

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

IN THE PROCEEDING BETWEEN

METALPAR S.A. AND BUEN AIRE S.A.
(Claimants)

and

THE ARGENTINE REPUBLIC
(Respondent)

AWARD ON THE MERITS

ICSID CASE NO. ARB/03/5

Members of the Tribunal:

Rodrigo Oreamuno Blanco, President
Duncan H. Cameron, Arbitrator
Jean Paul Chabaneix, Arbitrator

Secretary of the Tribunal: Natalí Sequeira

Representing the Claimants:

Roberto Mayorga and Joaquín Morales
Etcheberry Rodríguez, Abogados
Santiago, Chile
Jaime Paredes
Chairman Metalpar S.A., Santiago, Chile
Sergio Meli
Abogado-Fiscal del Grupo de Empresas
Metalpar, Santiago, Chile
Jorge Postiglione
Estudio Brons & Salas
Buenos Aires, Argentina
Gonzalo Varela
Manager Metalpar Argentina

Representing the Respondent:

Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Gustavo Scrinzi
Subprocurador del Tesoro de la Nación
Argentina
Gabriel Bottini
Jorge Barraguirre
Fabián Markaida
Ignacio Pérez Cortés
Cintia Yaryura
María Victoria Vitali
Ariel Martins
Verónica Lavista
Patricio Arnedo Barriero and
María Julieta Fontán
Procuración del Tesoro de la Nación Argentina
Ignacio Torterola
Embassy of the Argentine Republic

Date: June 6, 2008

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The Tribunal, composed as described above, after consideration of the written and oral presentations by the parties, and after having deliberated, issues the following award:

I. PROCEEDING

1. On February 3, 2003, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received from **Metalpar S.A.** and **Buen Aire S.A.**, (the “Claimants”), two companies incorporated in Chile, a Request for Arbitration against the Argentine Republic (“Argentina” or the “Respondent”) under the Convention on the Settlement for Investment Disputes between States and Nationals of Other States (the “Convention”). The request was based on the alleged adverse effects that a series of economic measures adopted by Argentine authorities in late 2001 and early 2002 would have had on the investments made by Claimants in a company manufacturing bus bodies for public transportation vehicles in Argentina.

2. In their request for arbitration, Claimants invoked the provisions of the 1991 bilateral investment treaty between Argentina and Chile for the Promotion and Reciprocal Protection of Investments, in force as from January 1, 1995 (hereinafter, the “BIT” or the “APPI”).

3. On February 5, 2003, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”), the Centre acknowledged receipt of the request for arbitration and sent copies thereof to the Argentine Republic and to the Argentine Embassy in Washington, D.C.

4. On April 7, 2003, the Acting Secretary-General of the Centre 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.

5. On July 14, 2003, the parties agreed on the number of arbitrators that would form the Arbitral Tribunal and on the method to appoint them. Under such agreement each

party would appoint one arbitrator by July 16, 2004, at the latest, and the President of the Tribunal would be appointed by the Secretary-General of ICSID. The agreement also provided that, should Respondent fail to appoint an arbitrator within the agreed term, Claimants would be entitled to request the application of the mechanism provided for in Article 37(2)(b) of the ICSID Convention (each of the parties appoints an arbitrator and they reach an agreement on the third arbitrator, who acts as President of the Tribunal).

6. None of the parties appointed an arbitrator within the term agreed upon. Consequently, by letter dated July 23, 2003, Claimants requested that ICSID constitute the Arbitral Tribunal as set forth in Article 37(2)(b) of the Convention. By that same letter, Claimants appointed Mr. Duncan H. Cameron, a national of the United States of America, as arbitrator in the instant case.

7. After 90 (ninety) days had elapsed as from the notification of the registration without the Tribunal having been constituted, on August 11, 2003, Claimants requested the appointment of the other two arbitrators and the designation of the President of the Arbitral Tribunal, as provided for in the mechanism set forth in Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

8. On August 20, 2003, Argentina appointed Jean Paul Chabaneix, a Peruvian national, as arbitrator.

9. After consultation with the parties, the Chairman of the Administrative Council of ICSID appointed Mr. Rodrigo Oreamuno Blanco, a national of Costa Rica, as President of the Arbitral Tribunal.

10. On September 23, 2003, in accordance with Arbitration Rule 6(1), the parties were notified that all the arbitrators had accepted their appointments and that therefore the Tribunal was deemed to have been constituted on that date. On the same date, pursuant to Regulation 25 of the ICSID Administrative and Financial Regulations, the parties were informed that Mr. Gonzalo Flores, Senior Counsel of ICSID, would serve as Secretary of the Arbitral Tribunal.

11. The first session of the Tribunal with the parties was held on November 13, 2003, at the seat of the Centre in Washington, D.C. Claimants were represented by Messrs. Roberto Mayorga, Joaquín Morales, Jorge Postiglione, and Sergio Meli. Mr. Jaime Paredes also appeared on behalf of Claimants. Argentina was represented by Ms. Cintia Yaryura and by Mr. Jorge Barraguirre, both of them from the *Procuración del Tesoro de la Nación Argentina*. At the beginning of the session, Mr. Barraguirre, on behalf of the Argentina, requested that the Tribunal decide briefly and immediately on the validity of the registration of Claimants' request for arbitration. After giving the floor to Claimants and deliberating, the Tribunal advised the parties that it was not procedurally possible to accept such petition on that occasion and noted that Argentina would have the opportunity to file any objections it might have during the proceedings. Subsequently, the President of the Tribunal invited the parties to continue with the session. Mr. Barraguirre indicated that, based on express instructions from Argentine authorities, he could not accept the Tribunal's decision. Immediately afterwards, the Argentine delegation left the session.

12. The President of the Tribunal regretted Argentina's decision and expressed the Tribunal's wish that Respondent reconsider its position and participate in the proceedings actively. He then invited those present to continue reviewing the agenda.

13. During the continuation of the first session, several procedural matters were determined, which were reflected in minutes signed by the President and the Secretary of the Tribunal. In addition, the following schedule was set for the written procedures: Claimants would file a memorial on the merits within one hundred and thirty-five days (135) from the date of the first session, and Respondent would file a counter-memorial within one hundred and thirty-five says (135) days from its receipt of Claimants' memorial; the Tribunal would then decide whether it was convenient for the parties to file reply and rejoinder memorials.

14. Claimants submitted their Memorial on the Merits (referred to as "Memorial" in the proceedings) with the related accompanying documentation on March 30, 2004.

15. On May 17, 2004, Argentina filed a Memorial on Objections to the Centre's Jurisdiction and the Competence of the Arbitral Tribunal.

16. By letter of May 21, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with Arbitration Rule 41(3) and the parties were requested to file their proposals on a schedule regarding the issue of jurisdiction.

17. On June 15, 2004, the Tribunal, having reviewed the parties' submissions on the issue, established the following procedural schedule for filing the briefs on jurisdiction: Claimants would file their Counter-Memorial on Jurisdiction within forty-five (45) days as from that date; Respondent would file a Reply on Jurisdiction within the subsequent forty-five (45) days as from the receipt of Claimants' Counter-Memorial, and Claimants would file a Rejoinder on Jurisdiction within the subsequent forty-five days (45) as from the receipt of Respondent's Reply. The Tribunal would subsequently fix, in consultation with the parties, an appropriate date to hold a hearing on jurisdiction.

18. In conformity with the schedule set by the Tribunal, Claimants filed their Counter-Memorial on Jurisdiction, with accompanying documentation, on July 28, 2004. Argentina filed its Reply on Jurisdiction on September 21, 2004, and Claimants filed their Rejoinder on Jurisdiction on November 8, 2004.

19. By letter dated December 13, 2004, the Tribunal forwarded to the parties proposals for dates to hold the hearing on jurisdiction, which was set, with the agreement of the parties, for March 17 and 18, 2005. As a result of a technical failure of the airplane which transported the Argentine delegation to Washington, D.C. the hearing was held, with the agreement of the parties, only on Friday March 18, 2005, at the Centre's headquarters. Claimants were represented by Messrs. Roberto Mayorga and Joaquín Morales from the law firm Etcheberry/Rodríguez Abogados in Santiago de Chile, Mr. Jorge Postiglione from the law firm Brons & Salas in Buenos Aires, and Messrs. Jaime Paredes, Sergio Meli and Gonzalo Varela from Metalpar S.A. Respondent was represented by Ms. Cintia Yaryura and Mr. Ignacio Torterola from the *Procuración del Tesoro de la Nación Argentina* (Argentina's Treasury Attorney General's Office), Mr. Osvaldo Siseles, Legal Under-Secretary of the Ministry of Economy and Production of Argentina, and Mr. Marcelo Massoni from the Argentine Embassy in Washington, D.C. During the hearing, Messrs. Mayorga, Meli, Morales, Postiglione and Varela addressed the Tribunal on behalf of Claimants; Ms. Yaryura and Mr. Torterola did so on behalf of

Argentina. The Tribunal posed questions to the representatives of the parties, in accordance with Arbitration Rule 32(3).

20. On April 27, 2006, the Arbitral Tribunal issued its decision on the jurisdiction of the Centre and its competence in which, as provided for in Arbitration Rule 41, it unanimously rejected the objection on jurisdiction filed by Argentina and declared its competence to hear and resolve the instant case.

21. On May 2, 2006, the Centre advised the Tribunal and the parties that, as a result of an internal reorganization of the Centre, Ms. Gabriela Álvarez Ávila, Senior Counsel of ICSID, would substitute Mr. Gonzalo Flores as Secretary of the Arbitral Tribunal.

22. On May 5, 2006, the Tribunal issued Procedural Order No. 1 in which it stated that Argentina had to file its Counter-Memorial on the merits within eighty-five days (85) as from the date of such order, that is to say, by July 31, 2006 at the latest. The Tribunal stated that it would subsequently decide on the need or convenience that the parties file Reply and Rejoinder memorials and that it would set a date for a hearing on the merits in due course.

23. On June 20, 2006, Argentina asked the Tribunal to request Claimants to deliver additional accounting, financial, corporate and other documentation related to the contracts entered into with the customers of Metalpar Argentina S.A. and Inversiones Loma Hermosa S.A., in order to complete the information provided by them in their Memorial. Claimants opposed this request and Argentina insisted on it. After analyzing the parties' positions, on July 13, 2006, the Tribunal ordered Claimants to submit the documents requested. On August 14, 2006, the Secretariat advised Argentina and the Tribunal that it had received nine volumes of documents submitted by Claimants in connection with this piece of evidence.

24. On August 8, 2006, the Tribunal issued Procedural Order No. 2, regarding items 7-8 of the minutes of the First Session and the Argentine Republic's request of July 14, 2006, that the time limit for filing substantive briefs be deemed to have been met upon receipt by the Centre via email of the briefs and declarations of witnesses and experts.

Once Claimants' observations were received, the Tribunal decided by such Order that the time limit for filing substantive briefs would be subsequently deemed to have been met: a) upon receipt by the Centre via international courier or email in pdf format of the substantive briefs, the statements of witnesses and experts and all the accompanying documentation; b) if one of the parties decided to meet the time limit via email, it would have to send the other party a copy of the email forwarding the documentation and on the same day send the Centre via a first-rate international courier service the original and six copies of the substantive brief and its exhibits.

25. At the request of Argentina, on August 29, 2006, the Tribunal granted an extension until September 13, 2006, to file the Counter-Memorial. On that latter date, the Centre acknowledged receipt of the Counter-Memorial filed by Respondent.

26. On October 2, 2006, the President of the Tribunal, in conformity with the minutes of the first session and Procedural Order No. 1, invited the parties to make their observations regarding the convenience of filing Reply and Rejoinder memorials and, should they chose to do so, he asked them to make their observations on the term deemed necessary for such purpose.

27. Taking into consideration both parties' observations, on October 23, 2006, the Tribunal granted a term of 75 days for each party to file its submission, as per the following schedule: a) Claimants had to file their Reply within seventy-five (75) days subsequent to the receipt of the communication from the Tribunal, that is to say, at the latest on January 8, 2007; b) Argentina had to file its Rejoinder within the seventy-five (75) days subsequent to the receipt of Claimants' Reply. The Tribunal informed the parties that, in the light of the fact that the terms granted were quite long, it excluded the possibility of granting future extensions, unless circumstances occurred making such concession indispensable.

28. On January 4, 2007, Claimants submitted a copy of the Reply memorial to the Centre via email. On January 8, 2007, Claimants submitted a copy of Exhibit 2 to the Reply memorial to the Centre via email. An electronic copy of these documents was

forwarded to Argentina on those same dates. On January 15, 2007, the Centre sent a hard copy of those documents to Argentina.

29. Through a communication of January 30, 2007, the Tribunal, having consulted with the parties, set September 10 through 17, 2007, as the dates for the hearing on the merits and it provided for the possibility of extending it for two further days should it be necessary.

30. Argentina sent an electronic copy of its Rejoinder to the Centre on March 30, 2007. On April 6, 2007, the Centre sent to Claimants by international courier a copy of that Rejoinder and the accompanying documentation, received by the Centre on the previous day.

31. On April 4, 2007, the Tribunal took note of Claimants' position as to the fact that Argentina should have filed its Rejoinder on March 24, 2007 (75 days as from January 8, 2007). In addition, the Tribunal noted that Argentina had forwarded to the Centre an electronic copy of its Rejoinder on March 30, 2007 (74 days as from January 15, 2007). The Tribunal considered that, despite the fact that there was disagreement between the parties as to how terms were calculated, even if it accepted Claimants' position in this regard, Argentina's delay in filing its Rejoinder memorial did not seriously undermine Claimants' rights, especially considering the long period between the date of the last filing and the hearing on the merits which, as resolved, had to begin on September 10, 2007.

32. On July 12, 2007, the Tribunal issued Procedural Order No. 3, whereby it decided several issues related to the organization of the hearing on the merits, including the time schedule, the distribution of time between the parties, the method for witness and expert examination, the order in which witnesses and experts would appear, the preparation of the documents to be used by the Tribunal and the parties during the hearing, the filing of post-hearing briefs, the Tribunal's questions and other administrative issues.

33. On August 21, 2007, the Arbitral Tribunal referred to the request filed by Claimants on August 6, 2007, related to the appearance of Professor Hernán Salinas as an

expert at the hearing on the merits. The Tribunal reminded Claimants that the minutes of the first session held on November 13, 2003, contained the following agreement:

“18. Documentary Evidence

Notwithstanding the power of the Tribunal to request the parties to submit additional evidence at any stage of the proceeding, it was decided that each filing would include all the supporting documentation and the statements of witnesses and experts, signed by them, that the parties may wish to submit. It was set forth that, exceptionally, the parties may request the Tribunal's authorization to file additional supporting documents after filing their briefs.”

34. Consequently, the Tribunal dismissed Claimants' request that Professor Hernán Salinas appear during the hearing since it considered that the request had been filed late and considering that: a) Claimants received Respondent's Rejoinder memorial in early April 2007 and, as from such date, at no time did they request any authorization from the Tribunal to file any additional documentation nor did they state the exceptional reasons justifying a request of such a nature; b) it is the Tribunal's duty to guarantee that both parties have the same opportunity to defend their positions and that is why clear rules were established from the early stages of the procedure.

35. On August 24, 2007, the Senior Counsel of ICSID informed the Tribunal and the parties that, as a result of an internal reorganization of the Centre, Ms. Natalí Sequeira Navarro, Counsel of ICSID, would substitute Ms. Gabriela Álvarez Ávila as Secretary of the Arbitral Tribunal.

36. On August 28, 2007, Claimants advised the Tribunal that they would “abstain from calling the witnesses and experts that they had previously announced.”

37. On August 29, 2007, Argentina stated as follows:

“[...] this Office believes that the current distribution of examinations of witnesses and experts is too concentrated, which could be detrimental to the adequate examination thereof. We therefore suggest that Dr. Pérez Rovira's and Dr. De Riz's examinations be postponed to the morning of the third day and morning of the fourth day, respectively, [...]”

38. On August 31, 2007, Claimants referred to the request made by Argentina as follows: “This party believes the method proposed to be inadequate as it damages and disrupts the logical order that has been followed in the process.”

39. On September 3, 2007, the Tribunal reminded the parties that the method for examining witnesses at the hearing (direct examination, cross-examination, and redirect examination) had been established in items II and III of Order No. 3, in conformity with the normal practice in this type of procedures and that such method had been confirmed by Respondent in its communication dated July 30, 2007, and by Claimants in their letter dated July 31, 2007.

40. As to the appearance of witnesses and experts, in that communication, the Tribunal confirmed that, when one of the parties to an arbitral proceeding files expert reports or written statements as evidence, it is obliged to present, if that is requested by the other party or the Tribunal, its witnesses or experts so that they may be examined at the hearing summoned for such purpose.

41. The Tribunal explained in its communication that, in the light of the fact that Respondent had communicated within the appropriate term the names of the witnesses and experts offered by Claimants that it wished to examine, it was Claimants’ responsibility to present these persons at the hearing. If something precluded them from appearing at the hearing, Claimants should have given notice to the Tribunal sufficiently in advance (item III(11) and (12) of Procedural Order No. 3).

42. In the same communication the Tribunal reminded the parties that paragraph II(5) of Procedural Order No. 3 stated that if one of the parties decided not to present witnesses or experts that it had previously offered for examination, the Tribunal would be entitled to make such inferences as it deemed necessary and even deny any probative value to the statements of such witnesses or experts.

43. Based on the above, the Tribunal invited both parties to confirm, no later than September 5, 2007, the names of the witnesses and experts that would appear at the hearing scheduled to begin on September 10, 2007.

44. Through the communication of September 4, 2007, Claimants explained that the witnesses and experts whose statements they offered during the proceedings and who were summoned to appear at the hearing by Argentina “have stated their impossibility to be present at the hearing” and that “Metalpar requested that they appear but, as stated, they excused themselves and neither this party nor the Tribunal are in a position to compel them to do so.”

45. By communication of September 4, 2007, Respondent confirmed the attendance of all the witnesses and experts it had proposed.

46. On September 7, 2007, the Tribunal referred to the answers received by the parties and noted that, in its letter dated August 31, 2007, Claimants advised the Tribunal that Messrs. Miguel Virgós and Carlos Pérez Rovira would not be able to travel to Washington, D.C. during the dates set for the hearing but, as to the other witnesses and experts, they stated that “if Respondent was especially interested in cross-examining any of the witnesses, it was such party that should have taken the necessary measures to make sure they appeared at the hearing.”

47. In such communication, the Tribunal repeated what it had stated in its letter of September 3, 2007, in the sense that the generalized practice in this type of arbitration procedure before ICSID is that the party providing as evidence the written statement of a witness or the report of an expert must make sure that they are available so that the other party and the Tribunal may examine them.

48. The Tribunal also stated that the parties had had enough time to prepare the organizational aspects and the logistical details necessary to submit their arguments and evidence at the hearing on the merits, the dates of which had been communicated to them well in advance.

49. The Tribunal also considered that, in the event of disagreement between the parties on any issue related to the organization of the hearing, it was the parties’ obligation to advise the Tribunal of such disagreement as soon as possible, for it to take the measures it

deems appropriate, as provided for in Procedural Order No. 3, and the ICSID Convention and Arbitration Rules.

50. In particular, the Tribunal called the attention of the parties to Arbitration Rule 34(3) which provides that the parties shall cooperate with the Tribunal in producing evidence and that the Tribunal shall take note of the failure of a party to comply with its obligations and of any reasons given for such failure.

51. Finally, the Tribunal confirmed that Arbitration Rule 34(1) grants the Tribunal the power to decide on the admissibility of any evidence adduced and on its probative value whenever deemed appropriate by the Tribunal.

52. Owing to a delay in the arrival of the flight of Claimants' representatives, the hearing on the merits, which was held at the Centre's headquarters, started on Tuesday, September 11, 2007, and it lasted through Friday, September 14, 2007.

53. The hearing was attended by the following people on behalf of Claimants: Messrs. Roberto Mayorga and Joaquín Morales from the law firm Etcheberry/Rodríguez Abogados in Santiago de Chile; Jorge Postiglione from the law firm Brons & Salas in Buenos Aires; Jaime Paredes, Chairman of Metalpar S.A.; Sergio Meli, legal counsel for Metalpar S.A.; Gonzalo Varela, Manager of Metalpar S.A.; Hernán Salinas, attorney-at-law; Pablo Grillo, attorney-at-law; Juan Fontaine, economist; and Hernán Buchi, economist.

54. The following people attended the hearing representing Respondent: Mr. Gustavo Adolfo Scrinzi, *Subprocurador del Tesoro de la Nación Argentina* (Deputy Treasury Attorney General); Messrs. Gabriel Bottini, Fabián Markaida, Ariel Martins, Ignacio Pérez Cortés, Jorge Barraguirre and Patricio Arnedo Barreiro, and Mses. Cintia E. Yaryura, Verónica Lavista, María Julieta Fontán and María Victoria Vitali, all of them from the *Procuración del Tesoro de la Nación de la República Argentina* (Argentina's Treasury Attorney General's Office); and Mr. Ignacio Torterola, from the Argentine Embassy in Washington, D.C.

55. At different times during the hearing, the following people were present or gave testimony at the request of Argentina:

Experts:

Dr. Augusto César Belluscio

Dr. Liliana de Riz

Dr. Roberto Frenkel

Dr. Mario Damill

Lic. Daniel Marx

Lic. José Echagüe

Witness:

Dr. Eduardo Ratti

56. As announced, Claimants failed to provide the experts and witnesses they had offered and Argentina had requested to examine.

57. On September 28, 2007, both parties filed their written replies to questions posed by the Tribunal at the hearing.

58. The Tribunal has thoroughly discussed and considered the content of the memorials on the merits filed by the parties, the evidence provided and the oral statements made by them at the hearing on the merits.

59. On February 13, 2008, the Tribunal communicated the closure of the proceeding to the parties, in accordance with ICSID Arbitration Rule 28.

II. BACKGROUND

60. In its Memorial and Counter-Memorial on Jurisdiction, **Metalpar S.A.** and **Buen Aire S.A.** described the following background of the instant case:

- a. **Metalpar S.A.** (formerly named Comercial Metalpar S.A.) is a Chilean company engaged mainly in manufacturing bus bodies.

- b. **Buen Aire S.A.** is also a Chilean company which is engaged in investing and technical advisory services.
- c. In May 1997, **Metalpar S.A.** and Mercobús S.A., a Chilean company formerly named Inversiones Mercobús S.A., owned 11,880 and 120 shares respectively out of a total number of 12,000, which formed the capital stock of an Argentine company called Inversiones Loma Hermosa S.A.
- d. On May 9, 1997, Inversiones Loma Hermosa S.A. acquired the Argentine company Bus Carrocería S.A., which was in default and on the brink of bankruptcy.
- e. On October 1, 1997, the shareholders of Bus Carrocería S.A. agreed to change the company's name to Metalpar Argentina S.A. This change was registered with the *Inspección General de Justicia* (Argentine regulatory agency of companies) (Exhibit 4 of the Memorial).
- f. On December 10, 1998, the shareholders increased the capital stock of Inversiones Loma Hermosa, which was distributed as follows: **Metalpar S.A.**, 1,999,880 shares and Mercobus S.A., 120 shares.
- g. On July 13, 2000, **Metalpar S.A.** transferred such 1,999,880 shares to Inversiones Metalpar S.A., a Chilean company set up in June 2000. Therefore, as from such date, the capital stock of Inversiones Loma Hermosa S.A. was held as follows: Inversiones Metalpar S.A., 1,999,880 shares and Mercobus S.A., 120 shares.
- h. On November 16, 2001, Inversiones Metalpar S.A. transferred 1,999,760 shares to Mercobús S.A. and kept 120; consequently, the capital stock of Inversiones Loma Hermosa S.A. was held as follows: Inversiones Metalpar S.A., 120 shares of stock and Mercobus S.A., 1,999,880 shares.
- i. On October 11, 2002, Mercobús S.A. transferred its 1,999,880 shares to Buen Aire, S.A.; thus, the shares of Inversiones Loma Hermosa S.A. were held as follows: Inversiones Metalpar S.A., 120 shares and Buen Aire, S.A., 1,999,880 shares.

61. On February 3, 2003, on which date Claimants requested ICSID to register this arbitration, the shares of the companies mentioned in this proceeding were held as follows:

- a) **METALPAR S.A** (Chilean):

Jaime Paredes Gaete:	416,286 shares
Mario Paredes Gaete:	416,286 shares
Carlos Paredes Gaete:	416,286 shares
Inversiones Yelcho S.A.:	22,895,714 shares
Inversiones Río Baker S.A.:	69,936,000 shares
Constructora Marga Marga S.A.:	22,749,428 shares
Total:	116,560,000 shares

(Exhibit A.13 of Claimants' Counter-Memorial on Jurisdiction).

b) BUEN AIRE S.A. (Chilean):

Jaime Paredes Gaete:	416,286 shares
Mario Paredes Gaete:	416,286 shares
Carlos Paredes Gaete:	416,286 shares
Inversiones Yelcho S.A.:	22,895,714 shares
Inversiones Río Baker S.A.:	69,936,000 shares
Constructora Marga Marga S.A.:	22,749,428 shares
Total:	116,560,000 shares

(Exhibit A.13 of Claimants' Counter-Memorial on Jurisdiction).

c) INVERSIONES METALPAR S.A. (Chilean):

Metalpar S.A.:	111,832,696 shares
Jaime Paredes Gaete:	50,050 shares
Mario Paredes Gaete:	42,350 shares
Carlos Paredes Gaete:	30,800 shares
Total:	111,955,896 shares

(Exhibit A.5 of Claimants' Counter-Memorial on Jurisdiction).

d) INVERSIONES LOMA HERMOSA S.A. (Argentine):

Inversiones Metalpar S.A.:	120 shares
Buen Aire S.A.:	1,999,880 shares
Total:	2,000,000 shares

In addition, **Metalpar S.A.** had made “irrevocable contributions” to Inversiones Loma Hermosa S.A. in the amount of USD 28,873,000.00.

(Exhibit A of Claimants’ Counter-Memorial on Jurisdiction; Exhibit 1 of the Memorial).

e) **METALPAR ARGENTINA S.A.** (Argentine):

Inversiones Loma Hermosa S.A.:	1,988,000 shares
Jaime Paredes Gaete:	12,000 shares

In addition, Inversiones Loma Hermosa S.A. had made “irrevocable contributions” to Metalpar Argentina S.A. in the amount of USD 30,022,426.00.

(Exhibit A.8 of Claimants’ Counter-Memorial on Jurisdiction; Exhibit 1 of the Memorial).

62. The Claim submitted involves several provisions of the Argentine legal system which, for better understanding, are listed below:

- a. **Law No. 24,522:** Bankruptcy and Insolvency Law.
- b. **Law No. 23,298:** Convertibility Law of March 28, 1991.
- c. **Presidential Decree No. 1570/2001:** Decree of December 1, 2001, which contains the rules that govern the entities subject to the Superintendency of Financial and Foreign Exchange Entities of the Central Bank of the Argentine Republic. Such rules establish temporary limitations on cash withdrawals and transfers abroad and ban the export of foreign currency bills and coins.
- d. **Law No. 25,561:** Public Emergency and Foreign Exchange System Reform Law, called “**Pesification Law**,” of January 6, 2002.
- e. **Presidential Decree No. 71/2002:** Decree of January 20, 2002, which contains the provisions regulating the foreign exchange system as established by Law No. 25,561.
- f. **Presidential Decree No. 214/2002:** Decree of February 3, 2002, on Reorganization of the Financial System, regulating Law 25,561.

- g. **Communication A 3471** of the Central Bank of Argentina (BCRA) of February 8, 2002, which implemented Presidential Decree No. 260/2002 and eliminated what Presidential Decree No. 71/2002 established.
- h. **Presidential Decree No. 260/2002:** Decree of February 8, 2002, which eliminated the official foreign exchange market.
- i. **Presidential Decree No. 320/2002:** Decree of February 15, 2002, on Reorganization of the Financial System, amending Presidential Decree No. 214/2002.
- j. **Presidential Decree No. 410/2002:** Decree of February 8, 2002, on Reorganization of the Financial System, which excluded several types of operations from the pesification system.
- k. **Presidential Decree No. 704/2002:** Decree of May 2, 2002, which widened the exclusions established in Presidential Decree No. 214/2002.
- l. **Presidential Decree No. 905/2002:** Decree of June 1, 2002, instructing the Ministry of Economy to redress the damages suffered by financial institutions as a consequence of the pesification.
- m. **Presidential Decree No. 53/2003:** Decree of January 10, 2003, amending Presidential Decree No. 410/2002.
- n. **Law No. 25,820:** of December 4, 2003, amending Law No. 25,561.

III. POSITIONS OF THE PARTIES IN CONNECTION WITH THE MERITS

63. Claimants stated that their investments in Argentina amounted to over USD 30,000,000 (thirty million US dollars), which was sent by **Metalpar S.A.** to Inversiones Loma Hermosa S.A. and then transferred by the latter to Metalpar Argentina S.A. as irrevocable contributions to capital. (Exhibit 1 of the Memorial and Exhibit B of the Counter-Memorial on Jurisdiction).

64. They also expressed that, as of December 2001, Argentina started a process of change of the financial and foreign exchange system in the country that affected their investments.

65. In short, they argued that Presidential Decree No. 1570/2001 “openly breaches” the APPI, which guarantees free transfers of funds, and that Law No. 25,561, called “Pesification Law,” which established that the obligations contracted in US dollars were bound to be converted into Argentine pesos and empowered the Executive Branch to set up the system that would determine the Argentine peso-foreign currency peg, also violates the APPI.

66. According to Claimants, because of the changes established “[...] debtors were authorized to pay their obligations in Argentine pesos at the new market value, which meant a loss in value of over 300% of the Argentine peso against the US dollar” (Memorial, paragraph 49).

67. They also stated that Metalpar Argentina S.A. entered into several contracts with different legal and natural persons in the amount of USD 18,000,000.00, by means of which, as a bus body manufacturer, it provided those persons with financing for the purchase of such bus bodies. Those contracts were secured with pledges over the vehicles it sold and, in some cases, with further collateral; credits were agreed upon in US dollars, based on articles 617 and 619 of the Civil Code, as in force at the time the contracts were signed. Claimants argued that “[...] the pesification [...] amounts to expropriation or to a measure similar in its effects on the credits in foreign currency, which is illegal and overtly violates the rules of the APPI in this regard” (Memorial, paragraph 52).

68. In the Claimants’ view, the situation described above also violates the APPI provisions that establish that investors shall be accorded fair and equitable treatment and constitutes an indirect expropriation.

69. According to Argentina, the measures challenged by Claimants are authorized by the BIT, Argentine law and general international law (Counter-Memorial, paragraph 1).

70. In addition, Argentina stated that: “It is not possible to argue the existence of an expropriation of METALPAR’s investment. METALPAR’s investment in Argentina currently, measured in US dollars, is worth a lot more [...]” (Counter-Memorial, paragraph 5).

71. In Argentina's opinion, the measures were adopted on the basis of the principles of reasonability, good faith and proportionality (Counter-Memorial, paragraph 8).

72. In Argentina's view, the Claimants' argument on the alleged expropriation derives from a conceptual error, because it does not specify what their investment in Argentina is (Rejoinder, paragraph 6).

73. Argentina added that the need for and reasonableness of the measures adopted have been ratified by international case law (Rejoinder, paragraph 7), and the state of necessity has also been acknowledged by general international law (Rejoinder, paragraph 8).

74. The parties not only disagree on the general aspects of the claim filed by **Metalpar S.A.** and **Buen Aire S.A.** They are also in disagreement on the specific aspects of that claim, as analyzed in the following paragraphs.

1. Claimants' investment

75. In their Reply, Claimants stated the following:

“Metalpar does not base its claim on the fact that its investment has been expropriated by Argentina. SPECIFICALLY, WHAT HAS BEEN EXPROPRIATED ARE THE RIGHTS AND CREDITS THAT METALPAR HAD AGAINST ITS CLIENTS, WHICH IT HAS BEEN UNABLE TO EXERCISE FULLY, BECAUSE THE ARGENTINE AUTHORITIES HAVE PREVENTED IT FROM DOING SO THROUGH THE FINANCIAL MEASURES ENFORCED TO THAT EFFECT” (Reply, paragraph 225).

76. In connection with their investments, Claimants stated the following: “For us [...] the issue is not [...] about the value of the investments but about the expropriation of credits, a contractual breach” (transcript of the hearing on the merits, September 14, 2007, page 714).

77. According to Argentina, **Metalpar S.A.** and **Buen Aire S.A.**'s investment “[...] are indirect shareholdings in local companies [...] any assessment or consideration of the measures has to be made taking into account the effect of the measures on those

investments and not on Metalpar Argentina's contracts" (transcript of the hearing on the merits, September 11, 2007, page 211).

78. Argentina added that Claimants confuses what their investment is, since such investment is not Metalpar Argentina's credits but rather Claimants' shareholding, which "is worth much more than what it would have been worth had the measures not been adopted" (transcript of the hearing on the merits, September 11, 2007, page 240).

2. Discrimination

79. In Claimants' opinion, "[...] compensations provided for the financial sector, in accordance with Law No. 25,561, Law No. 25,789 and Presidential Decree No. 905/2002, breach Article 2(3) of the APPI, which prohibits discriminatory or arbitrary acts against the foreign investor [...]" (Memorial, paragraph 169).

80. In that same memorial, Claimants stated that "The Argentine State has disregarded the rights expressly recognized to Metalpar Argentina in the Argentine Constitution, and has treated those affected by the 'pesification' unequally" (Memorial, paragraph 217). In order to support their statements, they cited the report signed by Dr. Pablo Richards, enclosed with the Memorial as Exhibit 6.

81. According to Claimants, Argentina discriminated against **Metalpar S.A.** and **Buen Aire S.A.** since "[...] it established and acknowledged exceptional situations to which it did not apply obligatory 'pesification'" (Memorial, paragraph 360). This argument is based on the fact that Presidential Decree No. 71/2002 made an exception with regards to the pesification, by providing that if a member of the financial sector "[...] holds pledge credits provided for the purchase of vehicles in an amount that exceeds at origin (in other words, at the time the obligation was executed) the amount of USD 100,000, the debtors' obligations are not affected by 'pesification', thus maintaining 'what was originally agreed to'" (Memorial, paragraph 361).

82. Moreover, Claimants declared that "Argentina also acted unfairly and inequitably when it adopted legal measures that affect Claimants' investments but that did not affect

the financial system, that type of action is arbitrarily discriminatory” (Reply, paragraph 281).

83. As for the alleged discrimination, Argentina stated that “It cannot be validly stated, as Claimants argue, that the measure is discriminatory because other subjects received a different treatment from that granted to METALPAR. It is illogical and illegitimate to compare categories of subjects that are regulated by different rules and that have different characteristics” (Counter-Memorial, paragraph 655).

84. Later on Argentina held that “[...] not discriminating does not entail treating everyone absolutely the same. Rather, in order to treat *everyone the same*, the affected people should be carefully listed into *different categories* based on the *relevant similarities* among them” (Counter-Memorial, paragraph 664). It repeated this argument in its Rejoinder in the following words: “[...] the measures did not discriminate between subjects of the same category. The effects of the measures were suffered by the immense majority of the players that held obligations outside the financial system. There was no discrimination in the sense of inequality within a **same category of equals**” (paragraph 289).

85. Respondent also based its arguments on the award of May 12, 2005, in the case of CMS against the Argentine Republic (ICSID case No. ARB/01/8), in which the Tribunal stated that “[...] discrimination exist[s] only in similarly situated groups or categories of people” (Rejoinder, paragraph 447).

86. Argentina also stated that “[...] it is worth highlighting that (sic) the financial institutions were also affected by the measures since asymmetric pesification was imposed on them (deposits had to be returned at USD1= ARS1.40 + CER (benchmark stabilization coefficient) whereas loans were pesified at USD1= ARS1), and for this special impact they were partially compensated” (Rejoinder, paragraph 453).

87. For all these reasons, Argentina rejected the arguments presented by Claimants and stated that “the Argentine government did not adopt more favourable measures for financial institutions” (Counter-Memorial, paragraph 686).

3. Expropriation

88. For Claimants “[...] the measures adopted by the Argentine State, in connection with Metalpar Argentina S.A., as the company receiving investments from Metalpar S.A. and Buen Aire S.A., and with respect to them as foreign investors, are disproportionate and constitute an ‘indirect expropriation’” (Memorial, paragraph 288).

89. In the same memorial they outlined the concept of indirect expropriation, which in their view means that the measures taken by the State do not either physically or legally seize the holder’s right or asset, but that “[...] they significantly reduce the bundle of powers that ownership implies, or they considerably undermine its economic value” (Memorial, paragraph 256). In addition, they asserted that: “It could be said that since the ‘pesification’ of credits derived from a general act of an authority, the confiscation would become ‘indirect’ in nature” (Memorial, paragraph 190).

90. When referring to indirect expropriation, Claimants explained the tests that, from the standpoint of scholar’s opinions and case law, make it possible to identify this type of expropriation: the sole effect doctrine and the balancing test (Memorial, paragraphs 266-294).

91. On the basis of the balancing test, Claimants stated that they “[...] **disproportionately** have suffered the ‘expropriatory’ effects of the Argentine devaluation measures without enjoying the potential benefits they could cause” (Memorial, paragraph 292).

92. In connection with the protection afforded by the **APPI** they stated the following: “Article 4 of the Argentina-Chile APPI grants full legal protection and security to Metalpar S.A. and Buen Aire S.A.’s investments in the Argentine territory. In accordance with the Treaty, such investments cannot be expropriated, nationalized, or subject to other measures the effects of which are equivalent to expropriation or nationalization, except by law, for a public purpose or the common good, and upon payment of prior compensation” (Memorial, paragraph 254).

93. Claimants referred in their Memorial to the well-known principle according to which no expropriation may take place without payment of the appropriate compensation and they asserted that the “[...] expropriation clause is currently considered a general Public International Law rule” (Memorial, paragraph 238). They added that: “It is equitable for the State that expropriates for the common good to compensate the party that suffers the individual costs of this common good” (paragraph 246).

94. Pesification, in Claimants’ opinion, “[...] disabled the mechanisms contractually provided for in the case of pesification and prevented METALPAR from collecting the dollars due, receiving instead Argentine pesos at a third of the promised value for the dollar. This reduction in the value, obviously ‘... *has caused a change in the substance of the affected right which renders this reduction invalid under the Argentine Constitution*’” (Reply, paragraph 30).

95. Moreover, they alleged that the measures adopted by Argentina “[...] were permanent in nature and have had ‘permanent effects’ on the contracts signed by Metalpar, since it was never allowed to demand full compliance with them [...]” (Reply, paragraph 254).

96. Argentina denied that it had violated Claimants’ property rights (Counter-Memorial, paragraph 224). In connection with the doctrine explained by Claimants, called the sole effect doctrine, Argentina declared that “[...] there has been no expropriation under that doctrine. An investment that is worth a lot more than what it would have been worth had the measures not been adopted was clearly positively affected by such measures” (Counter-Memorial, paragraph 225).

97. Based on the report prepared by Marx, Echagüe and Molina, Argentina also stated that the measures “[...] rather than compensate negative effects with positive ones, were widely beneficial for METALPAR’s investment” (Counter-Memorial, paragraph 234).

98. In Argentina’s opinion, in this case it is impossible to speak of an expropriation since the investment “[...] is worth substantially more in US dollars than what it would

have been worth if the measures had not been adopted” (Counter-Memorial, paragraph 185).

99. It also explained that Claimants’ position is based on an “[...] alleged expropriation of some of Metalpar Argentina’s contractual rights and not of METALPAR’s investment” (meaning **Metalpar S.A.** and **Buen Aire S.A.**), (Counter-Memorial, paragraph 192).

100. Argentina quoted what Claimants declared in paragraph 225 of their Memorial, (“Metalpar does not base its claim on the fact that its investment has been expropriated by Argentina”), and concludes that “[...] Argentina can only request the rejection of the expropriatory claim *in limine* on the grounds of what Claimants themselves have declared” (Rejoinder, paragraphs 171 and 172).

4. Interference

101. According to Claimants, Argentina interfered in their exercise of property rights: “[...] the measures adopted by Argentina, interfered with or ‘neutralized’ Metalpar’s ownership and use of rights and credits, which prevented it from ‘running the daily operations of its business and investments;’ in other words, it affected ‘the control over its investments and business’ since it could not demand the compliance with the validly executed contracts. These contracts are the essence of the activities related to its investments since it uses them to legally carry out its trade or business transactions” (Reply, paragraph 253).

102. Based on the award of August 30, 2000, of Metalclad against the United Mexican States (ICSID Case No. ARB(AF)/97/1), Claimants commented that an expropriatory action also includes the under-cover or incidental interference by the State with the use of property by its owners as it causes the effect of depriving the owners of all or some reasonably expected economic benefits, without it being necessary that there is an obvious economic benefit for the State (Reply, paragraph 239).

103. Claimants also outlined other arguments related to the alleged State intervention: “[...] had the Argentine State not interfered in Metalpar Argentina’s relationship with its

clients (by establishing the ‘pesification’ of the credits in foreign currency), METALPAR and BUEN AIRE would have maintained their investments today in the currency of origin [...]” (Memorial, paragraph 149). They argue that this intervention became apparent in the pesification of the credits, and the abandonment of the convertibility regime which pegged the US dollar to the Argentine peso, through Law No. 25,561 modifying Law No. 23,928.

104. Claimants concluded that: “[...] the effects of Law No. 25,561 did not hinder the enforcement of the credits guaranteed with pledges in the currency that had been originally agreed upon. Nonetheless, first through the provisions made in article 11 of Law No. 25,561 and then through articles 1 and 8 of Presidential Decree No. 214/2002, Argentina interferes in the relationships between individuals and affects the rights that are part of Metalpar Argentina’s equity as established by the Argentine Constitution and METALPAR and BUEN AIRE’s investments, under the protection of the APPI” (Memorial, paragraph 152).

105. In Argentina’s view “[...] it is impossible to affirm that METALPAR’s rights—referring to Claimants’—have ‘become so useless that they should be considered expropriated’, or that ‘the benefits of the property of the foreign investor has been effectively neutralized’, since METALPAR’s investment is worth substantially more than what it would have been worth if the measures had not been adopted [...]” (Counter-Memorial, paragraph 221).

106. Respondent also expressed:

“The Argentine Republic did not cause the Investor to lose control of its investment.

The Argentine Republic did not run nor currently runs the daily operations of the companies in which METALPAR has made its investment.

The Argentine Republic has not detained nor currently detains any executive or employee of the companies in which METALPAR has made its investment [...]

The Argentine Republic has not interfered nor currently interferes with the management or the activities of the shareholders.

The Argentine Republic did not prevent nor currently prevents the companies in which METALPAR has made its Investment from paying dividends to their shareholders.

The Argentine Republic has not interfered nor currently interferes with the appointment of directors and managers. [...]” (Counter Memorial, paragraph 224).

5. Prohibition from transferring funds abroad

107. Claimants stated that Argentina breached Article 5 of the APPI, which refers to the freedom to transfer investment-related payments. They explained that, through a letter of “[...] May 8, 2003, which is Exhibit 8 of this Memorial, Metalpar Argentina S.A., as the company receiving Metalpar S.A. and Buen Aire S.A.’s investments, asked BankBoston of Buenos Aires to transfer USD 200,000, which corresponded to a distribution of dividends that the investors had (sic) the right to transfer abroad in accordance with the abovementioned Article 5” (Memorial, paragraph 369). They also asked BankBoston to “[...] advise us on the procedure to be followed in order to perform such an operation” (Exhibit 8 of the Memorial). They added that, in a telephone conversation, the abovementioned bank indicated that they should “[...] refer to the legislation in force [*meaning the Presidential Decree No. 1570/2001, as Claimants pointed out later*], which banned those transfers” (Memorial, paragraph 370).

108. Claimants concluded “[...] that Argentina breached the guarantee to transfer funds granted in the Argentina-Chile APPI and, what is more, it discriminated against foreign investors in establishing exceptions to the transfer ban like payments of expenses incurred abroad through credit cards” (Memorial, paragraph 372).

109. In relation to this issue, Argentina explained that it always permitted international transfers and, only in the most difficult moment of the crisis, it required the prior approval of the Central Bank for those transfers (Counter-Memorial, paragraph 9). The problem, according to Argentina, is that, “[...] neither of the Claimants ever requested BCRA authorization to carry out a transfer” (Counter Memorial, paragraphs 707 and 716).

110. Argentina believes that, although it is true that Article 5 of the APPI indicates that States must guarantee individuals or companies of the other Contracting Party free transfer of investment-related payments, “[...] this does not prevent each State party from establishing certain procedures for such transfers ” (Counter-Memorial, paragraph 721). It added that “[...] in this particular case, the delays in the transfers are exclusively due to Claimants’ non-compliance with the required formalities” (Counter-Memorial, paragraph 744). Further, Argentina argued that the regulations related to this issue (Presidential Decree No. 1570 and several Communications issued by the Central Bank) “[...] do not discriminate between transfers in pesos and transfers in dollars” (Counter-Memorial, paragraph 753).

111. Finally, in relation to this issue, Respondent explained that the requirement of prior authorization became gradually more flexible and, after certain time, some transfers could even be made without having to comply with the authorization of the Central Bank (Counter-Memorial, paragraph 766).

6. Fair and equitable treatment

112. For Claimants, the fair and equitable treatment clause set forth in article 2.1 of the APPI, “[...] operates as a general guarantee clause addressed to foreign investors that their investments in that State will be given treatment that is compatible with those expectations and that that guarantee is independent of the national law of the Host State” (Memorial, paragraph 313).

113. Based on the proceedings in the arbitrations of Técnicas Medioambientales Tecmed S.A. against the United Mexican States (ICSID Case No ARB(AF)/00/2, award of May 29, 2003) and Mondev International Ltd. against the United States of America (ICSID Case No. ARB(AF)/99/2, award of October 11, 2002), Claimants stated that the breach of the fair and equitable treatment principle does not require that the State act in bad faith (Memorial, paragraph 315 and 316).

114. As regards Argentina’s acts, Claimants said that “Argentina’s legislative action was not coherent, it was ambiguous, unpredictable and lacking in transparency, which

prevented investors from being able to plan their activities” (Memorial, paragraph 320). Moreover, they stated that “[...] Argentina arbitrarily and illegally issued regulations that changed the legal framework on the basis of which claimants had decided to invest [...]” (paragraph 322). According to Claimants as of December, 2001, Argentina started issuing legal provisions of different levels in a disorderly and contradictory manner (Memorial, paragraph 350).

115. After stating that the APPI “[...] does not define what should be understood as ‘fair and equitable’” (Memorial, paragraph 331), Claimants declared that there were two thesis to approach this issue: the non-autonomy principle or “minimum standard of treatment” observance principle. For this thesis, fair and equitable treatment is reflected in “minimum standard of treatment” recognized in customary International Law. “In precise terms, ‘fair and equitable treatment’ represents the obligation to give the ‘minimum standard of treatment’ as established by customary International Law,” (Memorial, paragraph 332). The second thesis the autonomous standard of protection, or plain meaning approach, is based “[...] on the conventional nature of the fair and equitable treatment clause and the rules of interpretation of the Vienna Convention [...]” (Memorial, paragraph 335). Claimants concluded that arbitral case law has tended to interpret fair and equitable treatment clauses extensively (Memorial, paragraph 346).

116. Claimants declared that “[...] Argentina, by signing the APPI with Chile, took on the obligation towards Chilean investments and investors to respect the rights acquired in connection with such investments and the rational and legitimate expectations of the investors. Argentina did not respect its duty and, therefore, the treatment given to Metalpar S.A. and Buen Aire S.A.’s investments was neither fair nor equitable” (Memorial, paragraph 359).

117. For Argentina, fair and equitable treatment is “[...] **the international minimum standard of treatment, this understood as a standard meaning reasonableness and proportionality,**” (Counter-Memorial, paragraph 473). It is its opinion that international practice and organizations consider that “[...] the standard of fair and equitable treatment a) ‘does not include an obligation to afford any additional treatment beyond the requirements of the minimum standard under international customary law concerning the

treatment of foreigners’; b) it is related to concepts such as denial of justice or discrimination; c) based on the States’ understanding, it is not related to the stability of the legal and business framework, or the investors’ expectations” (Counter-Memorial, paragraph 485).

118. Based on the award issued on June 25, 2001, in the arbitration proceedings between Alex Genin, Eastern Credit Limited Inc., and A.A. Baltoil against the Republic of Estonia (ICSID Case No. ARB/99/2), Argentina pointed out, amongst other criteria, that for the principle of fair and equitable treatment “[...] to be violated by the State requires acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith” (Counter-Memorial, paragraph 551).

119. On the grounds of what we have just explained, Argentina denied that during “the emergency” it stopped respecting the fair and equitable treatment principle (Counter-Memorial, paragraph 499).

120. Argentina concluded that the allegedly violating measures were in fact proportional to the situation and that an equilibrium between all the economic agents in society was sought. “The measures were not inconsistent as, not only did they consider the society as a whole, but they also were successful in readjusting circumstances to the prevailing economic situation.” (Counter-Memorial, paragraph 609).

121. According to Argentina, Claimants referred to incompatible concepts in relation to fair and equitable treatment. “If fair and equitable treatment is a ‘minimum standard of protection,’ then it cannot be, at the same time, a stabilization clause as Claimants intend” (Rejoinder, paragraph 354).

122. Argentina also referred to the award of October 27, 2006, issued in the arbitration proceeding Champion Trading Company and Ameritrade International Inc. against the Arab Republic of Egypt, (ICSID Case No. ARB/02/9), which stated that “[...] according to recent case law, the fair and equitable standard must be assessed in light of all the facts and circumstances of the case, including the behaviour of the Claimants” (Rejoinder, paragraph 424). Based on what was resolved in that case, Argentina emphasized the need

to analyze the circumstances when assessing whether an investor was provided with fair and equitable treatment.

123. In Argentina's opinion: "METALPAR cannot argue that it had any legitimate expectation that, in the face of the most serious economic, social and institutional collapse in the history of the country, its investment would not be affected at all and that the legal framework governing the contractual relationships between private persons would not be readjusted." (Rejoinder, paragraph 392).

7. Compensation

124. In their Memorial, Claimants requested consequential damages for the decrease in value in dollars of the credit rights of Metalpar Argentina S.A., according to a financial report as of December 31, 2003, that they presented as Annex 7, in the amount of USD 8,055,933 (paragraph 407). They requested that upon issuance of the award a new calculation be prepared adjusted as of such date (paragraph 402). They also requested a total amount of USD 1,405,010 as actual damages with respect to the court and out-of-court costs as of January 6, 2002 (paragraph 410). With respect to lost profits, which is mentioned as opportunity cost in the abovementioned report with the cut-off date as of December 31, 2003, they requested the amount of USD 281,773 (paragraph 414); they reduced the amount in USD 174,947 for the liabilities settled by Metalpar Argentina S.A. in 2002 in Argentine pesos readjusted by CER, which—in their opinion—was a "benefit" for that company (paragraph 416). After such reduction, they requested a total amount of USD 9,567,769 for consequential damages and lost profits (paragraph 418). For moral damages, they requested the payment of damages for USD 3,000,000 (paragraph 423) and as "loss of chance," a total amount of USD 2,870,330.81 (paragraph 432). They also requested the amount of USD 2,500,000 for other damages related to economic, financial and legal advisory services that Claimants "[...] had to resort to in order to face the company's situation in Argentina and in Chile [...]" (paragraph 434).

125. To conclude, Claimants requested that Argentina be ordered to pay USD 17,938,099 plus "[...] compound interest from the date of the decision until the actual payment thereof" (Memorial, paragraph 437 b).

126. They also requested “In the alternative, to order the Argentine Republic to compensate claimants for the damages caused, in the amount deemed appropriate by the tribunal” (Memorial, paragraph 437).

127. In the hearing on the merits, Claimants stated as follows: “In order to reduce the effect of pesification or to try to reduce the effect of damages for the benefit of the Argentine Government and then require a lower compensation, Metalpar accepted payments from debtors even if they were 1-to-1 without CER, [...] thus, Metalpar was able to collect a significant amount from debtors” (transcript of the hearing on the merits, September 11, 2007, page 34).

128. Argentina expressed its disagreement with the compensation requested by Claimants, based mainly on the fact that—in its opinion—the measures that it took “[...] far from impairing METALPAR’s investment, have benefited it strongly [...]” (Counter-Memorial, paragraph 876). “[...] the measures amply benefited Metalpar Argentina as they allowed its debtors not only to settle their payables but also to improve their economic-financial situation as a result of the recovery in the demand of passenger transportation, a circumstance that meant a rise in the acquisition of new vehicles” (Rejoinder, paragraph 534).

129. Also, in its opinion, Metalpar should not have “[...] referred to the provisions contained in the contracts signed by Metalpar Argentina, in order to calculate the amount of compensation for alleged damages due to the breach of the BIT by Argentina” (Counter-Memorial, paragraph 879). It added that Claimants did not consider the economic crisis that Argentina went through either, which generated effects in the business of Metalpar Argentina, even before the application of the emergency measures adopted by such country. It stated that “[...] in fact, in the letter to the shareholders [*Memoria*] included in the 2001 financial statements, the company itself acknowledged that ‘[t]he billing of the fiscal year under analysis [2001] decreased in absolute values by 34.55% due to the macroeconomic situation previously mentioned...’” (paragraph 881).

130. According to Argentina, there is no causal relationship between its behaviour and the damages alleged by Claimants (Counter-Memorial, paragraph 884) and furthermore,

the headings of moral damages, loss of chance and other damages have no technical grounds supporting their quantification (Rejoinder, paragraph 545).

131. Argentina asserted that—as acknowledged by Claimants—the method used to estimate compensation is an accounting method, not a financial method and, further, there is an error in the assessment of the alleged damages (Rejoinder, paragraphs 549-552). Argentina challenged many of the aspects of the report submitted by Claimants as Exhibit 7 of the Memorial (“Financial Report, Metalpar, Effects of Pesification as of December 31, 2003”), since it was prepared by an accountant and the amounts disclosed derive from Metalpar’s Management. “The report lacks independence [...]” (transcript of the hearing on the merits, September 11, 2007, page 196). At the hearing, Argentina also explained the technical errors that it found in such report.

132. In the opinion of Argentina, the damages for moral damages are not admissible because Claimants are judicial persons and according to Argentine law they cannot “[...] experience spiritual suffering” (transcript of the hearing on the merits, September 11, 2007, page 207).

133. To conclude, Argentina argued that Claimants did not suffer any damage as a result of the measures adopted by such State and it is “[...] obvious that the valuation of the shareholding in Metalpar Argentina is currently much higher than that that could be assessed in 2001” (Rejoinder, paragraph 577).

8. State of necessity

134. Argentina argued, as a circumstance precluding responsibility, the state of necessity. In its opinion:

“[...] the collapse that affected and continues to affect it constitutes a state of necessity that exempts it from international responsibility as:

- The Government has not contributed to the occurrence of such state of necessity.

- The measures adopted were the only means of safeguarding that essential interest from the grave peril of social dissolution and political anarchy.
- No essential interest of the State or States with respect to which the obligation exists has been seriously impaired; neither has an interest of the community as a whole nor the compliance with a *ius cogens* obligation been affected.
- No unequal treatment has been given to foreign investors as compared to their Argentine counterparts, or to investors with respect to the other investors engaged in the same activity.
- The international obligation invoked (the BIT) does not rule out the possibility of invoking a state of necessity” (Counter-Memorial, paragraph 854).

135. According to Argentina, the crisis that it suffered is related to countless external factors in which it had null or insignificant involvement (Counter-Memorial, paragraph 859; Rejoinder, paragraph 497).

136. Argentina also stated, based on the case of *Sea-Land Service, Inc. against Iran*, Award No. 135-33-1 of 20 June 1984 issued by the Iran-United States Tribunal, that in a crisis situation government authorities may use “[...] a wide range of powers without incurring in international responsibility” (Counter-Memorial, paragraph 864).

137. According to Argentina, during the crisis, there was a certain risk of disintegration of the State itself (Rejoinder, paragraph 491). The measures that it adopted in view of this risk represented the only way of safeguarding an essential interest from a grave and imminent peril (Rejoinder, paragraph 517). Argentina also added that “[...] there is no doubt that the disastrous state which the country was in gives rise to the state of necessity, which is a clear cause of justification under both Argentine law and international law» (Rejoinder, paragraph 280).

138. According to Claimants, the emergency or necessity law—based on local case law—is limited and subject to the verification of certain circumstances established by the case law of the Argentine Supreme Court (Reply, paragraph 23). According to the Supreme Court, the measure adopted by a State shall be constitutional if it temporarily

restricts the performance of the contract or decision, keeping the substance thereof unharmed and integral (Reply, quotation in footnote number 5, page 13).

139. In Claimants' opinion, "[...] it is admissible that the need to provide for common welfare imply the limitation of certain individual rights; but in such case, that deprivation should be compensated" (Reply, paragraph 31).

140. Another argument posed by Claimants as regards this issue is that the emergency in Argentina "[...] did not come out of nowhere, and it was not a natural disaster, it was the result of its own mismanagement" (Reply, paragraph 47).

141. Claimants emphasized that they do not question the power of Argentina to issue the measures (Reply, paragraph 54) and that they are not intending to obtain a declaration of unlawfulness as regards pesification or devaluation (Reply, paragraph 56); neither do they question the sovereign power of Argentina to devalue its currency, "[...] Argentina had sufficient *imperium*—through public order laws—to modify the conventions agreed to freely between parties to the contracts" (Reply, paragraph 57). According to Claimants, pesification was not necessary or mandatory (Reply, paragraph 98); it was a measure that was deemed convenient and they do not question the power to issue it (Reply, paragraph 101). They concluded that, although they have no doubts as to Argentina's sovereign power to issue the measures challenged, such Government should compensate them for the losses that they suffered.

142. Claimants asserted that Argentina "[...] did not have nor has any right to require a 'patriotic contribution' from a foreign investor, and that the decrease, reduction or partial deprivation of their property (the investment instrumented through the contracts) must be compensated" (Reply, paragraph 115).

143. According to Claimants' opinion, the state of necessity is an exceptional excuse and it should only be used under strict conditions (transcript of the hearing on the merits, September 11, 2007, pages 82 and 86). It cannot be alleged "[...] if the responsible State has contributed deliberately or negligently to the occurrence of such state of necessity"

(page 96). “The state of necessity does not exclude the Government’s obligation to provide compensation for the effectively caused loss” (page 102).

9. Obligation to mitigate damages

144. Argentina stated that the Argentine legal system expressly established a method to amend situations of inequality that could arise from the application of pesification, and it added that “METALPAR acknowledges that neither Claimants in this arbitration nor Metalpar Argentina made use of the mechanism described” (Counter-Memorial, paragraph 17).

145. According to the Argentine Republic, “Metalpar Argentina, a company controlled by METALPAR, should have made a reasonable and ‘*bona fide*’ effort before local authorities to amend the alleged inequalities resulting from the pesification of contracts” (Counter-Memorial, paragraph 18). It clarified that this does not imply or equal the requirement to exhaust internal remedies, but rather “[...] it refers to the mere fact that, in the absence of a reasonable effort by the investor for the amendment of the measures challenged, the likelihood that there is a breach of the BIT becomes at least doubtful” (Counter-Memorial, paragraph 19).

146. Claimants expressed their disagreement with Argentina and asserted that they could not be required to initiate local legal actions because that would have implied a duplication of claims, which is inadmissible from the international point of view, and it would have prevented them from resorting to an ICSID tribunal (Reply, paragraphs 143, 153 and 154). In addition, initiating the proceedings would have signified incurring in a self-contradictory attitude in challenging the legality of the system and, at the same time, making claims within such system (Reply, paragraph 144). They also considered that the claim would not have even “produced results” because, as of December 27, 2006, there were over 50,000 proceedings pending at the Argentine Supreme Court with respect to the constitutionality of pesification (Reply, paragraph 145). Also, in their opinion, requiring them to “go through” the complicated legal proceedings “[...] also implied an expropriatory measure” (Reply, paragraph 146).

147. In a communication of September 28, 2007, in response to several questions posed by the Tribunal in the hearing on the merits, Claimants stated that “Metalpar received the payments made by their customers ‘towards the final amount due’, as established by Law No. 25,561, and proposed to their debtors a renegotiation of the loan” (page 7). They added that: “As established by Law No. 25,642, CER could only be applied as from October 1, 2002. That is why, we repeat, Metalpar used such date—and not any other date—to calculate CER, and not because of foreign exchange speculation. Consequently, Metalpar could only start claiming the payment of CER from its debtors as of October 1, 2002 [...] Furthermore, Metalpar refinanced the loans of some of its customers” (page 7).

10. Conclusions and requests

148. In the hearing on the merits, Claimants concluded that “[...] pesification breaches the legal framework and the Agreement for the Promotion and Reciprocal Protection of Investments (APPI) that it took into account upon making the investment since it implied substantive modifications to what Metalpar had considered upon carrying out the investment” (transcript of the hearing on the merits, September 11, 2007, page 36). They added that “Argentina breached its obligation to provide full protection and legal security within its territory to the investments made by Metalpar and Buen Aire and caused them to be subject to measures tantamount to expropriation” (transcript of the hearing on the merits, September 11, 2007, page 49).

149. In their Memorial, Claimants requested that the Tribunal issue the award as follows:

“a) Establish that the Argentine Republic has breached its obligations under the Bilateral Investment Treaty previously mentioned, which was signed between Chile and Argentina, international law and the Argentine Constitution itself;

b) Condemn the Argentine Republic to pay to claimants Metalpar S.A. and Buen Aire S.A. a compensation of **USD 17,938,099**, readjusted and updated as previously requested, plus all additional court expenses deriving from this litigation for claimants, as well as compound interest from the date of issuance of the decision until actual payment.

c) In the alternative, order the Argentine Republic to compensate claimants for the damages caused, in the amount deemed appropriate by the tribunal” (paragraph 437).

150. In their Reply, Claimants repeated the requests indicated in the previous paragraph (XXV Request for Relief).

151. In its Counter-Memorial, Argentina requested that the Tribunal declare “[...] a) that this Counter-Memorial be deemed filed in due time and manner; b) that METALPAR’s claim against the Argentine Republic be dismissed in full, plus court costs” (Counter-Memorial, paragraph 909).

152. In its Rejoinder, Argentina requested that the Tribunal declare “a) That the Rejoinder be deemed filed in due time and manner; b) That the evidence offered and submitted be considered; c) That METALPAR’s claim be dismissed in due time; e) That court costs be imposed on Claimants” (Rejoinder, paragraph 593).

IV. DIFFICULTIES WITH EVIDENCE

153. As previously explained, for reasons unknown to the Tribunal, Claimants did not present the witnesses and experts proposed by the parties in the hearing scheduled and held precisely with the object that the Tribunal and each of the parties examine them. Claimants proceeded in this way despite the fact that the Tribunal had indicated to them, pursuant to Rule 34(3) of ICSID Arbitration Rules, that they were required to present those witnesses and experts, so that they may be examined by Argentina and the Tribunal as explained in paragraphs 36, 37, 38, 39, 40, 41, 42, 44, 46, 50 and 51 above. Consequently, the Tribunal is unable to base its decision on the facts and conclusions that those witnesses and experts would have allegedly proved, as stated by Claimants. To proceed differently would imply causing a serious procedural inequality for Respondent, who expressly requested the presentation of those persons in order to examine them. The Tribunal also values the fact that the Argentine Republic did bring its witnesses and experts to the hearing, and Claimants had full possibilities of interrogating them on that occasion.

154. Neither will the Tribunal be able to base its decision on the documents submitted in the hearing by Dr. Juan Andrés Fontaine and Dr. Hernán Salinas, when they examined some of the experts presented by Argentina, although the Tribunal reserves its right to use their statements made at the hearing to clarify events. Accepting the inclusion of the opinions and reports issued by experts in the proceedings through the examination of the counterparty's expert witnesses would imply placing the counterparty in an obvious situation of procedural inequality, as those opinions and reports could not be examined and those who prepared them could not be interrogated.

155. Claimants justified their procedural attitude with respect to evidence through their alleged conviction—which was repeated by their legal counsel expressly—that the only remaining issues were matters of law (and that there was no controversy as to the matters of fact). Notwithstanding the reasons that led Claimants not to present their witnesses and experts to be examined by Argentina at the hearing, the truth is that they imposed serious probative limitations on the Tribunal that it cannot surpass without breaching the procedural equilibrium that should exist between the parties. In any case, as the issue discussed in this case is whether Claimants' investment was affected, the Tribunal considers that this fact should be proven and, therefore, it is not possible to treat the controversy as if the only remaining issues were matters of law (and that there was no controversy as to matters of fact).

156. Despite the objections made by Claimants, the Tribunal has no reason to doubt the truthfulness of the assertions made by the witness offered by Argentina or the conclusions reached by its experts. Their examination by Claimants' representatives and the members of the Tribunal might have shown some weaknesses in certain cases, but nothing that could disqualify them.

157. With respect to the evidence offered by Argentina, Claimants stated that they “[...] challenge the documentation, reports and statements filed by Argentina, both in form and substance. With respect to form, because they were not filed pursuant to procedural regulations, i.e. they did not form part of Argentina's Counter-Memorial [...]” (Reply, paragraph 321).

158. The Tribunal based on Rule 24 of the ICSID Arbitration Rules and point 18 of the Minutes of the Tribunal's First Session held on November 23, 2003, in which—among other issues—the procedure for documentary evidence was analyzed, does not share Claimants' criterion. Argentina offered its evidence in a timely manner, as exhibits to its briefs, just as Claimants did with theirs.

V. ANALYSIS OF THE MERITS OF THE CASE

159. Below the Tribunal will analyze and reach conclusions regarding the positions of the parties with respect to the issues discussed in these proceedings, as mentioned in section III above.

1. Discrimination

160. Claimants alleged, in brief, that Argentina, through Law No. 25,561, Law No. 25,789, and Presidential Decree No. 905/2002, had discriminated against them (Memorial, paragraphs 169 and 360). Argentina denied the existence of such discrimination against Claimants and in favor of the financial sector and, on the contrary, asserted that the entities of such sector had received a more burdensome treatment.

161. The Tribunal considers that a State's power to create its legal system—through its competent authorities—allows it to establish different rules to govern different subjects. If Claimants neither were nor are financial institutions, they cannot argue that the Argentine Government should have treated them as such.

162. Treating different categories of subjects differently is not unequal treatment. The principle of equality only applies between equal subjects, not between unequal subjects. This was acknowledged by the Tribunal in the case CMS Gas Transmission Company against the Argentine Republic, which stated as follows: "The Respondent's argument

about discrimination existing only in similarly situated groups or categories of people is correct [...].”¹

163. Likewise, the *Sempra Energy International against the Argentine Republic* case may be quoted:

“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.”²

164. In conclusion, the Tribunal does not find in this case that Argentina discriminated against Claimants through the rules cited by them because, as they belong to a group that is different from the financial sector, to which the rules granted different treatment as regards pesification, they cannot argue that they were treated in a discriminatory manner.

2. Expropriation

165. In the Memorial, **Metalpar S.A.** and **Buen Aire S.A.** argued that the APPI provides for protection and legal security to its investments and that they cannot be expropriated (paragraph 254). They also explained what is understood as indirect expropriation and argued that the acts performed by Argentina constituted an indirect expropriation.

166. Subsequently, they repeatedly explained their position as follows: “Metalpar does not base its claim on the fact that its investment has been expropriated by Argentina. SPECIFICALLY, WHAT HAS BEEN EXPROPRIATED ARE THE RIGHTS AND CREDITS METALPAR HAD AGAINST ITS CLIENTS, WHICH IT HAS NOT BEEN ABLE TO EXERCISE FULLY BECAUSE THE ARGENTINE AUTHORITY HAS

¹ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005, paragraph 293.

² *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Award of September 28, 2007, paragraph 319.

PREVENTED IT FROM DOING SO BY MEANS OF THE FINANCIAL MEASURES ISSUED TO THAT EFFECT” (Reply, paragraph 225).

167. Similarly, they stated at the hearing that: “In our opinion, the issue here is not the valuation of the investments, but an expropriation of credits, a contractual breach” (transcript of the hearing on the merits, September 14, 2007, page 714).

168. The BIT sets forth as follows:

“Article 4. Expropriation, nationalization and extraordinary situations.

1. The investments made by nationals or companies of one of the Contracting Parties shall enjoy full protection and legal security within the territory of the other Contracting Party.

2. The investments made by nationals or companies of one of the Contracting Parties shall not be, within the territory of the other Contracting Party, expropriated, nationalized or placed under the sphere of measures whose effects are tantamount to an expropriation or nationalization, except in the event of a law based on public use or common welfare, and, in those cases, they shall be previously compensated [...].”

169. As already stated, Argentina, aside from asserting that Claimants’ investments were not expropriated, repeated on different occasions Claimants’ alleged contradictions on this issue, as they mistook their investments for the contracts signed by its subsidiary, Metalpar Argentina S.A.

170. During the proceedings, Claimants repeated their position and asserted that what had been expropriated were the loan agreements signed between Metalpar Argentina S.A. and its customers, and they expressly stated that their Claim is not based “[...] on the fact that their Investment was expropriated by Argentina” (Reply, paragraph 225).

171. According to Claimants, the loan agreements that they signed with their debtors were financed with their investments and, therefore, they should be under the BIT’s protection. In the opinion of Argentina, the investments and the loan agreements are different things, and only the former are protected by the investment treaty.

172. In another ICSID arbitration, the tribunal correctly stated that:

“In considering the severity of the economic impact, the analysis focuses on whether the economic impact unleashed by the measure adopted by the host State was sufficiently severe as to generate the need for compensation due to expropriation. In many arbitral decisions, the compensation has been denied when it has not affected all or almost all the investment’s economic value. Interference with the investment’s ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation.”³

173. This Tribunal agrees with what was expressed in the previous paragraph and considers that in this proceeding Claimants were unable to prove that the actions taken by the Argentine Government had a “sufficiently severe” effect on their investments “to generate the need for compensation due to expropriation.” Furthermore, in this case, the Tribunal has not had any evidence showing that the intervention in the loan agreements alleged by Claimants produced any negative effects on their investment in Argentina.

174. In addition to the above, based on the evidence presented by Argentina, the Tribunal considers that Claimants were never prevented from managing their investment and they always had control over it through their subsidiary, Metalpar Argentina S.A. What is more, such company continued performing its business activities, negotiating with the customers that had already signed the contracts and with future customers. Metalpar Argentina S.A. improved its production and sales in the Argentine market, as acknowledged by its Chairman, Mr. Jaime Paredes, who is also one of the main shareholders of Claimants (transcript of the hearing on the merits, September 14, 2007, page 932). Therefore, there is no evidence of direct or indirect expropriation of Claimants’ investments.

3. Interference

175. For the same reasons given showing that Claimants’ investments were not expropriated, the Tribunal concludes that it is also not possible to affirm that there was

³ LG&E 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, paragraph 191.

any significant interference by Argentina with respect to Claimants' investments that may have prevented the latter or Metalpar Argentina S.A. from carrying out their business activities as they deemed most appropriate.

4. Prohibition on transferring funds abroad

176. According to Claimants, Argentina breached the guarantee of transfer of funds included in the **BIT** and thus discriminated against them as compared to other foreign investors (Memorial, paragraph 372). According to Argentina, there was no such violation since, even during the worst part of the crisis, investors were always able to make transfers, although for a period of time authorization from the Central Bank was required (Counter-Memorial, paragraphs 9, 707, 715 and 716).

177. To solve this issue, it is necessary to review the regulations quoted by Claimants, i.e. Presidential Decree No. 1570/2001, which, in the relevant part, establishes:

“Article 2 – The following transactions are hereby prohibited:

[...] b) Transfers abroad, except for those related to foreign trade transactions, to the payment of expenses or withdrawals made abroad through credit or debit cards issued within the country, or to the settlement of financial transactions or for other concepts, in this last case, subject to the authorization of the Central Bank of Argentina” (Memorial, paragraph 371).

178. Claimants intended to prove the only case in which they were allegedly unable to transfer funds abroad through a letter dated May 8, 2003 that was attached as Exhibit No. 9 to the Memorial. In that letter, Metalpar Argentina S.A. requested BankBoston to provide advice as to how to transfer USD 200,000.00 to its shareholders; the bank responded that current legislation prohibited such remittances.

179. The Tribunal concludes that Claimants, who knew the regulations on this matter well, as indicated in the file, did not comply with the established procedure, which consisted of requesting authorization from the Central Bank, not BankBoston, and that Argentina did not breach article 5(b) of the BIT, which guarantees the transfer of funds abroad. Should it be concluded that the events were the result of incorrect advice provided

by BankBoston to Claimants, the consequences of that error could not be charged to Argentina either.

5. Fair and equitable treatment

180. The Tribunal considers that, contrary to what Claimants stated, the treatment that Argentina accorded to their investments did not breach the fair and equitable treatment standard established in the BIT.

181. As explained in paragraphs 160 through 164, Argentina did not discriminate against Claimants. Nor did it deny them access to justice. As previously stated, the measures taken by Argentina to avert the crisis included judicial and extra-judicial mechanisms to mitigate the effects thereof. Claimants, through their own decision, and not because the Argentine authorities prevented them from doing so, did not use any of those mechanisms.

182. With respect to the issue of the expectations alleged by Claimants, the Tribunal observed that they were basically based on the award issued on May 29, 2003 in the arbitration Tecmed against the United Mexican States (ICSID Case No. ARB/00/2); however, it considers that it is required to analyze what was resolved in other cases in order to achieve greater conceptual accuracy. The following paragraphs are included for such purpose.

183. In the PSEG Global Inc. and Kenya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi against the Republic of Turkey case, the Tribunal stated as follows:

“Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable [...] Recent awards have applied this standard to the assessment of rights affected by inconsistent State action, arbitrary modification of the regulatory framework or endless normative changes to the detriment of the investor's business and the need to secure a predictable and stable legal environment. This includes most significantly the issue of legitimate expectations which, as the Tribunal in *Tecmed* concluded, requires a treatment that does not “detract from the basic expectations on the basis of which the foreign investor decided to make the investment” [...]. Although the Claimants, as noted above, provide a long list of legitimate

expectations that in their view have not been met, the Tribunal is not persuaded that all such complaints relate to legitimate expectations. **Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed**⁴ (emphasis added).

184. In the award of LG&E Corp., LG&E Capital Corp. and LG&E International Inc. against the Argentine Republic, the Tribunal concluded that:

“Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”⁵

185. After analyzing the abovementioned awards, the conclusions of which, in essence, this Tribunal shares as they properly reflect the concept of “fair and equitable treatment,” it is necessary to point out the following: the tribunals in the cases PSEG Global Inc. Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi against Republic of Turkey (ICSID Case No. ARB/02/5, award of January 19, 2007), Técnicas Medioambientales Tecmed S.A. against United Mexican States (ICSID Case No. ARB(AF)/00/2, award of May 29, 2003), ADC Affiliate Limited and ADC & ADMC Management Limited against Republic of Hungary (ICSID Case No. ARB/03/6, award of October 2, 2006), Azurix Corp. against Argentine Republic (ICSID Case No. ARB/01/12, award of July 14, 2006), Siemens A. G. against Argentine Republic (ICSID Case No. ARB/02/8, award of February 6, 2007), LG&E Corp., LG&E Capital Corp. and LG&E International Inc. against Argentine Republic (ICSID Case No. ARB/02/1, award of July 25, 2007), and Enron Corporation, Ponderosa Assets L.P. against Argentine Republic (ICSID Case No. ARB/01/3, award of May 22, 2007), amongst others, asserted that investors’ expectations were related to fair and equitable treatment. However, in all of them, the conflict arose out of a state of facts different to the one under analysis in this case: in some of them, the relevant governments had invited the foreign investors to participate in a bidding process that was awarded to each of those investors and ended with the signing of a contract. In

⁴ PSEG Global Inc. and Kenya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (ICSID Case No. ARB/02/5), Award of January 19, 2007, paragraphs 239-241.

⁵ LG&E 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, paragraph 131.

other cases, there were other types of contractual relations which created legitimate expectations; in all of them, the Government refused to renew or to comply with the contract, license or permit.

186. In this specific case, there was no bid, license, permit or contract of any kind between Argentina and Claimants, and the Tribunal considers that there were no legitimate expectations entertained by Claimants that were breached by Argentina.

187. In the hearing it was shown that both Claimants had business experience in Argentina as well as in Chile (transcript of the hearing on the merits, September 11, 2007, page 159) and that they knew that the automobile industry in Argentina was in bad conditions since 1997, as affirmed by Mr. Jaime Paredes, one of the main shareholders of Claimants (transcript of the hearing on the merits, September 14, 2007, page 927). Therefore, the Tribunal considers that it is unlikely that Claimants legitimately expected that their investments would not be subject to the ups and downs of the country in which they were made or that the crisis that could already be foreseen would not make it necessary to issue legal measures to cope with it. Since in this case there is no arbitrary governmental conduct nor is there a contractual situation of any kind leading Claimants to entertain legitimate expectations that were violated by such conduct, the Tribunal concludes that Argentina did not violate the provision that requires it to afford fair and equitable treatment to Claimants' investments.

188. Based on what has been disclosed in the previous pages, the Tribunal concludes that it was not proven during this proceeding that **Metalpar S.A.**'s and **Buen Aire S.A.**'s investments in the Argentine Republic received discriminatory treatment or treatment violating the provision requiring fair and equitable treatment from the Argentine Government. Neither has it been proven to the Tribunal that these investments were expropriated by that Government in a direct or indirect manner, that that Government interfered considerably in how the investments were handled by Claimants, nor that they were arbitrarily denied the possibility of making transfers abroad. That would be sufficient to dismiss the claim filed by Claimants. However, as already mentioned and as will be shown further ahead, this case, additionally, has the singular feature that there is no evidence in the case file showing that the investments of Claimants were adversely

affected, which is why their claims should be denied. The Tribunal also considers it convenient to analyze other aspects of this dispute that make it different from other similar disputes. The following paragraphs are devoted to this end.

6. The circumstances under which Claimants made their investment

189. As from 1998, a crisis began to shape in Argentina, which exploded violently in late 2001. The extent of this situation is undeniable and was thoroughly proven in the case. The severity of the phenomenon was described by Dr. Liliana De Riz, expert witness offered by Argentina, who in her report and in her subsequent oral statement expressed as follows:

“In 1998, the economy began a period of recession and the social imbalance worsened until it turned into a social crisis that, simultaneously, reflected a crisis in the legitimacy of the governing authorities and a crisis of the State, which was incapable of maintaining order” (Report, page, 1).

“After the abandonment of the convertibility regime, which was determined by the market, chaos and economic depression continued to reign. With a paralyzed banking system and no clear prospects of possible international financial aid, GDP contracted by 16% in the first half of 2002” (Report, page 6).

190. At the hearing, Dr. De Riz added: “There is no doubt that the unprecedented nature of this Argentine crisis, the new aspect of it, was that it consisted, simultaneously, of a collapse of the economy, a crisis of the Argentine Government, a crisis of the political system of representation and a social crisis” (transcript of the hearing on the merits, September 12, 2007, page 445).

191. When referring to the crisis, she said, on that same occasion:

“What did this translate into? As I said into the sudden increase in poverty, pushing half the population under the poverty line and a quarter of the population under the indigence line, which translates into the rapid spreading towards the periphery, to the marginal sectors of society, to those who do not receive a formal income, because the economic chain is broken. And in a context of sudden impoverishment—as I have said—there is an implosion, this social outburst that brings new social characters into the Argentine scene. This is what the *cacerolazos*

(people protesting through banging on pots and pans), the *piqueteros* (picketers) are, they had already begun to protest but they grew in significance” (transcript of the hearing on the merits, September 12, 2007, page 448 and 449).

192. The extremely grave situation experienced in Argentina during that time was not only shown by expert testimony. It was also reported by some of the most important newspapers around the world. As an example, the following headlines are transcribed below:

“*Argentina a la deriva*” (Argentina adrift), ABC (Spain), December 21, 2001; “*Argentina se hunde sin ayuda*” (Argentina sinks without help), El Nuevo Herald (Miami), December 21, 2001; “*Frágil, el equilibrio político, económico y social en Argentina: un mal paso desataría la furia*” (Fragile, the political, economic and social balance in Argentina: a wrong step would unleash fury), Jornada (Mexico), January 20, 2002; “*El 70% de los niños argentinos vive en la pobreza*” (Seventy percent of Argentine children live in poverty), La Nación, August 21, 2002 (exhibits A RA 44, 50, 45 and 36, respectively, submitted by Argentina).

193. Several international financial institutions, such as the International Monetary Fund, also expressed their concern over the severity of the crisis Argentina was going through. Similarly, figures without any connection to either of the parties pointed out how alarming the situation was. As an example, the following interview may be quoted:

“The U.S. Assistant Secretary of State for Latin American Affairs, Otto Reich, said that the severity of the economic crisis which Argentina is going through ‘more than doubles’ the Great Depression the United States went through in the early thirties. At that time, there was a serious financial crack which brought serious consequences for that country's economy.

Reich also indicated in an interview published yesterday by the Italian newspaper Corriere Della Sera that ‘the financial system in Argentina exists but must be rebuilt’. Furthermore, the U.S. official pointed out that due to the magnitude of the crisis, he is following ‘the negotiation between the Argentine Government and the International Monetary Fund (IMF) very attentively’” (Clarín.com, July 10, 2003, quoted by Argentina in its Counter-Memorial, footnote on page 54).

194. The Argentine Supreme Court of Justice itself recently recalled this chaotic situation:

“[...] the questions at issue make it necessary to recall that the political, social and economic events that gave rise to one of the most serious crises in the contemporary history of Argentina are public and well-known events acknowledged by the Court upon ruling in Fallos [...] once the situation of serious economic, social and political distress that represents a maximum danger for the country has been accepted, the State’s duty to put in place exceptional rules is imperative; i.e. a set of extraordinary remedies to ensure the self-defense of the community and the reestablishment of the social normality that the political system provided by the Constitution requires [...].”⁶

195. There were many external factors that contributed to the chaotic situation Argentina experienced in late 2001 and early 2002. Among them, those frequently mentioned are the problems suffered by Mexico in 1995, Russia as from 1998, the southeast Asian countries and, especially, Brazil in 1998 (Report by expert Carlos Pérez Rovira, filed by Claimants, page 5, and report by Roberto Frenkel and Mario Damill, filed by Argentina, page 33).

196. Although, in the words of the witnesses, the crisis in late 2001 and early 2002 is incomparable to any other in Argentina’s past, it is true that this country has suffered serious political and economic setbacks throughout its history. Without having to go back farther in history, it is sufficient to recall the difficult situations experienced by Argentina during the second part of the 20th century to know that, although extremely serious, the crisis of the early 21st century is not without precedent in Argentina.

197. As regards the causes of the crisis and the appropriateness of the measures taken by Argentina, the Tribunal cannot determine whether, as Claimants alleged, those measures contributed to the crisis. It is possible that some of them were not the best measures, but undoubtedly, they were aimed at overcoming the devastating situation Argentina was going through. Therefore, the Tribunal will base itself on the objective fact that, in a relatively short period, Argentina went from utter chaos in the social, economic and political fields to a situation of stability as is currently the case.

⁶ Rinaldi, Francisco A. et al versus Guzmán Toledo et al. Mortgage foreclosure, Argentine Supreme Court of Justice, March 15, 2007, Resolution 320 XLII.

198. Leaders of different countries must make decisions of a very different nature on a daily basis. Except in very obvious situations, it is extremely difficult to determine at the time such decisions are made, and even some time afterwards, whether said decisions were the best they could have been. In this case, to try to abstractly determine whether the actions carried out by Argentina during the crisis were optimal is a difficult or impossible task, especially if economic consequences are intended to be derived from the conclusion reached.

199. Resolving whether the actions taken by the Argentine Republic during the emergency were correct and taken in a timely manner and, consequently, whether they were key to Argentina overcoming the crisis, or whether, quite the opposite, they contributed to the creation of the crisis or, at least, made it more serious; or to evaluate the way in which international financial institutions and the global economic system conducted themselves, are discussions that go beyond this Tribunal's sphere of action. Even today, discussions continue on whether the financial aid received by Argentina was timely or tardy, sufficient or insignificant and some hold that no matter what governments and international institutions would have done, only Argentina could take the measures—some of these measures being almost heroic—that were necessary to start to overcome the situation that was weighing down its people. As regards the suggestions (or impositions, according to some) made by the international financial organizations, the discussion covers not only issues on their appropriateness, rather, it also includes other aspects such as the debate on whether, even if they were in fact correct, they were incorrectly or insufficiently applied by the governments of that country.

200. This Tribunal is fully aware that it was not appointed to make a historical and economic analysis of the social, economic and political problems Argentina has experienced. Neither is such a task of interest for the purpose of fulfilling the mission that was entrusted to the Tribunal, which is to settle the dispute between the parties. The undersigning arbitrators understand that the analysis of the causes of the crisis suffered by Argentina, which reached the height of its severity in late 2001 and during 2002, exceeds their field of action, as does the analysis of the appropriateness and timeliness of the measures that Argentine authorities brought into effect. Therefore, this Tribunal will neither take sides with those making the governing leaders responsible for the crisis

suffered by Argentina, nor with those considering that their course of action was optimum. To attempt to do so, as was expected in this proceeding, would constitute a mistaken decision and might lead the Tribunal to make assertions the evidence of which would be doubtful or impossible and whose consequences would be impossible to prove.

201. The representatives of **Metalpar S.A.** and **Buen Aire S.A.**, Chilean companies founded and based in this neighbouring country of Argentina, were not unaware of the political and economic problems undergone by Argentina in the past. They themselves expressed it on several occasions, one of such statements having been made in paragraph 139 of their Memorial. They were aware of the fact that in the near past Argentina had suffered serious instability issues and, possibly, with a little diligence, they would have been able to discover in 1996 and the following years, when they were making their investments in Argentina (in 1997 they purchased Bus Carrocería and in 1998 they made significant capital contributions in companies owned by them), that a new crisis was shaping although, of course, it would have been impossible to foresee the gravity of the events that were to come.

202. It is therefore valid to suppose that Claimants, with representatives who have ample international experience, living in a neighbouring country and with strong relations with that country, were aware of Argentina's reality. This supposition became certain for the members of this Tribunal during the hearing held in September 2007, when Claimants themselves, and persons related to them, in their eagerness to show that Argentina had contributed to the crisis that triggered the conflict that will be resolved in this proceeding, showed that they had a good understanding of the economic, social and political commotions that had been frequent in Argentina. They did this also in several submissions throughout the proceeding.

203. As mentioned previously, long discussions have been held between economists on the reasons for the crisis and with a view to defining whether the measures taken by Argentina were the correct ones and whether they were implemented in a timely fashion. There are several experts, on whose opinions Claimants have based themselves, which state that Argentina contributed to the outbreak of the crisis. However, there is also another group of knowledgeable persons on the subject, expert Carlos Pérez Rovira

among them, introduced by **Metalpar** (page 5 of his report cited by Argentina on page 14 of the Rejoinder), which hold that the crisis resulted from external factors such as those mentioned in paragraph 195 above.

204. In the world of finance, it is frequently held that “the greater the return, the greater the risk.” Although this aphorism is normally applied to financial transactions between private parties, such aphorism cannot be ignored when trying to decide which country to invest in; that is why there is such a thing as a “country risk” rating. It cannot be denied that there are countries in the world that enjoy greater stability than others. Claimants’ representatives, businesspersons with international experience who are knowledgeable of Argentina’s situation, were aware, as already stated, of the problems Argentina had suffered on several prior occasions. However, they decided to invest in that country where, although there was a greater risk due to the instability problems Argentina had experienced in the past, there was also the possibility of obtaining greater returns.

205. In one of his interventions in the hearing on the merits held in September 2007, Dr. Hernán Salinas, who appeared as part of Claimants’ legal advisors, referred to the CMS against Argentina case (ICSID, ARB 01/8) and said:

“[...] in this regard, the Arbitral Tribunal cited concludes that after examining the circumstances of the controversy—I quote—‘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—it continues—exogenous factors did fuel additional difficulties they do not exempt the Respondent for its responsibility in the matter.’ End quote” (transcript of the hearing on the merits, September 11, 2007, page 97).

Mr. Salinas added:

“As Argentina herself has pointed out, the Argentine crisis was not the [sic] an isolated crisis. There were numerous economies that suffered the external shocks, the effects of volatility or movements of funds and the so-called contagion effects” (transcript of the hearing on the merits, September 11, 2007, page 99).

206. Claimants also stated that: “[...] during Argentina's democratic governments there was never a period lasting longer than 7 years without an ‘emergency’ justifying the subjugation of constitutional rights [...] As established by the ICSID Tribunal in ‘LG&E Energy Corp. vs. Argentine Republic’, there have been ‘...emergency periods in Argentina longer than the non-emergency periods...’” (Reply, paragraph 26). Further ahead, they expressed as follows: “That is why—in light of the ups and downs of the economy—Metalpar Argentina included in the Agreements the clauses that established the price in US dollars and, moreover, which expressly maintained that currency for payment, waiving the theory of unpredictability, if the convertibility regime established by Law No. 23,928 were to be altered” (Reply, paragraph 28).

207. When Claimants invested in Argentina, they knew that the Convertibility Law No. 23,298, published on March 28, 1991, was in effect, and that, in the event of certain external events impacting on Argentina, the factual situation upholding what was provided in that law could become unreal and a new crisis would lash such nation. In spite of this, Claimants’ representatives decided to invest large sums of money in Argentina. The Tribunal is not clear on whether, in addition to weighing the aforementioned risks, Claimants had the possibility of foreseeing that the Argentine Government could, in such circumstances, intervene with the contractual relations with its customers, forcing them to change these relations the way it was done. However, as already stated, such analysis is pointless considering that it has not been shown that Claimants’ investment in the Argentine Republic was affected.

7. State of Necessity

208. Self-preservation is one of the fundamental duties of the government of a country. If the government disappears, chaos and great hardship for that country's population ensue. In this specific case, as already stated above, the Tribunal is convinced of the severity of the crisis suffered by Argentina in late 2001 and early 2002. As already mentioned, back then there were discussions, which persist to this day, on whether the measures taken at that time by Argentina’s governing leaders were appropriate and whether they were taken in a timely manner. The Tribunal also expressed, in previous

paragraphs, that the determination of this matter exceeds its sphere of action and, moreover, is unnecessary to resolve the dispute existing between the parties.

209. During this proceeding, the representatives of Argentina confirmed that the measures taken by the Government during the months in which the crisis was at its peak and subsequently, were absolutely essential to overcome the situation the country was going through. They also added that, as regards Claimants, these measures had a beneficial effect and contributed, in a definite manner, to their financial recovery. Claimants, on the other hand, consider that Argentina contributed to causing the crisis and, although they acknowledge Argentina's sovereign right to take the measures it deems necessary to solve the crisis, they state that as these actions adversely affected them, Argentina should compensate them.

210. The parties disagree on what circumstances are necessary to be able to refer to a "state of necessity," on the duration of the ruling imposing it and on the consequences of the actions taken by a government in such circumstances. To defend their points of view in relation to this matter, they presented extensive written and oral arguments.

211. For the purposes of this proceeding, as explained below, it is not necessary to clarify this matter due to the fact that, as will be shown further ahead, Claimants did not prove that their investments in the Argentine Republic were adversely affected by the actions taken by the Argentine Government, which would make it pointless to decide whether the measures taken by Argentina and challenged by Claimants, were executed due to there being a "state of necessity," which would extinguish the liability that could be attributed to Respondent.

212. This conclusion clearly distinguishes this matter from others filed against the Argentine Republic. To exemplify, we mention the arbitrations of LG&E (ICSID case ARB/02/1) and Enron Corporation (ICSID case ARB 01/3), which also discussed the existence of a "state of necessity" in Argentina and its consequences. Both cases mentioned are clearly different to this case because in them the existence of damages to the investments was shown.

213. The analysis of the *state of necessity* issue, as a circumstance precluding responsibility, is required in cases in which a government is shown to conduct itself in a manner that infringes the right of a person, whether natural or judicial, to have its investment in that country respected. If, in addition to the existence of this detrimental conduct to the investments it is proven that, as a result thereof damage was caused, and moreover, the amount thereof can be proven, the definition of whether there is a state of necessity precluding the government from responsibility, is unavoidable. None of this occurs in this case and, therefore, going into this analysis would be completely futile.

8. Obligation to mitigate the alleged damage

214. Argentina stated that Claimants should have carried out a reasonable effort with their debtors and before local authorities to remedy the supposed inequalities resulting from the pesification (Counter-Memorial, paragraph 18). Claimants disagreed with such statement and to support their position they provided several arguments.

215. Claimants basically argued that bringing any proceeding before Argentine courts would have eliminated the possibility of accessing an arbitration proceeding before an ICSID tribunal. They added that proceeding in this manner would have entailed, moreover, a contradictory stance as, if they had done so, they would have been turning to a system they were questioning. They concluded that such a proceeding would have required an enormous effort on their part and would have had a futile outcome given the backlog of cases pending before the Argentine Supreme Court of Justice in which there are more than “[...] 50,00 proceedings pending a decision on whether the pesification is constitutional” (Reply, paragraph 145). Argentina contradicted each of these arguments.

216. In other circumstances, it may be of importance to analyze whether Metalpar Argentina S.A. should have attempted, through negotiations or, otherwise, through the court system, the actions provided by the measures to counteract inequitable situations. Evidently, if they had done so there would not have been an identity of parties, purpose and causes of action between those hypothetical legal actions and this arbitration; therefore, a legal action filed by Metalpar Argentina S.A. in this regard would not have jeopardized Claimants’ possibility of beginning arbitration proceedings through ICSID.

217. Given the conclusions that will be presented below, the Tribunal considers that to resolve this dispute there is no need to go into the discussion on whether Claimants should have acted before Argentine courts to attack the measures taken by the Argentine Government or to mitigate the damages they allegedly suffered. For these same reasons, the Tribunal is also not interested in judging on the duration of the proceedings filed or on the discussion of whether Claimant's actions brought before those courts would have jeopardized their possibility of resorting to ICSID or would have required an effort from them that was out of proportion.

9. Claimants' Investment

218. According to the Tribunal, the evidence in the case determines doubtlessly that the Argentine Republic's current situation is much better, regardless from which perspective the situation is looked at, than what it was some six years ago. The arbitrators also find it evident that the effects of the recovery began to be felt a very short time after Argentine authorities took, during the crisis, the actions that were referred to above.

219. The Tribunal will not enter into the analysis of whether the development of the international economic context contributed to Argentina's economic recovery. It is very possible that this was the case. However, the Tribunal finds it evident (and it lacks evidence to reach a conclusion to the contrary) that the actions taken by the Argentine Government in late 2001 and early 2002 had a beneficial effect and made it possible to overcome the chaos the country experienced in those days.

220. The effects of the actions taken by the governmental authorities (or these effects and the changes of other circumstances that also took place), benefited the Argentine society in general, the automobile industry in particular and, according to Argentina's experts, the investments made by **Metalpar S.A.** and **Buen Aire S.A.** (report by Marx and Echagüe and Molina, page 7).

221. At the hearing on the merits Argentina submitted several graphs to support its statement that "[...] Metalpar's investment is worth much more in a scenario, the real scenario in which the measures were taken, than in an assumed scenario in which the

measures would not have been taken [...]” (transcript of the hearing on the merits, September 11, 2007, page 208 and 209).

222. Through the evidence submitted, the Tribunal is shown that the bus bodies sold by Metalpar Argentina S.A. from 1998 through 2005 were as follows:

Year	Amount
1998:	75
1999:	17
2000:	56
2001:	107
2002:	98
2003:	147
2004:	431
2005:	1,048

(Report by Daniel Marx, José Echagüe and Federico Molina, August 29, 2006, page 8)

223. As Argentina showed in the hearing on the merits held September 11, Metalpar Argentina S.A. had the following sales, in thousands of US dollars since 1998 through 2005:

Year	Sales in USD
1998:	\$9,713,000
1999:	\$13,713,000
2000:	\$12,062,000
2001:	\$7,895,000
2002:	\$4,626,000
2003:	\$2,806,000
2004:	\$9,157,000

2005: \$20,754,000

(Report by Daniel Marx, José Echagüe and Federico Molina, August 29, 2006, page 8)

224. As far as this Tribunal knows, the only investments made by **Metalpar S.A.** and **Buen Aire S.A.** in the Argentine Republic were the purchase of shares of the Argentine company named Loma Hermosa S.A. and its capitalization. This company, in its turn, was the sole shareholder of all the capital stock of the company that, after having changed its name, was named Metalpar Argentina S.A. and received most of Claimants' investments. Part of these investments were used by Metalpar Argentina S.A., subsidiary of Claimants', to give financing to the persons purchasing the vehicles it manufactures; the transactions were generally documented using contracts with a pledge executed in relation to the vehicles. The Tribunal supposes (because, as indicated, it was not proven) that Metalpar Argentina S.A.'s credits with its customers may have been temporarily affected by the actions taken by Argentina but, in effect, it has no evidence that Claimants' investments would have been adversely affected.

225. In fact, regardless of the vicissitudes that could have been suffered by the loans that Metalpar Argentina S.A. granted the buyers of the vehicles it manufactured, the Tribunal was unable to find one single piece of evidence showing that, in the end, Claimants' investments would have been adversely affected as a result of the measures taken by Argentina to avert the crisis. On the contrary, the evidence received during the proceeding (report dated August 29, 2006, written by Marx, Echagüe and Molina, page 7, and the financial statements of Metalpar Argentina S.A., among others) show that Metalpar Argentina S.A.'s financial situation improved significantly after 2004; the Tribunal attributes this improvement to the combination of several factors, as will be explained further ahead.

226. Claimants stated that "Metalpar recovered not as a result of the 'Measures' in itself (sic), but rather due to the increase in turnover and production registered between 2004 and 2005 (2 years after implementing the 'Measures'), which is explained: (i) through the need to supply a market with a very significant delay in renewing the passenger vehicle sector, infringing renovation laws and not abiding by the aging of the vehicles currently in circulation due specifically to the 'Measures' that harshly punished the Argentine

economy as a whole and in particular passenger public transport companies, and (ii) due to the fact that Metalpar Argentina S.A. is in an advantageous competitive position as its main competitor is undergoing a bankruptcy situation” (Reply, paragraph 302).

227. It is very possible that the improvement in Metalpar Argentina S.A.’s situation is not only due to the measures taken by Argentina, but that in this improvement there was an influence of the change in external and internal circumstances such as those mentioned in the paragraph above and, of course, the actions taken by Metalpar Argentina S.A. However, the objective fact which has been sufficiently proven is that the recent results of the business of such company are much better than what it obtained in 2001, before Argentine authorities took the measures that are being questioned by Claimants.

228. To speculate about what would have happened if Argentina had not taken any action or if it had imposed different measures would, as has already been said, be a futile exercise that would lead to purely hypothetical conclusions, which would be impossible to prove. What in actual fact took place, and on which the Tribunal has no doubt whatsoever, is that the putting in order of public finances, the subsidies that Argentina granted to transport companies and the recovery of stability, in general, constituted a beneficial environment for Metalpar Argentina S.A. to make the business decisions that would enable it to make a speedy recovery.

229. In addition to those already mentioned, it is evident that other factors, which made Metalpar Argentina S.A.’s success possible, must be taken into consideration, such as the proven business ability of its representatives and the disappearance of its main competitors.

230. In effect, as acknowledged by Mr. Paredes, Chairman and one of the main shareholders of Claimants (transcript of the hearing on the merits, September 14, 2007, pages 932-934), its Manager, Mr. Gonzalo Varela (transcript of the hearing on the merits, September 14, 2007, pages 753-754) and their legal counsel, Messrs. Mayorga and Postiglione, due to a series of factors, from which they exclude the measures taken by the Argentine Republic, as from 2004 Metalpar Argentina S.A. has enjoyed, and shall continue to enjoy, as stated by Mr. Paredes (the Tribunal deems him to do so with full

knowledge of the facts) in the closing argument, spectacular success, as explained in the following paragraphs.

231. Judging Metalpar Argentina S.A.'s business operation in Argentina by almost any parameter, it is highly successful. After selling 56 bus bodies in 2000, it jumped to 431 in 2004 and 1,048 in 2005. Further, Mr. Paredes declared that in 2007 they would be manufacturing 2400 bus bodies (transcript of the hearing on the merits, September 14, 2007, page 932).

232. The increases in sales affected Metalpar Argentina S.A. in such a way that it is currently one of the main bus body sellers in Argentina. This is remarkable if it is taken into consideration that in 2001 there were 28 companies engaged in this business and today there are only 5 left (statement by Mr. Jaime Paredes, transcript of the hearing on the merits, September 14, 2007, page 932). As mentioned repeatedly, it is obvious that this success cannot be attributed exclusively to the measures taken by Argentine authorities but it is evident that the Tribunal, in light of this scenario, cannot come to a contradictory conclusion and rule that these measures had a ruinous effect on Claimants' investments, the alleged ruin of which led to this proceeding.

233. When comparing sales and earnings of Metalpar Argentina S.A. in 2001 with those of recent years, the Tribunal must inevitably come to the conclusion that the situation of this company has not deteriorated, but quite the opposite, has notably improved in the past five years and, furthermore, according to its representatives, shall continue to do better and better. It is impossible to determine which factors had an influence in this drastic improvement in Metalpar Argentina S.A.'s situation, related directly to the investments of Claimants. It is just as impossible to determine the degree to which each of those factors contributed to the final outcome and guess what would have happened had Argentina not taken any action at all or had Argentina imposed different measures. In any case, that determination is of no interest for the purpose of resolving this dispute as, for the numerous reasons which have been set forth in the preceding paragraphs, the Tribunal must reject, as to all its aspects, the Claim filed by **Metalpar S.A.** and **Buen Aire S.A.**

234. **Legal costs:** The Tribunal is not unaware of the fact that, for external or internal reasons, or a combination of both, due to the fault or not of its governments, it is in fact true that the Argentine Republic experienced a catastrophic situation in late 2001 and during the early months of 2002, which to some extent altered all commercial relations in existence at the time in its territory. To avert this crisis, it was necessary for authorities of Argentina to take a series of emergency measures that, although in the long run had a beneficial effect on Claimants, also constituted a factor disruptive to the business relationships which their subsidiary had with their customers and to the contracts executed with them. The Tribunal has affirmed that such measures did not adversely affect Claimants' investments; however, it cannot be denied that they distorted Metalpar Argentina S.A.'s business activities in which Claimants had, indirectly, invested. Out of fear of what had taken place, and the impossibility of being able to foresee in early 2003 the consequences that could derive from such measures, Claimants' were driven to initiate these arbitration proceedings in February 2003. Argentina's defense brought to light the weak points of Claimants' case; their conduct in the proceedings as regards evidence contributed to weakening their claim. However, there is no doubt that Argentina cannot consider itself to have played no part in the alteration suffered by the legal relations existing between Metalpar Argentina S.A. or its debtors and the commotion its actions caused Claimants. Due to these considerations, the Tribunal considers it fair that each party cover the costs they incurred in relation to this arbitration proceeding.

VI. FINAL DECISION

235. Due to the reasons mentioned above, the Arbitration Tribunal unanimously resolves:

1. To dismiss the Claim filed by **Metalpar S.A.** and **Buen Aire S.A.** against the Argentine Republic in its entirety.
2. Each party shall bear the costs which it has incurred in relation to this arbitration proceeding.

[signature]

Duncan H. Cameron
Arbitrator

Date: May 15, 2008

[signature]

Jean Paul Chabaneix
Arbitrator

Date: May 9, 2008

[signature]

Rodrigo Oreamuno B.
President

Date: May 6, 2008