

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

IN THE PROCEEDING BETWEEN

CMS GAS TRANSMISSION COMPANY
(CLAIMANT)

AND

THE ARGENTINE REPUBLIC
(RESPONDENT)

CASE NO. ARB/01/8

**APPLICATION FOR ANNULMENT
AND REQUEST FOR STAY OF ENFORCEMENT OF
ARBITRAL AWARD**

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**RESPONDENT’S APPLICATION FOR ANNULMENT
AND REQUEST FOR STAY OF ENFORCEMENT**

1. Pursuant to Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), and Rule 50 of the Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”), Respondent, the Argentine Republic (“Argentina”), respectfully submits this Application for Annulment of the Award issued in the matter *CMS Gas Transmission Company c. República Argentina* (Case No. ARB/01/8).

2. Respondent requests that enforcement of the Award be stayed pending the *ad hoc* Committee’s decision on this Application for Annulment.

APPLICATION REQUIREMENTS

3. ICSID Arbitration Rule 50(1) provides that an application for the annulment of an award shall be addressed in writing to the Secretary-General and shall (a) identify the award to which it relates; (b) indicate the date of the application; and (c) state in detail the grounds on which it is based.

4. **Identification of the Award.** Argentina seeks annulment of the Award issued May 12, 2005, Case No. Arb/01/8,¹ in which the Tribunal concluded that Argentina violated Articles II(2)(a) and II(2)(c) of the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (the “Treaty” or “BIT”) and awarded compensation and interest to Claimant CMS Gas Transmission Company (“CMS”).

5. **Date of the Application.** The date of Argentina’s Application for Annulment is September 8, 2005.

¹ Because the Award incorporates the Tribunal’s Decision on Jurisdiction of July 17, 2003 (see Award (¶ 3), and because some of the Tribunal’s reasons for annulling the Award reference jurisdictional issues, this Application also applies to the Decision on Jurisdiction.

6. **Grounds for Annulment.** Argentina applies for annulment based on the following grounds provided in ICSID Convention Article 52:

- a. Art. 52(1)(b): The Tribunal manifestly exceeded its powers; and
- b. Art. 52(1)(e): The Award fails to state the reasons on which it is based.

BACKGROUND

7. Argentina believes that a brief exposition of the factual background will assist the *ad hoc* Committee in understanding the reasons, which are detailed below, as to why the Award should be annulled based on the grounds stated in Articles 52(1)(b) and (e). Argentina will expand upon both the factual background and the reasons for annulment in its memorial after the *ad hoc* Committee is constituted.

The Argentine Crisis

8. “The collapse of the Argentine economy [was] one of the most spectacular in modern history.”² The issues in this case cannot be understood without an appreciation of the crisis that ravaged Argentina’s economy, society, and polity prior to its adoption of the emergency measures challenged by CMS. In particular, the question whether the challenged measures were necessary to maintain public order or protect Argentina’s essential security interests and were thereby protected against liability by Treaty Article XI, as well as whether Argentina complied with other Treaty provisions, must be examined in light of the socio-economic disaster that befell Argentina and the social turmoil it generated.

9. In the late 1990s, Argentina was plunged into an economic crisis triggered by international capital market conditions and rising interest rates, which led to a sharp increase in deficits and public debts. Argentina was especially hard hit by a sudden halt to capital inflows after the East Asian crisis of 1997 and the Russian default

² Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA 1 (BBS Public Affairs 2005).

in August 1998. In addition, demand from its primary trading partner, Brazil, fell sharply after Brazil devalued its currency in 1999, and Argentina's exports became relatively more expensive due to a steep drop in commodity prices. Interest rate increases by the U.S. Federal Reserve beginning in mid-1999, designed to slow down the United States' economy, also had a drastic impact on Argentina and its dollar-pegged currency at a time when Argentina's economy was contracting.

10. These cumulative shocks led to a deepening recession (in fact, a depression) that further increased Argentina's fiscal deficit. "By mid-2000, with unemployment rising above 14 percent, social unrest in the countryside and labor strife in the cities were becoming increasingly common."³ Unemployment climbed to over 18% in October 2001 and to over 21% six months later. Argentina's Gross Domestic Product ("GDP") shrank over 25% between 1999 and 2002, the most severe output contraction in an emerging market economy in recent history. The shrinkage became especially acute in the fourth quarter of 2001, when GDP fell 10.5% more than in the prior year. In December 2001, "the Argentine economy ground to a virtual halt."⁴ The decline continued into the first quarter of 2002, when GDP fell 16.3% more than the prior year and private consumption shrank by almost 20%. Argentina's attempts to reduce the fiscal deficits only intensified the output contraction. In the last few months of 2001, Argentina lost 22% of its bank deposits and 45% of its international reserves. In December 2001, "the United States government decided to lower the boom on the country by opposing the IMF's distribution of a previously agreed upon disbursement of 1,264 million dollars."⁵

11. The enormity of Argentina's economic crisis is undisputed. Disinterested observers called it a "decline without parallel"⁶ and "an economic collapse to match the Great Depression of the 1930s."⁷

³ *Id.* at 80.

⁴ *Id.* at 1.

⁵ Deborah L. Norden & Roberto Russell, *THE UNITED STATES AND ARGENTINA* 127 (Routledge 2002).

⁶ *A decline without parallel – Argentina's collapse*, *The Economist*, Mar. 2, 2002.

⁷ *Liberty's great advance*, *The Economist*, June 28, 2003.

12. The financial crisis became a social crisis as unemployment kept rising and per capita income shrank in half. Bankruptcies mounted at a record pace. Millions of people lost access to health care coverage and medicines. Much of Argentina's middle class, the largest in Latin America, suddenly found itself mired in poverty. As described in one study, "Argentina's economy imploded in 2001. Hordes of people found themselves scrounging for food and other essentials, many resorting to a barter system to replace liquid assets that had evaporated overnight."⁸ By the fall of 2002, over half of Argentina's population was living below the poverty line. This "extreme political and economic crisis [was] catastrophic even by Argentine standards."⁹

13. This socio-economic crisis rapidly became a serious security concern. Beginning in November 2000, massive strikes swept the country, leading to violence in the streets and the shutdown of schools, businesses, transportation, energy, and health services.¹⁰ In the spring of 2001, highways were barricaded across the country as protests spread.¹¹ In July 2001, after stock prices plunged 12% in one week and created a "crisis atmosphere," another general strike "brought much of the country to a standstill," as protestors "blocked roads with flaming tires and the national airline suspended all flights."¹² In August, the country was shut down by another wave of roadblocks, and massive protests rocked Buenos Aires. As the crisis deepened, government officials were "beaten up and abused on the street," and banks were physically attacked.¹³ In the words of one study, "Argentina [was] experiencing a

⁸ Albert H. Cho & Navroz K. Dubash, *Will Investment Rules Shrink Policy Space for Sustainable Development?* 21 (Sept. 5, 2003) (World Resources Institute Working Paper).

⁹ Norden & Russell, *supra* note 4, at 2.

¹⁰ *One dead as Argentina is paralyzed by biggest national strike in years*, The Canadian Press, Nov. 24, 2000.

¹¹ Laurence Norman, *Jobless and others protest Argentina's recession*, Associated Press Newswires, May 22, 2001.

¹² *Strike over cutbacks brings Argentina to a standstill*, Scotsman, July 20, 2001.

¹³ *A decline without parallel*, *supra* note 5.

breakdown not just of its financial system, but its political institutions and social order as well.”¹⁴

14. Looting became commonplace, and new forms of crime developed and gained novel labels, including *piratas del asfalto* (truck hijackings) and *express kidnaps* (short-term, low-ransom abductions). Foreign newspapers noted “the unceasing spiral of robberies and kidnappings within a framework of record levels of poverty and unemployment.”¹⁵ In December 2001, thousands of demonstrators marched on the Casa Rosada in Buenos Aires and destroyed the municipal government headquarters in Córdoba, while elsewhere in the country “supermarkets and banks were pillaged.”¹⁶ During this “social explosion,” the streets were filled with “uncontrolled protests, compete with rioting and looting.”¹⁷ Riots left 30 civilians dead on just one day in December 2001. After Christmas, protestors “blocked the main streets of Buenos Aires for hours during the day, and in a nighttime confrontation on December 28 that left several police officers injured, demonstrators besieged the downtown area and broke into the Congress building, where they set fire to furniture before being driven off.”¹⁸

15. Popular insurrection was openly discussed. At meetings of “neighborhood assemblies,” popular anger focused on the “ten billions taken away by the power suppliers [and] the profits that the telephone companies gained every year,” and plans were made to make these companies “feel the citizens’ rage.”¹⁹

16. The havoc and collapse of public order were reflected in global headlines: “Argentina breaks”;²⁰ “Argentina braced for mass protests”;²¹ “Argentina

¹⁴ Dominic Barton et al., *DANGEROUS MARKETS 3* (John Wiley & Sons, Inc. 2003).

¹⁵ *Ensordecedor cacerolazo de protesta en Buenos Aires*, *El Mercurio* (Chile), Sept. 10, 2002.

¹⁶ Blustein, *supra* note 1, at 185-86.

¹⁷ Norden & Russell, *supra* note 4, at 2, 128.

¹⁸ Blustein, *supra* note 1, at 186.

¹⁹ Stella Calloni, *Frágil, el equilibrio político, económico y social en Argentina; un mal paso desataría la furia*, *La Jornada* (Mexico), Jan. 21, 2002.

²⁰ Manuel V. Sola, *Argentina Se Rompe*, *Diario de León* (Spain), Nov. 25, 2001.

declares state of siege in order to stop looting”;²² “Reeling From Riots, Argentina Declares a State of Siege”;²³ “Argentina sinks without help”;²⁴ “L’Argentine en plein chaos”;²⁵ “Argentina at the verge of abyss and anarchy.”²⁶

17. Facing an accelerating flight of capital from Argentina and a run on its currency, in late 2001 the government was forced to impose capital, exchange, and wage controls, to limit the right to withdraw funds from bank accounts (the “corralito”), and to default on the public debt. But the crisis could not be contained, and the government lost public support, leading to the unprecedented installation of five presidents in just twelve days. Thus, the Argentine “social explosion” brought down the government “in a painful and bloody manner.”²⁷

Argentina’s Emergency Measures

18. On January 6, 2002, Argentina declared a public emergency. Law 25.561 proclaimed “a public emergency with regards to social, economic, administrative, financial, and foreign exchange matters” to ensure “public order.” In line with the advice of many domestic and foreign economists, Argentina officially repealed its decade-old currency convertibility regime, under which the peso was pegged to the U.S. dollar, and moved towards a floating exchange rate (which officially took effect on February 11, 2002).

19. These measures were the *de jure* expression of a devaluation of the peso that already had transpired *de facto* due to the substantial overvaluation of the

²¹ Thomas Catan & Richard Lapper, *Financial Times* (U.K.), Dec. 13, 2001, The Americas Sec. at 8.

²² *Argentina declara el estado de sitio para contener los saqueos*, *Expansión* (Spain), Dec. 20, 2001.

²³ Clifford Krauss, *New York Times* (U.S.), Dec. 20, 2001, at A3.

²⁴ *Argentina se Hunde sin Ayuda*, *El Nuevo Herald* (Miami), Dec. 21, 2001.

²⁵ *L’Argentine en Plein Chaos*, *Le Figaro* (France), Dec. 21, 2001.

²⁶ *Argentina al Borde del Abismo y la Anarquía*, *El Universal* (Venezuela), Jan. 14, 2002.

²⁷ Norden & Russell, *supra* note 4, at 127.

dollar-pegged peso. As economist Paul Krugman explained, “It is clear that Argentina suffers from a real overvaluation — that is, prices are too high given the exchange rate.”²⁸ Indeed, even before the repeal of convertibility, it was no longer possible to obtain a dollar in exchange for a peso outside of Argentina.

20. The devaluation of the peso in turn required that liabilities denominated in foreign currencies be redenominated in pesos to avoid an even greater financial and economic collapse. As observers explained, “Argentina will have [to] redenominate dollar assets and liabilities within Argentina into domestic currency.”²⁹ Hence, the emergency measures imposed an across-the-board redenomination of all domestic contracts into pesos (“pesification”). Commentators saw no alternative. As Krugman put it, “The only way to end the economy’s pain is through some form of nominal devaluation, which ends the need for deflation”³⁰ and through “a decree canceling * * * indexation.”³¹ Analyst Paul Blustein agrees that there was “no choice” but to end the convertibility system and adopt pesification because allowing debts to be paid in depreciated pesos was necessary “[t]o head off mass bankruptcy.”³² If the devaluation had been implemented without pesification, liability payments would have more than tripled if they remained denominated in dollars because the value of the peso had shrunk to less than one-third of a dollar. By denominating all liabilities, including contractual obligations, in pesos, Argentina ensured that all participants in the economy would share the necessary burdens collectively.

21. As particularly relevant here, the emergency measures required that tariffs for essential services, including gas transportation, be denominated in devalued pesos. The measures also established a Renegotiation Commission to

²⁸ Paul Krugman, *Argentina’s Money Monomania*, Dec. 2001, <http://www.pkarchive.org/crises/MoneyMonomania.html>; see also Floyd Norris, *Argentina’s Woes: With Peso Overvalued, It Can’t Compete*, N.Y. Times, Dec. 8, 2000, at C1.

²⁹ Michael Mussa, *Fantasy in Argentina*, Financial Times, Nov. 12, 2001.

³⁰ Krugman, *Argentina’s Money Monomania*, *supra* note 27.

³¹ Krugman (Op-Ed), *Reckonings: A Cross of Dollars*, N.Y. Times, Nov. 7, 2001, at A23.

³² Blustein, *supra* note 1, at 187, 192.

renegotiate license terms and suspended tariff increases tied to the U.S. Producer Price Index (“PPI”). If gas tariffs had not been so modified, it would have taken three to four times as many pesos to pay utility bills. Skyrocketing gas prices would have forced factories and other businesses to close down, and most residents would have been unable to heat their homes or cook. According to a World Bank study, even with utility rates converted into pesos, 60% of lower income households (the first quintile) were in arrears on utility service payments during the first half of 2002.³³ Thus, Argentina’s emergency measures both prevented a windfall to the concessionaires at the expense of beleaguered customers and also helped overcome insurmountable obstacles to tariff collection.

22. Although rioting “subsided” after adoption of the emergency measures in January 2002, “[f]ears of a new social explosion were running high.”³⁴ Enormous crowds continued to mass frequently in the Plaza de Mayo, “banging pots and pans, roaring chants, and waving banners.”³⁵

23. Eventually, Argentina’s emergency measures proved effective. Although conditions remained and continue to remain severe, the value of the peso stabilized so that, by March 2004, its real exchange rate had increased 40% relative to the U.S. Dollar, 60% relative to the Brazilian Real, and 97% relative to the Euro. Above all, Argentina emerged from this period of public disorder and insecurity with its republican form of government intact.

CMS’s Arbitration Claims

24. In July 2001, CMS, a U.S. company, filed a request for arbitration with ICSID. CMS was a 29.42% shareholder in Transportadora de Gas del Norte (“TGN”), an Argentine company, which in 1992 had obtained a license to transport gas (the “License”). CMS alleged that Argentina’s suspension of TGN’s PPI-based tariff adjustments violated the BIT. In February 2002, CMS filed ancillary claims. CMS

³³ Vivien Foster, *Impacto Social de la Crisis Argentina en los Sectores de Infraestructura*, p.11 (Apr. 2003) (World Bank Working Paper No. 1/05).

³⁴ Blustein, *supra* note 1, at 189.

³⁵ *Id.*

alleged that Argentina's emergency laws had fundamentally altered the prior regulatory regime under which TGN's tariffs were calculated in U.S. dollars, converted to pesos at the exchange rate at the time of billing, and adjusted every six months based on the U.S. PPI. CMS alleged that the emergency measures reneged on commitments made to CMS and TGN, and that they substantially lowered the value of CMS's stake in TGN by reducing TGN's revenues and increasing TGN's costs.

25. CMS claimed that Argentina violated the Treaty by expropriating CMS's shares in violation of Article IV; failing to treat CMS's investment fairly and equitably in violation of Article II(2)(a); acting discriminatorily and arbitrarily in violation of Article II(2)(b); and failing to observe obligations with regard to CMS's investment in violation of Article II(2)(c) (the "Umbrella Clause").

The Decision on Jurisdiction

26. On July 17, 2003, the Tribunal overruled Argentina's objections to jurisdiction. The Tribunal recognized that it lacked jurisdiction over "measures of general economic policy" but stated that it had jurisdiction "to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts." Decision on Jurisdiction ¶ 33.

27. The Tribunal also rejected additional jurisdictional objections asserted by Argentina, including its contention that CMS lacked *jus standi* to bring a claim based on a purported breach of the License terms where TGN was the licensee and CMS was but a shareholder in TGN. *Id.* ¶ 65.

The Award

28. The Tribunal, in its Award dated May 12, 2005, rejected CMS's claims of expropriation under Article IV of the BIT and of discriminatory and arbitrary treatment under Article II(2)(b). However, it ruled that Argentina did not accord fair and equitable treatment to CMS's investment in violation of Article II(2)(a) of the BIT, and failed to observe its commitments with respect to CMS's investment in violation of Article II(2)(c) of the BIT. The Tribunal awarded US\$133.2 million plus interest to CMS.

29. The Tribunal ruled that Argentina did not expropriate CMS's investment in violation of Article IV of the Treaty. The Tribunal explained that CMS was not substantially deprived of its investment because it retained "full ownership and control" of its interest in TGN. Award ¶¶ 263-264. The Tribunal also ruled that Argentina did not impair CMS's investment by taking arbitrary or discriminatory measures and thus did not violate Article II(2)(b). The Tribunal explained that the challenged measures were not arbitrary because there had been "no impairment [of] the management and operation of the investment" and were not discriminatory because they did not treat "similarly situated groups or categories of people" differently. *Id.* ¶¶ 292-293.

30. Nevertheless, the Tribunal ruled that Argentina violated Article II(2)(a) of the Treaty by not according "fair and equitable treatment" to CMS's investment. According to the Tribunal, a failure to provide "a stable legal and business environment" objectively breached this provision, notwithstanding the lack of "any deliberate intention or bad faith in adopting the measures in question." Award ¶¶ 274, 280-281. The Tribunal also ruled that Argentina violated Article II(2)(c) of the Treaty by breaching "legal and contractual obligations pertinent to the investment." *Id.* ¶ 303. In particular, the Tribunal focused on purported breaches of "two stabilization clauses contained in the License" — commitments "not to freeze the tariff regime or subject it to price controls" and "not to alter the basic rules governing the License without TGN's written consent." *Id.* ¶ 302.

31. The Tribunal then responded to Argentina’s invocation of necessity to justify its emergency measures. Separate sections of the Award addressed this issue under Argentine law, customary international law, and Treaty Article XI.

32. The Tribunal ruled that, under Argentine law, a breach of contract is not excused by a state of necessity: “[T]he state of necessity under domestic law does not offer an excuse if the result of the measures in question is to alter the substance or the essence of contractually acquired rights.” Award ¶ 217. The Tribunal recognized that the Argentine law doctrine of *imprevisión* requires revision of contract obligations when changing conditions make compliance onerous. *Id.* ¶¶ 221-222. However, without citing any Argentine authority, it relied on a 1916 French ruling, *Gaz de Bordeaux*, to conclude that the doctrine of *imprevisión* was inapplicable in this context. *Id.* ¶¶ 224-225. And it relied on that same 1916 French decision to rule that, under Argentine law, a crisis — no matter how serious — does not prevent liability and a duty to pay compensation to investors harmed by measures taken in response to the crisis. *Id.* ¶¶ 239-246.

33. The Tribunal proceeded to opine that any adjustment of License terms took place pursuant to certain adjustment and tariff review mechanisms specified in the License and Argentina’s Gas Law. Award ¶ 238. However, the Tribunal did not examine whether resort to those mechanisms, all of which by their plain terms would have involved many months or even years of administrative proceedings, would have resolved the crisis devastating Argentina’s economy and society. That omission was striking in light of the Tribunal’s view that the crisis in fact ended “sometime between late 2004 and early 2005.” *Id.* ¶ 250.

34. The Award’s final section on liability rejected Argentina’s position that Treaty Article XI precludes liability under the Treaty. The Tribunal rejected Argentina’s view that a State’s invocation of necessity under Article XI is entitled to deference and subject only to review for good faith. Award ¶¶ 370-374. Instead, the Tribunal stated that it must undertake a “substantive review” of the measures adopted by Argentina in response to the crisis. *Id.* ¶ 374. However, the Tribunal never engaged in any such “substantive review” with respect to Article XI. It opined, invoking Article 27

of the International Law Commission’s Articles on State Responsibility, that a temporary period of necessity does not preclude liability for the period *after* a period of necessity ends. *Id.* ¶¶ 379-382. But it did not apply that view to the facts of this case to preclude liability for measures taken *before* the end of the crisis. Nor did the Tribunal examine whether reverting to the pre-emergency regime was viable or whether it would simply have plunged the country into crisis and chaos once again. Instead, the Tribunal again relied on customary international law, the Articles on State Responsibility, and the French *Gaz de Bordeaux* case to hold that, even if the challenged measures were necessary, Argentina still would have a “duty to compensate” CMS for its losses. *Id.* ¶¶ 383-384, 388, 393.

35. To reach its conclusion that compensation is required even if the challenged measures were necessary, the Tribunal refused to apply Article XI, stating instead that “Article 27 [of the Articles on State Responsibility] establishes the appropriate rule of international law on this issue.” Award ¶ 390. The Tribunal not only granted priority to the Articles on State Responsibility over a provision in the specific treaty governing the investor-State relationship, but it disregarded the Special Rapporteur’s Commentary, which states that Article 27 “does not attempt to specify in what circumstances compensation should be payable.”³⁶ Instead, the Tribunal simply declared without support that an investor should not “bear entirely the cost of the plea of the essential interests of the other Party.” Award ¶ 390. The Tribunal made no attempt to reconcile that declaration with the plain prescription in Article XI that the Treaty “shall not preclude” the adoption of “measures necessary.”

36. The Tribunal awarded CMS compensation of US\$133.2 million plus interest. Award Decision ¶¶ 2, 4. This figure represents, according to the Tribunal, 29.42% of the fair market value of TGN as of August 17, 2000 using the discounted cash flow valuation method to account for estimated income through 2027, the termination date of the License. Award ¶¶ 410-463. The Award does not provide any calculations to show how the Tribunal reached that figure nor explain why the Tribunal based its

³⁶ James Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY 190 (2002).

determination of quantum on a percentage of TGN's value. The Award also provides that Argentina has a one-year option to purchase CMS's shares in TGN for an additional US\$2,148,100 upon payment of the above compensation. Award Decision ¶ 3.

REASONS TO ANNUL THE AWARD

I. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS.

37. As provided in Article 52(1)(b) of the ICSID Convention, annulment is required where the tribunal "manifestly exceeded its powers." As explained by the *ad hoc* Committee in *Aguas de Aconquija*, annulment is mandatory "where a tribunal has 'manifestly exceeded its powers,'" because "the matter is by definition not trivial."³⁷ Indeed, the Tribunal's excess of authority in this case is not only manifest but material given its "clear and serious implications" for Argentina.³⁸

A. The Tribunal Manifestly Exceeded Its Powers By Failing To Give Effect To Treaty Article XI.

38. Treaty Article XI overrides other provisions of the BIT where a State adopts measures necessary to maintain public order or protect essential security interests: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order...or the Protection of its own essential security interests." Hence, insofar as Argentina's emergency measures were "necessary" to maintain public order or protect essential security interests, Argentina cannot be liable under Treaty Articles II(a) and (c) as the Tribunal ruled.

39. In Argentina's view, which is consistent with the publicly expressed views of both State parties to the BIT, Article XI requires tribunals to defer to a State's judgment as to whether emergency measures were necessary to maintain public order or protect its essential security interests, subject only to review for good faith.³⁹

³⁷ *Compañía de Aguas del Aconquija S.A. v. Vivendi Universal* ("Vivendi"), Decision on Annulment ¶ 63 (July 3, 2002).

³⁸ *Id.* at ¶ 115.

³⁹ Article XI is virtually identical to Article X of the 1992 Model U.S. BIT, which, according to the U.S. State Department, reflected "the self-judging nature of the

Such deferential good-faith review would give effect to the State's sovereign right to take prompt action to defend itself against threats to public order and security. It also would ensure that adoption of the measures was not pretextual but rather was rationally related to resolving the emergency invoked by the State. Nothing in the Award suggests that Argentina's emergency measures were pretextual, were not rationally addressed to the emergency at hand, or were otherwise taken in bad faith.

40. The Tribunal rejected Argentina's position that its invocation of necessity must be accepted so long as it was in good faith. Instead, the Tribunal declared that it would undertake its own "substantive review" as to whether Argentina's measures were necessary within the meaning of Article XI. Award ¶ 374. As noted, Argentina's view is that Article XI does not contemplate such a "substantive review." But even if it does, the Tribunal did *not* engage in any substantive review and *never determined* that Argentina's measures were not necessary pursuant to Article XI. Article XI requires a determination of whether Argentina's measures were necessary to maintain public order or protect its essential security interests. Either the Tribunal had to defer to Argentina's good-faith judgment (Argentina's position) or make its own determination (the Tribunal's professed standard). By doing neither, the Tribunal failed to apply Article XI at all. That disregard of an essential element of the BIT manifestly exceeded the Tribunal's authority.

41. If the Tribunal had applied its professed "substantive review" standard, it would have had to address the severe economic crisis that plunged Argentina

protection of a Party's essential security interests." *Bilateral Investment Treaties with the Czech and Slovak Federal Republic, the Peoples' Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland*: Hearing Before the Senate Foreign Relations Committee, 102d Cong. 65 (1992). When the Argentina-U.S. BIT was submitted to the U.S. Senate in 1993, the State Department omitted Article XI from its list of provisions differing from those in the 1992 Model BIT. *Id.* at 26-27. Subsequent U.S. BITs with language virtually identical to that in Article XI were sent to the Senate for ratification accompanied by the following interpretive guidance: "The first paragraph of Article X reserves the right of a Party to take measures *it regards as necessary* for the maintenance of public order ...or the protection of its own essential security interests." (Emphasis added.) Furthermore, U.S. negotiators repeatedly indicated to foreign negotiators that the U.S. regards the language in Article XI as self judging. Kenneth J. Vandeveld, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 Int'l Tax & Bus. Law 159, 174 (1993).

into a societal breakdown, generating unprecedented governmental instability and widespread violence. It would have had to determine the role of Argentina's emergency measures in reversing the economic downturn, initiating a period of recovery, preventing a violent overthrow of the government, and saving the economy to the benefit of both domestic and foreign investors. It would have had to examine whether maintaining dollarized utility tariffs was a viable option once the value of the peso had sunk so far below the value of the dollar. It would have had to consider whether less stringent measures than those taken by Argentina would have been as effective in abating the ravages of the crisis. The Tribunal engaged in no such "substantive review" and thus failed to determine whether Argentina's measures were "necessary" within the meaning of Article XI.⁴⁰

42. The Tribunal did express the view, citing Article 27 of the Articles on State Responsibility, that a State's invocation of necessity does not preclude liability once the emergency giving rise to the necessity has ended. Award ¶¶ 379-382. But the Tribunal did not determine whether reversing the pesification measures was a viable option for Argentina or what the impact of restoring dollarized tariffs would be on the economy, public order, or investors. The emergency measures obviously would remain necessary if repealing them would again plunge the economy into chaos and collapse. By failing to examine that question at all, the Tribunal again failed to give effect to Article XI. Furthermore, the Tribunal's view that the period of necessity was temporary cannot be reconciled with its award of damages for harm allegedly incurred *during* the period of necessity.

43. The Tribunal confirmed its disregard and evisceration of Article XI by ruling that compensation is required even if a State's measures were necessary.

⁴⁰ The Tribunal's suggestion that the Argentine crisis "did not result in total economic and social collapse" (Award ¶ 355) provides no justification for its disregard of Article XI. The Tribunal's own description of the crisis shows that Argentina was on the brink of such a collapse, and the evidence of spreading violence in the streets directed against the government and financial institutions was uncontroverted. If emergency measures could be invoked only *after* a collapse and not to prevent one, Article XI would be deprived of all meaning.

Article XI states that the Treaty does not preclude emergency measures and nowhere mentions compensation. If a State were required to compensate all asset holders harmed by such necessary measures, when such measures apply generally and affect many thousands of people, the State effectively *would* be precluded from taking the very measures that Article XI authorizes. The Tribunal had no authority to disregard the plain and mandatory language of Article XI.

44. The Tribunal's reliance on Article 27 of the Articles on State Responsibility is unavailing, even if Article 27 were applicable in light of Treaty Article XI. Article 27 does not require the payment of compensation for measures subject to the defense of necessity, and the Tribunal exceeded its authority by adding such a requirement. Article 27 states only that an invocation of necessity is "without prejudice to...the question of compensation for any material loss caused by the act in question." As the Commentary of the International Law Commission states, Article 27 merely "refers to the possibility of compensation in certain cases" and "does not attempt to specify in what circumstances compensation should be payable." The Tribunal's ruling that compensation must always be paid when a State invokes necessity exceeded its authority and further warrants annulment.

45. In sum, the Tribunal manifestly exceeded its powers by failing to give effect to Article XI. It engaged neither in a deferential good-faith review nor in a substantive review of whether Argentina's invocation of Article XI precluded liability under other Treaty articles. Instead, it effectively excised Article XI from the Treaty by ruling that, notwithstanding whether Argentina's emergency measures were necessary to maintain public order or protect essential security interests, Argentina still must pay compensation to investors asserting claims under the Treaty.

B. The Tribunal Manifestly Exceeded Its Powers By Failing To Apply The Governing Law.

46. Application of the wrong law is an excess of authority and a ground for annulment. "That a tribunal must apply the proper law to the merits of the

dispute is not a controversial principle, and there is universal agreement that a tribunal's failure to do so justifies the annulment of an ICSID award.”⁴¹

47. The Tribunal failed to make a reasoned determination as to which law should apply to each issue before it. Instead, it simply proclaimed its right to choose from domestic law and international law as it felt appropriate to justify its conclusions. Award ¶¶ 116-117. It then proceeded to pick and choose from a variety of sources of law without explanation, and it gave particular force — again without explanation — not to domestic or international law but rather to inapplicable French law.

48. The Tribunal was first and foremost required to apply the provisions of the Treaty to the parties' dispute, including Article XI in particular. The tribunal in *Methanex* so held in its recent final award, stating: “The issue here is not the relevance of general international law. * * * International law directs this Tribunal, first and foremost, to the text [of the treaty].”⁴² In holding that compensation is always required notwithstanding the need for the challenged measures (Award ¶ 388), the Tribunal patently disregarded Article XI, instead relying entirely on the inapplicable Articles on State Responsibility and the French *Gaz de Bordeaux* decision. *Id.* ¶¶ 390, 393. There is no evidence that Argentina or the United States intended to incorporate the Articles on State Responsibility or French law into Article XI. To the contrary, the fact that they inscribed Article XI in the Treaty is strong evidence of their intent to override the prevailing international law of “necessity.”⁴³

49. Even if it were appropriate to resolve this issue by looking to sources of law outside the Treaty, Article 42(1) of the ICSID Convention required the Tribunal to apply “the law of the Contracting State party to the dispute (including its

⁴¹ Eric A. Schwartz, *Finality at What Cost?*, in ANNULMENT OF ICSID AWARDS 43, 55 (Emmanuel Gaillard & Yas Banifatemi eds., 2004).

⁴² *Methanex Corp. v. United States of America*, Arbitration pursuant to NAFTA and the UNCITRAL Rules, Final Award, Part IV, Chapter B, ¶ 37 (Aug. 3, 2005).

⁴³ Vandeveld, *Of Politics and Markets*, *supra* note 38, at 164 (explaining that, with regard to the “measures necessary” provisions in U.S. BITs, “some public policy concerns of the state were deemed sufficiently compelling that they justified state interference with market-based allocations of capital”).

rules on the conflict of laws) and such rules of international law as may be applicable.” The Tribunal failed to heed that command.

50. The Tribunal purported to take account of Argentine law, referencing the Argentine law principle of *imprevisión*. Award ¶ 222. However, the Tribunal inexplicably rejected the applicability of that principle based solely on its view of French law, relying entirely on the 90-year-old *Gaz de Bordeaux* decision. *Id.* ¶ 224. The Tribunal had no authority to substitute French law for Argentine law. Nor did it have the authority to override Argentine regulatory law as to whether terms of the License in fact were guarantees that survived the termination of the convertibility regime, especially in light of the manifestly radical change in circumstances.⁴⁴

51. Just as impermissibly, the Tribunal declared that Article 27 of the Draft Articles on State Responsibility “establishes the appropriate rule of international law” as to whether compensation is required even when a State’s emergency measures were necessary within the meaning of Treaty Article XI. Award ¶ 390. Even if the Tribunal’s view of the Draft Articles on State Responsibility were correct (it is not, see *infra*), the Tribunal had no authority to override the terms of the BIT, under which the Tribunal had no jurisdiction, or authority to question, *inter alia*, Argentina’s monetary policy.

52. The Tribunal did not give effect to the provisions of the BIT by applying Article 27, overlooking the fact that said provision is not *per se* binding among the parties in this context. When the General Assembly adopted Resolution A/56/83, in point 3 of said Resolution, the General Assembly took into consideration the draft articles. However, neither the General Assembly’s Resolution A/56/83 (see Point 3) nor the Project of the International Law Commission qualifies as a treaty. Hence, Article 27 is non-binding in this context; at a minimum, the Tribunal should have determined if the rule contained in Article 27 of the Draft qualified as customary international and could even be enforceable against the parties to the BIT.

⁴⁴ In this respect, the Tribunal failed to consider the Minutes of the Privatization Committee related to post-convertibility guarantees. Likewise, the Tribunal failed to consider regulatory economic and historic reasons.

53. Finally, the Tribunal manifestly exceeded its authority by hierarchically prioritizing its view of bilateral investment treaties over all other rules of domestic and international law, including those rules that mandate States to preserve the individual's basic human rights for which they are domestically and internationally responsible. To presuppose that the purpose of a treaty justifies an unqualified interpretation of its articles in favor of investors, independently of its terms and context, and even against the subsequent conduct of the parties to the treaty, evidences a clear failure to engage in the functions every tribunal must observe. To narrowly focus on the consequences of the economic emergency for the interests of the investors protected by bilateral investment treaties, as well as subordinate the general interest secured by the State's emergency public policies to the particular interests of investors, is to ignore basic principles of domestic and international law that the Tribunal was obligated to apply as one of its specific and essential duties in deciding the controversy.

54. The Tribunal not only disregarded Argentina's invocation of certain human rights treaties (referenced in ¶ 114 of the Award), but also failed to provide any reasons for its statement in ¶ 121 of the Award, where here the Tribunal failed to support its conclusion that "there is no question of affecting fundamental human rights when considering the issues disputed by the parties."

C. The Tribunal Manifestly Exceeded Its Powers By Transforming The "Fair and Equitable" And "Umbrella" Clauses Into Strict Liability Provisions and By Not Determining the Ordinary Meaning of the Terms "Fair and Equitable".

55. Even apart from the Tribunal's failure to give effect to Article XI, it manifestly exceeded its authority by transforming Articles II(2)(a) and (c) into strict liability provisions, that is, unqualified warranties.

56. According to the Tribunal, Articles II(2)(a) and (c) were necessarily breached so long as the challenged measures "affect[ed]" the Claimant's investment (Award ¶ 124) and had "adverse consequences for the Claimant" (*id.* ¶ 159). In addition, the Tribunal asserted that "fair and equitable" treatment is "an objective requirement" that is "unrelated" to the reasons for the challenged measures (*id.* ¶ 280),

and that the Umbrella Clause is violated simply because “legal and contractual obligations pertinent to the investment have been breached,” notwithstanding the reasons underlying any such breach (*id.* ¶ 303).

57. It has never before been suggested that context is immaterial to the application of these two Treaty articles. Indeed, it is well established that “the standard [is] not one of strict liability. Rather the government must provide protection reasonable under the circumstances.”⁴⁵ The tribunal in the *Lauder* case agreed, stating: “In the context of bilateral investment treaties, the ‘fair and equitable’ standard is subjective and depends heavily on a factual context.”⁴⁶

58. The Tribunal had no authority to determine what was fair and equitable or a breach of an investment-related obligation in a vacuum. Nowhere in its decision is there any explanation of what is fair and equitable treatment of foreign investors in the midst of a severe economic crisis. Nowhere in its discussion of investor expectations is there any reference to what a reasonable investor would expect if a social explosion forced the end of the existing convertibility regime and caused a radical change in circumstances. The Tribunal’s authority was limited to determining what was fair and equitable during the actual crisis ravaging Argentina, not during a period of idyllic stability which did not exist during the relevant time period.

59. This is not a mere *disagreement* with the Tribunal’s approach. It is beyond dispute, for instance, that the standards for appropriate behavior by an airline crew when the plane is about to crash are necessarily different from those on a routine flight. A tribunal holding otherwise would manifestly exceed its authority. It would patently be failing to direct its attention to the questions that it was obliged to consider. It would be asking the wrong questions, and not simply answering the correct questions improperly. The analogy holds here. The Tribunal was obliged to evaluate the propriety

⁴⁵ Kenneth J. Vandeveld, UNITED STATES INVESTMENT TREATIES § 5 03, at 77 (1992).

⁴⁶ *Lauder v. Czech Republic*, Final Award, at 67 (3 Sept. 2001); cf. *Case Concerning Elettronica Sicula S.P.A.*, ICJ Case No. 84, ¶ 108 (July 20, 1989) (FCN Treaty provision providing for “constant protection and security” of investments was not “a warranty that property shall never in any circumstances be occupied or disturbed”).

of the challenged measures in light of the dire emergency facing Argentina and the need to save the economy on which CMS's investment depended. It had no authority to impose liability under Articles II(2)(a) and (c) without doing so.

60. Although the Tribunal had the authority to adopt an interpretation of this standard, it manifestly exceeded its authority by failing to interpret the terms of the Treaty by completely ignoring the basic treaty interpretation rules provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

61. The Tribunal's failure to determine the ordinary meaning of the phrase "fair and equitable treatment" in the Treaty (in reality, a determination it never even attempted) constituted a manifest excess of authority. In this respect, Article 31 of the Vienna Convention on the Law of Treaties clearly establishes that: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose." As the International Court of Justice has confirmed, "the interpretation must be primarily based on the text of the treaty."⁴⁷

62. To support its position with respect to the fair and equitable treatment, the Tribunal refers to "[s]everal arbitral awards and authorities" that "point to the same direction." In this respect, it must be noted that even if the cited references were correct and sufficiently supported, that would not cure the Tribunal's failure to express its reasoning, since the authorities and the case law are secondary sources of international law.⁴⁸ Thus, simply citing these authorities does not constitute "sufficiently relevant" reasoning.⁴⁹

⁴⁷ Case Concerning the Territorial Dispute, *Libyan Arab Jamahiriya/Chad*, ICJ Reports, 1994, ¶ 41. Also, as prominent commentators have explained: "The text of the treaty is normally the only authentic expression and the most recent of what the parties intended, and thus, the interpretation must be fundamentally considered a textual matter." Oppenheim's International Law (London, Longman, 9th ed., 1992), at 1271.

⁴⁸ Cnfr. Article 38 1.d. of the Statutes of the International Court of Justice.

⁴⁹ *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports, at 143.

63. Moreover, the arbitral decision and article cited in note 139 of the Award do not come close to describing the reasons on which the Award is based. The Tribunal quotes *Alex Genin and others v. Republic of Estonia* (Case No. ARB/99.2) (*Genin*), Award of June 25, 2001, 17 ICSID Rev.- FILJ 395 (2002). The tribunal in that case referred to the fair and equitable standard in the following manner:

”367. Article II(3)(a) of the BIT requires the signatory governments to treat foreign investment in a “fair and equitable” way. Under international law, this requirement is generally understood to “provide a basic and general standard which is detached from the host State’s domestic law.” While the exact content of this standard is not clear, the Tribunal understands it to require an “international minimum standard” that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action failing far below international standards, or even subjective bad faith. Under the present circumstances – where ample grounds existed for the action taken by the Bank of Estonia – Respondent cannot be held to have violated Article II(3)(a) of the BIT.”

64. Similarly, with respect to the article cited in the same footnote, Patrick Juillard, *L’Evolution des Sources du Droit des Investissements*, Recueil des Cours de l’Academie de Droit International, Vol. 250, 1994, the Tribunal regrettably did not refer to the section of the article that purportedly supported its position with respect to the fair and equitable treatment standard.

65. Nevertheless, the author of the article defines that standard as a general and imprecise principle that provides minimum protection (§ 225), which with respect to equitable treatment requires that each be given what is theirs (§ 61). Definitely, the position of the author resembles the position of the Tribunal in *Genin*, which does not equate the fair and equitable treatment standard with “stability of the law and business environment.”

66. The Tribunal’s manifest excess of authority and failure to provide any reasoning in adopting a concept of a “fair and equitable” standard that in essence

requires “stability of the law and business environment” had a critical impact on the Award. If the Tribunal, instead of adopting this concept, which it calls “objective” and unrelated to any “deliberate intention or bad faith” (¶ 280), would have adopted the standard used in *Genin* (which the tribunal surprisingly itself cited to support its decision), and would have taken into consideration Argentina’s lack of intent to fail to comply with any obligation and lack of subjective bad faith, it would have concluded that Argentina did not violate the fair and equitable treatment standard. This conclusion follows from the fact that the Tribunal never found that Argentina acted in bad faith or with the intention to violate a rule, and the Tribunal’s conclusion that Argentina had not committed a discriminatory or arbitrary act (¶ 295).

D. The Tribunal Manifestly Exceeded Its Powers By Exercising Jurisdiction Over Claims By A Company’s Shareholder For Income Lost By The Company.

67. “There is no doubt that the lack of jurisdiction of an Arbitral Tribunal, whether alleged to be total or partial, necessarily falls within the framework of ‘excess of power’ as envisaged by Art. 52(1)(b).”⁵⁰ The Tribunal manifestly exceeded its powers by exercising jurisdiction over CMS’s claims for damages. Based on the nature of CMS’s allegations, only TGN was entitled to claim damages.

68. It was TGN — not CMS — that held the License providing the alleged rights to tariffs in dollars and bi-annual PPI adjustments. It was TGN — not CMS — that had its tariffs readjusted as a result of Argentina’s emergency measures. It was TGN — not CMS — that purportedly lost income as a result of those measures. The value of CMS’s shares declined only because TGN’s revenues declined and TGN’s costs increased. Thus, CMS incurred its alleged losses only derivatively, that is, only to the extent of its percentage interest in TGN. Because damages from the purported Treaty violations represent the lost net income that TGN would have received under the License but for the violations, any such lost income rightfully belongs to TGN and should not be

⁵⁰ *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, Annulment Decision ¶ 70 (May 3, 1985); see also Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS, *supra* note 41, at 25 (a decision where there is no jurisdiction is an “obvious instance of an excess of powers”).

diverted to a shareholder. It is well established, not only in Argentina but in CMS's home country, that "a person cannot pursue an individual cause of action against third parties for wrongs or injuries to a corporation in which he or she holds stock, even if the stockholders suffers a harm that flows from the damage to the corporation, such as a reduction in the value of his or her stock."⁵¹

69. Awarding 29% of TGN's lost purported income to CMS is not the same as awarding those damages to TGN. It is far from certain that, if TGN were awarded damages, it would pass them on to its shareholders. It is well established, not only in Argentina but in CMS's country, that "a person cannot pursue an individual action against third parties for unlawful acts or damages to the company in which it is a shareholder, even when a shareholder suffers a loss which is transferred from the loss suffered by the company, such as a reduction in the value of its shares."⁵² It is clear that both parties intended to incorporate this principle in the Treaty and prevent a foreign shareholder from claiming losses presumably lost by a local company, which does not mean that shareholders are not protected by the Treaty or that shares do not constitute an investment protected under the Treaty. Hence, awarding CMS 29% of the present value of TGN's lost income under the License amounts to an impermissible partial liquidation of TGN.⁵³

70. The Tribunal justified its exercise of jurisdiction over CMS's claim on the ground that the Treaty provides "a direct right of action of shareholders." Decision on Jurisdiction ¶ 65. But Argentina does not contest the right of shareholders to bring Treaty claims for damages based on measures directed at *their* shares. If Argentina

⁵¹ 19 Am. Jur., 2d. Corporations # 1927; see *Strougo v. Bassini*, 282, F 3d 162, 169 (2d Cir. 2002); *Jackson v. Roes*, 273 F3d, 1192, 1202 n.4 (9th Cir. 2001); *Cowin v. Bresler*, 741 F2d 410, 414 (D.C. Cir. 1984).

⁵² 19 Am. Jur., 2d. Corporations # 1937; see *Strougo v. Bassini*, 282, F 3d 162, 169 (2d Cir. 2002); *Jackson v. Roes*, 273 F3d, 1192, 1202 n.4 (9th Cir. 2001); *Cowin v. Bresler*, 741 F2d 410, 414 (D.C. Cir. 1984).

⁵³ See Note, *Distinguishing Between Direct and Derivative Shareholders' Suits*, 11 U. Pa. L. Rev. 1147, 1148 (1962) (claims by shareholders alleging harms to the corporation effectively call on the adjudicator "to distribute corporate assets either as a dividend or in partial liquidation").

had enacted measures barring CMS from transferring its shares or from receiving dividends, such measures may well have authorized claims by CMS. But as explained above, in this case CMS's purported harm derived exclusively from income lost by TGN due to certain measures taken by Argentina against TGN's alleged assets.

71. Furthermore, if CMS were to receive the awarded \$133 million plus interest, and if TGN subsequently obtains higher tariffs through the ongoing renegotiation process, CMS will recover twice — both through the Award and through its 29% interest in TGN. ICSID should not serve as a vehicle for such shareholder windfalls.

72. Moreover, because the type of claim filed by CMS is clearly beyond ICSID's jurisdiction, the Tribunal had no authority to adjudicate it and manifestly exceeded its authority by doing so. The ICSID Convention does not allow any indirect actions other than those provided in Article 25(2)(b) *in fine*, and the Tribunal had no authority to ignore strict requirements under which damaged domestic companies may gain access to the ICSID procedures.

73. For all these reasons, the Tribunal exceeded its powers by accepting and exercising jurisdiction over CMS's claims for damages and by proceeding to award such damages to CMS.

E. The Tribunal Manifestly Exceeded Its Authority By Authorizing CMS, Which Was Not A Party Nor Even Mentioned In Any Of The Applicable Instruments, To Claim A Breach Of Obligations Under The Umbrella Clause.

74. The Tribunal had the authority to interpret the Umbrella Clause. The Tribunal might have ruled that the Umbrella Clause automatically elevates all contract obligations to the level of treaty obligations, or could have adopted a more narrow interpretation of the Umbrella Clause, ruling that only under certain circumstances contractual obligations or any other type of obligations are equated to obligations under the Treaty.

75. However, the Tribunal manifestly exceeded its authority by authorizing CMS, which was not a party and was not even mentioned in any of the

applicable instruments, to claim a breach of obligations under the Umbrella Clause. Those obligations, at most, were directed to TGN, not to CMS. There is no arbitral precedent for allowing non-parties to the applicable treaty instruments to bring claims alleging a breach of commitments under the Umbrella Clause.

II. THE AWARD FAILS TO STATE THE REASONS ON WHICH IT IS BASED.

76. As explained below, the Award’s failure to state the reasons on which it is based requires annulment pursuant to Article 52(1)(e) of the ICSID Convention. The decision on some points in particular that were “necessary to the tribunal’s decision” and highly significant “relative to the legal rights of the parties” were left “essentially lacking in any expressed rationale.”⁵⁴ Those points concern the effect of Treaty Article XI, the customary international law defense of necessity, damages, and ownership of the rights claimed by CMS.

A. The Award Fails To Explain Why Treaty Article XI Does Not Bar Liability Under Articles II(2)(a) and II(2)(c).

77. As explained above, the Tribunal evaded its obligation, once it decided not to defer to Argentina’s good-faith judgment, to determine whether Argentina’s measures were necessary within the meaning of Article XI. The Tribunal also failed to perform a substantive analysis of whether the measures challenged by CMS were necessary under that article. That failure to account for Article XI requires annulment not only because the Tribunal thereby exceeded its authority but also because the Award fails to state the reasons on which it is based.

78. Furthermore, the Tribunal’s brief discussion of Article XI is replete with contradictory statements. For example, the Tribunal’s assertion that “clauses dealing with investments and commerce do not generally affect security” (Award ¶ 373) contradicts its prior statement that “major economic crises” are not excluded “from the scope of Article XI” (*id.* ¶ 359). Further, its statement that although “the Argentine crisis was severe,” it “did not result in total economic and social collapse” (Award ¶ 355)

⁵⁴ *Vivendi*, Decision on Annulment, *supra* note 36 ¶ 65.

conflicts with its prior statement that emergency measures might well be necessary so long as a crisis is “*likely* to lead to a total breakdown of the economy” (*id.* ¶ 354, emphasis added). Such overt contradictions on such key points underscore the Tribunal’s failure to state the reasons supporting the Award.

79. A reasoned explanation as to whether Argentina’s emergency measures were necessary within the meaning of Article XI is especially important in light of the large number of pending investor claims against Argentina. Any reliance by subsequent tribunals on the Award’s conclusions would be unwarranted given its failure to provide a reasoned basis for those conclusions. It is critical that the first award on the merits in this lengthy series of arbitrations properly state the reasons on which it is based.

B. The Award Fails To State The Reasons For Its Rejection Of Argentina’s Defense Of Necessity Under Customary International Law.

80. The Award rejects Argentina’s alternative defense of necessity under customary international law on the grounds that two of the factors set forth in Article 25 of the Articles on State Responsibility were not satisfied. The Award does not state reasons for holding that the two factors were not satisfied.

81. First, the Award asserts that “the measures adopted were not the only steps available.” Award ¶ 324. The Award contains no analysis or reasoning to support that bare conclusion. After stating that “whether the measures adopted were the ‘only way’ for the State to safeguard its interest [is] indeed debatable” (*id.* ¶ 323), the Award states only this: “The International Law Commission’s comment to the effect that the plea of necessity is ‘excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,’ is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.” *Id.* ¶ 324. In other words, the Award simply acknowledges the “only way” factor without analyzing whether or how it applies in this case.

82. Although the Award suggests, in its analysis of the necessity defense under Argentine law, that Argentina could have employed adjustment “mechanisms” provided in the Gas Law and License (Award ¶ 238), it nowhere addresses

the impact of resorting to those mechanisms. Nor does the Award address the impact of taking no action in response to the emergency. Hence, the Award fails to state any reasons to support a conclusion that the crisis could have been resolved other than by the emergency measures adopted by Argentina.

83. Second, the Award asserts that Argentina substantially contributed to the crisis, stating as follows:

The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.

Award ¶ 329. That is all the Award states on the subject. It does not specify the alleged “shortcomings” in government policies, the manner in which they contributed to the crisis, suggest any different policies that Argentina should have adopted, or analyze whether it was even possible for Argentina to have avoided the unprecedented crisis given the confluence of “exogenous factors” besetting it from all directions. The Tribunal’s failure to provide any reasoning in support of its conclusion is grounds for annulment.

84. Furthermore, the Tribunal appears to blame the crisis on the privatization policies Argentina adopted a decade earlier. Yet the Tribunal justifies its imposition of liability on Argentina’s abandonment of those very policies. That contradiction further supports the conclusion that the Award fails to state the reasons on which it is based.

C. The Award Does Not Explain How Damages Were Calculated.

85. The Award does not delineate how the Tribunal determined damages. Its failure to state the reasons for the awarded damages additionally warrants annulment.

86. The Award provides a general overview of the Tribunal's methodology, stating that the awarded damages represent some 29% of the value of TGN. But the Award does not explain why a percentage of the value of the company is the proper basis for awarding damages to a shareholder. As the *ad hoc* Committee stated in the *Amco* annulment decision, "there must be a reasonable connection between the bases invoked by a tribunal and the conclusions reached by it."⁵⁵

87. Nor does the Award specify the inputs or calculations used to determine the amount of damages awarded to CMS. Thus, it is not possible to read the Award and determine how the damages figure was derived, nor to tell whether the awarded damages appropriately reflect TGN's actual losses and CMS's share thereof, as the Award represents. This lack of transparency is precisely the harm to which Article 52(e) of the ICSID Convention is directed. As Christoph Schreuer has observed, there is a "tendency of arbitrators to be summary when it comes to numbers," which Schreuer states is a ground for annulment.⁵⁶

88. Many of the numbers in the damages portion of the Award simply reflect assumptions for which the Tribunal offers no explanation. For example, the Tribunal found that CMS had submitted no evidence on the impact of trebling gas transport tariffs at a time when GDP was severely declining, evidence that the Tribunal properly deemed necessary to determine TGN's future revenues absent a violation. Award ¶ 445. The Tribunal's response to this lack of evidence was simply to assert that "it is reasonable to assume that sales revenues would have decreased by 5% in each of 2002 and 2003 and by 1% in 2004." *Id.* ¶ 446. The Tribunal offered no support or any explanation for that assumption, which at a minimum appears questionable given trebled

⁵⁵ *Amco Asia Corp. v. Republic of Indonesia*, Decision on Annulment ¶ 29 (May 16, 1986); see also *Klöckner*, *supra* note 47 (a valuation of damages based on "approximations and estimates" is "impossible to justify" and requires annulment).

⁵⁶ Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS, *supra* note 41, at 17, 36. As another commentator has put it, "it cannot be sufficient for a tribunal, as a reason for an award, to refer merely to the evidence submitted by a party and to state, without any explanation, that its award is based on that evidence." Schwartz, *Finality at What Cost?*, in ANNULMENT OF ICSID AWARDS, *supra* note 41, at 80.

tariffs and the economy's 10.9% shrinkage in 2002. For subsequent years, the Tribunal similarly pronounced that "[t]he Tribunal is of the view that a gradual increase in demand over the following years would have taken place until full capacity would have been achieved." *Id.* For annulment purposes, the point is not whether these assumptions were right or wrong but rather the Tribunal's failure to provide any reasons for assumptions that translated into tens of millions of dollars in awarded damages.

89. In addition, it is not possible to tell whether the Award compensates CMS for TGN's losses resulting from the crisis in general rather than from the challenged measures in particular. The Award does not discuss the extent to which the value of CMS's shares would have dropped even if Argentina had not adopted its emergency measures. That omission is plainly material because there was evidence before the Tribunal showing that TGN's value had fallen precipitously *before* Argentina adopted its emergency measures. Without the emergency measures, TGN's value (and thus the value of CMS's shares) likely would have continued to fall as more businesses would have been forced to close their doors, leading to the inability of more customers to pay CMS's natural gas bills. One cannot tell from the Award the extent to which, if any, such factors were incorporated into the Tribunal's damages analysis and conclusions.

90. Finally, the Tribunal awarded CMS compensation equivalent to its entitlement in the event of an expropriation, that is, the fair market value of the affected property at the time of the purported violation. Although the Tribunal expressly found that there was no expropriation, it assumed without explanation that the methodology for determining compensation under Article II is the same as for an expropriation under Article IV. At a minimum, the Award should have explained why that is so or, if it is not, how the methodologies differ. The Award's failure to explain why the Tribunal awarded the equivalent of expropriation damages when there was no expropriation is a further ground for annulment. The Tribunal also failed to explain which were the factual reasons to consider that the Argentine measures had a permanent nature, ordering Argentina, without any basis, to compensate CMS for damages during the term of the

License. Again, Argentina's objection is not to the correctness of the Tribunal's damages award but rather to its failure to provide reasoning.⁵⁷

D. The Tribunal Failed To Explain Its Conclusion That CMS Rather Than TGN Had The Right To Tariffs Calculated In Dollars, PPI Tariff Adjustments, And The Benefit Of The Purported Stabilization Clause In The License.

91. The Award provides no reasons for the Tribunal's conclusion that it was CMS and not TGN that had the right to calculate tariffs in dollars, obtain PPI tariff adjustments, and benefit from the purported stabilization clause in the License. In response to Argentina's position that those rights belonged to TGN and not to CMS, the Tribunal refused to elaborate on this topic, stating merely that it had already been decided in the Decision on Jurisdiction. However, although in its Decision on Jurisdiction the Tribunal provided that CMS had the right to bring a separate claim independent of the company, the Tribunal never decided which rights CMS could claim.

92. For example, in ¶ 132 of the Award, which refers to the calculation of tariffs in dollars, the Tribunal responded to Argentina's argument —that CMS did not have any rights under the License regarding calculation of tariffs in dollars because the License was granted to CMS — by stating that it had ruled on this issue in its Decision on Jurisdiction. However, the Tribunal never ruled in its Decision on Jurisdiction that CMS was entitled to tariffs in dollars. In paragraph 148 of the Award, the Tribunal makes a similar statement with respect to the purported stabilization clause. Again, nothing in the Tribunal's Decision on Jurisdiction explained why CMS would have rights under the purported stabilization clause. In short, the Award does not explain the reasons on which it is based.

⁵⁷ See paragraphs 107, 277, 407, 408, 439 of the Award, among others. Additional examples of grave omissions and a manifest lack of reasoning are the Tribunal's findings that exports and cross-subsidies resulting from the challenged measures did not compensate TGN for its alleged loss of income (¶ 195)..

III. THE EXTRAORDINARY IMPLICATIONS OF THIS CASE MANDATE CLOSE SCRUTINY OF THE AWARD UNDER THE ANNULMENT STANDARDS.

93. This is an unprecedented case with extraordinary implications. Enormous damages were imposed on a State still recovering from one of the most serious economic crises in modern times — despite the Tribunal’s findings that the challenged measures were not discriminatory, not arbitrary, and not expropriatory. Since ICSID’s inception, there has been no annulment decision and, to our knowledge, no arbitration award addressing measures taken by a State in response to a national emergency.

94. States will look to this case for guidance as to how they may lawfully respond to national emergencies in light of bilateral investment treaty provisions providing that “measures necessary” are not precluded. The Tribunal’s decision provides no such guidance. If States must compensate foreign investors for generalized measures taken to resolve such crises, as the Tribunal held, States faced with emergencies will have to choose between (i) not taking necessary action and risking heightened public disorder and the undermining of essential security interests, or (ii) taking necessary action and being forced into insolvency by claims for damages from every affected investor. Such a “Catch-22” is not the proper outcome of an ICSID arbitration and cannot be reconciled with the plain language of Article XI of the BIT.

95. The significance of this case is heightened by the fact that it is the first decision on the merits from any of the dozens of investor arbitrations currently pending against Argentina. The vast majority of these arbitrations involve the issue of State action to protect its essential interests during an emergency, as well as what is fair and equitable treatment and what constitutes an actionable impairment of an investment during a crisis. The damages claimed in these arbitrations approach the total of Argentina’s annual national budget and thus are irreconcilable with any practical capacity to pay if Argentina’s economy is to remain viable.⁵⁸ A State should not face bankruptcy

⁵⁸ See Vaughan Lowe, *Some Comments on Procedural Weaknesses in International Law*, 98 Am. Soc’y Int’l L. Proc. 37, 39 (2004) (noting that pending foreign investor claims against Argentina “add up to virtually the total annual budget of the Argentinean government” and that “the state plainly cannot afford to pay on all potential awards”).

for doing what was required to prevent a total economic, social, and security collapse and to preserve an economy in which investment can thrive. The Award cannot be reconciled with that common-sense principle, which is incorporated in Treaty Article XI and which the Tribunal had no authority to disregard.

96. Ensuring that the decision comports with ICSID standards of fairness and equity, as reflected in Article 52 of the ICSID Convention, is therefore critical, requiring a particularly hard look by the *ad hoc* Committee. The annulment process is “an essential safeguard to ensure that the decisions conforms to the basic requirements of a fair settlement.”⁵⁹ There is nothing fair about hammering a country into insolvency for acting swiftly, decisively, and effectively to preserve public order and defend its essential security interests at a time when its very existence was at stake. There is nothing equitable about setting the stage for damages that exceed the possibility of payment or that will be plucked by the first pair of hands at the trough. It is essential that the *ad hoc* Committee take these concerns into account when addressing Argentina’s Application for Annulment.

REQUEST FOR STAY OF ENFORCEMENT OF THE AWARD

97. Pursuant to ICSID Convention Article 52(5), Argentina requests that enforcement of the Award be stayed pending a decision on Argentina’s Application for Annulment.

98. As provided in Article 52(5), “If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.” Argentina hereby requests that the Secretary-General notify the parties of said provisional stay.

99. As soon as the *ad hoc* Committee is constituted, Argentina shall immediately request continuance of the stay.

⁵⁹ Hans Van Houtte, *Article 52 of the Washington Convention*, in ANNULMENT OF ICSID AWARDS, *supra* note 41, at 12.

100. Argentina is entitled to a stay of enforcement pending the *ad hoc* Committee's decision on its Application for Annulment based on the following circumstances:

- a. Permitting the Award to be enforced pending the *ad hoc* Committee's decision on annulment would irreparably harm Argentina. Argentina would be deprived of the use of tens of millions of dollars at a time when it continues to suffer the effects of the recent crisis and its fiscal situation remains exceedingly difficult. Obtaining use of those funds upon annulment of the Award would come too late to repair such harm. Furthermore, Argentina has no assurance that, if the Award is annulled, it would be able to recover any funds previously paid to CMS because other creditors may lay claim to those funds.
- b. As set forth above, Argentina has compelling grounds for annulment. The over-arching ground — the Tribunal's failure to give effect to Article XI of the Treaty — is an issue of first impression. Enforcement of the Award should be suspended until the legal implications of Argentina's invocation of the "measures necessary" clause are evaluated through the annulment process.
- c. Staying enforcement of the Award pending the *ad hoc* Committee's decision on annulment would not prejudice CMS, which is entitled to interest up to the date on which the awarded compensation is paid.
- d. A stay is in the public interest. Permitting CMS to enforce the Award prior to the *ad hoc* Committee's decision on annulment would prioritize CMS over other potential prevailing claimants in the long series of arbitrations pending against Argentina, as well as over other creditors (including non-settling bondholders). A stay pending the *ad hoc* Committee's decision will provide time to address this issue. If annulment is granted, CMS will obtain no priority. If annulment is denied, a stay will have provided sufficient time to seek a solution to the issue of competing claims to limited assets.

PRAYER

101. For the foregoing reasons, the Argentine Republic requests that the Award be annulled and that enforcement of the Award be stayed pending a decision on Argentina's Application for Annulment.

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Respectfully submitted,

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