20.2 that if the Licensees were not reimbursed within 15 days, they would be authorized to apply full tariff rates. As noted above, the subsidies are governed by the "principle of indifference" in the light of Article 48 of Decree No. 1738/92. The neutrality of subsidies is explained by Mr. Perkins as meaning that the "financial burden of any subsidies was to be borne solely by the Government."[34]

182. The question left for the Tribunal to decide at this point is whether such subsidies were owed in AR pesos or U.S. dollars. The Claimant has argued that subsidies were an integral part of the tariff, and that as such they are due in U.S. dollars like the tariff itself. The Claimant's witness Mr. Albarracín has explained that the "nature of the subsidy and the tariff are the same … The amounts are calculated in

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[32] Witness Statement of Messrs. Nachon, Vera, Labadie, Kunz, filed with Respondent's Rejoinder, paras. 25-30.

[33] Witness Statement of Mr. Philip Dexter Peacock of June 21, 2003, Cl. Exhibit 7B, para. 28.

[34] Witness Statement of Mr. Patricio Carlos Perkins of June 2, 2003, Exhibit 7A, para. 251.

dollars expressed in pesos."[35] Financial experts for the Claimant have also made the same point in respect of valuation because what matters in their view is the "true value of the money at the moment the obligation was due."[36]

183. The Respondent argues to the contrary that subsidies have always been established, billed and collected in pesos. Asked by the Tribunal how subsidies were in practice collected, witness for the Claimant Mr. Martin Juan Blaquier explained that "the system produces a bill for the customer in pesos, and a sworn statement in pesos that is the first process that goes to ENARGAS."[37] Another witness for the Claimant likewise expressed the view that at the time the Agreement was entered into, "it was in pesos."[38] This view was followed by various demands for clarification at the hearing, the answers to which were none too clear.[39] More explicit yet was a witness for the Respondent, who explained that the subsidy is a result of a budget allocation which by law is set up in pesos, as the "nature of the subsidy is to discount the amount to be paid by the end user … is already set up in pesos."[40]

184. The Tribunal is persuaded by the Respondent's argument that the subsidies were payable in Argentine pesos. To begin with, there is a question concerning the practical operation of the subsidy. Once the tariff was calculated in U.S. dollars at any given point in time, it was expressly provided that it would be converted into pesos for billing purposes. At that time, the tariff departed from its U.S. dollar denomination and became due in pesos. Billing was made in pesos, and sums owed were collected in pesos. The role of the subsidy is that the Government picks up a part of the bill and reimburses the distributor for that part, the other part being paid by the customer. It was never envisaged that the customer should pay the equivalent in U.S. dollars. Neither was it ever envisaged that the Government should do so for its part of the bill. If it were

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35 Testimony of Mr. Santiago Albarracín, Hearing Transcript, Vol. 2, February 7, 2006, pp. 267-268; Claimant's Post Hearing brief of April 3, 2006, para. 19.

36 Expert Statement of Mr. Manuel Abdala, Hearing Transcript, Vol. 5, February 10, 2006, p. 918; Claimant's Post Hearing brief of April 3, 2006, para. 85; LECG Supplemental Report of September 20, 2005, para. 102.

37 Testimony of Mr. Martin Juan Blaquier, Hearing Transcript, Vol. 7, February 13, 2006, pp. 1375-1376.

38 Testimony of Mr. Santiago Albarracín, Hearing Transcript, Vol. 2, February 7, 2006, p. 250.

39 Testimony of Mr. Santiago Albarracín, Hearing Transcript, Vol. 2, February 7, 2006, pp. 250-251, 253-256.

40 Testimony of Mr. Walter Kunz, Hearing Transcript, Vol. 3, February 8, 2006, pp. 507-508.

intended to be otherwise, it would have had to be expressly provided, which was certainly not the case.

185. Even with the subsidies being payable in pesos, there was a clear obligation on the part of the Government to pay them on time. If this was not done within a period of fifteen days, as noted, the License allowed the Claimant to charge the customer the full tariff. This was the natural consequence of the principle of indifference noted above. The Subsidies Agreement made on December 12, 2001 was made in pesos,[41] but it included payment of part of the subsidies owed in U.S. dollars and the option to accept U.S. dollar denominated government bonds since pegging was still in force at the time. Had the Government paid the subsidies when they were due, the value of such payment, even counted in pesos, would have been quite different from the value after devaluation. The Tribunal believes in the light of the License provisions that the Claimant cannot be made to bear the consequences of the Government's fall into arrears. The conclusion that follows is that the value of the pesos owed is necessarily to be established as that at December 2001.

186. The amount owed through October 31, 2001 was established in the Subsidies Agreement of December 12, 2001 (AR$108,151,277.73). Additional amounts for the months of November and December 2001 accrued later, which the Claimant puts at AR$17.3 million, a figure that the Tribunal will correct in view that it also covered the month of September 2001.

187. While both parties have argued, for different purposes, that the Agreement was not ratified by the pertinent administrative act, the Tribunal can only conclude that such an agreement genuinely embodied a firm commitment of both parties. If no necessary follow-up was undertaken, this was most likely the result of the administrative nightmare into which the Government was plunged when the crisis erupted in full strength a few days later. In fact, a witness for the Claimant confirmed in answer to a question from the Tribunal that the Agreement had been signed by company representatives as well as by Ministers Cavallo and Bastos, who "were Ministers at the time in Argentina."[42] In answer to another question from the Tribunal, Counsel for the

41 Testimony of Mr. Walter Kunz, Hearing Transcript, Vol. 3, February 8, 2006, p. 521.

42 Testimony of Mr. Martin Juan Blaquier, Hearing Transcript, Vol. 7, February 13, 2006, p. 1360.

Respondent explained that the pertinent Executive Order of the President, which in the Respondent's view was the necessary administrative act of approval, was apparently not issued because "we are talking about … 10 days before the President was overthrown, so …"[43]

188. In the light of the principle of indifference explained above and the fact that Argentina recognized the amount of subsidies as owing before December 31, 2001, the Tribunal concludes that any amount owed for the period terminating on December 31, 2001, in spite that it might have been expressed in pesos, must be compensated at the parity exchange value which the peso had in December 2001 as otherwise the Claimant would be put at great disadvantage.

The fifth claim: Interference with the collection of bills and related matters

1. The Claimant's arguments

189. On actions taken by the National Ombudsman, federal courts in Argentina issued preliminary measures directing the gas companies and other utilities to reschedule the date for payment of all bills due after December 31, 2001. This is a matter which the Claimant brings to this Tribunal. The Claimant similarly argues that other injunctions prevented the Licensees from interrupting service in case of non-payment of bills, and that these decisions, while later reversed, resulted nonetheless in the prevention of the companies' exercise of a right and led to what the Claimant believes was a judicial encouragement of default.

190. Other complaints brought by the Claimant concern the ENARGAS policy of rejecting requests for suspension of service to sub-distributors in arrears, the imposition by law of employee severance restrictions that resulted in added costs, and the regulatory agency's refusal to allow the passing-through to tariffs of most or any costs associated with the purchase and transportation of natural gas or the payment of easements to surface owners.

[43] Remarks of Mr. Gabriel Bottini, Hearing Transcript, Vol. 7, February 13, 2006, pp. 1366-1367.

2. The Respondent's arguments

191. The Respondent contends that none of these claims has any merit, as court measures rescheduling the due dates of bills were only one-time decisions, limited to a duration of 20 days that caused no damage and led the Supreme Court to reject the Licensees' complaints. Other court injunctions were equally exceptional, the Respondent maintains, as they were later reversed and in any event had arisen in the context of specific lawsuits concerning work stoppage that were soon settled.

192. The Respondent also asserts that the provisions of the Emergency Law prohibiting the lay-off of workers responded to the social and employment conditions produced by the crisis, and were upheld by the Supreme Court. While these measures are still in force, they have not impeded the severance of employees. They have only required the payment of additional compensation, which has been gradually reduced as employment conditions have improved.[44] In the Respondent's view, pass-through costs can only be adjusted under the regulatory framework on the occasion of the periodic five-year tariff review, or else in the light of an extraordinary review, neither of which was the case with the Claimant's applications to ENARGAS. In any event, it is also explained that the economic balance of the licenses has not been altered by these costs. The Respondent additionally argues that the license clauses allowing for the pass-through of costs associated with the use of the public domain are not applicable to easements.

3. The Tribunal's findings

193. Apart from factually explaining the measures taken concerning these matters and their circumstances, the parties have only briefly elaborated on the legal arguments and defenses supporting their respective positions. The Tribunal is nevertheless satisfied that some of the measures taken, such as the extension of the payment deadline or suspensions ordered in connection with a work stoppage, were applied for very limited

[44] Dr. Graciela Vilas' First Legal Opinion, filed with Respondent's Rejoinder, paras. 31-34.

periods of time, related to the circumstances of the moment, and do not entail demonstrable damages beyond or additional to the effects that the crisis had on the Licensees, which will be considered as a whole.

194. The Tribunal is also satisfied that the restrictions concerning the severance of employees apply to the economy as a whole and were not aimed at the Licensees in particular. As the Respondent has explained, these measures did not involve a prohibition on labor lay-offs, but only increased the pertinent compensation to be paid. This obligation has, moreover, been eased as conditions have improved. Here again, whatever the effects these measures had, they are part of the overall impact of the crisis on the business, which will also fall to be considered as a whole.

195. In accordance with the above, the Tribunal does not find merit in such peripheral claims, and will not consider these aspects separately from the Claimant's overall claim for compensation.

196. Questions concerning the passing through to tariffs of certain costs have also been raised in connection with easements. To the extent that there might be damages in connection with this claim, they are equally to be considered in the context of the overall claim for compensation and not as a separate item.

Damages claimed

197. As a consequence of the measures described above, the Claimant alleges that damage was caused to two major areas of its business. It first argues that the Licensees were unable to secure international credit, and that in order to avoid default, the Claimant loaned the Licensees U.S.$56,017,000 by the end of 2001. The Claimant next argues that the Licensees were rendered unable to pay gas producers, and thus made vulnerable to numerous lawsuits for unpaid debt.

198. In its closing statement, the Claimant explains that, including damage to equity value and debt, unpaid subsidies and historical PPI damage, its share of the damages suffered amounts to U.S.$209.3 million. The precise amounts will be considered in the section on Remedies.

199. The Respondent objects to the Claimant's estimates, arguing first that the price originally paid for CGS and CGP was lower than that claimed in the present case, particularly because part of this price was paid in government debt instruments that were valued higher than the market price. The Respondent further contends that the loans made to the Licensees in late 2001 responded to their financial policies, and that the risks which they took cannot be attributed to the Government. Neither, in the Respondent's view, can the decision of the Licensees to take debt abroad in dollars or other currencies be so attributed, given that the Government is not a financial insurer. The Tribunal accepted the Respondent's request for the Claimant to produce a number of financial statements and documents on which its claim is based.

200. The Respondent additionally objected to the expert valuation of the Licensees produced by the Claimant, and requested further information on cash flows. The Respondent also for its part produced expert reports concluding that the Licensees had obtained a reasonable return on their capital, which under one "project finance" methodology is estimated at US$120,000,000 as of 2005. The Respondent particularly objects to the Claimant's argument that there is a principle of international law requiring full compensation to be paid. In the Respondent's view, if any valuation is to be required, this must be done in terms of the stock's value. The Claimant considers this method inappropriate, however, since CGS is not traded on any stock market, and since CGP's very limited stock trading is extremely illiquid and any large sale of its shares would substantially affect the market price.

201. The parties' discussion of the relevant aspects of the technical reports and conclusions will be considered further below in the context of valuation.

Regulatory and financial issues and defenses

202. In addition to the parties' specific arguments in respect of each of the claims explained above, they have also discussed a number of important questions touching on economic and financial matters that are closely related to the regulatory framework governing the investment. These issues and defenses will be examined next, without

prejudice to the pertinent items that will be discussed in connection with valuation issues further below.

1. The valuation date

203. In view of the fact that the Claimant had significantly increased its investment in CGS and CGP in October 2000, after the PPI adjustment injunction had been issued, the Tribunal raised at the hearing on the merits the question of the date which the Claimant was asserting as the relevant one in respect of the alleged expropriation acts. If this date was the day prior to the PPI injunction in August 2000, *i.e.*, August 17, 2000, it raised questions about why the company had decided to increase its investment shortly afterwards, and how this increase should be treated for the purpose of valuation. If, on the other hand, the date was one prior to the enactment of the Emergency Law in January 2002, it raised a different question, namely about whether the injunction was in fact considered an act of expropriation.

204. The Claimant has clarified that it is requesting that the expropriation date be set at December 31, 2001, a few days before the enactment of the Emergency Law. This is because that measure was the one which gave rise to the central claim in this arbitration.[45] In Professor Reisman's view, this choice by the Claimant is entitled to some deference,[46] and the Claimant further argues that such deference was paid by the Tribunal in *CMS*.

205. A witness for the Claimant also stated at the hearing on the merits that the decision to increase the investment in October 2000 was explained by the view at the time that there was no indication on the part of the Government that the investor's rights could be affected, and also by the fact that both the Government and ENARGAS had appealed the injunction.[47] Professor Reisman has likewise explained that the injunction

[45] Claimant's Post-hearing Brief, para. 90.

[46] Expert Statement of Professor W. Michael Reisman, Hearing Transcript, Vol. 6, February 11, 2006, p.1055; see also Opinion of Professor W. Michael Reisman of July 25, 2003, paras 146-157.

[47] Testimony of Mr. George Michael Morgan, Hearing Transcript, Vol. 1, February 6, 2006, pp. 203-205.

could be regarded as a first small step that only with the benefit of hindsight could be seen as an indirect expropriation ultimately leading to the Emergency Law.[48]

206. The Claimant concludes on this basis that the injunction was at first considered a temporary deferral that would be fully compensated in the short-term. The Claimant also contends that even if the Tribunal were to choose August 17, 2000 as the valuation date, this should not affect the treatment of the investment done in October 2000 because, for the reasons already explained, there was no expectation at the time that the suspension would lead to a deprivation of rights and failure of compensation.

207. The Respondent has noted the Claimant's apparent contradiction in alleging expropriation with respect to the injunction of August 2000 and yet increasing the investment a few weeks later. The Respondent has, however, quite naturally not offered a valuation date in this context because in its view there has been no expropriation and no compensation is due.

208. One can be puzzled by the fact that an experienced investor would have taken a decision to increase its equity participation at a time when trouble was around the corner. This decision in fact prompted questions and explanations before the investor's governing board.[49] Yet, considering the fact that both the Government and ENARGAS were fully supporting the rights of the Licensees, as became apparent in the appeals brief when it explained in detail the rights the Licensees had under the regulatory framework and the License, the explanation given by the Claimant is plausible. While the events at the time could give rise to concern, the real warning signals had not yet appeared, and both the Government and the Licensees were confident that the situation could be managed.

209. The Tribunal will accordingly use December 31, 2001 as the proper valuation date. This is not because it believes that the Claimant's argument should be given any deference, but simply because the explanation given shows that there was an investment decision made in good faith. Neither does the Tribunal share the interpretation which

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[48] Expert Statement of Professor W. Michael Reisman, Hearing Transcript, Vol. 6, February 11, 2006, pp.1054-1055.

[49] Testimony of Mr. George Michael Morgan, Hearing Transcript, Vol. 1, February 6, 2006, pp. 204-205.

the Claimant has given to *CMS* with regard to the payment of certain deference in the choice of a valuation date. It is apparent that in *CMS* no acts or decisions taken by the claimant after the injunction raised any doubt about the date which triggered the events complained of.

210. The determination of the Tribunal as to the valuation date has two implications for the Claimant's pleas, one being positive and the other negative. The positive implication is that the investment made in October 2000 must be treated as part of the protected equity affected by the complained-of measures as from the valuation date. The negative implication for such pleas is that it raises questions about the situation of the inter-company loans made in December 2001. This last matter will be discussed next.

2. The inter-company loans

211. It has been noted above that the Claimant is arguing that the investment includes a loan for US$56 million that it made to CGS and CGP in December 2001, for which the Claimant should also be compensated. The Respondent believes that this loan responded to financial decisions made by the Claimant that are not to be attributed to anyone else, and for which the Government is not responsible.

212. The Tribunal must first take into consideration the context in which this loan was made. The Licensees had first obtained international financing by issuing Commercial Paper for six months. This was followed by a Floating Rate Note due in December 1996. When the Note became due, CGS and CGP issued negotiable instruments ("Obligaciones Negociables") under a Medium-Term Note Program that came due in December 2001. The Claimant explains that these instruments were not convertible into shares.

213. When the Licensees attempted to secure financing in order to cancel the notes due in December 2001, they found that it was no longer possible to do so because, as witness Mr. Blaquier explains, "[a]t that time, financial markets were for all purposes

closed to Argentine companies."[50] In order to avoid default, the Claimant made the presently discussed loan as it was felt that, from the investor's point of view, "a default from the Licensees on their bonds would have resulted in a severe negative impact on shareholders' values and, therefore, the decision to lend was a reasonable financial decision."[51]

214. Under the broad definition of investment contained in the Treaty, loans are generally to be considered as a protected investment. The Tribunal has carefully considered whether in the light of the *Joy Mining* case,[52] in which a distinction was drawn between a purely commercial operation and an investment, there could here be a situation in which the loans might, as argued by the Respondent, be considered a commercial operation not different from those normally made by financial institutions, and which would result in the loans not qualifying as a part of the investment. Despite the fact that the commercial papers, notes, bonds and negotiable instruments, as the instruments have been variously described, are not different from any other issuance of obligations, they were still made by a qualifying investor as a substitute for financial obligations previously undertaken in the context of the financing of the same investment. Such loans were in fact part of the investment's continuing financing arrangements, and were interposed at a moment when only the investor was available to make them.

215. While a witness for the Claimant described this operation as one in which "[t]he only contribution that the partners made was an amount to pay the bond that was to mature,"[53] it was a normal business move by the investor in a situation where additional financing was necessary to keep a company out of default. To the extent that the loans were made in connection with a legitimate business purpose, as they in fact were, there is no reason to exclude them from the protected investment.

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[50] Supplemental Witness Statement of Mr. Martin Juan Blaquier, filed with Claimant's Reply Memorial, para. 7.

[51] Supplemental Witness Statement of Mr. George Michael Morgan, filed with Claimants' Reply Memorial, para. 14.

[52] *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award of August 6, 2004.

[53] Testimony of Mr. Martin Juan Blaquier, Hearing Transcript, Vol. 7, February 13, 2006, p. 1362.

216. While the question of the reasonableness of leverage has been discussed at various points in the pleadings, including with respect to the loans made to the Licensees, the issue does not appear to be any different in the presently discussed context. As noted above, the loans were made in substitution for an investment financing scheme that had been ongoing from the beginning, and which had not met with any objection from the regulatory authority. The Tribunal sees no reason why they should not now be considered equally reasonable.

3. Regulated and non-regulated business

217. The parties have also discussed whether the existence of a non-regulated sector of the Licensees' business that was particularly involved in the production and marketing of LPG, ethane and raw gasoline should have any influence on the valuation of the companies, and also on the discussion about whether they benefited from devaluation in view of the improved results of this side of the business.

218. The Tribunal is persuaded that the two sides of the business are entirely separate both legally and financially. This has been the consistent understanding of the Respondent and its regulatory bodies from the outset. The bad results in one area of the business cannot be set off against the good results in the other. Avoidance of cross-subsidization is the right economic principle applied by many companies that have various sectors of activity within their overall business. The success of the non-regulated business should not subsidize the losses of the regulated business, and this is to be the criterion that shall guide the eventual determination of compensation. Furthermore, any such determination shall relate only to the measures adopted in respect of the regulated sector of the business.

219. The Tribunal therefore concludes that the regulated and non-regulated sectors of CGS and CGP are to be kept separate and independent for the purposes of this claim.

4. The issue of renegotiations

220. The Emergency Law directed the Government to begin a renegotiation process for public utility contracts affected by the measures indicated. While the rights of

licensees were expressly safeguarded under the arrangements originally set up for the process, the Government gradually conditioned the right to participate on the abandonment of all claims before local courts or arbitral tribunals. Various bodies in charge of renegotiation have been set up over time, and the deadlines have been regularly extended, with the last extension bringing the deadline to the end of 2007.

221. The renegotiation process has not made much progress in the gas transportation and distribution industry as a whole, but it has advanced in respect of some contracts. One such contract was entered into with a gas provider and was finalized in July 2005 but is still pending legislative and executive approval (i.e., GASBAN).[54] As noted above, two other agreements signed in 2007 involve the Licensees in this claim, although as it will be explained the investor concerned in this claim has challenged the process followed.[55] The process of renegotiation has also been successfully completed in connection with the contracts of gas producers and in some other sectors of the economy.

222. The Claimant explains in this respect that the failure of the renegotiation process as far as its interests are concerned is due partly to the fact that the tariff adjustment proposed by the Government has been well below the minimum required by the industry, and partly to the fact that none of the rights existing under the License would be reestablished and no compensation would be paid for the losses incurred thus far. The Claimant further asserts that it is required to withdraw its legal actions and make the Government whole for any adverse decision.

223. The Government for its part maintains that the renegotiation process is gradually advancing, and that out of 64 contracts subject to renegotiation, 37 agreements have been successfully completed, including those noted in the gas transportation sector.[56] It is further asserted that international claims have been an obstacle to the more expedient

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[54] Witness Statement of Mr. Jorge Gustavo Simeonoff, filed with Respondent's Rejoinder, para.64.

[55] Acta Acuerdo Adecuación del Contrato de Licencia de Distribución de Gas Natural between the Argentine Republic and CGS and CGP, respectively, of April 26, 2007 (Cited as Agreements, Memorandums of Understanding or MOU).

[56] Testimony of Mr. Jorge Gustavo Simeonoff, Hearing Transcript, Vol. 2, February 7, 2006, pp. 279-282, and Witness Statement of Mr. Jorge Gustavo Simeonoff, filed with Respondent's Rejoinder, paras. 64 and 127.

progress of negotiation. According to the Respondent, CGS also participates in various expansion projects, all of which result in benefits to the company.

224. As indicated above, the Respondent signed Memoranda of Understanding on April 26, 2007 with both Licensees concerned in this case, CGS and CGP. Under these agreements a 25% tariff adjustment will take place as from January 1, 2008 for one company and from July 1, 2007 for the other. Neither shall exceed an average tariff increase of 15%. In addition, a 2% increase shall be allocated to infrastructure improvement. The agreements also envisage the suspension and discontinuance of judicial or arbitral claims.

225. On the basis of this development, the Respondent wrote to the Tribunal on June 29, 2007 putting forth the view that the agreements made the claim in this case inadmissible as the Licensees had accepted a new tariff regime and the investor did not have any separate claim of its own. This view was opposed by the Claimant on the argument that it had not accepted the agreements in question and that these bound only Camuzzi, the claimant in a separate proceeding which was also an indirect investor in CGS and CGP. The Claimant also explained that it had initiated legal proceedings against Camuzzi in Argentina for breach of a shareholders agreement.

226. The Tribunal shall not pass judgment on the features of a renegotiation between the Licensees and the Government of Argentina, least between the shareholders, but it is bound to take note that the Licensees agreed to new contractual terms with the Government and that these cover the period running from January 6, 2002 until the end of the License. The Tribunal must also take note of the fact that the Claimant in this case has expressly disavowed its acceptance of the agreements. The issue for the Tribunal is then to decide whether the Claimant is bound by the agreements to which a separate investor has consented. Whether this consent was given in accordance with corporate arrangements and required majorities is something to be decided by the Argentine courts. Yet, the Tribunal must take into consideration the effect of such agreements on the Claimant's interests in the Licensees.

227. After considering this matter and the arguments of the parties, the Tribunal has reached two conclusions. The first is that as the Claimant is still an investor whose

interests are protected by the Treaty, it cannot be bound by an agreement between different entities to the extent that those interests have not been adequately satisfied. The agreements are to this effect *res inter alios acta*. The agreements envisage that corporate majorities involving both majority and minority shareholders are necessary to express the required consent. The interests of the Claimant in its investment in the Licensees are still affected by the measures complained of and it is to be regarded as entitled to pursue his grievances in this arbitration. Consequently, there is no ground to justify a decision of inadmissibility of the claim in this context.

228. The second conclusion is that, in spite of the above holding, the agreements do have consequences for the Claimant in view of the fact that there are objective outcomes that benefit the Licensees to an extent. The first concerns the question of double dipping, in that the agreements envisage an obligation for the parties to them to keep the Respondent free from any adverse implications of compensation that could be obtained by the Claimant in an arbitral or other forum. The second consequence is that objectively the agreements will improve the business of the Licensees and to that extent the Claimant will also benefit as a shareholder. Both consequences will be examined separately, one in the context of the argument of double dipping and the other in the context of valuation.

5. The Trust Fund

229. The Respondent has argued that both the Claimant's participation in the "Agreement for the Expansion of the Andean Line,"[57] to which CGS is a party, and the related establishment of a Trust Fund to expand the gas transportation and distribution system, are further evidence that tariffs are being adjusted to the benefit of the Licensees' operations and business. A separate Trust Fund Agreement concerning the expansion of distribution systems and carriage capacity in Tierra del Fuego has also

[57] Convenio entre la Unidad de renegociación y análisis de contratos de servicios públicos, la Empresa Transportadora de Gas del Sur S.A. y la empresa Camuzzi Gas del Sur S.A., para la ampliación del sistema del gasoducto cordillerano of February 27, 2004, Annex RA 169.

been described as particularly benefiting CGS.[58] The Claimant opposes these assertions.

230. Again, this is not a matter for the Tribunal to consider. Agreements between the parties about matters not involving the Licenses cannot be interpreted as changing any rights or obligations established under the Licenses. At most, such agreements offer insights into the organization of certain aspects of the business after the emergency.

The law applicable to a finding of liability

231. The parties have disagreed about the law applicable to this dispute under Article 42(1) of the Convention. This article provides that the Tribunal "*shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."*

232. The Claimant argues that the parties have chosen the Treaty as the *lex specialis* applicable in this case under the first sentence of this Article. Other rules of international law not inconsistent with the Treaty are, according to the Claimant, likewise applicable in the light of the second sentence of the same Article. These include rules on the interpretation of treaties and customary rules that provide for a minimum standard of treatment for covered investments. The Claimant asserts, moreover, that domestic law is relevant only in the context of factual matters, such as the nature of the assurances made to the investor. In the opinion of a legal expert introduced by the Claimant, such assurances acquired international legal force by virtue of the Treaty, and therefore to "regard Argentine law rather than the *lex specialis* of the BITs … would be to eviscerate the fundamental objectives of the States parties to the BITs."[59]

233. The Respondent for its part believes that Article 42 has an entirely different meaning. In the Respondent's view, domestic law is not confined in scope of

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[58] Testimony of Mr. Cristian Folgar, Hearing Transcript, Vol. 3, February 8, 2006, pp. 581-582.

[59] Expert Opinion of Professor W. Michael Reisman of July 25, 2003, pars 59, 60.

application to factual matters, but also has a substantive role in defining the rights of the investor, particularly where property rights are involved in the dispute. These rights are allegedly not defined by international law, but by the local law to which the investor has voluntarily submitted. In support of this view, the Respondent invokes in particular Clause 18.3 of Annex 1 of the Licenses, which provides that "[e]ach and every provision of this License shall be valid and enforceable to the fullest extent permitted by the applicable law."[60] It is maintained that this law is contained in the Constitution, the Gas Law, the Gas Decree and the License itself. The Respondent also argues that when parties have agreed on a forum-selection clause giving jurisdiction to a domestic court, this choice cannot later be ignored by an international tribunal.

234. The Respondent further explains that this approach does not exclude the application of either the Treaty, for example in defining which investors are covered under its provisions, or general international law, which provides for rules on the treatment of investments. In any event, the Respondent asserts that any finding of international responsibility would require the Claimant to prove that a specific breach of the Treaty has taken place, and that this has not been done in the present case.

235. The parties' discussion concerning Article 42(1) of the Convention appears to be theoretical to some extent since this Article provides for a variety of sources to play simultaneous roles. Indeed, the Respondent is right to argue that domestic law is not confined in scope of application to the determination of factual questions. It indeed has a broader role, as is evident from the pleadings and arguments of the parties to this very case. The License is itself governed by the legal order of the Argentine Republic, and it must be interpreted in its light.[61]

236. So too, the Claimant is right in arguing for the prominent role of international law. In fact, the Treaty, international conventions and customary law have been invoked by the parties in respect of a number of matters. While writers and decisions have on occasion tended to consider domestic law and international law as mutually

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60 Executive Order 2255/92, Exhibit "B", Distribution License, Subexhibit I, Basic Rules.

61 License, Clause 16.1 on governing law.

incompatible in their application, this is far from actually being the case. Both have a role to perform in the resolution of the dispute, as has been recognized.[62]

237. The legal order of the Argentine Republic, in keeping with those of many other modern States, provides for a prominent role to be played by international law under both Articles 27 and 31 of the Constitution. Treaties are recognized as "the supreme law of the Nation." It follows that in case of a conflict between a rule of domestic law and a rule embodied in a treaty, it is international law that will prevail. This is also the solution provided by Article 27 of the Vienna Convention on the Law of Treaties, which establishes that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

238. In examining the Claimant's allegation that Argentina has incurred a liability in consequence of its adopted measures, and the Respondent's defense that no such consequence arises under the law, the Tribunal finds that there is generally no inconsistency between the Argentine law and international law insofar as the basic principles governing the matter are concerned. Problems arise only in respect of some specific issues that will be noted in due course. To the extent that there is any inconsistency between Argentine law and the treaties in force, however, international law will prevail, as is established under both the Argentine Constitution and Article 27 of the Vienna Convention on the Law of Treaties.

239. The parties have given particular attention in their arguments to the meaning in this context of the *Tecmed* decision.[63] The Claimant believes that this award reached the right conclusion, namely that an "Act of State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law …" The Respondent, however, distinguishes that case because under the relevant investment promotion treaty, unlike the Treaty applicable to this case, domestic law has a different role, and also because the *Tecmed*. tribunal considered the relevant Mexican law to determine whether the

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[62] *Wena Hotels Limited v. Arab Republic of Egypt, Ad Hoc* Committee Decision on Application for Annulment of February 5, 2002, 41 *ILM* 933 (2002), at 941; *CMS Gas Transmission Company v. the Argentine Republic*,(ICSID Case No. ARB/01/8), Award of May 12, 2005.

[63] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003.

treatment required had actually been afforded. The Tribunal concludes that the Respondent is right in asserting that the *Tecmed* award relates to an entirely different legal context, and that it does not provide helpful guidance in respect of the present dispute.

240. In accordance with the above considerations, the Tribunal will consider both Argentine law and international law to the extent each is relevant to a determination on liability.

The stability of the License under the Argentine Constitution and contract law

241. The Tribunal concluded above that various rights which the Claimant held under the License have ceased to be observed as a result of the measures complained of. It is now necessary to examine the Argentine law governing contracts in order to determine whether liability exists under the domestic legal order. The Respondent has in this context again raised the objection that to the extent they exist, such rights belong to CGS and CGP as the Licensees, and not to the Claimant. The Tribunal has already decided this question in the Decision on Jurisdiction, however, and shall not discuss it again here.

242. The Tribunal has examined above the aspects of the parties' discussion dealing with the constitutional implications of a right to calculate tariffs in U.S. dollars, and has concluded that there is no inconsistency between such a right and the provisions of the Constitution. The basic principles enshrined by the Argentine Constitution are also pertinent to the discussion on liability. Indeed, Article 17 of the Constitution establishes the basic principle that the "right to property is inviolable and that no inhabitant of the Nation can be deprived of it except by a judicial decision founded in the law." The Constitution further provides at Article 28 that "the principles, guarantees, and rights recognized in the preceding articles shall not be altered by the laws regulating their exercise." Consistent with these provisions, Article 1197 of the Civil Code mandates that contractual rules must be observed as the law between the parties. The stability of rights and contracts is thus clearly a central feature of the applicable domestic law.

243. This is not to say that contractual obligations must never be changed, irrespective of the circumstances. Article 1198 of the Civil Code addresses cases in which extraordinary and unforeseeable events can allow a party to a contract to request its termination for having become excessively onerous. It thereby recognizes the theory of "imprévision" and the seeking of a rebalancing of contractual benefits. *Force majeure* and unjust enrichment are additional mechanisms that allow for the renegotiation and rebalancing of contractual obligations.

244. The Tribunal observes in this context that the award of the Tribunal in *CMS* identified the *Gaz de Bordeaux* decision as the source of the theory of "imprévision" in administrative law,[64] as an expression of the common understanding about general principles of law that are found in most legal systems, particularly those of the civil law tradition.

245. The Respondent's legal experts have concluded in this case that, as a result of the aforementioned jurisprudential developments, the theory of "imprévision" has been incorporated into Argentine law.[65] A legal expert for the Claimant reaches the same conclusion, with the understanding that the theory was accepted in Argentine jurisprudence even before *Gaz de Bordeaux.*[66]

246. It must further be kept in mind that, insofar as the theory of "imprévision" is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation involve the occurrence of an irresistible force, beyond the control of the State, making it materially impossible under the circumstances to perform the obligation. In the commentary to this article, it is stated that "[*f*]*orce majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis."[67]

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64 *CMS Gas Transmission Company v. the Argentine Republic*, ICSID Case N. ARB/01/8, Award of May 12, 2005, para. 224.

65 Legal Opinion of Mr. Gabriel Bouzat and Mr. Carlos F. Rosenkrantz, Second Legal Opinion filed with Respondent's Counter Memorial, paras. 131-132.

66 Expert Statement of Professor Héctor A. Mairal, Hearing Transcript, Vol. 4, February 9, 2006, p. 699.

67 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (ed., Cambridge University Press) (2002), p. 171.

Emergency as a defense under Argentine jurisprudence

247. The Respondent has relied significantly on the argument that, under Argentine law, a state of emergency justifies the legal standing of the measures adopted. The Respondent's view allegedly finds support in the various aforementioned legal concepts allowing for the rebalancing of contracts. The courts of Argentina have on various occasions addressed recurring emergency situations, declared by Congress, by conditioning their legal recognition on very precise terms.[68] This jurisprudential definition acquires particular significance in the light of the fact that, as explained by the legal expert Professor Mairal, the Argentine Constitution does not "expand the powers of Congress in the case of emergencies."[69] The Argentine Supreme Court has for its part held in connection with the Emergency Law presently in force that

> "it is not useless to remind, as the Tribunal has done for long, that restrictions imposed by the State on the normal exercise of patrimonial rights must be reasonable, limited in time, and constitute a remedy and not a mutation in the substance or essence of the right acquired by judicial decision or contract …"[70]

248. It is against this background that the Tribunal must examine the effects of the emergency measures enacted in 2002 on the obligations and commitments defined in the License. The License is of course not an ordinary contract since it involves the operation of a public service under the regulatory authority of the State. Even in this context, however, the licensees enjoy specific rights which are subject to protection under the Constitution, relevant law and the provisions of the contract. As noted above, however strong the regulatory powers of the State might be, they are yet governed by the law and the State's obligation to protect the rights acquired by individuals.

1. First requirement: Temporality

249. The Tribunal can well understand the need to adopt emergency measures in the midst of the major crisis that has been noted. Yet, invocation of an "emergency" is not

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[68] See the jurisprudence cited in *CMS Gas Transmission Company v. the Argentine Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005, footnote 91.

[69] Second Expert Report of Professor Héctor Héctor A. Mairal of September 14, 2005, Cl. Exh 188, para. 63.

[70] Argentine Supreme Court, Judgment in the case "*Provincia de San Luis c. P. E. N. –Ley 25561, Dto. 1570/01 y 214/02 s/ amparo)"*, March 5, 2003.

enough *per se* to exempt these measures from liability in the light of the applicable law. A first question that must be examined in this respect is whether the measures adopted are temporal or permanent in nature. This is a matter on which the parties' views differ. The Respondent has repeatedly emphasized both the temporal nature of the emergency measures and the fact that the Emergency Law expires on a precise date. This ending date has been extended, it is argued, so as to ensure the orderly settlement of complex, outstanding problems. The fact is, however, that the expiry date has been extended year after year, so that the Emergency Law is presently scheduled to end on December 31, 2007. This is the situation that has given rise to the Claimant's argument that the Emergency Law has in reality been turned into a permanent feature of the Argentine economy.

250. The Tribunal finds this to be a rather disquieting situation because in actual fact the crisis is largely over, even if aftershocks might quite naturally still be felt for some time. Experts and tribunals have considered different dates as the ending point of the crisis, ranging from mid-2003[71] to the end of 2004 or even early 2005.[72] A witness for the Respondent states that while the economy started to recover in 2003, "it is only in 2004 when we see a very important recovery,"[73] including an increasing flow of foreign direct investment comparable in level to that of the 1990's.[74]

251. In any event, it is not presently disputed that the crisis is over, and the strong performance of the Argentine economy evidences this conclusion unequivocally. In point of fact, the Argentine Gross Domestic Product grew 35.5% in the period 2003-2006, with an average growth of 8.8%.[75] The continued extension of the emergency legislation would thus not seem to be quite justified by the facts.

252. The requirement of temporality is also not met by the Respondent's policy not to allow for PPI adjustments or the calculation of tariffs in U.S. dollars, on the ground that

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[71] Expert Statement of Professor Sebastian Edwards, Hearing Transcript, Vol. 6, February 11, 2006, p.1160.

[72] *CMS Gas Transmission Company v. the Argentine Republic* (ICSID Case No. ARB/01/8), award of May 12, 2005.

[73] Expert Statement of Mr. Daniel Chudnovsky, Hearing Transcript, Vol. 4, February 9, 2006, p. 771.

[74] Expert Report of Mr. Daniel Chudnovsky, filed with Respondent Rejoinder, para. 34.

[75] Economic Commission for Latin America and the Caribbean, *Statistics Yearbook of Latin America and the Caribbean 2006*, Economic Statistics, Table 2.1.1.1; see also Claimant's Exhibit 338.

there is still an ongoing crisis. When questioned about these issues at the hearing, a witness for the Respondent replied that the answer to PPI adjustment was "no," and that the one to the calculation of tariffs in U.S. dollars was likewise "[n]o. The tariffs resulting from the renegotiation process are in pesos."[76]

2. Second requirement: No essential mutation of rights

253. A second requirement which the courts have imposed for the establishment of the emergency measures' legal validity is that the restrictions imposed must provide a remedy while not also resulting in the mutation of the substance or essence of the rights acquired under a contract. Counsel for the Respondent, however, has advanced an interpretation that appears to be inconsistent with this requirement, namely that the Emergency Law meant "basically the granting of a death certificate" for the calculation of tariffs in U.S. dollars, as the Argentine currency had already been devalued in international markets.[77] So too, a witness for the Respondent stated at the hearing that the Government made the "great mistake … to keep the Convertibility Law in effect as a long-term plan since it should have been a short-term resource to solve a specific problem; namely, serious hyperinflation, serious problems in the eighties and nineties."[78]

254. The decision to do away with this policy, while within the prerogative of the Government, means in reality that the rights granted under the License shall be permanently eliminated, at least insofar as the calculation of tariffs in U.S. dollars and their PPI adjustment are concerned. Licensees might of course accept the terms of a new tariff regime in the context of a renegotiated contract. In such a case, the mutation would be validated by the agreement of the parties. The natural outcome of the operation of "emergency" is not, however, a legal exemption from liability.

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[76] Testimony of Mr. Jorge Gustavo Simeonoff, Hearing Transcript, Vol. 2, February 7, 2006, p. 335.

[77] Respondent's Closing Statement, Hearing Transcript, Vol. 8, February 14, 2006, p. 1497; see also Testimony of Mr. Jorge Gustavo Simeonoff, Hearing Transcript, Vol. 2, February 7, 2006, pp. 335-336; Claimant's Post Hearing brief of April 3, 2006, para. 14.

[78] Testimony of Mr. Eduardo Ratti, Hearing Transcript, Vol. 3, February 8, 2006, pp. 490-491.

3. Third requirement: Reasonableness

255. A third requirement the courts have indicated is that restrictions imposed under the emergency must be reasonable. The discussion concerning the tariff regime which the Tribunal has outlined above reveals profound disagreement between the parties as to what is to be regarded as a just and reasonable tariff. While the Claimant believes that a tariff frozen for nearly seven years and kept unadjusted for nine years cannot in any way be considered reasonable, the Respondent contends that this was the only measure possible in the context of crisis and deflation, and that it is thus eminently reasonable.

256. The Tribunal can only note in this respect that both the Government and the licensees of public services have repeatedly indicated that there is an inescapable need to attend to tariff adjustments and thereby ensure both the continued operation of the companies and the necessary supply of energy and other services. The very emphasis which the Respondent has placed on the question of renegotiation and the Agreements reached with the Licensees as to certain tariff adjustments are further evidence of this recognition. It follows that the prolongation of emergency measures for such a long period without the reestablishment or rebalancing of the License's benefits cannot be regarded as satisfying the legal requirement of reasonableness.

4. Unilateral determinations and adjustment by consent

257. There is still one other aspect of the matter that does not help the Respondent's argument about the consistency of the emergency measures with the domestic legal order. If changes indeed become necessary, they cannot be unilaterally adopted by the Government or its regulators, however competent they may be. This conclusion is supported by the view of a witness for the Respondent, who testified that because the crisis did not entail a merely circumstantial alteration of costs, but rather profound implications for contracts and licenses, "a negotiation between the State and the

concessionaires, not just the mere intervention of regulatory entities, was justified by the crisis."[79]

258. The decision to adjust contracts has either to be taken jointly by the parties, as in a successful renegotiation, or requested from a judge, as is provided for in Article 1198 of the Civil Code. In any event, this decision is subject to judicial control even when the relevant regulatory authority is entailed in a license. It so happens, however, that the domestic judicial control of the emergency decisions has been mostly adverse to the Respondent's claimed justification, as in the *Provincia de San Luis* case noted above.

259. It must also be noted that the licenses have carefully provided for a detailed adjustment mechanism so that tariffs are revised periodically in order to take into account the true conditions of the industry. This shows that the question of an eventual rebalancing of benefits was not ignored. The semi-annual PPI adjustment, an efficiency-related adjustment following the first quinquennial review, and an investment-related adjustment likewise applicable after this review were some of the mechanisms envisaged to reflect the changes in the value of goods and services for the operator. The five-year review was another such mechanism, as was the possibility, provided for by the License, of an extraordinary review to correct tariffs considered to be inadequate, discriminatory or preferential. This review could be initiated either by ENARGAS or the licensees.

260. All such mechanisms could equally have resulted in either an increase or reduction in tariffs. The interests of consumers could also have been addressed and protected by these mechanisms, particularly if the tariffs became unrealistic and excessive in the context of a changed economic environment. Such changes would also have met the Government's obligation under the License not to amend the License without the agreement of the licensees. Yet, the Government chose not to use the alternatives provided under the License, and resorted instead to the unilateral determination reached under the emergency measures. The 2007 Agreements reached by the Government with the Licensees in part seeks to correct this imbalance.

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[79] Witness Statement of Mr. Eduardo Ratti, filed with Respondent's Counter Memorial, Spanish version, para. 31.

261. Even assuming that the implementation of any such mechanism would have taken some time, and that the Government needed to react quickly in confronting an emergency situation, which is a perfectly understandable concern, such measures could have been undertaken pursuant to a limited time schedule while reviews were carried out. It is the Government's unilateral determination, taken outside the appropriate regulatory system, and not the License corrections required, which resulted ultimately in the inconsistency of the measures taken with the domestic legal order.

The stability of licenses under Argentine administrative law

262. The Respondent has correctly argued that a situation involving the regulatory powers of the State and licenses concerning public services cannot be examined only from the point of view of private contracts, but also requires that principles arising from Argentine administrative law and jurisprudence be taken into consideration. This the Tribunal will examine next.

263. On the basis of Articles 14 and 17 of the Constitution, the Argentine Supreme Court has broadly interpreted the meaning of the right to property, so that "every right that has a value recognized as such under the law, whether it originates in private law relations or is born from administrative acts (subjective rights of public or private nature), is comprised within the constitutional concept of property, on the condition that the holder of this right to property has a right of action against anyone attempting to interfere with its use, even if it is the State itself."[80]

264. While it is true that such rights are not absolute, and that in certain circumstances they must yield to the public interest, it is nevertheless true that in such a case the State is obliged to compensate the owner affected or limited in the exercise of its right. This is the very principle embodied in Article 2511 of the Civil Code in respect of expropriation.

[80] *Bustos, Alberto Roque y otros c/ Estado Nacional y otros s/ amparo*, Corte Suprema de Justicia de la Nación, October 26, 2004.

265. The opinions of learned authors equally impose very specific conditions on the operation of the doctrine of the "fait du prince" that is applicable to administrative acts which would alter the contractual relationship to the detriment of the other party. Among such conditions is the requirement that an administrative act be of a general nature and attributable to the public authority, that it would alter the economic balance of the contract, and that it was unforeseeable at the time of the contract's execution. All of these lead to a right to compensation for the affected party.

266. As the expert report of Professor Mairal concludes in this matter, the measures presently in question were adopted by the Respondent's Government, while the Respondent was also a party to the contract with the licensees, and were unforeseeable at the time the Licenses were approved. There is also a direct causal relationship between the act and the damage suffered by the other party, all of it fundamentally altering the economic equation of the contract and thereby leading to the inescapable conclusion that compensation must be paid.[81]

267. The same conclusion is reached by Professor Mairal when examining the attribution of liability in the light of acts that breach the principle of equality in public obligations established under Article 16 of the Argentine Constitution, which would not permit a situation in which the licensees bore the entire cost of measures directed at preventing the sudden increase in gas tariffs.[82]

Liability under Argentine law

268. The Tribunal's inescapable conclusion is that in considering the claims solely from the point of view of the Argentine legislation as the law applicable to the dispute, the obligations and commitments which the Argentine Republic owed in relation to the License were not observed. Whether the question is examined from the point of view of the Constitution, the Civil Code or Argentine administrative law, the conclusion is no different. Liability is the consequence of such a breach, and there is no legal excuse

[81] Expert Statement of Professor Héctor A. Mairal, filed with Claimant's Memorial on the merit, p. 46.

[82] Expert Statement of Professor Héctor A. Mairal, filed with Claimant's Memorial on the merit, p. 47.

under the legislation that could justify the Government's non-compliance since the very conditions set out by the legislation and the decisions of courts have not been met. As will be examined further below, these conclusions are no different from those that could be reached under the Treaty and international law.

269. All the same, the Tribunal bears in mind that there was indeed a major crisis. While these unfortunate events do not in themselves amount to a legal excuse, neither would it be reasonable for the Claimant to believe it remains wholly unaffected by them. The economic balance of the License was clearly affected by the crisis, and just as it is unreasonable for the licensees to bear the entire burden of such a changed reality, neither would it be reasonable for them to believe that nothing has happened in Argentina since the License was approved. This is a point which the Tribunal will duly take into account when considering the compensation that follows upon this finding of liability and how the crisis period shall influence its determination.

The discussion of liability under the Treaty

270. The Tribunal must now examine the question of whether the breach of the License and its regulatory regime, in addition to its meaning under Argentine legislation, also results in a breach of the Treaty guarantees.

1. The claim of expropriation

271. The principal claim made in this arbitration is that the measures adopted since early 2000, and particularly those taken in 2002 pursuant to the Emergency Law, have both directly and indirectly expropriated the Claimant's investment in a manner contrary to the protection granted under Article IV of the Treaty. The Claimant argues that its investment comprises the equity in CGS and CGP, and also the specific contractual rights arising from the License regime. The Claimant maintains that its deprivation is permanent rather than merely ephemeral, and that no prompt, adequate

and effective compensation has been paid. In the Claimant's view, compensation must be paid irrespective of the purpose of the measures taken.[83]

272. The Claimant contends that the effects of the measures taken by the Government have been to significantly reduce the licensees' revenues, withhold owed subsidies, restrict the severance of employees to control costs, permanently repudiate vested legal rights, require the continuing provision of service regardless of unilateral changes made to the regime, subject the licensees to a coerced renegotiation process, and exclude the licensees from tariff adjustments if they seek to enforce their legal rights.

273. The Claimant asserts that the Respondent's measures resulted in the direct expropriation of the rights conferred on it by law and contract, in that all of these rights have been repudiated by the Emergency Law. The Claimant argues that since a claim for direct expropriation was not pleaded or addressed in *CMS*, the fact that in that case it was held that no expropriation had taken place is irrelevant to the resolution of the instant dispute, in which direct expropriation has allegedly occurred. The Claimant further argues that in *CMS* no question of expropriation of vested contractual and legal rights was pleaded. The Claimant invokes in support of its argument an OPIC "Memorandum of Determinations" of August 2, 2005 concerning an insurance claim brought by Enron in a similar dispute with Argentina, and concluding that "[i]nternational arbitral tribunals have recognized that rights under contracts are property subject to expropriation." [84]

274. The Claimant also argues that the measures in question are "tantamount to expropriation," and thus constitute an indirect or creeping expropriation unfolding over time and resulting in a cumulative substantial destruction of the investment's value. This kind of measure, the Claimant asserts, not only pertains to the day-to-day management and control of the investment, as was discussed in *CMS*, but also includes various forms of regulatory action resulting in the abrogation and repudiation of stabilization rights granted in the Licenses, just as the measures resulted in an

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[83] *Compañía del Desarrollo de Santa Elena S. A. v. Republic of Costa Rica*, (ICSID Case No. ARB/96/1), Final Award of February 17, 2000, 15 ICSID Review—FILJ 169 (2000), paras. 71, 72.

[84] OPIC Memorandum of Determinations; Expropriation Claim of Ponderosa Assets, L.P.; Argentina, Contract of Insurance No. D733, August 5, 2005; *Enron Corp. and Ponderosa Assets, L. P. v. Argentine Republic*, (ICSID Case No. ARB/01/3), Award of May 22, 2007, para. 235.

interference with legitimate expectation, the assurances offered to induce the investment, and the capacity for rational decision-making on behalf of the business.

275. The Respondent argues as a preliminary point that the only rights which the Claimant could invoke in the context of expropriation are those relating to its condition as shareholder. The Respondent contends that the Claimant cannot lay claim to contractual or other rights since these pertain exclusively to the licensees.

276. The Respondent opposes the claims of direct and indirect expropriation on the basis of several tests that, in its view, are accepted in arbitral and judicial decisions as well as in the literature on expropriation. It first invokes the test of redistribution, arguing that there has been no transfer of property rights to the benefit of the Government or consumers. The Respondent asserts that there is no expropriation without redistribution.[85] The Respondent further argues that temporary measures, particularly emergency measures, do not qualify as expropriation as they do not entail a permanent deprivation of earnings or corporate rights, and as no such effects can be shown in the present dispute. The Respondent further contends that: (i) a substantial deprivation of fundamental property rights must be established, and that no such deprivation has taken place or been proven in this case; (ii) losses must be significant, and that the Claimant instead continues to benefit from earnings; (iii) the value of the investment would have been further reduced had the measures not been adopted; and (iv) a mere contract violation cannot be turned into a Treaty claim.

277. On the other hand, the Respondent argues that the purpose of the measures is relevant to the determination of an expropriation claim, particularly if such measures are adopted under the police power of the State and are proportional to the requirements of public interest. Moreover, the Respondent maintains, the Treaty does not protect legitimate expectations, but rather only specific rights. The Respondent argues that in this case none of the measures questioned can be assimilated to those deemed in other cases to be inconsistent with the guarantees offered to induce investment, or amounts to a destruction of the capacity for rational decision-making. It is also asserted that a

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[85] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Arbitration Proceeding, Final Award of September 3, 2001, available at <http://ita.law.uvic.ca/documents/LauderAward.pdf>, cited in Respondent's Counter Memorial, para. 330.

legitimate expectation cannot in any event arise from mere road shows or information materials not attributable to the Government.

278. The Tribunal is again grateful to the parties' counsel for having undertaken a detailed explanation of their respective views on the issue of expropriation, and for invoking in support of their arguments a wealth of decisions, scholarly opinions and other authorities that allow the Tribunal to understand the parties' arguments in all their aspects and differences.

279. The first question which the Tribunal must consider is that concerning the protected investment. The parties do not dispute that equity is a protected investment under the Treaty, but they differ on whether the Claimant has other rights, particularly those of a legal or contractual nature. As the Tribunal explained in the Decision on Jurisdiction, the Treaty definition of investment is quite broad, with the equity investment being in this context the vehicle through which a complex business relationship is developed. The investment can also be affected in other ways by the measures in question. This is the case, for example, with the measures affecting the tariff regime envisaged in the License, which is the key factor determining the success or failure of the equity investment in CGS and CGP. The expropriation claim can therefore refer to those elements of the investment that are inextricably linked to the legal and contractual framework that governs the operation of the business.

280. This discussion turns out in any event to be rather academic in view of the Tribunal having been persuaded by the merits of the Respondent's argument on expropriation. The Tribunal does not in fact believe that there can be a direct form of expropriation if at least some essential component of the property right has not been transferred to a different beneficiary, in particular the State. In this case, it can be argued that economic benefits may have to some extent been transferred from the industry to consumers, or from the industry to another industrial sector, and that this will ultimately benefit society and the State as a whole. This does not, however, amount to an effect upon a legal element of the property held, such as title to property.

281. It is quite true, as argued by the Claimant, that interference with contractual rights can in certain circumstances amount to an expropriation. Yet, in the instant case

the Tribunal is not persuaded that such has been the result of the measures taken. In spite of all the difficulties which the Licensees and the investors have experienced, and which have doubtlessly affected rational management,[86] they are still the rightful owners of the companies and their business. No one else has or could lawfully claim any such right. While the noted adverse effects can give rise to compensation, they cannot do so in connection with direct expropriation. The same is true with respect to the breach of stability clauses under the contract which, while potentially resulting in damage, is to be protected against and eventually compensated under a separate Treaty guarantee rather than under the heading of expropriation.

282. It is at this point that the intention to expropriate becomes relevant, and the parties have discussed this matter with clear attention. The Tribunal is persuaded that while many damages can be inflicted unintentionally, and as such will be entitled to compensation if liability is found to exist, a transfer of property and ownership requires positive intent. This is not a question of formality, but rather one of establishing a causal link between the measure in question and the title to property.

283. The question of indirect or creeping expropriation requires a more complex assessment. The Tribunal has no doubt about the fact that such expropriation can arise from many kinds of measures, and that these have to be assessed by their cumulative effects. Yet, in this case, the Tribunal is not convinced that such has happened either.

284. The Respondent has invoked, among other authorities, the list of measures considered in the *Pope & Talbot* case as being tantamount to expropriation. These are, in the Tribunal's view, representative of the legal standard required to make a determination on alleged indirect expropriation. Substantial deprivation results under this list from depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part.[87] The list of

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[86] Witness Statement of Mr. Martin Juan Blaquier of June 30, 2003, Claimant's Exhibit 7E, para. 40.

[87] *Pope & Talbot Inc. v. Government of Canada*, Interim Award of June 26, 2000, para. 100.

measures could be expanded significantly in the light of the findings of many other tribunals, [88] but would still have to meet the standard of having as a result a substantial deprivation of rights.

285. Many of the measures discussed in the instant case have had a very adverse effect on the conduct of the business concerned. This is, however, again a question that the Treaty addresses in the context of other safeguards for protecting the investor. A finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated. This is not the case in the present dispute.

286. The Tribunal must accordingly conclude that the Government did not breach the standard of protection established in Article IV(1) of the Treaty by adopting the measures complained of. This holding is without prejudice to the other findings which the Tribunal will make below in connection with these measures.

287. The question of devaluation has also been discussed by the parties in the context of its influence on a determination of expropriation. Each party has done so particularly in the light of the meaning it respectively attaches to the *Himpurna* case.[89] As the Tribunal has explained above, however, this is not a dispute about devaluation, nor has such been claimed. The dispute is instead about an alleged breach of rights under the regulatory framework and the License. The devaluation discussion thus does not alter the Tribunal's determination about expropriation.

288. Legitimate expectation is also an issue which the parties have discussed, and is subject to protection under broadly conceived treaty standards and international law. This does not mean, however, that this right will operate to make the test for indirect expropriation less stringent.

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[88] Campbell McLachlan, L. Shore and M. Weiniger: International Investment Arbitration. Substantive Principles, 2007, 298-309.

[89] *Himpurna California Energy Ltd. v. Republic of Indonesia*, May 4, 1999.

289. The Respondent has argued that the Government also had many expectations in respect of the investment that were not met or were otherwise frustrated. Apart from the question of investment risk, it is alleged that there was, *inter alia*, the expectation that the investor would bear any losses resulting from its activity, work diligently and in good faith, not claim extraordinary earnings exceeding by far fair and reasonable tariffs, resort to local courts for dispute settlement, dutifully observe contract commitments, and respect the regulatory framework. The Tribunal notes that to the extent that any such issues would be within the Tribunal's jurisdiction to decide, and could have resulted in breaches of the Treaty, the Respondent would be entitled to raise a counterclaim. While this right has been resorted to by Respondent States only to a limited extent in cases submitted to ICSID tribunals, nothing prevents its exercise in the light of Article 46 of the Convention and Rule 40 of the Arbitration Rules. This right was not exercised in the present case.

2. The claim concerning the standard of fair and equitable treatment

290. The Claimant has argued that, in addition to effecting an expropriation, the Respondent has in various ways breached the standard of fair and equitable treatment established under Article II(2)(a) of the Treaty, including by failing to act in good faith, frustrating the Claimant's legitimate expectations, unreasonably interfering with the investor's property rights, violating and repudiating assurances and representations offered to attract foreign investment, altering the legal and business environment upon which the Claimant had relied in making the investment, failing to provide a stable and predictable legal environment, and abusing its rights.

291. The Claimant explains that while this particular standard originates in the obligation of good faith under international law, it has gradually acquired a specific meaning in the light of decisions and treaties, and requires, *inter alia*, a treatment compatible with the expectations of foreign investors,[90] the observance of arrangements

[90] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* , (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, 43 *ILM* 133 (2004), para. 115.

on which the investor has relied in making the investment,[91] and the maintenance of a stable legal and business framework.[92]

292. The Respondent's argument on this point is based on the premise that fair and equitable treatment is a standard indistinguishable from the customary international minimum standard, and that it is not for tribunals to set out its meaning and even less to legislate on the matter. The Respondent asserts that this view is confirmed by the practice of a number of governments, NAFTA and ICSID decisions, and opinions of learned writers.

293. In the Respondent's view, what has been criticized by recent decisions is a kind of conduct that evidences either inconsistency in State action,[93] radical and arbitrary modification of the regulatory framework,[94] or endless normative changes to the detriment of the investor's business as decided in the *OEPC* case cited. None of these, the Respondent's argument follows, is present in the instant case since the measures adopted were eminently reasonable in the light of the economic crisis described above, and of the changes in the economic conditions of the country.

294. The Respondent maintains in particular that devaluation was the result of market decisions, and that the consistent decisions of courts in other crises have reaffirmed the constitutionality of such a measure, most notably in the context of the Great Depression in the U.S. The *Thunderbird v. Mexico* decision[95] has also been invoked by the Respondent in support of its view that the standard of fair and equitable treatment does not include the protection of legitimate expectations, and it is no different from the international minimum standard.[96]

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91 *CME Czech Republic B.V. v. Czech Republic*, Partial Award of September 13, 2001, as published in http://www.investmentclaims.com/decisions/CME-Czech-PartialAward-13Sept2001.pdf, para. 611.

92 *Occidental Exploration and Production Company (OEPC) v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award of July 1, 2004, <http://www.asil.org/ilib/OEPC-Ecuador.pdf >, para. 183.

93 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, (ICSID Case No. ARB/01/7), Award of May 25, 2004, <http://www.asil.org/ilib/MTDvChile.pdf>para. 164.

94 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, 43 *ILM* 133 (2004), para. 154

95 *International Thunderbird Gaming Corporation v. The United Mexican States*, Award of January 26, 2006, http://www.iisd.org/pdf/2006/itn_award.pdf, para. 147.

96 Respondent's Post Hearing Brief, para. 100.

295. Again, counsel for the parties have competently discussed their respective views and arguments in great detail, with particular reference made to the many past and contemporary decisions that have purported to clarify the standard of treatment required under international law generally and bilateral investment treaties in particular.

296. The Tribunal finds the Respondent to be right in arguing that fair and equitable treatment is a standard that is none too clear and precise. This is because international law is itself not too clear or precise as concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development.[97] Not even in the case of rules which appear to have coalesced, such as denial of justice, is there today much certainty.

297. The evolution that has taken place is for the most part the outcome of a case-by-case determination by courts and tribunals, as is evidenced by many investment treaty and NAFTA decisions, including the *Tecmed, OEPC* and *Pope & Talbot* cases cited. This shows that, as with the international minimum standard, there has been a fragmentary and gradual development. However, it has been rightly commented that essentially "the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties."[98] The principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes.[99]

298. The essence of the protection sought was well explained in *Tecmed*, where the tribunal held in the light of the good faith requirement that under international law, the foreign investment must be treated in a manner such that it "will not affect the basic expectations that were taken into account by foreign investor to make the

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[97] Stephen Vasciannie: "The Fair and Equitable Treatment Standard in International Investment Law and Practice," British Yearbook of International Law, (1999), vol. 70, p. 100.

[98] Rudolf Dolzer: "Fair and Equitable Treatment: a Key Standard in Investment Treaties", The International Lawyer, 2005, Vol. 39, No. 1, 87-106, at p. 90

[99] *Ibid*. at 91.

investment."[100] This requirement becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations, as has been established in the jurisprudence that the Claimant has invoked.[101] The recent *Thunderbird* case does not alter at all the meaning of this protection in the context of fair and equitable treatment. This is so first because it reaffirms the relevance of the standard in question, and next, most importantly, because it finally decided the issue with respect to a question arising from a misrepresentation made by the Claimant to the Mexican Government that precisely violated the principle of good faith which is at the heart of the concept of fair and equitable treatment.[102]

299. The Respondent has distinguished a number of recent cases in which the principle of fair and equitable treatment has been upheld, particularly the *Tecmed*, *MTD* and *OEPC* cases. This is correct given that the circumstances of individual cases are almost invariably different. There remains, however, a requirement of good faith that permeates the whole approach to the protection granted under treaties and contracts. Even if the standard were restricted to a question of reasonableness and proportionality not entailing objective liability, as the Respondent argues in the light of *Tecmed*, there are nevertheless expectations arising from promises that must be respected when relied upon by the beneficiary.

300. It follows that it would be wrong to believe that fair and equitable treatment is a kind of peripheral requirement. To the contrary, it ensures that even where there is no clear justification for making a finding of expropriation, as in the present case, there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended. Whether this result is achieved by the application of one or several standards is a determination to be made in the light of the facts of each dispute. What counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty.

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[100] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, para. 154.

[101] *Embassy Limousines & Services v. European Parliament*, [1998] ECR II-4239, para. 8, cited in Claimant's Memorial footnote 708.

[102] Claimant's Post Hearing brief of April 3, 2006, para. 47.

301. It must also be kept in mind that on occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting. In case of doubt, however, judicial prudence and deference to State functions are better served by opting for a determination in the light of the fair and equitable treatment standard. This also explains why the compensation granted to redress the wrong done might not be too different on either side of the line.

302. It might well be that in some circumstances in which the international minimum standard is sufficiently elaborate and clear, the standard of fair and equitable treatment might be equated with it. But in other cases, it might as well be the opposite, so that the fair and equitable treatment standard will be more precise than its customary international law forefathers. On many occasions, the issue will not even be whether the fair and equitable treatment standard is different or more demanding than the customary standard, but only whether it is more specific, less generic and spelled out in a contemporary fashion so that its application is more appropriate to the case under consideration. This does not exclude the possibility that the fair and equitable treatment standard imposed under a treaty can also eventually require a treatment additional to or beyond that of customary law. Such does not appear to be the case with the present dispute, however. The very fact that recent interpretations of investment treaties have purported to change the meaning or extent of the standard only confirms that, those specific instruments aside, the standard is or might be a broader one.

303. The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Where there was business certainty and stability, there is now the opposite.[103] The tariff regime speaks for itself in this respect. A long-term business outlook has been transformed into a day-to-day discussion about what is next to come. The guarantees given are no longer available. The Respondent might be right in distinguishing this case from the situations that recent decisions had in view, but this

[103] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006, available at <http://www.worldbank.org/icsid/cases/pdf/ARB021_LGE-Decision-on-Liability-en.pdf>, paras. 124, 125.

does not mean that the present conditions are consistent with the meaning of the protection granted under the Treaty.

304. Even assuming that the Respondent was guided by the best of intentions, what the Tribunal has no reason to doubt, there has here been an objective breach of the fair and equitable treatment due under the Treaty. The Tribunal thus holds that the standard established by Article II(2)(a) of the Treaty has not been observed, to the detriment of the Claimant's rights.

3. The claim concerning the alleged breach of the umbrella clause

305. The Claimant has also brought to this Tribunal a claim about an alleged breach of the observance of the obligations into which the Respondent entered with regard to the investment in the light of the "umbrella clause" of Article II(2)(c) of the Treaty. This aspect of the claim is built on the premise that the envisaged protection is an expression of the obligation to observe the principle *pacta sunt servanda*. The Claimant cites in this context the view of Judge Higgins to the effect that this principle and its related acquired rights "emphasize the protection that the private party has been given against either a later change of mind by the State or against the exercise of the State's regulatory powers."[104]

306. The Claimant argues that the umbrella clause applies to obligations arising from a contract or from broader undertakings contained in the State's own law, and that the Respondent's measures breached every commitment made in the Gas Law, the Gas Decree and the License. The Claimant makes particular reference to the tariff regime and the Government's commitment not to amend the License without the consent of CGS or CGP, respectively.

307. The Respondent opposes this claim, arguing that under customary law violations of contracts cannot be equated with a treaty breach and consequently do not engage the

[104] R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil des Cours 267, 347 (1982), as cited in Claimants' Consolidated Memorial on the merits, para. 444, footnote. 721.

international responsibility of the State.[105] The Respondent further contends that, as held in *SGS v. Pakistan*, contract claims do not qualify as BIT claims.[106] The Respondent also maintains that the tribunal in *SGS v. Philippines*, while disagreeing with some aspects of the *Pakistan* decision, still held that the umbrella clause comprises only obligations undertaken with respect to a specific investment, and thus that the clause does not extend to ordinary contractual breaches, which must instead be taken to the contract forum.

308. In any event, according to the Respondent, since the commitments were made in respect of the Licensees they cannot be invoked by the Claimant, and the License does not qualify as an investment agreement. The Respondent invokes the *Noble Ventures v. Romania* decision insofar as it would limit the application of the umbrella clause to investment contracts which do not include a license.[107] The Claimant opposes such an interpretation, finding instead that *Noble Ventures* referred to contracts made with regard to an investment.[108] The Award in the *Encana* case[109] has also been invoked by the Respondent as rejecting the view that a Claimant can rely on a contract to which the State and a local corporation in which the Claimant has invested are parties.[110]

309. Various recent decisions have dealt with the meaning and extent of the "umbrella clause", and the mystery surrounding the matter seems to be gradually lessening.[111] The parties are in agreement that a contractual breach does not necessarily

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105 *Noble Ventures, Inc. v. Romania*, (ICSID Case No. ARB/01/11), Award of October 12, 2005, <http://www.investmentclaims.com/decisions/Noble-Ventures-Final-Award.pdf>, para. 53.

106 *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, available at http://www.investmentclaims.com/decisions/SGS-Pakistan-Jurisdiction-6Aug2003.pdf.; see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of July 3, 2002, para. 96.

107 Respondent's Opening Statement, Hearing Transcript, Vol. 1, February 6, 2006, para. 160.

108 Claimant's Post Hearing brief of April 3, 2006, para. 50.

109 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, of February 3, 2006.

110 Respondent's Post Hearing brief, para. 112.

111 *Fedax N.V. v. Venezuela,* (ICSID Case No. ARB/96/3), final award of March 9, 1998, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/01/13), Decision on Jurisdiction of August 6, 2003; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* (ICSID Case No. ARB/02/6), Decision on Jurisdiction of January 29, 2004; *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award of August 6, 2004; *Noble Ventures, Inc. v. Romania*, (ICSID Case No. ARB/01/11), Award of October 12, 2005; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, (ICSID Case No. ARB/02/13), Award of January 31, 2006; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005; *El Paso Energy International Company v. The Argentine Republic*, (ICSID

result in a Treaty breach unless it simultaneously violates a right or obligation protected under the Treaty. The difference between the parties arises rather from the view of one party that no breach of the License has occurred, or that, if the contrary is the case, the License is not an investment agreement made with the Claimant. The other party's view is that the violations of the License are manifest and not ordinary contractual breaches. Instead, they allegedly entail the violation of Treaty rights and obligations, and consequently trigger the operation of the umbrella clause.

310. The Tribunal fully shares the view that ordinary commercial breaches of a contract are not the same as Treaty breaches, as was well explained by the tribunal in *SGS v. Philippines* when distinguishing a contractual dispute over payment from a Treaty dispute. So too, the Tribunal can only agree with the view adopted in *SGS v. Pakistan* that such a distinction is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause. The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.[112]

311. In many cases, it might be difficult to draw this distinction, as not every kind of conduct can be clearly ascribed to one or the other type. The measures discussed before this Tribunal are not, however, mere ordinary contractual breaches of a commercial nature. They are instead the outcome of major legal and regulatory changes introduced by the State, and give expression to a change of policy that is evidently not what was envisaged in the License and legal framework governing the privatization and the investments made in its context. Only the State, and not an ordinary contract party, can decide that such sweeping changes will operate as part of the public function. Contractual breaches made in this context are far from ordinary, and may in themselves be a source of Treaty violations if they affect a right protected under the Treaty.

Case No. ARB/03/15), Decision on Jurisdiction of April 27, 2006; *Enron Corp. and Ponderosa Assets, L. P.v. Argentine Republic,* (ICSID Case ARB/01/3), Award of May 22, 2007, paras. 275-276.

[112] *Impregilo S.p.A. v. Islamic Republic of Pakistan,* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, para. 260.

312. Even if the umbrella clause is considered in the light of the limited understanding provided for it by the *SGS v. Philippines* tribunal, to wit that it extends only to obligations undertaken with respect to a specific investment agreement and its related aspects, the clause applies in this case. Jurisdictional aspects aside, the License is the ultimate expression of a series of complex investment arrangements made with the specific intention of channeling the influx of capital into newly privatized companies. Such a network was required under the law and the regulations, and it is therefore impossible to argue now the separation of the License from the investments made in the resulting process.

313. Specific obligations undertaken not to freeze the tariffs or subject them to price controls, to compensate for any resulting differences if such actions were in fact taken, and not to amend the License without the licensee's consent are among the obligations that typically come under the protection of the umbrella clause. There are other obligations contained in the License and the law that could also eventually fall under the protection of the umbrella clause, such as those concerning detailed aspects of the tariff regime. As some of these relate more closely to the breach of fair and equitable treatment, they have been considered above.

314. The Tribunal accordingly concludes that the breach of the aforementioned obligations undertaken in respect of the investment have resulted in a breach of the protection provided by the umbrella clause of Article II(2)(c).

4. The claim about arbitrariness and discrimination

315. The Claimant asserts that there has also been a breach of Article II(2)(b) of the Treaty because the measures adopted are both arbitrary and discriminatory. The claim of arbitrariness is based on the argument that such measures destroyed the Claimant's rights and reasonable expectations, lacked proportionality, and were in violation of the law. The claim of discrimination for its part relies on the Claimant's view that the measures fell disproportionately on the largely foreign-owned gas sector.

316. The Respondent opposes this claim, asserting that the measures were consistent with the law and aimed at the continuing operation of the companies and the maintenance of their income and earnings, while at the same time being reasonable and proportionate to the purpose sought. In any event, the Respondent maintains, there was no intention to breach the rule of law or affect judicial propriety, with such intent being an element required by numerous judicial and arbitral decisions.

317. Neither has there been any discrimination, the Respondent contends, because the regulated gas sector is very different from other sectors operating in a competitive market, such as banking, and because the entities involved are far from being in a similar or even comparable situation. In the Respondent's view, there cannot be discrimination if actors are treated differently in the light of each individual's or sector's requirements. Least of all has there been any capricious, irrational or absurdly differential treatment of the Claimant, who is not even among those who have suffered the most severe consequences of the measures adopted.

318. After examining the detailed arguments of the parties and their supporting authorities and decisions, the Tribunal remains unpersuaded by the Claimant's view that there is here arbitrariness or discrimination. The measures adopted might have been good or bad, but this is not a matter which is for the Tribunal's to judge. As the Tribunal has already concluded, they were inconsistent with the domestic and Treaty frameworks. They were not, however, arbitrary in that they responded to what the Government believed and understood to be the best response to the unfolding crisis. Irrespective of the question of intent, a finding of arbitrariness requires that some important measure of impropriety be manifest. This is not found in a process which, although far from desirable, is nonetheless not entirely surprising in the context in which it took place.

319. The Tribunal reaches a similar conclusion in respect of the alleged discrimination. There are quite naturally important differences between the various affected sectors, so it is not surprising that different solutions might have been or are being sought for each. It could not be said, however, that any such sector has been particularly singled out either to have applied to it measures harsher than in respect of others, or conversely to be provided with a more beneficial remedy to the detriment of

another. The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities or sectors.

320. The Tribunal accordingly concludes that the Respondent has not breached the duty of protection established under Article II(2)(b) of the Treaty.

5. The claim concerning the alleged failure to give full protection and security

321. Lastly, the Claimant argues that there has been a failure to give full protection and security to its investment, as is required under Article II(2)(a) of the Treaty. The Claimant relies in this regard on the broader interpretation of this requirement made particularly in *CME*, in which the standard was deemed applicable not just to physical security but also to the legal protection of the investment.

322. The Respondent believes differently, arguing first that the standard relates only to physical protection and security, as is evidenced in *AAPL* and *AMT*, in which installations were destroyed. The Respondent next asserts that the support of *CME* does not mean that the Claimant's interpretation of the standard is the one accepted under international law, particularly as it was contemporaneously contradicted by the opposite conclusion in *Lauder*.

323. There is no doubt that historically this particular standard has been developed in the context of physical protection and the security of a company's officials, employees and facilities. The Tribunal cannot exclude as a matter of principle the possibility that there might be cases in which a broader interpretation could be justified. Such situations would, however, no doubt constitute specific exceptions to the operation of the traditional understanding of the principle. If such an exception were justified, then the situation would become difficult to distinguish from that resulting in a breach of fair and equitable treatment, and even from some form of expropriation.

324. In this case, there has been no allegation of a failure to give full protection and security to officials, employees or installations. The general argument made about a possible lack of protection and security in the broader ambit of the legal and political

system has in no way been proven or even adequately developed. The Tribunal accordingly rejects this claim and finds that no breach of Article II(2)(a) of the Treaty has taken place.

The alternative plea of emergency

325. In case the Tribunal found that a breach of the Treaty had taken place, the Government has pleaded in the alternative an exemption from liability in the light of a national emergency or state of necessity under domestic law, general international law and the Treaty, all based on the severity of the crisis that has affected the country since 2000.

326. The Respondent has explained in detail the severity that characterized the crisis affecting the country, which in its view threatened the very existence of the State and its independence. The Respondent asserts in particular that the significant decreases in the Argentine Gross Domestic Product, consumption and investment during the crisis period, together with deflation and the reduction in value of Argentine corporations, resulted in widespread unemployment and poverty, with dramatic consequences for health, nutrition and social policy. Public institutions were also no longer functioning. A witness for the Respondent describes the crisis as "a combination of political, economic, financial, institutional, fiscal circumstances that coalesced."[113]

327. With a view to overcoming such difficulties, there was an urgent need to resort to emergency, described by the Respondent as a severe form of necessity, and which materialized in the 2002 Emergency Law. The Respondent explains in this respect that the Emergency Law was not the cause of the unfolding economic emergency, but rather the normative consequence of a situation that had become manifest in world financial markets. The Respondent maintains that the measures adopted were the remedy recommended by distinguished economists and led to the gradual recovery that is noticeable at present.

[113] Testimony of Mr. Eduardo Ratti, Hearing Transcript, Vol. 3, February 8, 2006, pp. 442-445.

1. Necessity and emergency under the Argentine Constitution

328. The Respondent explains that the Argentine Constitution provides for various kinds of emergency measures, including most prominently those for dealing with economic emergencies such as the one declared by Congress in this case. The Respondent contends that as a public act, such a declaration benefits from a presumption of legality, albeit subject to constitutional control by the judiciary. According to the Respondent, the emergency legislation meets the requirements laid down by judicial decisions to the extent that there exists a state of necessity, the rules are aimed at attending to a public interest, the remedy introduced is proportional to the emergency, and its time frame is reasonable and related to the causes of the emergency. So too, in the view of the Respondent, the measures enacted by the Government when acting on powers delegated by Congress observe the legal requirements of emergency as provided under the Constitution.

329. In the Claimant's view, the Respondent has not demonstrated that the degree of threat required to invoke the defense of necessity has been met, particularly since the existence of the State has not been imperiled as if it faced a military threat. Nor, according to the Claimant, has it been demonstrated that the derogation from the specific guarantees and disputed obligations was justified.

330. The Tribunal has examined above the circumstances of the measures complained of in the context of the Argentine legislation. While there can be no doubt that "emergency" has been continuously invoked and recognized in Argentina, it is precisely for this reason that the courts have been careful in stating the conditions under which emergency may be exercised and legally validated. The case of *Peralta* is well known for having set out the limits of emergency legislation with regard to both the temporal effects of the measures taken and the obligation not to alter the substance of contracts.[114] During the hearing, the *Bourdieu* case was discussed in the context of the recognition that concessions and other contracts with the State entail "ownership rights"

[114] *Peralta v. Estado Nacional*, CSJN 313 Fallos 1513 (1990), cited in the Second Expert Report of Professor Héctor A. Mairal of September 14, 2005, Cl. Exh 188, paras. 91-96.

protected under the Constitution.[115] In the context of the present emergency, the Tribunal is mindful of the specific requirements laid down in *Provincia de San Luis*, and these, as has been concluded above, have not been met by the emergency legislation. It follows that the very constitutional provisions which were subject to judicial control and which led to the definition of those conditions cannot be invoked to preclude a finding of wrongfulness as to the measures adopted if they do not comply with the conditions indicated.

331. The discussion about institutional survival and preservation of the constitutional order has also been related to the provisions of the Inter-American Convention on Human Rights, to which Argentina is a party. At the hearing, Counsel for the Respondent put the following question to a legal expert: "[W]ould Argentina have been compelled because of the Inter-American Convention to maintain its constitutional order towards the end of 2001, 2002, and afterwards?"[116] The answer from Professor Reisman was "[y]es."[117]

332. This debate raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners. Yet, the real issue in the instant case is whether the constitutional order and the survival of the State were imperiled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation. The Tribunal believes that the constitutional order was not on the verge of collapse, as evidenced by, among many examples, the orderly constitutional transition that carried the country through five different Presidencies in a few days' time, followed by elections and the reestablishment of public order. Even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation.

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[115] Examination by Mr. Roberto Aguirre Luzi, Hearing Transcript, Vol. 3, February 8, 2006, pp. 465-466; see also Supreme Court in *Bourdieu v. Municipalidad de la Capital*, 145 Fallos 307, 327(1925), cited in the Second Expert Report of Professor Héctor A. Mairal of September 14, 2005, Cl. Exh 188, para. 62, footnote 38.

[116] Remarks of Mr. Gabriel Bottini, Hearing Transcript, Vol. 6, February 11, 2006, pp. 1021-1022.

[117] Expert Statement of Professor W. Michael Reisman, Hearing Transcript, Vol. 6, February 11, 2006, p. 1022.

2. The plea of state of necessity under customary international law

333. The Respondent maintains in this respect that the concept of "state of necessity" has consolidated itself under international law so as to foreclose any wrongfulness on the part of measures adopted in its context and to exempt the State from international responsibility. The *Neptunus* case and the *Gabcíkovo-Nagymaros* judgment, as well as Article 25 of the International Law Commission's Articles on State Responsibility, are invoked in support of this conclusion.

334. The Respondent argues in particular that it has not contributed to the state of necessity since most of the relevant factors were exogenous, the measures adopted were the only means to safeguard an essential interest against a grave and imminent peril because otherwise the situation would have gone out of control, no essential interest of other States benefiting from the obligation or of the international community as a whole have been seriously impaired, and the Claimant, CGS and CGP have not been treated differently from other investors in this sector.

335. In answering the Claimant's arguments, the Respondent distinguishes the *Himpurna* case from its own situation on the ground that in that case the State company PLN had expressly waived in the contract the possibility of invoking *force majeure* in justification of non–performance, and that the alleged events were not proven. This, in the Respondent's view, explains the tribunal's decision not to admit economic emergency. So too, the Respondent distinguishes *Socobelge*, in which the financial situation of Greece never came to be considered by the Permanent Court of International Justice.

336. The Respondent emphasizes in particular the view of experts that Argentina had no other option than to undertake the pesification of its contractual relations since every other remedy was unviable.[118] Furthermore, as already noted, it is argued that Argentina did not contribute to the situation of necessity because the main difficulties originated in external shocks, including the Asian and Russian crises, devaluation in

[118] First Expert Report of Professor Nouriel Roubini of July 13, 2005, para. 37 *et seq*.

Brazil, and the strengthening of the U.S. dollar. An expert for Argentina concludes that the option of dollarization at the old parity in order to avoid depreciation "was altogether undesirable and most likely unfeasible."[119]

337. Following the *Gould* case, the Respondent concludes that in view of the existence of a state of necessity, any damage caused is not attributable to the State as it originates in "social and economic forces beyond the power of the state to control through the exercise of due diligence."[120] Compensation is thus not due, in the Respondent's view.

338. While the Claimant shares the Respondent's view that Article 25 of the Articles on State Responsibility reflects customary international law in this matter, it believes that the Respondent has not met the requirements for the preclusion of a wrongfulness finding under that Article. Specifically, the Claimant maintains that Argentina has not demonstrated that it was threatened by a grave and imminent peril, that the measures adopted were the only way to safeguard against that peril, that the obligation in question does not exclude the defense of necessity, and that the Government did not contribute to the state of necessity. The Claimant relies upon *Himpurna* and *Socobelge* in support of these assertions.

339. The Claimant emphasizes that, contrary to the Respondent's assertion, the crisis finds its origins in endogenous factors which, in the view of another expert, are almost entirely the result of Argentina's own policy failures,[121] particularly the failure to implement structural reforms in the 1990's to ensure fiscal discipline, labor market flexibility, open foreign trade and the maintenance of the currency board's credibility. The Claimant further argues that options other than pesification were available, and thus that pesification was not the only way to address the crisis. The Claimant also points out that among the options discussed were the structural reforms earlier noted, the agreed restructuring of Argentina's debt, dollarization, and devaluation without pesification.

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[119] Second Expert Report of Professor Nouriel Roubini of November 28, 2005, par 58.

[120] *Gould. Marketing Inc., as succesor to Hoffman Export Corporation v. Ministry of National Defense of Iran*, 3 IRAN-US C.T.R. 147 (AL RA 202), cited in Respondent's Rejoinder, footnote 213.

[121] Expert Report of Professor Sebastian Edwards of September 13, 2005, Claimant's Reply memorial, Exhibit 183, paras. 33-59

The expert explained that such alternative plans have worked in other countries, such as Uruguay.

340. Asked by the Tribunal about the various alternatives available to Argentina in the crisis, the Claimant's expert stated that, in his view, there was still time in 2000 and 2001 to implement the appropriate policies to sustain the currency board, and that this was the first best option. Because this was not done, dollarization was preferable to devaluation in the expert's view, and even in the case of devaluation there was no need to undertake a costly pesification of contracts.[122]

341. The expert opinion of Professor Sebastián Edwards can be summarized as reaching the following main conclusions: (i) Argentina itself primarily caused its economic crisis by making policy mistakes prior to 2001, and also through a series of additional mistakes in 2001; (ii) external shocks played a limited role in the Argentine economic crisis; (iii) the country had a number of options available to it throughout the 1990's, and also during 2000 and 2001; and (iv) even after devaluation, Argentina did not have to pesify.[123]

342. A rebuttal opinion by Professor Nouriel Roubini was introduced by the Respondent in opposition to the Claimant's views and its expert's analysis.[124] Professor Roubini has also explained in other reports that at least some domestic factors contributed to the collapse of the currency board, most notably structural rigidities in the economy, fiscal deficits and debt accumulation. In Professor Roubini's view, however, the crisis was triggered mostly by external shocks.[125]

343. The conclusion which the Claimant reaches is that even in the case of a state of necessity, the preclusion of wrongfulness is established without prejudice to: (i) the requirement of compliance with the obligation concerned if and to the extent that the circumstance precluding wrongfulness no longer exists; and (ii) the question of compensation for any material loss caused by the measures adopted. This is allegedly in

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122 Expert Statement of Professor Sebastian Edwards, Hearing Transcript, Vol. 6, February 11, 2006, pp.1211-1215.

123 Expert Report of Professor Sebastian Edwards of September 13, 2005, Claimant's Reply memorial, Exhibit 183, paras. 129-139.

124 Second Expert Report of Professor Nouriel Roubini of November 28, 2005, para. 11 *et seq*.

125 First Expert Report of Professor Nouriel Roubini of July 13, 2005, paras.16-20.

accordance with Article 27 of the Articles on State Responsibility, as it does not allow for the permanent repudiation of rights or necessary compensation.

344. The Tribunal shares the parties' understanding of Article 25 of the Articles on State Responsibility as reflecting the state of customary international law on the matter. This is not to say that the Articles are a treaty or even themselves a part of customary law. They are simply the learned and systematic expression of the law on state of necessity developed by courts, tribunals and other sources over a long period of time. Article 25 states:

> *1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
>
> > *(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
> >
> > *(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
>
> *2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
>
> > *(a) The international obligation in question excludes the possibility of invoking necessity; or*
> >
> > *(b) The State has contributed to the situation of necessity.*

345. There is no disagreement either about the fact that a state of necessity is a most exceptional remedy that is subject to very strict conditions because otherwise it would open the door to States to elude compliance with any international obligation. Article 25 accordingly begins by cautioning that the state of necessity "may not be invoked" unless such conditions are met. Whether in fact the Respondent's invocation of a state of necessity meets those conditions is the difficult task that the Tribunal must now undertake.

346. The Tribunal has examined with particular attention the recent decision on liability[126] and subsequent award on damages[127] in the *LG&E* case as they have dealt with mostly identical questions concerning emergency and state of necessity. The

[126] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006.

[127] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Award, July 25, 2007.

decision on liability has been contrasted with the finding of the Tribunal in *CMS*.[128] While two arbitrators sitting in the present case were also members of the tribunal in the *CMS* case the matter has been examined anew. This Tribunal must note, first, that in addition to differences in the legal interpretation of the Treaty in this context, an important question that distinguishes the *LG&E* decision on liability from *CMS*, and for that matter also from the recent award in *Enron*,[129] lies in the assessment of the facts. While the *CMS* and *Enron* tribunals have not been persuaded by the severity of the Argentine crisis as a factor capable of triggering the state of necessity, *LG&E* has considered the situation in a different light and justified the invocation of emergency and necessity, albeit for a limited period of time. This Tribunal, however, is not any more persuaded than the *CMS* and *Enron* tribunals about the crisis justifying the operation of emergency and necessity, although it also readily accepts that the changed economic conditions have an influence on the questions of valuation and compensation, as will be examined further below.

347. The first condition which Article 25 sets out is that the act in question must be the only way for the State to safeguard an essential interest against a grave and imminent peril. The Tribunal must accordingly establish whether the Argentine crisis qualified as one affecting an essential interest of the State. The opinions of experts are sharply divided on this issue. They range from those that consider the crisis as having had gargantuan and catastrophic proportions, to those that believe that it was no different from many other contemporary crisis situations around the world.

348. The Tribunal has no doubt that there was a severe crisis, and that in such a context it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, is not convincing. Questions of public order and social unrest could have been handled, as in fact they were, just as questions of political stabilization were handled under the constitutional arrangements in force.

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[128] Mathieu Raux: "La reconnaissance de l'état de nécessité dans la dernière sentence relative au contentieux argentin: LG&E c/Argentine", *Gazette du Palais*, 13-14 Décembre 2006, 56-60.

[129] *Enron Corp. and Ponderosa Assets, L. P. v. Argentine Republic,* (ICSID Case ARB/01/3), Award of May 22, 2007.

349. This issue is in turn connected with the alleged existence of a grave and imminent peril that could threaten the essential interest. While the Government had a duty to prevent a worsening of the situation, and could not simply leave events to follow their own course, there is no convincing evidence that events were actually out of control or had become unmanageable.

350. It is thus quite evident that measures had to be adopted to offset the unfolding crisis, but whether the measures taken under the Emergency Law were the "only way" to achieve this result, and whether no other alternative was available, are questions on which the parties and their experts are profoundly divided, as noted above. A rather sad global comparison of experiences in the handling of economic crises shows that there are always many approaches to addressing and resolving such critical events. It is therefore difficult to justify the position that only one of them was available in the Argentine case.

351. While one or the other party would like the Tribunal to point out which alternative was recommendable, it is not the task of the Tribunal to substitute its view for the Government's choice between economic options. It is instead the Tribunal's duty only to determine whether the choice made was the only one available, and this does not appear to have been the case.

352. Article 25 next requires that the measures in question do not seriously impair the interests of a State or States toward which the obligations exist, or of the international community as a whole. The interest of the international community does not appear to be in any way impaired in this context, as it is an interest of a general kind. That of other States will be discussed below in connection with the Treaty obligations. At that point, it will also be discussed whether the Treaty excludes necessity, this being another condition peremptorily laid down by the Article.

353. A further condition that Article 25 imposes is that the State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity. This is of course the expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault. In spite of the parties' respective claims that the factors precipitating the crisis were either endogenous or exogenous, the truth seems to

be somewhere in the middle, with both kinds of factors having intervened. This mix has in fact come to be generally recognized by experts, officials and international agencies.

354. This means that there has to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore cannot be claimed that the burden falls entirely on exogenous factors. This state of affairs has not been the making of a particular administration, given that it was a problem which had been compounding its effects for a decade. Still, the State must answer for it as a whole.

355. The Tribunal must note in addition that, as held in the *Gabcíkovo-Nagymaros* decision with reference to the work of the International Law Commission, the various conditions discussed above must be cumulatively met. This brings the standard governing the invocation of necessity to a still higher echelon. In the light of the various elements examined above, the Tribunal concludes that the requirements for a state of necessity under customary international law have not been fully met in this case.

3. The plea of necessity under Article IV (3) of the Treaty

356. The Respondent also justifies the invocation of necessity under the terms of Article IV(3) of the Treaty. This Article provides:

> *3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall he accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.*

357. The Respondent, following the holding in *Gabcíkovo-Nagymaros* that the essential interest of the State cannot be reduced to questions of the State's existence, but rather extends to other matters such as a grave danger to ecological preservation,[130] asserts that the fact that human life was endangered in the crisis under discussion justifies *a fortiori* the inclusion of this type of event under the terms of Article IV (3). The Respondent accordingly concludes that the invocation of necessity is not excluded

[130] *Gabcíkovo-Nagymaros Project* (Hungary/Slovakia), International Court of Justice, Judgment of September 25, 1997, para. 53.

by Article IV(3), so that the similar requirement envisaged by Article 25 of the Articles on State Responsibility is also met.

358. The Respondent additionally relies in this regard on the expert report of Dean Anne-Marie Slaughter and Professor William Burke-White, who conclude that the measures adopted by Argentina are fully consistent with the terms of Article IV(3).[131]

359. The Claimant opposes this asserted justification on the ground that Article IV(3), far from reducing Argentina's obligations, adds to them by requiring national treatment and most favored nation treatment of the investors, as compared to the treatment given other companies in the light of the measures adopted to offset any losses. It is also argued that the decisions in *AMT* and *AAPL* upheld the liability of the host State despite situations of war and civil disturbance that were invoked under the provisions of the respectively applicable treaties.

360. In the Claimant's view, Article IV(3) applies only to measures adopted in response to a loss, such as those respecting compensation, and not to the measures that caused the loss. Moreover, the covered measures allegedly cannot apply to economic emergencies, but instead only to "war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events." In any event, the Claimant concludes, this Article does not exempt Argentina from liability and the duty to pay compensation.

361. The Claimant relies upon the expert opinion of Professor José Alvarez in support of its arguments. Professor Alvarez has concluded that the Article in question provides additional assurances to foreign investors and is not "a further exception permitting derogations from the treaty."[132]

362. The Tribunal must note that the only purpose of Article IV (3) is to provide for a minimum level of treatment for foreign investments that suffer losses in the host country by the simultaneous interplay of national and most favored nation treatments,

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131 First Expert Opinion of Dean Slaughter and Professor Burke-White of July 19, 2005, paras. 85-86. See also Respondent's Counter-memorial, paras. 652-653.

132 Expert Opinion of Professor José E. Álvarez, September 12, 2005, para. 75.

and then only in respect of measures which the State "adopts in relation to such losses," *i.e.*, corrective or compensatory measures.

363. While there is no reason to exclude from this Article's scope economic emergency measures taken in circumstances of particular gravity, allowing for such inclusion would still not allow derogation from Treaty rights since the Article refers to a different matter. Even less so can the Article be read as a general escape clause from treaty obligations. It consequently does not result in the exclusion of wrongfulness, liability and eventual compensation. Accordingly, the Tribunal concludes that a state of necessity cannot be justified under this Article pursuant to the terms in which the Respondent has invoked it.

4. The plea of necessity under Article XI of the Treaty

364. The discussion of Article XI of the Treaty has been particularly complex in this proceeding given the richness of the parties' arguments and the wealth of authorities and materials brought to the attention of the Tribunal. The Tribunal is once again grateful to the parties' counsel and to the experts who have written learned opinions. In particular, the Tribunal would like to recognize the contributions of Dean Anne-Marie Slaughter, Professor William Burke-White and Professor José Alvarez in this regard.

365. Article XI of the Treaty reads as follows:

> *This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*

366. The Respondent, relying on the opinion of Dean Slaughter and Professor Burke-White, asserts that public order and national security exceptions have to be interpreted broadly in the context of this Article so as to include considerations of economic security and political stability. Moreover, the Respondent's experts understand this Article to be self-judging insofar as each party will be the sole judge of when the situation requires measures of the kind envisaged by the Article, subject only to a determination of good faith by tribunals that might be called upon to settle a dispute on

this point.[133] In the Respondent's view, the gravity of the crisis that it faced amply justified resorting to such measures, which can only be considered as having been adopted in good faith.

367. The Respondent also explains that in applying this Article, Argentina has been able to maintain public order, protect its essential security interests and recompose with great difficulty its relations with the international economic system, all the while treating foreign investors like any other investor. The expert opinion of Dean Slaughter and Professor Burke-White emphasizes the view that measures can be adopted under Article XI to protect economic security and political stability, as well as classical military security.[134]

368. The Respondent assigns particular significance to the self-judging character of this Article, which the Respondent maintains has been reaffirmed by the interpretation given to the Article by the U.S. in a number of bilateral investment treaties and statements before Congress. The experts for the Respondent assert that "[t]he U.S.-Argentina Bilateral Investment Treaty specifically allows the two states Parties to take measures that would otherwise be inconsistent with their treaty obligations when public order or national security is threatened."[135]

369. The Claimant does not share this understanding, and neither does Professor José Alvarez. It is first argued that Article XI is not self-judging, and that judicial review is not limited to a good-faith determination, but instead has to examine the facts and whether they qualify under the requirements of a state of necessity. It is also maintained that a self-judging clause is an extraordinary exception that has to be clearly stated, as has been done in Article XXI of the GATT and confirmed by the International Court of Justice in the *Nicaragua* case in rejecting an argument of the U.S. similar to the one advanced here by Argentina. The Claimant notes that while such a clause has been expressly included in some bilateral investment treaties, most notably the U.S.-Russia BIT Protocol, nothing of the sort was done in the Treaty applicable here.

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[133] Expert Opinion of Dean Anne-Marie Slaughter and Professor William Burke-White of July 19, 2005, paras. 43-46.

[134] Expert Opinion of Dean Anne-Marie Slaughter and Professor William Burke-White of July 19, 2005, paras. 47-55.

[135] Expert Opinion of Dean Anne-Marie Slaughter and Professor William Burke-White of July 19, 2005, para. 14.

370. Professor Alvarez has summarized the conclusions of his expert opinion on the meaning of Article XI as being that this essential security and public order clause: "(1) is not self-judging; (2) does not apply to 'economic emergencies', except in the most extraordinary and so far unprecedented circumstances; and (3) even when it does apply (for example, in the event of war or insurrection), is not the equivalent of a 'denial of benefits' or termination clause in a treaty, and so does not negate state responsibility to pay compensation for actions that harm investors."[136]

371. The Claimant does not believe that exchanges undertaken between the U.S. Government and Congress in different contexts and to a very limited extent could be taken to mean that a self-judging interpretation was intended for the Treaty here applied.[137] In fact, it is asserted that the opposite is true because the U.S. Government explained at the time that the Treaty "contains an absolute right to international arbitration of investment disputes."[138]

372. The Claimant further argues that Article XI does not in any event apply to economic emergencies, but rather only to internal security, just as international peace and security have been interpreted to mean the obligations under the Charter of the United Nations. Nor does the Claimant believe that Article XI relieves Argentina from the duty to pay compensation. A self-judging interpretation, the Claimant concludes, would result in the creation of a broad and sweeping exception to the obligations established under the Treaty, and would eviscerate the very object and purpose of this kind of treaty.[139]

373. In weighing this discussion, the Tribunal must first note that the object and purpose of the Treaty is, as a general proposition, for it to be applicable in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the defined obligations cannot be easily reconciled with that object

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136 Expert Opinion of Professor José E. Álvarez September 12, 2005, para. 8.
137 Expert Opinion of Professor José E. Álvarez, September 12, 2005, para. 41.
138 Letter of Submittal of the U.S. BIT, January13, 1993, Claimants' Exhibit 274
139 Expert Opinion of Professor José E. Álvarez, September 12, 2005, para. 64.

and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.

374. The Tribunal considers that there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI. Essential security interests can eventually encompass situations other than the traditional military threats for which the institution found its origins in customary law. However, to conclude that such a determination is self-judging would definitely be inconsistent with the object and purpose noted. In fact, the Treaty would be deprived of any substantive meaning.

375. In addition, in view of the fact that the Treaty does not define what is to be understood by an "essential security interest," the requirements for a state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. Different might have been the case if the Treaty had defined this concept and the conditions for its exercise, but this was not the case.

376. The Tribunal notes that in the view of Dean Slaughter and Professor Burke-White, which the Respondent shares, the *CMS* award was mistaken in that it discussed Article XI in connection with necessity under customary law.[140] This Tribunal believes, however, that the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined. Similarly, the Treaty does not contain a definition concerning either the maintenance of international peace and security, or the conditions for its operation. Reference is instead made to the Charter of the United Nations in Article 6 of the Protocol to the Treaty.

377. The expert opinion of Dean Slaughter and Professor Burke-White expresses the view that the treaty regime is different and separate from customary law as it is *lex*

[140] Expert Opinion of Dean Anne-Marie Slaughter and Professor William Burke-White of July 19, 2005, paras. 65-66, 68-72.

specialis.[141] As Professor Burke-White explained at the hearing, the consequence of this approach is that while Article XI requires only a good faith determination, under customary law the whole panoply of requirements laid down in Article 25 of the Articles comes into play.[142] Moreover, Professor Burke-White stated that the U.S. and Argentina had "decided to accord investors greater protection than they would receive under customary international law, but simultaneously to guarantee to states, the States Parties greater protection to deal with threats to their national security."[143]

378. It is no doubt correct to conclude that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. The problem here, however, is that the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law. As concluded above, such requirements and conditions have not been fully met in this case. Moreover, the view of the Respondent's legal expert, as expressed at the hearing, contradicts the Respondent's argument that the Treaty standards are not more favorable than those of customary law, and at the most should be equated with the international minimum standard. The Tribunal does not believe that the intention of the parties can be described in the terms which the expert has used, as there is no indication that such was the case. Nor does the Tribunal believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.

379. As explained by Dean Slaughter, the U.S. position has been gradually evolving towards support for self-judging clauses in respect of national security interests, and some bilateral investment treaties reflect this change, albeit not all of them. Yet, this does not necessarily result in the conclusion that such was the intention of the parties in respect of the Treaty under consideration. Truly exceptional and extraordinary clauses, such as a self-judging provision, must be expressly drafted to reflect that intent, as

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[141] Expert Opinion of Dean Anne-Marie Slaughter and Professor William Burke-White of July 19, 2005, para. 6.

[142] Expert Statement of Professor William Burke-White, Hearing Transcript, Vol. 6, February 11, 2006, pp.1072-1073.

[143] Expert Statement of Professor William Burke-White, Hearing Transcript, Vol. 6, February 11, 2006, p.1068.

otherwise there can well be a presumption that they do not have such meaning in view of their exceptional nature.

380. In the case of the Treaty, nothing was said in respect of a self-judging character, and the elements invoked in support of this view originate for the most part in U.S. Congressional discussions concerning broader issues, or in indirect interpretations arising mainly with respect to the eventual application of model investment treaties used by the U.S.[144] The Respondent's post-hearing brief has listed a number of discussions and statements which relate to the issue of a self-judging interpretation,[145] but these items are contextual and do not specifically address the case of the Treaty in question.

381. Professor Burke-White also stated at the hearing that, in his understanding, the letter submitting the Treaty to the Argentine Congress did not say "anything about it being self-judging, nor anything about it being non self-judging … this document does not speak to that issue."[146] This expert also explained that while he had no evidence about the internal discussions within the Argentine Government as to the intent of the Treaty, there was such evidence in respect of the intent of the U.S. Government, and that given the "reciprocal nature of the Treaty … the intent … would be for a self-judging interpretation of Article XI."[147] This is, however, again a contextual interpretation that does not appear to meet the stricter requirements of Articles 31 and 32 of the Vienna Convention on the Law of Treaties in respect of treaty interpretation in the light of its context, or the resort to supplementary means of interpretation.

382. More to the point is a letter sent by an official of the United States Department of State on September 15, 2006 to a former official asked to testify in the context of a different arbitration, which the Respondent brought to the attention of the Tribunal on June 25, 2007. In this letter, it is stated that "notwithstanding the decision of the ICJ in the Nicaragua case, the position of the U. S. Government is that the essential security language in our FCN treaties and Bilateral Investment Treaties is self-judging, *i.e.*, only

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144 Expert Statement of Professor William Burke-White, Hearing Transcript, Vol. 6, February 11, 2006, pp. 1058-1062.

145 Respondent's Post Hearing Brief, para. 124.

146 Expert Statement of Professor William Burke-White, Hearing Transcript, Vol. 6, February 11, 2006, p. 1100.

147 Expert Statement of Professor William Burke-White, Hearing Transcript, Vol. 6, February 11, 2006, at pp. 1101-1102.

the party itself is competent to determine what is in its own essential security interests." The Respondent is of the view that this confirms the interpretation given by it of the Treaty in this case. The Claimant, however, has opposed this understanding on the argument that the letter refers to an interpretation supposedly adopted as from 2006 and that in any event it does not refer to the Treaty with Argentina nor does it preclude liability or compensation.

383. The discussion noted above concerning the GATT and the *Nicaragua* decision, just like the *Oil Platforms* case, confirms that the language of a provision has to be very precise for it to lead to a conclusion about its self-judging nature. In those decisions, the fact that the language was not express turned out to be crucial to the rejection of arguments favoring a self-judging interpretation. So too, the International Court of Justice held in the *Gabcíkovo-Nagymaros* case, when referring to the conditions defined by the International Law Commission, that "the State concerned is not the sole judge of whether those conditions have been met."[148]

384. The Tribunal must also note that not even in the context of GATT Article XXI is the issue considered to be settled in favor of a self-judging interpretation, and the very fact that such article has not been excluded from dispute settlement is indicative of its non-self-judging nature.[149]

385. The same holds true of the U. S. Department of State letter referred to above in that it does not address any specific treaty, least that with Argentina. Furthermore, the fact that arbitration is the compulsory dispute settlement mechanism established in the Treaty in question, like with GATT/WTO, could be rather indicative of the non self-judging nature of the essential security interest clause. Not even if this is the interpretation given to the clause today by the United States would this necessarily mean that such an interpretation governs the Treaty. The view of one State does not make international law, even less so when such a view is ascertained only by indirect means of interpretation or in a rather remote or general way as far as the very Treaty at

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[148] *Case Concerning the Gabcíkovo-Nagymaros Project* (Hungary/ Slovakia),Judgment of 25 September 1997, ICJ Reports(1997), paras. 51-52.

[149] M. Matsushita, T. J. Schoenbaum and P. Mavroidis: *The World Trade Organization*, 2006, at 594-598.

issue is concerned. What is relevant is the intention which both parties had in signing the Treaty, and this does not confirm the self-judging interpretation.

386. Moreover, even if this interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries. In fact, Article XIV of the Treaty provides that in case of termination, the investment will continue to be protected under its provisions "for a further period of ten years." So too, with reference to rights protected under the Energy Charter Treaty, the tribunal in *Plama* has held that any denial of advantages to which an investor might have rights "should not have retrospective effect," as such a situation would result in making legitimate expectations false at a much later date.[150]

387. As an English court has recently held in respect of a claim of non-justiciability relating to a State challenge to the *OEPC* award, the fact that a treaty is concluded between States cannot allow the derogation of rights that belong to private parties. In that case, the issue concerned dispute settlement, and as a consequence the doctrine of non-justiciability was held not to apply.[151]

388. In the light of this discussion, the Tribunal concludes that Article XI is not self-judging and that judicial review is not limited in its respect to an examination of whether its invocation, or the measures adopted, were taken in good faith. The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness. Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard.

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[150] *Plama Consortium Limited v. Bulgaria*, (ICSID Case No. ARB/03/24), Decision on Jurisdiction of February 8, 2005 para. 162.

[151] *Republic of Ecuador v. Occidental Exploration and Production Corporation*, English Commercial Court, Case No: 2004 FOLIO 656, judgment given on April 29, 2005, para. 85.

389. A judicial determination as to compliance with the requirements of international law in this matter should not be understood as suggesting that arbitral tribunals wish to substitute their views for the functions of sovereign States. Such a ruling instead simply responds to the Tribunal's duty that, in applying international law, it cannot fail to give effect to legal commitments that are binding on the parties, and must interpret the rules accordingly unless a derogation of those commitments has been expressly agreed to.

390. The Tribunal explained above that it would consider the requirement of Article 25 of the Articles on State Responsibility, to the effect that the act in question not seriously impair an essential interest of the State towards which the obligation exists in the context of the Treaty obligations. In the light of the discussion above about changing interpretations, it does not appear that the Government's invocation of Article XI or of a state of necessity generally would be taken by the other party to mean that such impairment arises.

391. Be that as it may, in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations, as was explained by the English court in the *OEPC* case noted above. The essential interest of the Claimant would certainly be seriously impaired by the operation of Article XI or a state of necessity in this case.

5. Temporality and Compensation

392. There are still two other aspects of the "state of necessity" which the Tribunal needs to discuss. There is first the question posed by necessity being a temporal condition and, as expressed in Article 27 of the Articles on State Responsibility, its invocation being without prejudice to "(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists." This premise does not seem to be disputed by the parties, although the continuing extension of the emergency, discussed above, does not seem to be easily reconciled with the requirement of temporality. This in turn results in uncertainty as to what will be the legal consequences of the Emergency Law's conclusion.

393. The second question is posed by the fact that Article 27 also provides that necessity is without prejudice to "(b) the question of compensation for any material loss caused by the act in question." This other premise has been much debated by the parties, as noted above. The Respondent does not share this premise because the record shows that there would eventually be no compensation for past losses or adverse effects originating in the emergency measures, either in the context of the renegotiations undertaken or otherwise. As put by the Respondent's witness Mr. Simeonoff, "[t]he answer is a single one. The Argentine State will not recognize any compensation for damages."[152]

394. The Respondent's view appears to be based on the understanding that Article 27 would require compensation only for the damage arising after the emergency is over, and not for that taking place during the emergency period. Although that Article does not specify the circumstances in which compensation should be payable because of the range of possible scenarios, it has also been considered that this is a matter to be agreed with the affected party.[153] The Article thus does not exclude the possibility of an eventual compensation for past events. The 2007 agreements between the Respondent and the Licensees appear to confirm this interpretation insofar as they cover, as noted, the period running from January 6, 2002 until the end of the License. This could mean that the tariff adjustment scheduled to begin on January 1, 2008 has been conceived as including past damages.

395. The question of compensation has been discussed at various points by the parties in the context of an eventual issue of double recovery resulting from, on the one hand, the compensation which the investor would receive as a result of arbitration and, on the other hand, the compensation which the company would receive in the context of a renegotiated adjustment of tariffs or some other mechanism. The Tribunal believes that this is actually not likely to since Government negotiators will make sure that any recovery obtained from one source is not duplicated by means of a separate recovery from another source. In answer to a question from the Tribunal with respect to the multiple possible sources of recovery, a company executive appearing as a witness for

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[152] Testimony of Mr. Jorge Gustavo Simeonoff, Hearing Transcript, Vol. 2, February 7, 2006, p. 336.

[153] James Crawford: *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (ed., Cambridge University Press) (2002), p. 190.

the Claimant explained at the hearing that "these two sources are mutually exclusive, and I don't think there is any possibility for a double compensation to exist."[154] This interpretation proved to be correct as the 2007 agreements with the Licensees, as explained, expressly envisage that the Respondent shall be kept free of any adverse consequences arising from compensation that the Claimant might obtain in this arbitration or other proceedings.

396. The Tribunal also notes that this discussion is related to the broader issue of whether crisis conditions should result in the lowering of standards set under treaties and investment law, to the benefit of the State. The question was extensively discussed at the hearing in connection with the expert statement of Professor W. Michael Reisman, who in the Respondent's understanding had minimized the importance of the crisis context for the operation of investment law standards, and who was criticized for it.[155] The Respondent emphasized its view by showing a video on the Argentine crisis in 2001-2002. Professor Reisman explained in the context of this discussion that

> "of course governments in these circumstances must take measures to restore public order, but from the investment *law* standpoint – and this is for the future of all investments – international investment law says you may do it, but you must pay compensation. If exceptions are made for like these or other circumstances, the entire purpose of modern investment law, which is to accelerate the movement of private funds into developing countries for development purposes, will be frustrated."[156]

397. The Tribunal does not believe that the issue here is one of lowering the standards of protection set under the Treaty or the law. This being said, however, the manner in which the law has to be applied cannot ignore the realities resulting from a crisis situation, including how a crisis affects the normal functioning of any given society. This is the measure of justice that the Tribunal is bound to respect. The Tribunal will accordingly take into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards.

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[154] Testimony of Mr. Martin Juan Blanquier, Hearing Transcript, Vol. 7, February 13, 2006, pp. 1367-1370.

[155] Remarks of Dr. Osvaldo César Guglielmino, Hearing Transcript, Vol. 6, February 11, 2006, pp. 1000-1009.

[156] Expert Statement of Professor W. Michael Reisman, Hearing Transcript, Vol. 6, February 11, 2006, p. 1007.

D. Remedies

398. The Tribunal has concluded above that the Respondent breached in this case Article II2(a) and (c) of the Treaty relating to fair and equitable treatment and the respect of obligations with regard to investments. There remains for the Tribunal to determine the compensation to be paid to the Claimant as a result of such breaches.

399. In this task, the Tribunal analyzed the reports and testimonies presented by the experts retained by each side, Dr. Manuel A. Abdala and Dr. Pablo T. Spiller of LECG, LLC (hereafter "LECG") for the Claimant, and Professor Diego J. Dzodan of the Universidad Torcuato Di Tella, for the Respondent. The Respondent also submitted a valuation report prepared by Mr. Juan Carlos Fassi, Director of PA Consulting Services S.A. and dated December 5, 2005. This report was supplemented by a letter of January 19, 2006 from Mr. Fassi providing answers to questions raised by the Claimant. During the course of the hearing on the merits, the Tribunal was informed, on February 9, 2006 that Mr. Fassi could not appear as a witness. By letter of February 15, 2006 to the parties, the Tribunal decided that, notwithstanding the fact that Mr. Fassi could not be subjected to oral examination on his report by the parties and the Tribunal, his report would nonetheless be admitted in order to have the full view of the parties' position on the valuation of damages. In reaching its own conclusions on damages, the Tribunal gave careful consideration to the views expressed by Mr. Fassi in his expert report of December 5, 2005 and subsequent letter of January 19, 2006. The Tribunal was assisted by Dr. Luis Carlos Valenzuela, of Bogota, Colombia, who was appointed as expert by the Tribunal with the agreement of the parties, following the oral hearings in this case. Dr. Valenzuela produced two reports which were transmitted to the parties; their comments on each report were received by the Tribunal and given due consideration. The Tribunal wishes to express its appreciation to all the experts for their contribution.

1. The Valuation Principle.

400. The principles governing compensation under international law were well explained by the Permanent Court of International Justice in the *Chorzow Factory Case* and have been developed in numerous decisions of international courts and tribunals. As

the Permanent Court held in that case, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[157]

401. In the absence of restitution or agreed renegotiation of contracts or other measures of redress, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party. The International Law Commission Articles on State Responsibility for Internationally Wrongful Acts adopted by the United Nations General Assembly in 2002, also state in this respect that compensation is meant to cover any "financially assessable damage including loss of profits insofar as it is established."[158]

402. Article IV of the Treaty establishes the standard for the determination of compensation. It states:

> "*Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.*"

403. It must be noted that this provision addresses specifically the case of expropriation which the Tribunal has concluded has not taken place in the present case. The Treaty does not specify the damages to which the investor is entitled in case of breach of the Treaty standards different from expropriation. Although there is some discussion about the appropriate standard applicable in such a situation, several awards of arbitral tribunals dealing with similar treaty clauses have considered that compensation is the appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruption to the investment made.[159] In such cases it might be very difficult to distinguish the breach of

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[157] *Chorzów*, Judgment No. 13 (Claim for Indemnity - The Merits) of September 13, 1928, <http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1/>, para. 47.

[158] Articles on State Responsibility, Article 36 (2).

[159] *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award of December 16, 2002; *S.D. Myers, Inc. v. Canada*, UNCITRAL Arbitration Proceeding, Partial Award of November 13, 2000, paras. 311-315; *Metalclad Corporation v. United Mexican States*, (ICSID Case No. ARB(AF)/97/1), Award of August 30,2000, para. 122; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005; *Azurix Corp. v. The Argentine Republic*

fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same.

404. Fair market value is thus a commonly accepted standard of valuation and compensation. In the present case, the Claimant made its investment in Argentina in 1996 and increased it over the years. The Tribunal is of the view that fair market value would be the most appropriate standard to apply in this case to establish the value of the losses, if any, suffered by the Claimant as a result of the Treaty breaches which occurred, by comparing the fair market value of the companies concerned with and without the measures adopted by Argentina in January 2002.

405. An internationally recognized definition of fair market value reads as follows:

> *"(…) the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."*[160]

406. The Claimant estimates that it has suffered damages to equity value in the amount of US$143.49MM. In addition, claims are made for historical (or discrete) damages concerning the U.S. PPI adjustment in the amount of US$9.86MM, subsidies in the amount of US$38.63MM and loss on a loan in the amount of US$17.4MM; these the Tribunal will consider separately. The total amount claimed by the investor in this arbitration is US$209.38MM.

2. The Methodology Adopted.

407. Both LECG and Professor Dzodan adopted Discounted Cash flow as an appropriate methodology but they followed different paths to arrive at their conclusions.

(ICSID Case No. ARB/01/12), Award of July 16, 2006, para. 424; *Enron Corp. and Ponderosa Assets, L. P.v. Argentine Republic*, (ICSID Case ARB/01/3), Award of May 22, 2007, paras. 360-363.

[160] International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website, June 6 2001, p. 4

408. Professor Dzodan's model aims at determining whether CGP and CGS created or destroyed value for the Claimant during their useful life, on the basis of the return established under the appropriate Argentine regulation. This implies calculating whether or not CGP and CGS achieved economic equilibrium. For this purpose, that model calculates:

- The present value of future free cash flow from 2005 to 2027 under the actual conditions prevailing in Argentina during that period ("the pesification scenario").
- The compounded value of historical free cash flow from 1992 to 2004.
- The compounded value in 2004 of the Claimant's investments in CGP and CGS from 1992 to 2004.

409. The value created or destroyed is established by adding the two values of cash flows measured in 2004, from which the compounded value in 1994 of the original investments is subtracted (or Value created/destroyed =A+B-C).

410. According to Professor Dzodan, in so far as the positive cash flows are equal or superior to the negative ones, or to the realized investments, there is no reason to award compensation since the investment is recoverable, even with the effects of the measures adopted by Argentina.

411. LECG, on the other hand, aims at establishing the damages suffered by the Claimant as a result of the measures adopted by Argentina in the following manner:

- It first makes an individual evaluation of the historical damages suffered by CGS and CGP as a consequence of the non-application of the U.S. PPI adjustments to the tariffs, the non-payment of subsidies owing to them under the License, and the reduction of income they suffered from the implementation of taxes which were not translated into tariff increases.
- It then establishes the discounted cash flow value of the companies in the context of the pesification scenario following the adoption by Argentina of the measures complained of.

- Finally, by utilizing discounted cash flow and book value, it establishes the value of the firms in the context where the spirit of the original contractual conditions would have been maintained for the duration of the License ("the but-for scenario").

412. The damages suffered are then arrived at by first stating the value of the firms under the but-for scenario, from which the value under the pesification scenario is subtracted and the value of the historical damages is added (or Damages = C-B+A).

413. The Tribunal has come to the conclusion that, without contesting its economic validity per se, the model proposed by Professor Dzodan does not represent an adequate instrument to establish the level of compensation which may be due to a party under the Treaty, the License and the ENARGAS regulations. The problem at hand under the Treaty and the License is not to judge whether the companies have been fairly remunerated in the past but to determine what they were worth in 2001 given their prospects over the remaining years of the licenses. International legal standards governing compensation do not normally consider past earnings to determine compensation due.

414. In light of this conclusion, the Tribunal does not need to address a certain number of criticisms raised by the Claimant's and the Tribunal's experts against some of the assumptions made in Professor Dzodan's report.

415. On the other hand, the LECG model appears to the Tribunal to be more appropriate since it differentiates between the various alleged breaches thus allowing for a closer analysis of the nature of such breaches and, thereby, the value of the damages suffered.

3. Damages valuation at December 31, 2001 (but-for scenario)

416. The Tribunal will therefore pursue its analysis of damages valuation by basing itself on the DCF model proposed by LECG. The Tribunal, however, wishes to discuss further the following factors under the model proposed by LECG

- The asset base
- The discount rate under the but-for scenario.
- The tariff increases that would have been approved under the but-for scenario.
- The consumption effect under the but-for scenario.

417. These various factors are open to discussion in view of the likely effect of the economic crisis affecting Argentina at the time on the business prospects. The Tribunal has held above that there was quite evidently a major crisis in Argentina and while this crisis does not excuse the wrongfulness of the measures taken in respect of the investment, it does have an incidence on the issue of valuation and compensation.

a) The Asset Base

418. A major factor which ENARGAS had to consider in establishing the tariffs of gas distribution companies on the occasion of its Second Quinquennial Tariff Review ("RQT II") was the asset base of the companies concerned.

419. As part of that process, ENARGAS received in December 2002 an Interagency Report.[161] This report included the results of a study it requested from an independent private consulting firm (PSI) to provide figures for the CGP and CGS asset bases as of December 2000, for the purposes of the RQT II. Those asset bases were significantly lower than those proposed by the Claimant. In fact, while the Claimant indicated an asset base for regulatory purposes of US$461.72 MM for CGP and an asset base of US$241.19MM for CGS, the PSI consultants suggested reductions of AR$ 65.2MM (parity) pesos for CGP and AR$ 44.6MM (parity) pesos for CGS.[162]

[161] ENARGAS «Interagency Report» *(Informe Interagencial)* of December 2002, Annex 1(a), p.86.
[162] Ibid., Annex 1(a), p. 86.

420. The Claimant has argued that the asset bases arrived at by PSI were not final and were only the first step towards the calculation of the companies' approved asset base. According to the Claimant, ENARGAS still had to apply the U.S. PPI adjustments and consider other relevant factors, including the efficient levels of working capital and the companies' views on the potential disallowances.

421. LECG submitted a Reconciliation of the 2000 Asset Base, which included adjustments for working capital disallowances and for PPI, which led to a PSI decrease in asset base of only 3.4% for CGP and 5.8% for CGS compared to the Claimant's proposed asset base. In addition, in bringing that asset base valuation to December 2001, the Claimant argued that it is necessary to add the actual 2001 investments (minus depreciation), look at efficient working capital variations, and adjust all figures by the U.S. PPI.

422. The Tribunal is of the view that, under the but-for scenario, ENARGAS would have had to include a proper PPI adjustment. However, it would be extremely hard to believe that, under the macroeconomic conditions that Argentina faced at the end of 2001 and in 2002, ENARGAS would not have adopted the reductions in asset base recommended by PSI.

423. As to the working capital disallowances adjustments suggested by the Claimant (US$21.10M for CGP and US$14.00M for CGS for the 2000 Asset Base), it is most likely that ENARGAS would have rejected them. Indeed, the financial statements of CGP and CGS show clearly that both companies usually had a negative working capital in normal years.

424. This is indeed the case under the classical definition of working capital (that is the difference between all current assets and all current liabilities), as shown by the 1999 and 2000 financial statements of CGP; the same conclusion is reached for CGS, once adjustments are made for unpaid subsidies. It is usually considered more informative to study the non-cash (*i.e.* disregarding cash reserves and short term debt) operations-related capital and to remove anything which might be doubtful or temporary; using that formula, the absolute numbers change but the working capital

remains negative. This would appear to be due in large part to the fact that, in normal years, the gas consumers paid their bills faster than the distributors paid the transportation companies (32 or 33 days compared with 42 or 45 days for each company).

425. In the Tribunal's view, ENARGAS would have had valid grounds in the circumstances of this case, which deals with distribution companies, to refuse an amount for working capital in arriving at the asset base. The same conclusion should apply to 2001 as well.

426. It is therefore appropriate, in the case of CGP, to deduct from the 2000 asset base of US$461.72MM proposed by the Claimant the negative adjustments of US$65.2MM (parity pesos) recommended by PSI and to add the adjustment for PPI of US$28.32MM. In the case of CGS, it is necessary to deduct from the asset base of US$241.19MM. proposed by the Claimant, the negative adjustments of US$44.6MM. proposed by PSI and to add the PPI adjustment of US$16.16MM. Using the table contained in the Claimant's letter of 18 December 2006, the adjusted asset base of CGP goes down from US$461.72MM to US$424.85MM, on December 31, 2000. Applying the same reasoning to CGS lowers the asset base from US$241.19MM to US$212.75 MM at that date.

427. However, it is still necessary to bring those figures up to December 31, 2001, by applying the 2001 U.S. PPI change of -5.84% to the 2000 asset base and by adding the actual investments (US$20.03MM for CGP and US$20,57MM for CGS) minus depreciation (US$0.94MM for CGP and US$0.67MM for CGS).

428. The total amount of the asset base at December 31, 2001 is accordingly US$419.13MM for CGP and US$220.23 MM for CGS.

b) The But-For Scenario Discount Rate

429. In all probability, ENARGAS would have considered in its tariffs reviews that distribution is a riskier business than transportation. This conclusion is reasonable in the instant case in the light of the difficulties Argentina faced, since distribution is

closer to the final consumer and the latter is more likely to be late or to default on payments than the distributor itself. Further, the transportation company can usually get some form of protection from demand variation through take-or-pay contracts. It is thus also reasonable that the cost of equity ("COE") for CGP and CGS be larger than for a transportation company. In fact, this is the exact conclusion which ENARGAS arrived at in its Notes of November 21, 2001 where it mentions that it was proposing to establish the WACC at a level 1.7% higher for gas distribution than for gas transportation, effective the first semester of 2003.[163]

430. As to the cost of equity, it was established by ENARGAS at 15.56% after the first quinquennial review of 1997 and this was the figure adopted by Professor Dzodan in his report of 15 January 2006.[164] As to the experts for the Claimant, they chose a slightly higher COE of 16.28% (yielding a WACC of 13.77%) for CGP and 16.75% (yielding a WACC of 14.12%) for CGS. The same WACC for both valuations (but-for and pesification scenarios) was used.

431. Given the fact that the parties arrive at relatively similar figures and bearing in mind the historical cost of equity, for CGP and CGS between 1992 and 2001 varied between some 16 and 22% according to the Claimant´s experts, the Tribunal believes that the COE rates proposed by the Claimant are reasonable and should be retained for both the but-for and the pesification scenario. It could even be thought that the COE should have been larger under the pesification scenario to reflect the greater uncertainty in the new regulatory context; this would have further reduced the value of the firms under the pesification scenario and increased the damages suffered by the Claimant.

432. In the context of some of the expert reports before the Tribunal, high discount rates were also envisaged as a consequence of the premium on Government bonds being very high at the end of December 2001 because these bonds were in default at that time and as a consequence they could only sell at a deep discount, if at all. However, the Tribunal believes that the case of CGP and CGS is different.

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[163] ENARGAS Notes 5498 of November 2001 (p. 31) to CGP and CGS, produced by the Claimant on December 18, 2006 pursuant to a December 12, 2006 request to the parties by the Tribunal for additional information relating to RQT II.

[164] Analysis of SEMPRA and CAMUZZI's return on their investments in CGS and CGP, 15 January 2006, pp.7-8.

433. In fact, there is first a difference between the Argentine government's credit risk and the country risk. It has been clearly established before the Tribunal that, even in the latter part of 2001, the country risk premium required by an investor in a private company in Argentina was significantly lower than the Government's credit risk premium during the same period. The difference was even more significant in the case of energy companies like CGP and CGS, because of their regulated status and their relatively lower business risk.

434. Next, if the regulatory framework would have been maintained (no pesification of tariffs, no suspension of the PPI adjustment and other elements, or, in the alternative, pesification but with preservation of the allowed rate of return on the U.S. dollar value of assets), the companies would not have suffered the strong impact of the crisis in its entirety, their bonds would have kept trading at a better rate than the Government's bonds (as was the case even before the crisis), and their future would not have appeared compromised, especially over a long period of time extending to 2027. Discounting so many years at a very large rate implies that Argentina, and CGP and CGS with it, would have remained in a state of economic dislocation and that maintaining the initial tariff conditions would have served no purpose at all.

435. Had CGP and CGS (or Sodigas) hypothetically decided, at the end of 2001, to sell their shares on the Argentine exchange (in fact, none of them were listed), they might very well have suffered from the adverse reactions engendered by the state of economic and political difficulties. In other words, investors might very well have applied an extremely high discount rate and undervalued the equity. But the Claimant had originally not invested in CGP and CGS for trading purposes. It invested for the long term. Therefore, an unusually high market discount should not be included in the valuation of a long term investment, on the basis of a serious but temporary economic crisis.

436. This conclusion does not mean that, under the but-for scenario, CGP and CGS would have merrily sailed through the major economic crisis which Argentina suffered and brought home large returns on equity, as if nothing had ever happened. In particular, the Tribunal is of the view that CGP and CGS would have been called upon

to shoulder some of the burden of the general economic crisis and might have been faced with the need to reduce some of the increases to which they might otherwise have felt they were entitled to; moreover, and in a significant way under the but-for scenario, gas consumption and tariff rates would have been significantly impacted, with the consequent results on the value of the firm.

437. The Tribunal will therefore proceed to discuss projected tariff changes and projected consumption.

c) The Tariff Changes under the But-For Scenario

438. One of the most crucial and debatable assumption is the peso tariff increase assumed by the Claimant to take place in 2002.

439. The Claimant estimates increases of 147% (for CGP) (53% blended) and 139% (for CGS) (49% blended) for the distribution component (without a similar increase in transportation tariff and an increase in the price of gas being postponed to 2005 in the case of CGP and 2004 in the case of CGS). The result is that, at least until 2004, the income of those companies would have increased, but their costs would have been kept much lower, a fact which is considered most unlikely. This assumption is particularly unreasonable when one considers the transportation component which is covered by the same regulatory framework as the distribution component and is affected by the same macroeconomic conditions.

440. Under the Claimant's assumptions, the EBITDA in Argentine pesos increases, between 2001 and 2002, by 272% for CGP and 270% for CGS. This increase is even higher than the increase in the exchange rate during the same period.

441. The political and economic viability of such a situation would have been practically nil in the actual context of the Argentine economy at the time. In fact, a 49% (CGS) or 53% (CGP) blended tariff increase in 2002 (in its post-hearing brief, the Claimant mentions 61% for CGP and 58% for CGS) would have been out of the question from the point of view of consumers. The Argentinean currency having lost 2/3 of its international purchasing power, the cost of many items had all of a sudden

become much higher and Argentineans were suffering the consequences. Bank deposits had been forcibly converted to pesos and partly frozen, and unemployment and inflation were high. It is quite evident that 147% and 139% increases in the distribution component of the tariff would have been impossible. But even a possible smaller increase cannot be looked at in isolation from the other increases, implicit or explicit. It is realistic to think that the Government would not have added fuel to citizens' discontent, nor to inflation.

442. In addition, the Tribunal believes that, taking into account the state of the Argentine economy since 2002, it is most unlikely that, even by spreading the requested 147% and 139% increases in the distribution components over a period of years, it would have been possible to fully implement such an increase. It is true that, with the reduced asset base established above by the Tribunal, those increases become 128.43% for CGP and 131.92% for CGS. But these remain very large increases indeed. In the context of the economic crisis at the time, the Tribunal considers inevitable that the Claimant would have been called upon to carry part of the burden of that crisis.

443. In that regard, the Tribunal considers as reasonable the following measures that might have been taken by ENARGAS at that time:

- The Tribunal has already indicated the significant downward adjustments that would have been made to the asset base by ENARGAS on the occasion of RQT II, resulting in a reduction of the allowable tariff increases.
- The Tribunal is also of the view that, in the economic context of 2001-2002, ENARGAS would have been entitled to further reduce the tariff increase by recognizing no more than 85% of the allowable increases, thus producing a tariff increase of 109.17% (85% of 128.43%) for CGP and 112.13% (85% of 131.92%) for CGS.
- That increase would not have taken place in a single shot in 2002 but would have been spread over a five-year period, corresponding to the regular quinquennial review envisaged under the License, but with a 0% end-user blended tariff increase in 2002.
- In addition, the Tribunal finds it inconceivable that ENARGAS would have granted a large increase to the gas distribution sector while the tariffs in transportation sector would have remained flat. In its analysis of the impact of

tariff changes, the Tribunal will assume that equal increases would have been granted to the transportation sector. This would increase further the level of the blended tariff for the gas distribution clients and, because of its impact on price elasticity, would reduce consumption of natural gas, and hence the revenues of the gas distributors.

444. The changes in consumption considered are not the result of a sophisticated equation but of a reasonable estimate. Prudence also suggests that decreases in consumption are shifted one-year forward compared with tariff increases.

445. The Tribunal therefore arrives at the following end-user tariff average variation starting in year 2002 in the case of CGP: 0.0%, 11.9%, 18.5%, 24.9%, 24.4%, 26.9%, 3.7%, 3.4%, 3.3%, 2.9%, 1.2% and then 2.4% per year until 2027 (with the distribution and transportation component increasing by 2% per year starting in 2007, as forecasted by LECG). In the case of CGS, the figures are respectively: 0.0%, 10.2%, 15.8%, 21.3%, 43.1%, 21.4%, 3.7%, 3.4%, 3.2%, 2.8%, 1.9% and then around 2.4% until 2027 (with the distribution and transportation component growing by 2% per year starting in 2007, as forecasted by LECG). These increases in average end-user tariff factor in the changes in the price of gas forecasted by LECG.

d) Consumption Adjustments under the But-For Scenario

446. The Claimant's experts based their estimates on some low price elasticities computed by an independent organization. It is to be noted, however, that low price elasticities are valid only for relatively modest increases in a given economic context. These experts also argue that elasticity is very low because the majority of the natural gas sold by CGP and CGS is for industrial and commercial users. While this is true in terms of volume, it is the residential consumers who represent the largest income component because of the higher profit margin in the latter case. It is therefore not possible to retain the argument that income will not be affected because the largest share of volume of gas is consumed by industrial and commercial users.

447. The Tribunal believes that the elasticities used by these experts were not realistic in the context of the large immediate tariff increase proposed by the Claimant for the

distribution component of the tariff. Moreover, in the Claimant's scenario, no increase at all is provided for gas transportation before 2006; in addition, there is no increase in the price of natural gas until 2005 in the case of CGP and there is an actual significant decrease until 2004 in the case of CGS. A more plausible scenario is one where at least gas transportation would gain the same increase as gas distribution (with 0% increase in the price of gas); in such a scenario the blended overall tariff increase would have been around 90%.

448. The Claimant also argues that there was either no alternative source of energy or that, if it existed, gas, even with large price increases, would have remained competitive. There is little doubt in the Tribunal's mind that gas consumption, at such but-for scenario prices, would have been likely to decrease in the residential, commercial and industrial sectors during the first years following 2001 or CGP and CGS would have been faced with a serious increase in defaulting payments.

449. The Tribunal considers that, taking into account the tariff changes just mentioned, it is reasonable to assume the following combined (across customers) price elasticities for CGP: -0.2 in 2004, -0.25 in 2005, -0.3 in 2006, 2007 and 2008, with the resulting consumption changes: 0% in 2002 and 2003, -2.4% in 2004, -4.6% in 2005, -7.5% in 2006, -7.3% in 2007, -8.1% in 2008, 0.0% in 2009 and 2010, +1.0% in 2011 and 2.0% until 2027. As to CGS, the figures are respectively for price elasticities: -0.15 for 2004 and 2005, -0.2 in 2006, -0,25 in 2007 and -0.15 in 2008; as to consumption changes, the figures are : 0.0% in 2002 and 2003, -1.5% in 2004, -2.4% in 2005, -4.3% in 2006, -10.8% in 2007, -3.2% in 2008, 0.0% in 2009, 1.0% in 2010 and 2.0% in the following years up to 2027.

450. The net result of the above changes is that, under the but-for scenario, the equity value of CGP is US$168,240,220, and that of CGS is US$33,434,238.

4. Valuation in the Pesification Scenario

451. The Tribunal, during its first consideration of the pesification scenario, was inclined to endorse the one proposed by the Claimant. However, events intervened

subsequently to the hearings and the post-hearings briefs submitted by the parties, which led the Tribunal to accept amendments to that scenario.

452. These events are related in particular to the Agreements which the Respondent signed with the Licensees in 2007, noted further above. In fact, by letters of May 2 and June 29 2007, Argentina informed the Tribunal that on April 26, 2007, CGS and CGP had signed with Argentina Memorandums of Understanding for the Adjustment of License Agreement for Distribution of Natural Gas ("MOU").

453. It was also explained above that this MOU provides for a 25% increase in tariff for the transportation and distribution of natural gas; an additional 2% increase is subject to the implementation of certain investments. These increases were due to come into effect on July 1, 2007 for CGS and on January 1, 2008 for CGP. In addition, the MOU contains an indexation formula for the future based on a mechanism of monitoring of costs ("MMC") in the Argentinean economy.

454. It is important to recall that the MOU is however subject to a number of restrictions and conditions, including the abandonment of all arbitral or judicial claims by the Licensees or their shareholders relating to the pre-2002 regime governing gas distribution or transportation. In addition, certain categories of residences classified as R1, R2 and R3 are protected from tariff increases until the adoption of an Integral Tariff Review to take place at a later time. Finally, the average total tariff increase cannot exceed 15%, taking into account adjustments to the price of gas.

455. By letters of June 25 and July 6 2007, Sempra informed the Tribunal that it would not sign any release or discharge in favor of Argentina of any liability in relation to the events which are the subjects of this case and that it persisted in its claims in this arbitration. It also mentioned that it had initiated proceedings against the shareholders of the companies that had approved and signed the MOU; such proceedings however are, as noted, outside the purview of this Tribunal.

456. Notwithstanding the conditional, and even litigious, character of the MOU, the Tribunal agrees with Argentina that this is a development that the Tribunal should take into account in assessing the pesification (or "actual") scenario as it prompts objective consequences for the Licensees and consequently for the interests of the Claimant.

457. For instance, the first scenario proposed by the Claimant contained CPI tariff increases between 2002 and 2007 which did not materialize, but did not contain the increases now proposed by Argentina. It is quite appropriate in the circumstances to refer to the real situation as it stands today when considering the actual scenario. The MOU proposes adjustments to the pesification scenario which Argentina (albeit with certain conditions) is willing to implement in relation to the companies concerned in this case.

458. The Tribunal has therefore accepted the adjustments to the original pesification scenario, such as presented by the Claimant in its letter of July 6, 2007. In particular, the CPI indexation suggested in that scenario between 2002 and July 1, 2007 for CGS and January 1, 2008 for CGP has been removed as it did not materialize. However, from those respective latter dates, the proposed 27% tariff increase (taking into account a maximum 15% average increase in consumer price, including the price of gas) has been inserted for each company. In addition, as recognized by the Claimant in its letter of July 6, 2007, significant pesification gains of US$27,700,367 and U.S$ 12,014,617 have been made on the debts of CGS and CGP respectively and those have been taken into account in establishing the equity value loss of those companies. The cash flows are discounted with WAACs of 13.77% and 14.12% for CGP and CGS respectively.

459. The result is an estimated equity value of US$21,510,284 for CGP and -US$58,030,252 for CGS (in practice 0 for the shareholders and the rest affecting the creditors).

5. The Equity Value Loss

460. The total equity value loss in the case of CGP is thus in the amount of US$146,729,936 and in the case of CGS of US$33,434,238.

461. The share of equity belonging to the Claimant being 37.10% in CGP and 38.78% in CGS, its damages for equity value loss amount to US$54,436,806 for CGP and US$12,965,797 for CGS, for a total of US$67,402,603.

6. The loss on the Loan

462. The Tribunal has already decided that the Claimant was entitled to claim in this case for the value of the loss on the loan granted in December 2001.

463. In this case, the Tribunal needs only to concentrate on the pesification scenario, the question being to determine whether the debt of CGS and CGP could have been reimbursed in those conditions.

464. In fact, the problem arises only for CGS for as it has been explained CGP has a positive equity value; this means that its debt will have been reimbursed in full during the duration of the License and there will still be some money left for the shareholders. For CGS, however, the situation is quite different, the firm having a large negative equity value.

465. In December 2001, the Claimant and Camuzzi loaned US$56,017,000 and US$73,983,000 respectively to the Licensees, which totaled US$130,000,000 (Sempra therefore providing 43.1% and Camuzzi 56.9% of the loan). Of that amount US$50,812,056 went to CGS, which represented 63.77% of the net debt of the company. Consequently, the combined loss for Sempra and Camuzzi is that same percentage out of the negative equity value of US$58,030,252, that is US$37,005,892 (63.77% x 58,030,252).

466. In the case of the Claimant, as creditor of 43.1% of the loan, this loss represents a sum of US$15,949,540.

7. Historical Damages

a) PPI Adjustments

467. The Claimant is entitled to the payment of the PPI adjustments which were suspended and not allowed to them in 2000 and 2001.

468. In its expert report submitted by the Claimant, LECG has valued those damages, as at December 31, 2001, at US$15,746,004 for CGP and US$10,339.626 for CGS, for a total of US$26,085,630. In its closing statement, the Claimant has reduced that total amount to US$13.6MM for CGP and US$9.3MM for CGS, for a total of US$22.9MM. The Respondent has not challenged the validity of those latter figures and this is the

amount that the Tribunal will retain for the purpose of assessing damages under this section.

469. The 37.10% held by the Claimant in CGP represents US$5.045,600 and its 38.78% share of CGS comes to US$3,606,540. The total amount therefore awarded to the Claimant as compensation for its share of unpaid PPI adjustments before December 31, 2001 amounts to a total of US$8,652,140.

b) Non-Payment of Subsidies

470. In the Subsidies Agreement of December 12, 2001, the parties agreed that, at October 31, 2001 an amount of AR$ 108,151,227,73 (including interest) was due for non-payment of subsidies but such amount does not include any amount for November and December.

471. In its closing statement document, the Claimant indicated that a sum of US$106.5 MM was owing as of September 2001, another US$17.3 MM up to December 31 and then US$5.4MM from January 1, 2002 to April 2002 (using currency parity under the Convertibility Law).

472. The Tribunal has already decided that damages would be established as at December 31, 2001. Damages in all cases are therefore determined as at that time, after which time the pesification and the but-for scenarios are applied. In both cases, it is assumed that, after that date, the tariffs will have been implemented fully one way or the other. The amounts of subsidies not paid between January and April 2002 should therefore be ignored for the purpose of calculating the compensation under this category.

473. The claim for unpaid subsidies will therefore only cover the period finishing on December 31, 2001. That amount has been established by the Claimant, in its Post-Hearing Brief, as of April 2002, at US$129, 187, 344 (as indicated a deduction of US$5.4 MM must be made for the January-April 2002 period).

474. From that amount, the subsidies the Respondent paid or committed to pay subsequently to that date must also be deducted.

475. For its part, the Respondent argues that the amount owing should be in AR$ and not US$ and that most of that debt has already been repaid. On the basis of this assumption, the Respondent estimates that there would be only a remaining amount of some US$3 million to be paid to the Claimant.

476. In answer, the Claimant recognizes that a certain amount has been received but that it is very far from covering the total amount of unpaid subsidies. The difference between the Parties is explainable by the fact that Argentina argues that, since the subsidies were to be paid in pesos, whatever amount it paid subsequently in that currency should be deducted from the peso debt for unpaid subsidies, while the Claimant argues that, by virtue of the principle of indifference, the amount owed by the Respondent should be calculated on the basis of parity between the two currencies which was in effect at the time the debt was incurred.

477. The Tribunal has already decided, for the reasons mentioned, that the unpaid subsidies before December 31, 2001, although established in pesos, should be paid on the basis of parity between the Argentine peso and the U.S. dollar. It will therefore proceed to calculate the amount still owed by Argentina on that basis.

478. The unpaid subsidies to December 31, 2001 shall be in the amount of US$123,787,344, leaving aside the US$5.4 MM claimed for the subsequent period up to April 2002. From that amount the sum of US$16,775,249 paid by Argentina up to January 2006 should be deducted. If it is assumed that all the amounts provided for under the Fiduciary Fund are going to be paid fully to the end of 2008 (on a currency parity basis, *i.e.* US$13,030,012 for the period of January 2006 to the end of 2008) - the Claimant itself has assumed that such payments would be made - the total amount owing for subsidies as of December 31, 2001 becomes US$93,982,083. Applying the same percentages as the ones mentioned by the Claimant for the allocation of that amount between CGP (1.13%) and CGS (98.37%), the unpaid subsidies therefore amount to US$1,061,998 in the case of CGP and US$92,450,175 in the case of CGS.

479. This is the amount which is awarded by the Tribunal as damages for unpaid subsidies. The Claimant is entitled to payment of its proportionate share of that amount, as represented by the respective interests of Sempra and Camuzzi in CGP and GGS.

This amounts for the Claimant to US$394,001 in the case of CGP (corresponding to the Claimant's share of 37.10%) and US$35,852,178 in the case of CGS (corresponding to the Claimant's share of 38.78%). The total amount owing to the Claimant under this item is therefore US$36,246,179.

480. If, for any reason, the Respondent were not to implement in full the commitments it made under the Fiduciary Fund, such pending payments must be added to the amount awarded by the Tribunal.

c) Other Discrete Claims

481. In its Memorial on the Merits, the Claimant had made a number of claims relating to various taxation matters. As noted, however, subsequently the Claimant decided not to pursue those claims and, consequently, the Tribunal does not need to address them.

8 Total Damages

482. The total damages due by the Respondent to the Claimant, as at December 31, 2001, amount to US$128,250,462.

Sempra Damages

Equity value loss	US$67,402,603
Loss on the loan of December 2001	US$15,949,540
Unpaid PPI adjustments	US$8,652,140
Non-Payment of subsidies	US$36,246,179
Total damages at 31/12/2001	US$128,250,462

9. Interest

483. In its Consolidated Memorial on the Merits and in its Reply, the Claimant, in its prayer for relief requests "(a)n order that the Argentine Republic compensate Camuzzi and Sempra for all damages they have suffered, plus interest compounded quarterly."

484. In the light of the recent Award in the *Enron* claim, this request became another contentious point in this arbitration. In *Enron*, the Tribunal decided that interests would be ordered until the date of the Award only as it understood that this was the request made by the Claimants.[165] The Claimant brought that issue to the attention of this Tribunal and argued by letter of June 22, 2007 that post Award interest be also awarded. Argentina expressed opposition to this request by letter of July 2, 2007 on the ground that such request had not been timely made nor had it been made in the memorials or the *Petitum*, which on the contrary referred to interest until the date of the Award.

485. In considering this issue the Tribunal has unanimously concluded that it is appropriate for interest to begin on January 1, 2002. Yet, the Tribunal by majority has concluded that in the light of the fact that post Award interest was not expressly requested in the memorials or their *Petitum*, and such memorials repeatedly referred to interest until the date of the Award, interest should, like in *Enron*, be awarded only until the date of the Award. In the view of the majority formal petitions for relief can only be made in the *Petitum* and the memorials which explain and support such petitions. The Tribunal will accordingly order interest until the date of the Award.

486. The Tribunal also unanimously agreed that interest on the above-noted amounts of damages will be computed at the successive 6-month LIBOR rates, plus a 2% annualized premium or portion thereof. Interest shall be compounded semi-annually.

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165 *Enron Corp. and Ponderosa Assets, L. P. v. Argentine Republic,* (ICSID Case ARB/01/3), Award of May 22, 2007, para. 452.

NOW THEREFORE THE ARBITRAL TRIBUNAL
DECIDES AND AWARDS AS FOLLOWS

1. The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(2)(a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty.
2. The Respondent shall pay the Claimant compensation in the amount of US$128,250,462. If the Respondent were not to implement in full the commitments it made under the Fiduciary Fund for the payment of owed subsidies, such pending payments shall be added to the amount awarded by the Tribunal.
3. The Respondent shall pay the Claimant interest at the 6 month successive LIBOR rate plus 2 per cent for each year, or proportion thereof, beginning on January 1, 2002 until the date of the Award. Interest shall be compounded semi-annually.
4. The Tribunal hereby confirms its Order that the Stamp Tax Claims are discontinued subject to the terms therein specified.
5. Each party shall pay one half of the costs of the arbitration and bear its own legal costs.
6. All other claims are hereby dismissed.

The Arbitral Tribunal

[signature]
Francisco Orrego Vicuña
President
September 9, 2007

[signature]
Marc Lalonde
Arbitrator
(Signed subject to the attached Partial Dissenting Opinion)
September 18, 2007

[signature]
Sandra Morelli Rico
Arbitrator
September 14, 2007