

IN THE MATTER OF AN UNCITRAL ARBITRATION

between

**NATIONAL GRID P.L.C.,
CLAIMANT**

v.

**ARGENTINE REPUBLIC,
RESPONDENT**

AWARD

Date: November 3, 2008

RENDERED BY AN ARBITRAL TRIBUNAL COMPOSED OF

ALEJANDRO MIGUEL GARRO, ARBITRATOR
JUDD L. KESSLER, ARBITRATOR
ANDRÉS RIGO SUREDA, PRESIDENT

SECRETARY OF THE TRIBUNAL:
MERCEDES CORDIDO-FREYTES DE KUROWSKI

Seat of the arbitration: Washington, D.C.

Representing the Claimant:

Freshfields Bruckhaus Deringer

Nigel Blackaby

Lluís Paradell

Sylvia Noury

Gregory Fullelove

Caroline Richard

Estudio O'Farrell

Uriel O'Farrell

Representing the Respondent:

Procurador General del Tesoro de la Nación Argentina

Oswaldo César Guglielmino

Procuración del Tesoro de la Nación

Argentina

Buenos Aires, Argentina

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I. PROCEDURE

A. PROCEDURE LEADING TO THE DECISION ON JURISDICTION

1. By notice dated April 25, 2003, National Grid Transco plc¹ (hereinafter “National Grid” or the “Claimant”) requested the institution of an arbitration proceeding against the Argentine Republic (hereinafter “the Argentine Republic” or the “Respondent”) under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter the “UNCITRAL Rules”) pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments, which was signed on December 11, 1990 and entered into force on February 19, 1993 (the “Treaty”).
2. The Claimant and the Respondent appointed as arbitrators Mr. Eli Whitney Debevoise and Professor Alejandro Garro, respectively. In accordance with Article 7(1) of the UNCITRAL Rules, the party-appointed arbitrators selected Dr. Andrés Rigo Sureda as the third arbitrator and President of the Tribunal.
3. On June 20, 2006, the Tribunal issued a Decision on Jurisdiction, which is made part of this Award, dismissing the objections to jurisdiction submitted by the Respondent. The procedural history in the present case up to that date was indicated in paragraphs 1 through 31 of the Decision on Jurisdiction.

¹ By letter of August 19, 2005, the Claimant informed the Tribunal of its change of name from National Grid Transco plc to National Grid plc.

B. PROCEDURE LEADING TO THE AWARD ON THE MERITS

1. Scheduling of submissions

4. On June 20, 2006, the Tribunal issued Procedural Order No. 10 for the continuation of the proceedings on the merits, ratifying the deadlines established in Procedural Order No. 2 of July 12, 2004, which had been agreed during the Preparatory Meeting of June 25, 2004.
5. By letter of July 24, 2006, the Respondent informed the Tribunal about the Parties' agreement concerning the continuation of the proceeding, which was confirmed by the Claimant by letter of July 24, 2006.
6. On August 31, 2006, the Tribunal issued Procedural Order No. 11 concerning the Parties' remaining pleadings on the merits and other changes agreed by the Parties for the computation of deadlines. The Tribunal further decided, after consultation with the Parties, to establish July 9, 2007 as the starting date of the hearing on the merits.
7. On September 25, 2006, the Respondent filed its Counter-Memorial on the merits in Spanish. The English translation followed on October 18, 2006. On November 14, 2006, the Centre received Additional Documents to the Respondent's Counter-Memorial, together with a letter of November 10, 2006.
8. Following the Claimant's request by letter of December 13, 2006 and the Respondent's confirmation of the same by letter of December 15, 2006, on December 18, 2006, the Tribunal issued Procedural Order No. 12 modifying, as per the Parties' request, the Tribunal's Procedural Order No. 11 of August 31, 2006 to establish a revised timetable for the submission of the remaining pleadings on the merits.

9. On January 12, 2007, the Claimant filed its Reply on the merits in English. The Spanish translation followed on February 2, 2007.
10. After due consideration of (i) the Claimant's proposal of August 10, 2006 on venue and videoconferencing for the hearing on the merits; (ii) the Respondent's proposal by letter of August 18, 2006 to address such issues at a later stage; (iii) the Respondent's communication of January 26, 2007; and (iv) the Claimant's letter of January 30, 2007; on February 7, 2007, the Tribunal issued Procedural Order No. 13 to confirm that the hearing on the merits was to be held in Washington, D.C.
11. By letter of March 2, 2007, the Respondent requested an extension of the deadline for the submission of its Rejoinder on the merits, to which the Claimant opposed by letter of March 7, 2007. After careful consideration of the Parties' arguments in such regard, and for the reasons indicated in the Tribunal's letter of March 8, 2007, the Parties were informed of the Tribunal's decision to retain the deadline of May 7, 2007, agreed by the Parties and fixed in Procedural Order No. 12, for the filing of the Respondent's Rejoinder on the merits.

2. Replacement of Mr. Whitney Debevoise by Mr. Judd Kessler as party-appointed arbitrator by the Claimant

12. On April 3, 2007, the Secretary of the Tribunal notified the Parties of Mr. Whitney Debevoise's resignation as an arbitrator.
13. On April 12, 2007, the Claimant appointed Mr. Judd L. Kessler to substitute Mr. Debevoise.

3. Preliminary motions and organization of the hearing on the merits

14. By letter of April 9, 2007, the Respondent made observations with regard to certain witness statements and expert reports that were filed by the Claimant with its pleadings on the merits, and requested that Mr. Brian Henderson's witness statement be struck from the record because he would not be available to give oral testimony during the hearing on the merits.
15. By letter of April 19, 2007, the Claimant made observations to the Respondent's letter of April 9, 2007. For the reasons indicated in the Tribunal's letter of April 24, 2007, the Parties were informed of the Tribunal's decision not to strike from the record the statement of Mr. Henderson, which was to be appreciated with regard to its materiality and weight as permitted by Article 25.6 of the Arbitration Rules.
16. On May 7, 2008, the Respondent filed its Rejoinder on the merits in Spanish. The English translation followed.
17. On May 25, 2007, the Parties filed their proposals regarding the pre-hearing matters suggested by the Tribunal on May 15, 2007, and on the running order of witnesses and experts, with indication of the matters where the Parties had reached an agreement.
18. By letter of May 31, 2007, the Claimant made certain observations and requests related to the Respondent's Rejoinder.
19. Following the Tribunal's invitation by letter of May 31, 2007, on June 4, 2007, the Parties gave their respective comments in writing on the procedural matters that remained pending in connection with the organization of the hearing. Further

communications were filed by the Parties in such regard on June 7, 2007 and June 8, 2007.

20. On June 5, 2007, at the Tribunal's invitation, the Respondent commented on the Claimant's observations and requests of May 31, 2007.
21. On June 12, 2007, the Tribunal issued Procedural Order No. 14 concerning: the organizational aspects of the hearing; certain documentation issues related to the Respondent's Rejoinder; and the deadlines for the filing of the Post-Hearing Briefs and Cost Submissions.
22. By letter of June 15, 2007, the Claimant made certain comments and proposals with regard to the time allotted in Procedural Order No. 14 for direct and cross-examination of witnesses and experts; and filed the Parties' preliminary agreement on a schedule for their examination and cross-examination during the hearing, with some observations.
23. On June 19, 2007, at the Tribunal's invitation, the Respondent commented on the Claimant's letter of June 15, 2007.
24. In accordance with section 10 of the Tribunal's Procedural Order 14, on June 20, 2007, the Centre received hard copies of additional documents dated June 15, 2007 submitted by the Respondent, and electronic copies of the Claimant's submission of additional documents in connection with the Respondent's Rejoinder of May 7, 2007.
25. On June 28, 2007, the Parties were informed of the Tribunal's decision with regard to the points raised by the Parties in their respective letters of June 15, 2007 and June 19, 2007 concerning the examination of witnesses and experts.

26. By letter of June 28, 2007, the Claimant addressed a number of outstanding issues in relation to Procedural Order No. 14.
27. Also on June 28, 2007, at the Tribunal's invitation, the Respondent commented on the additional documents that had been filed by the Claimant on June 20, 2007.
28. On July 3, 2007, the Tribunal issued Procedural Order No. 15 concerning further organizational aspects of the hearing and addressing certain issues that had been raised by the Parties in such regard.
29. By letter of July 3, 2007, the Respondent requested the suspension of the proceedings in compliance with the decision of the Fourth Chamber of the *Cámara Federal en lo Contencioso-Administrativo* dated July 2, 2007, attached thereto. By letter of July 5, 2007, the Claimant, at the Tribunal's invitation, submitted its observations in such regard, objecting to the suspension of the proceeding.
30. On July 6, 2007, the Tribunal issued Procedural Order No. 16 rejecting the request by the Respondent to suspend the arbitral proceedings in the present case for the reasons indicated therein.
31. By letter of July 6, 2007, the Respondent made certain comments with regard to the Tribunal's Procedural Order No. 15. Also by letter of July 6, 2007, the Claimant referred to Procedural Order No. 15, and commented on the Respondent's response of that same date.

4. Evidentiary hearing and additional documentary evidence requested by the Tribunal

32. The Tribunal held a Hearing on the Merits in Washington, D.C. on July 9-20, 2007.
33. On July 20, 2008, the Tribunal issued Procedural Order No. 18 concerning certain fact witnesses, ordering the Claimant and the Respondent to produce the terms of engagement, including any money allowance to the extent that any had been paid or promised to be paid, of all fact witnesses not currently in the employ of the Parties in order to give the other party access to such information and an opportunity to comment on them.
34. On July 27, 2008, the Claimant filed, following the Tribunal's request during the hearing, a copy of National Grid's letter to the Multilateral Investment Guarantee Agency ("MIGA") requesting a copy of the MIGA policy issued to the company relating to its investment in the Argentine Republic. Such documents were filed by the Claimant on August 31, 2007.
35. Further to Procedural Order No. 18, on July 27, 2008, the Claimant filed copies of the agreements between National Grid and two of its fact witnesses.
36. As instructed in Procedural Order No. 18, by letter of August 6, 2007, the Respondent informed the Tribunal that, except for the travel expenses (transportation and a fixed *per diem* with obligation to submit the supporting receipts) for their attendance to the hearing, it had made no other payments to its fact witnesses.

5. Challenge of Mr. Kessler and its resolution

37. On July 27, 2007, the Respondent filed a notice of its challenge to Mr. Judd L. Kessler in Spanish, which was rejected by the Claimant by letter of July 31, 2007. On July 31, 2008, the Respondent filed a revised version of such challenge. The English translation followed on August 3, 2007.
38. By letter of August 9, 2007 addressed to the President of the Tribunal, Mr. Kessler gave his reasons for not resigning from the Tribunal. By letter of August 9, 2007, the Tribunal requested the Respondent to manifest whether it wished to insist on the challenge, which the Respondent did by letter of August 14, 2007. By letter of August 17, 2007, the Claimant requested the Tribunal to proceed to determine the merits in this case.
39. On August 20, 2007, the Tribunal issued Procedural Order No. 19, among other things, to invite the Parties to consult each other on the selection of an appointing authority which would be willing to give a reasoned decision on the challenge.
40. On August 31, 2007, the Centre received the corrected versions of the original language transcripts of the hearing agreed between the Parties.
41. By letter of September 7, 2007, the Claimant informed the Tribunal of the Parties' agreement that the challenge be decided by the London Court of International Arbitration (LCIA) rather than by the Court of Arbitration of the International Chamber of Commerce (the ICC Court), which was the appointing authority in this case. On September 11, 2007, the LCIA confirmed that it would undertake the role of appointed authority for the purposes of the challenge.

42. On December 3, 2007, the Division of the LCIA Court composed of Dr. Klaus Sachs, Dr. Hassan Ali Radhi and Mr. Paul B. Hannon dismissed the challenge to Mr. Judd L. Kessler on the grounds set forth in that ruling.

6. Filing of Post-Hearing Briefs

43. On October 1, 2007, the Claimant filed an electronic version of its Post-Hearing Brief and Cost Submissions. On that date, the Respondent also filed its Post-Hearing Brief. On October 16, 2007, the Respondent filed its submission on costs. Hard copies and translations of these submissions were distributed to the Tribunal and to each opposing party in due course.

7. Appointment of Professor Calvet as the Tribunal-Appointed Expert and the Filing of his Report

44. On November 2, 2007, the Tribunal informed the Parties that, in accordance with Article 27 of the Arbitration Rules, the appointment of one or more experts might be of assistance to the Tribunal to review the expert report of Mr. Wood-Collins and the critical valuation of it done by experts Bello and Molina, inviting the Parties to attempt to reach an agreement on the selection of one or more independent experts. On November 30, 2007, the Claimant (i) informed the Tribunal that the Parties had been unable to reach an agreement in such regard, and (ii) proposed certain criteria to the Tribunal for the selection and procedure for the appointment of the expert.
45. By letter of December 5, 2007, the Respondent commented on the selection criteria proposed by the Claimant, and proposed the consideration of additional

criteria. Further letters were filed by the Parties in this regard between December 7 and 12, 2007.

46. Having considered the views and proposals of the Parties, on December 20, 2007, the Tribunal issued Procedural Order No. 20 concerning the criteria, terms of reference, and procedure to be followed with regard to the selection of an independent expert. By letter of December 28, 2007, the Parties were informed of the Tribunal's intent to appoint Professor Louis Calvet, unless the Parties raised compelling objections to his appointment. None having been raised, on February 1, 2008, the Parties were informed of the appointment by the Tribunal of Professor Louis Calvet as an independent expert.
47. In accordance with Procedural Order No. 20, on February 6, 2008, Professor Calvet's Draft Report dated February 3, 2008 (the "Draft Report") was submitted for the consideration of the Parties. On March 3, 2008, the Claimant filed its comments on the Draft Report, and so did the Respondent on March 4, 2008. Further communications were made in such regard by the Respondent on March 6, 2008 and by the Claimant on March 12, 2008, the latter attaching the views of its own expert, Mr. Wood-Collins. Having been authorized by the Tribunal, on March 25, 2008, the Respondent filed Messrs. Bello and Molina's views on the Independent Expert's Draft Report.
48. On March 14, 2008, the Respondent objected to the inclusion of the award in the *BG Group v. the Argentine Republic* case as an exhibit to the Claimant's comments on Professor Calvet's Draft Report in light of the obligations set forth in Procedural Order No. 3 of that case. In such regard, and after due

consideration of the Claimant's letters of March 19 and 25, 2008 and of the Respondent's letters of March 14 and 26, 2008, on March 31, 2008, the Tribunal informed the Parties that it would consider any information in the public domain that was brought to its attention by any of the Parties, including an arbitral award such as the one rendered in *BG v. Argentina*.

49. On April 29, 2008, the Centre notified the Parties of the Independent Expert's Final Report (the "Final Report") dated April 28, 2008. On May 12, 2008, in accordance with Procedural Order No. 20 of December 20, 2007, as amended by the Tribunal on April 25, 2008, each party submitted its corrections to any manifest errors in the Final Report, adding its respective comments on the Final Report. On May 15 and 19, 2008, the Claimant and the Respondent filed further communications in this regard.
50. On May 23, 2008, the Tribunal, referring to the Parties' various communications related to the Final Report of Professor Calvet, informed the Parties that it had taken note of the Parties' submissions to the extent they purported to identify manifest errors in the Final Report. The Tribunal also informed the Parties that it considered that Professor Calvet had completed his assignment as described in his terms of reference and that should the Tribunal decide that it needed further assistance, it would consult with the Parties.

II. FACTUAL BACKGROUND

A. THE PRIVATIZATION OF STATE-OWNED ELECTRICAL POWER COMPANIES

51. As part of its response to solve the economic crisis of 1989, the Respondent enacted Law 23,696 on August 17, 1989 (the "State Reform Law"), which

provided for the privatization of, among other things, State-owned electrical power companies, and Law 23,928 on March 27, 1991 (the "Convertibility Law"), which pegged the peso to the dollar at the fixed exchange rate of one peso to one dollar.

52. At the time three State-owned companies were operating the electricity sector of the Argentine Republic: *Hidroeléctrica Norpatagónica S.A.* ("Hidronor"), *Agua y Energía Eléctrica S.E.* ("A y E") and *Servicios Eléctricos del Gran Buenos Aires S.A.* ("SEGBA"). As part of its electricity industry privatization program and pursuant to Decree 634/91 and Law 24,065 (the "Electricity Law"), the Respondent established commercial corporations and transferred to them assets consisting of the electricity transmission and distribution network. The Respondent created *Compañía de Transporte de Energía Eléctrica en Alta Tensión S.A.* ("Transener") on May 31, 1992 and transferred to Transener all of the assets of the high voltage electricity transmission network formerly owned by Hidronor, A y E and SEGBA. The other transmission assets owned by these electric power utilities were transferred to six regional transmission companies.
53. The Electricity Law provided for the creation of two administrative agencies to supervise and manage the privatized sector: *Ente Nacional Regulador de la Electricidad* ("ENRE") responsible for the regulation and control of all sectors of the electricity industry, and *Compañía Administradora del Mercado Mayorista Eléctrico S.A.* ("CAMMESA") responsible for the management of the Wholesale Electricity Market ("WEM").

54. In December 1992, the Respondent offered to sell 65% of the shares in Transener in accordance with the terms and conditions set out in the bidding rules (“Transener Bidding Rules”). In parallel, the Respondent approved a 95-year concession for Transener to provide the high-voltage electricity transmission service in the Argentine Republic (the “Concession”).
55. The Province of Buenos Aires (the “Province”) followed a similar process with respect to *Empresa de Transporte de Energía Eléctrica por Distribución Troncal de la Provincia de Buenos Aires* (“Transba”). In 1997, the Province offered for sale 100% of its shares in Transba on the terms and conditions set forth in the respective bidding rules (“Transba Bidding Rules”), and approved a 95-year concession for Transba to provide the transmission service in the Province (“Transba Concession”).

B. CLAIMANT’S INVESTMENTS

56. In 1993, National Grid Finance B.V., a wholly-owned subsidiary of National Grid, together with two US companies –Duke Transener Inc. (“Duke”) and Entergy Corp (“Entergy”)– and two Argentine companies –*SADE Ingeniería y Construcciones S.A.* (“SADE”), a wholly-owned subsidiary of Perez Companc (“Perez Companc”), and *Eléctrica del Plata S.A.*, a subsidiary of *Sociedad Comercial del Plata S.A.* (“SCP”)– formed a consortium to participate in the international tender of shares in Transener (the “Consortium”).² The Consortium incorporated an Argentine company –*Compañía Inversora en Transmisión*

² Exhibit C-22.

Eléctrica Citelec S.A. (“Citelec”)– as the vehicle for its investment in Transener.³

National Grid initially acquired a 15% share of Citelec for US\$18.5 million.

57. Citelec successfully bid for the 65% stake in Transener for US\$234.1 million, the assumption of US\$54.2 million in debt transferred to Transener and a mandatory investment commitment of US\$37 million. On June 30, 1993, Transener signed the Concession Contract with the Government of the Argentine Republic (the “Concession Contract”).⁴ On July 17, 1993, Transener took over operation of the high voltage electricity system. Subsequently, National Grid purchased an additional 26.25% stake in Citelec for US\$48.8 million and approved Transener’s acquisition of a 90% stake in Transba for US\$220.2 million and the assumption of US\$10 million in debt owed to the Government of the Province. Transener subsequently made investments in the upgrading of the electricity transmission system as well as in certain expansion projects. In 1997, 1999 and 2001, Transener was awarded three contracts to construct, operate and maintain transmission lines in return for periodic payments from the beneficiaries of the lines. These payments, or *cánones*, were to be calculated in US dollars (“dollars”) and adjusted periodically in accordance with the US Consumer Price Index (“CPI”) and the US Producer Price Index (“PPI”).
58. In December 1999, National Grid acquired a further 1.243% interest in Citelec by way of a capitalization of contributions made by National Grid in October 1999 for an amount of US\$32 million.

³ Exhibit C-24.

⁴ The Concession Contract and the contract related to the Transba Concession are collectively referred to as the “Contracts.” Transener and Transba are referred to collectively as the “Concessionaires.” See Exhibit C-26 for the Concession Contract and Exhibit C-50 for the Transba Concession.

C. MEASURES ADOPTED BY THE ARGENTINE REPUBLIC TO ADDRESS THE CRISIS

59. On January 6, 2002, Law 25,561 –the Public Emergency and Exchange Rate Reform Law– (the “Reform Law”)⁵ abolished the currency board set up by the Convertibility Law in 1991.⁶ Law 25,561 also terminated by operation of law the right to calculate public utility tariffs in dollars and the right to adjust those tariffs on the basis of international price indices. Under the terms of Law 25,561, public service tariffs were converted into Argentine pesos (“pesos”) at the rate of one peso to one dollar and were frozen at that rate (the so-called “pesification”). All other dollar-denominated payment obligations and their adjustment by international indices were made subject to these same restrictions. As of April 2003, the peso had fallen to 2.90 pesos to one dollar.
60. The Reform Law also forbade electricity transmission and public utility companies from suspending or modifying compliance with their obligations under their concessions and licenses. It also established certain conditions for the renegotiation of public utility contracts. At the time of filing the Statement of Claim, National Grid affirmed that the renegotiation process had achieved nothing. In March 2004, National Grid agreed to sell its shares in Citelec to *Dolphin Management S.A.* (“Dolphin”) for US\$14 million. The Claimant alleges that this sale was undertaken to mitigate its losses and was made expressly without prejudice to its rights in this arbitration.⁷ The Respondent disputes the

⁵ Exhibit C-69.

⁶ Law 23,928 of March 27, 1991, Exhibit C-10.

⁷ Statement of Claim, para. 24.

Claimant's allegation that the renegotiation achieved nothing and points out that an agreement has since been reached with Dolphin.

III. OVERVIEW OF THE POSITIONS OF THE PARTIES

A. POSITION OF THE CLAIMANT

61. The Claimant alleges that the Respondent expropriated its investment by acts and omissions contrary to the undertakings and assurances related to the remuneration regime on which its investment was premised, namely, the Reform Law and Decrees 214/02 and 410/02 (the "Measures"). The Claimant affirms that the Respondent's undertakings and assurances are contained in the following legal instruments (the "Regulatory Framework"):

- First, the State Reform Law, Decree 634/91, the Electricity Law, Resolution 137/92 of the Secretariat of Energy ("SoE"), the Transener Bidding Rules approved by Resolution 1483 (including as attachments the Draft Concession and its annexes as approved by Decree 2743), the Circulars issued by the Privatization Committee amending the Transener Bidding Rules (in particular Circulars No. 3 and No. 6 amending the remuneration regime contained in the Draft Concession approved by ENRE Resolution 1343/92), and the Concession that included such amendments.
- Second, the legal instruments related to Transba: the Electricity Law and Buenos Aires Provincial Law 11769 (setting forth the basic framework for the privatized electricity industry in the Province of Buenos Aires), the Transba Bidding Rules approved by Decree 107/97 (attaching the Transba Draft

Concession approved by Resolution SEyP 0015/96 of the SoE), and the Transba Concession.

- Third, specific instruments related to Transener's participation in other activities, including the expansion of the transmission network and maintenance, supervisory and technical assistance activities. The following are the instruments related to the Fourth Line: ENRE Resolution 613/96 (issuing the Certificate of Convenience and Public Need and setting out the terms for the construction, operation and maintenance of the Fourth Line), ENRE Resolution 525/97 (approving the Fourth Line Bidding Rules, including the draft Fourth Line Contract), and ENRE Resolution 1028/97 (approving the selection of Transener as the successful bidder and authorizing the conclusion of the Fourth Line Contract).

62. The Claimant summarizes the assurances and guarantees given by the Respondent in these instruments as follows:

“(i) tariff-based remuneration for the transmission service would be ‘fair and reasonable’ and provide efficient and prudent Concessionaires with revenue sufficient to cover reasonable operating costs, taxes, amortizations and a reasonable rate of return;

(ii) tariff-based remuneration for the transmission service would be reviewed on the basis of established and predictable mechanisms, namely (a) a Five Year Review, which would ensure, among other things, that tariffs remained sufficient to provide efficient and prudent Concessionaires with a reasonable rate of return, and that they reflected any increase in costs beyond the Concessionaire's control; and (b) an extraordinary review, which would ensure that tariffs could be adjusted on ‘objective and justified’ grounds, or in the event that they

became 'unfair, unreasonable, unduly discriminatory or preferential.'

(iii) all remuneration would be calculated in US dollars and expressed in pesos at the exchange rate applicable at the date of billing;

(iv) all remuneration would be automatically adjusted every six months in accordance with the US PPI and US CPI; and

(v) remuneration for the construction, supervision, operation and maintenance of expansions to the system would be paid in accordance with the express terms and conditions set out in the Government resolutions and contracts authorizing such expansions, such as those authorized for the Fourth Line, which provided for dollar-based remuneration and, in most cases, adjustment in accordance with US price indices."⁸

63. According to the Claimant, these guarantees constituted essential conditions for National Grid's investment and the ensuing stability of the remuneration regime provided Transener access to international capital markets to finance the operation, upgrade, expansion and maintenance of the electricity infrastructure. The Claimant contends that the Measures adopted since January 2002 breached these guarantees by:

- failing to respect the promise that Transener's and Transba's tariff-based remuneration would be "fair and reasonable" and sufficient to cover reasonable operating costs, taxes, amortizations and provide a "reasonable rate of return";
- abolishing Transener's and Transba's right to calculate all their remuneration in dollars and express it in pesos at the exchange rate applicable at the time of billing;

⁸ *Ibid.*, 277.

- abolishing Transener’s and Transba’s right to adjust their tariff-based remuneration every six months in accordance US PPI and CPI indices;
- converting all of Transener’s and Transba’s tariff-based remuneration into pesos at the artificial rate of one peso to one dollar in spite of the abolition of the dollar-peso parity;
- freezing Transener’s and Transba’s tariff-based remuneration for the electricity transmission service as of January 2002;
- failing to conduct the Five-Year Review of Transener due in 2003 and that of Transba due in 2002; and
- failing to adjust Transener’s and Transba’s tariff-based remuneration on the basis of “objective and justified” circumstances or on the basis that the remuneration had become “unjust, unreasonable, unduly discriminatory or preferential” as a result of the January 2002 Law.

64. The Claimant argues that the Measures destroyed the remuneration regime established by the instruments described above and the value of Transener. Transener’s revenue in dollar terms decreased by about one third, and Transener’s operating income (EBITDA) was reduced in dollar terms to less than one third. Transener’s dollar denominated debt remained fixed in dollars and in April 2002 Transener defaulted in its debt service obligations. The Claimant alleges that the value of National Grid’s investment fell by about 90% as a result of the Measures.

65. The Claimant contends that “Government measures that substantially deprive an investor of the use or enjoyment or result in a significant reduction in the value of

its investment constitute expropriation, regardless of their form, intent or purpose, particularly when contrary to specific undertakings and assurances granted to investors.”⁹ According to the Claimant, it was clear that, when by March 2004 the Claimant agreed to sell its investment, it had been deprived of “the use or reasonably to be expected benefit of its investment,”¹⁰ and that the Measures had directly and indirectly expropriated the investment. The Claimant points out that the Measures taken by the Respondent after it agreed to sell its investment only confirm this conclusion. Indeed, the first proposal made by UNIREN provided for remuneration in pesos, no adjustment by any index, mandatory investment plans and a temporary increase of 25% in the Concessionaires’ remuneration from January 2005 until full tariff review could take place in 2007.

66. In addition, the Claimant alleges that the Respondent breached: (a) Article 2(2) of the Treaty by failing to provide a stable and predictable investment environment in accordance with its legitimate and reasonable expectations and to protect its investment and by placing a disproportionate and discriminatory burden on Transener, Transba and National Grid; and (b) the obligation to observe any obligation it may have entered into with regard to investments of investors.¹¹
67. The Claimant claims that it is entitled to compensation for expropriation in order to recover the fair market value of its investment and secondarily and alternatively, the Claimant claims full recovery of its losses, which amount to the fair market value of the investment lost on account of the breach of the fair and

⁹ *Ibid.*, para.237(i)(a).

¹⁰ *Ibid.*, para. 281.

¹¹ Statement of Claim, para. 287, et seq.

equitable treatment standard. In the opinion of the Claimant, it is universally accepted under current international law that “adequate” compensation means the fair market value of the investment. Accordingly, the Claimant bases its claim of fair market value on Article 5(1) of the Treaty which requires prompt, adequate and effective compensation. Furthermore, the Treaty refers to an amount of compensation that reflects the “genuine value” of the investment which, in some cases such as *CME*, it has been interpreted to mean the “fair market value” of the investment.

68. The Claimant takes the position that the fair market value of an income-producing asset or “going concern” is the measure of future prospects and that should be valued by the discounted cash flow method which is consistent with economic reality. As a measure of the decrease in value because of the Measures, the Claimant refers to the difference in the range of fair market values produced in the DKW Report in July 2001, prior to the taking of the Measures, and the price agreed with Dolphin for the sale of the Claimant’s stake in Transener in March 2004.
69. According to the Claimant, it had the obligation to obtain maximum value for its shareholders and the price agreed for the sale of the Claimant’s share in Transener to Dolphin is a true reflection of the value of such share because that price was obtained as a result of an arm’s length transaction between a willing buyer and a willing seller, and because such price was within the value range estimated by the ABN AMRO Report and was comparable to the purchase price obtained in December 2003 for the sale of TAICO’s stake in Transener. In fact,

alleges the Claimant, using said report as a bench mark, the price of Dolphin is on the high side since ABN AMRO had assumed acceptance by the creditors of Transener's debt restructuring proposal of December 2003 which at the end was rejected.

70. The Claimant also explains that, based on the price paid by Dolphin to TAICO, the value of the Claimant's stake in Transener would be around US\$20 million, but this price includes a premium because Dolphin obtained the right of first refusal under Citelec's Shareholders' Agreement and the right to appoint one member to Citelec's board of directors. The Claimant concludes that the decrease of the fair market value of its investment is about 90%.
71. The Claimant first claimed interest on damages at the average interest rate applicable to US six-month certificates of deposit compounded semi-annually until the date of payment. The Claimant contended that interest should be at a "normal commercial rate" which the Treaty requires. Later, the Claimant revised this claim and, instead, argued that damages should be increased by the expected return on equity for Transener. For that return on equity, the Claimant set a rate of 12.9% applicable to the period between January 1, 2002 and August 18, 2004 representing the rate of return on equity which, in the absence of the Measures, the Claimant would have expected to earn during that period plus a rate of 10.9% per annum thereafter, which represents the expected long-run return on equity of the Claimant.
72. The Claimant has also claimed compensation for the breach of the fair and equitable treatment standard. The Claimant points out that the Treaty does not

specify damages in case of a breach of the Respondent's obligations under Article 2(2) of the Treaty but, pursuant to *Chorzów Factory* and *SD Myers*, the Claimant demands full compensatory damages to wipe out the effects of the Respondent's alleged Treaty violations.

B. POSITION OF THE RESPONDENT

73. The Respondent contests the Claimant's affirmation that the privatization of the electric power sector was oriented to transfer the state-owned companies to foreign enterprises. According to the Respondent, its decision to privatize was not motivated by the need to attract foreign investors but was simply a decision to transfer to the private sector those activities and risks which the private sector is more apt to undertake, thus obtaining improved quality of service at reasonable tariffs.
74. The Respondent observes that the transmission of electric power includes the activities of operation and maintenance of the assets assigned to the service but not to its extensions, and that the legal framework governing the privatization of the electric power sector only assures an opportunity to companies operating economically and prudently to obtain sufficient revenues to pay the reasonable operating costs and to earn a reasonable rate of return. The Respondent affirms that the decision regarding the amount to be paid for the acquisition of assets and the subsequent management decisions are the sole responsibility of the company concerned and its shareholders.
75. The Respondent contests that SoE had any delegated power in tariff-related matters. The Respondent points out that Decree 2743/1992 only authorized SoE

to sign the Concession Contract approved by that decree on behalf of the Argentine Executive Branch, since the Argentine Congress had previously assigned to ENRE responsibility for tariff matters. The Respondent also points out that there is an inconsistency between the desire of tariffs expressed in dollars and the actual tariff principles reflected in the Electricity Law, which prevails over the Concession, the Bidding Conditions and the Contract of the Transfer of shares.

76. The Respondent explains that the situation of emergency is foreseen in its Constitution and that the constitutionality of the Measures was upheld by the Argentine courts. Furthermore, the Respondent explains that the Measures fit within the theory of unforeseeable risk under Argentine administrative law. According to the Respondent, those risks arise out of unforeseeable and temporary economic factors and not as a result of governmental decisions, and that the disequilibrium caused by those unforeseeable and temporary economic factors were of a magnitude that it is impossible to solve by applying the regulations related to tariff adjustments.
77. The Respondent argues that Article 4 of the Treaty contemplates emergency situations and the expression "state of national emergency" in its ordinary sense means a situation of danger or disaster irrespective of its cause calling for immediate action at the national level. According to the Respondent, an emergency could be caused by economic, financial, social or institutional factors. Furthermore, Article 4 does not specify any requirements regarding the measures to be adopted. It is obvious from the facts that the emergency existed

before the Respondent took any measures, including the Measures, to address it. The Claimant may attempt to argue about whether those were the best measures to take under the circumstances, but the power to take them is a prerogative of the State. Furthermore, the measures taken to address the emergency do not distinguish between national or foreign companies; all are treated alike.

78. The Respondent contends that it had no obligation to agree to the tariff adjustment as requested by the Claimant which had accepted the economic risk; disputes on tariff obligations are contractual disputes between the Concessionaires and the State; even if the provisions of the Concession were applicable as understood by the Claimant, they were not applicable in the extraordinary circumstances of the Argentine Republic in 2002; omissions or action of the Respondent do not amount to expropriation nor to a breach of the other standards under the Treaty; and the Respondent's actions have to be considered in light of all relevant circumstances, including the economic crisis and the primary obligation of the State to assure the transport of electric power at a reasonable price.
79. In case the Tribunal was to find that the Respondent breached the standards of protection of the Treaty, the Respondent has invoked the state of necessity under international law. Based on case law, doctrine and Article 25 of the Draft Articles on State Responsibility (the "Draft Articles") in particular, the Respondent alleges that the crisis situation in the Argentine Republic since 2001 fulfills the strict requirements of the state of necessity defense: the Respondent did not

contribute to the situation of necessity; the measures the Respondent took were the only way to safeguard an essential interest against a grave and imminent peril and they did not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole; investors have been treated in the same manner irrespective of their nationality or within the same type of activity; and the international obligations of the Respondent under the Treaty do not exclude the possibility to plead the defense of the state of necessity.

80. The Tribunal will review the arguments presented by the parties in more detail while addressing each of the issues raised by those arguments. First, it will consider the law to be applied to this dispute followed by a set of preliminary questions that need to be addressed before examining whether the Treaty has been breached and the admissibility of the state of necessity defense.

IV. APPLICABLE LAW

A. SOURCES GOVERNING THE SETTLEMENT OF THIS DISPUTE

81. Both Parties agree that the issue of the law applicable to the dispute is addressed in and governed by Article 8(4) of the Treaty.¹² Article 8(4) provides that:

“The arbitral tribunal shall decide this dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in this dispute, including its rules

¹² Respondent’s *Alegato Posterior a la Audiencia de Fondo* (“Alegato Posterior”), under B, *Derecho aplicable (Necesidad de aplicación de derecho doméstico. Art. 8(4) TBI)*, para. 6 (emphasizing the preeminent role of Argentine law); Claimant’s Post-Hearing Brief (“Post-Hearing Brief,” at II “Applicable Law”), para. 66 (emphasizing the role of international law to determine the scope of protection due to the investment).

on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law.”

82. This provision points to the application of the Treaty itself, Argentine law (including its rules on conflict of laws), and “*the applicable principles of international law.*” Although the Parties do not disagree that these are the relevant sources of law applicable to this dispute, they note the absence of specific guidelines under the Treaty as to which aspect of the dispute is governed by one source or the other and how those sources interact in case of conflict *inter se*.¹³
83. Article 8(4) of the Treaty, however, expressly indicates the scope of application of the contracting State’s domestic law, such as in defining the type of assets or property rights making up an “investment.” Thus, according to Article 1(c)(i)(bb) of the Treaty, Argentine law governs who qualifies as an “investor”¹⁴ and, while addressing the concept of “asset” in order to ascertain what is an eligible “investment” under the Treaty, Article 1(a) specifically indicates that such concept is to be defined pursuant to the law of the host State: “...*investment means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made*” (Emphasis added).

¹³ See Respondent’s *Alegato Posterior*, para. 6 (“...*el Tratado no distingue en absoluto dónde se aplica el derecho de la parte contratante que sea parte en la controversia y en qué áreas de la controversia el derecho de la parte contratante no se aplica*”). See also, Claimant’s Post-Hearing Brief, para. 66 (noting that “Article 8(4) of the Treaty sets out the sources of law, which may be relevant to any investment dispute, but does not specify how such sources are to interact”).

¹⁴ See *El Paso Energy International Co. v. The Argentine Republic* (ICSID Case No. ARB.03/15/), Decision on Jurisdiction of April 27, 2006.

84. Argentine law is also relevant for the purpose of measuring the investor's expectations under the Regulatory Framework governing the newly privatized electricity transmission services, as presented to foreign investors at the time of the privatization and as subsequently modified by Argentine law. Accordingly, in its Decision on Jurisdiction, the Tribunal relied upon and applied Argentine law in support of its finding that commitments were made to the investor under Argentine law that gave rise to a claim under the Treaty.¹⁵ It is clear that in such preliminary decision, as well as in this final Award, the Tribunal dealt with the law of the host State as a matter of law, dispelling the notion that Argentine law may be considered a mere matter of fact.¹⁶
85. Neither party has invoked the application of Argentine rules of private international law, and it bears noticing that there is no contract concluded between the Claimant and the Republic of Argentina, the dispute between the two focusing on the scope of protection to which the Claimant's investment is entitled under the Treaty. Therefore, the Tribunal finds that Argentine substantive law, the Treaty and relevant principles of international law are the sources of law applicable to this dispute.

B. HIERARCHY OF SOURCES AND GAP-FILLING METHODOLOGY

86. Article 8(4) of the Treaty grants a preeminent role to the Treaty itself for the purpose of ascertaining: a) whether the investor's rights to the "investment" may

¹⁵ Decision on Jurisdiction, para. 160.

¹⁶ See Respondent's *Alegato Posterior*, para. 7 (to the effect that "...el derecho doméstico no debe ser reducido a una cuestión de mero hecho sino que deberá formar parte de la presente controversia para determinar cuáles sean los derechos adquiridos, cuáles son sus alcances, cuáles son los efectos en que el derecho doméstico impacta sobre la inversión").

have been illegally restricted under the substantive standards provided by the Treaty; and (b) whether such restriction may be imputed to the Respondent. Indeed, the preeminence of the Treaty as *lex specialis* governing the scope of protection owed to the investor is the main purpose for concluding a bilateral treaty aimed at protecting foreign investments.

87. The Treaty, however, is not a self-contained, stand-alone legal framework, but rather an international bilateral treaty which must be “integrated” with underlying principles of international law in order to fill its gaps. Thus the remission in Article 8(4) to “the applicable principles of international law.” Accordingly, whether the Respondent breached the Treaty and which defenses are available against such breach are matters to be decided according to the treaty itself, supplemented by principles of international law as may be relevant to the issues in dispute.
88. Claimant makes much of the issue that, for the purpose of adjudicating the responsibility of the Respondent under the Treaty, international law displaces Argentine domestic law.¹⁷ Yet, the doctrinal and jurisprudential authorities brought to the attention of the Tribunal fail to disclose any collision or contradiction between the protection to which Claimant’s property rights are entitled under Argentine constitutional and administrative law and the protection it ought to receive under international law. Indeed, Mr. Rovira’s and Dr. Cassagne’s declarations seem consonant not only on the Respondent’s sovereign authority to take the measures it deems necessary to safeguard the social and economic rights of its population, but also on the State’s obligation to

¹⁷ See Claimant’s Post-Hearing Brief, para. 66 (“...*the scope of protection (of the investment) is a matter for international law which simply displaces Argentine administrative law on those issues since what is being adjudged is the international responsibility of the Argentine state*”).

provide compensation when, in the exercise of its police powers, property rights protected under Articles 14 and 17 of the Argentine Constitution are affected.¹⁸

89. Even if the protection of the investor's property rights were to differ under Argentine municipal law on the one hand, and the Treaty and applicable principles of international law on the other, the Tribunal takes notice that Argentine constitutional law expressly incorporates the latter into the former. Thus, according to consistent case-law of the Argentine Supreme Court, well before the adoption of the constitutional reforms of 1994,¹⁹ international treaties are incorporated into Argentine law as the "supreme law of the land," preempting conflicting provincial and federal laws.²⁰ Accordingly, as a matter of Argentine law, the standards of protection granted by an international investment treaty and applicable principles of international law prevail over any lower standard provided by domestic law,²¹ although, as noted before, no discrepancies in this regard have been brought up by the Parties to the attention of the Tribunal.

¹⁸ See Declaration of Alfredo Rovira, Hearing Transcript, Day 6, pp. 1346-48 (Spanish); Declaration of Juan Carlos Cassagne, Hearing Transcript, Day 4, pp. 922-24. See also Report of Juan Carlos Cassagne, at para. 116, p. 31.

¹⁹ See *Fibracsa Constructora S.C.A., c/Comisión Técnica Mixta de Salto Grande*, Supreme Court of Argentina, July 7, 1993, Docket No. F 433.XXIII (Para. 8: "...la aplicación por los órganos del Estado argentino de una norma interna que transgrede un tratado –además de constituir el incumplimiento de una obligación internacional– vulnera el principio de supremacía de los tratados internacionales sobre leyes internas"). To the same effect, see *Café La Virginia S.A.*, Supreme Court of Argentina, October 13, 1994; *Ekmekdjian v. Sofovich*, Supreme Court of Argentina, *El Derecho*, vol. 148, at 133 (referring to Article 27 of the Vienna Convention on the Law of Treaties, ratified by Argentina by Law No. 19865 of 1980, conferring international treaties a higher rank compared with statutes, stating that such senior rank is part and parcel of Argentine domestic law).

²⁰ Argentine Constitution (as adopted in 1994), Article 31 ("*Esta constitución, las leyes de la nación que en su consecuencia dicte el Congreso y los tratados con potencias extranjeras son la ley suprema de la nación...*"); Article 75(22) ("*...los tratados y concordatos tienen jerarquía superior a las leyes*").

²¹ See *Desarrollos en Salud S.A., s/Concurso Preventivo s/incidente de Revisión*, Commercial Court No. 26, Division 26 (*Juzgado en lo Comercial No. 26, Secretaría No. 51*), November 10, 2003, Claimant's Exhibit C-259. In this bankruptcy proceedings decided by J. María Elsa Usal, the claim of a Belgian secured creditor (N.V. Nissho Iwai, S.A.), who had invoked the protection of the Argentina-Benelux

90. In brief, pursuant to Article 8(4) and other provisions of the Treaty, the Tribunal shall apply Argentine law to ascertain the concept of “asset” and for the purpose of determining the “investment” eligible under the Treaty. Also governed by Argentine substantive law is the regulatory framework designed to transfer the transmission of high and medium voltage electricity from public domain to the private sector, thus providing specific commitments to the Claimant at the time of its investment. Questions regarding the protection of the Claimant’s investment and the excuses that may be relied upon to disregard such protection are governed by the Treaty itself, supplemented by principles of international law, as may be relevant, applicable, and relied upon by the Parties.

V. PRELIMINARY MATTERS

A. RELEVANCE OF WHETHER THE MEASURES WERE TAKEN IN ACCORDANCE WITH ARGENTINE LAW.

1. Positions of the Parties

91. The Parties have argued extensively whether the Measures met the criteria of emergency measures under the Argentine Constitution. While the Claimant alleges that they did not meet these criteria, the Respondent dismisses the Claimant’s arguments for their lack of merit.

BIT ratified by Law No. 24123, was held to be immunized from the “pesification” regime adopted under Argentina’s emergency legislation on the ground that the protection afforded by the bilateral investment treaty could not be overridden by domestic legislation (“...*dada la preeminencia de los tratados internacionales sobre el derecho interno, debe concluirse, con base en las disposiciones contenidas en el Convenio Internacional aprobado por Ley 24123 que las garantías acordadas en los Arts. 9 y 10 del referido Convenio amparan la acreencia que se revisiona, la que debe verificarse en la moneda en que fuera pactada*”).

2. Considerations of the Tribunal

92. The Tribunal considers it unnecessary to proceed to a separate analysis of the legality of the Measures under Argentine law. A finding by the Tribunal whether affirmative or negative would not be determinant of the alleged liability of the Respondent under the Treaty. For this reason the Tribunal will limit its considerations to whether the actions of the Respondent breached the standards of treatment under the Treaty and international law. This does not mean that Argentine law is irrelevant in proceeding to such determination; to the contrary, Argentine law is relevant and will be part of the Tribunal's considerations as explained above.

B. NATURE OF THE DISPUTE

1. Positions of the Parties

93. The Respondent has argued that the dispute is a dispute about the devaluation of its currency, a right that the Respondent claims to have as a sovereign. On the other hand, if the dispute is not about such devaluation, then the Respondent maintains that this is a contractual dispute over which this Tribunal does not have jurisdiction.
94. The Claimant has explained that it does not question the right of the Respondent to devalue the peso but argues vehemently that the Measures taken in the aftermath of the devaluation did violate specific engagements of the Respondent, which precisely foresaw such possibility.

2. Considerations of the Tribunal

95. The Tribunal has already considered the nature of the dispute between the Parties as part of its Decision on Jurisdiction. It then held that: “The arguments advanced by the parties and the facts alleged by them show that a dispute exists between them as to whether the protection due to the investor under the Treaty has been violated and as to whether commitments were made to the investor under the laws of the Argentine Republic that would give rise to a claim under the Treaty. These claims extend beyond claims for breach of contract as contemplated in *Vivendi II*. Therefore, the Tribunal is satisfied that a dispute exists between the parties concerning an obligation of the Respondent with regard to an investment of the Claimant...”²² The Tribunal also observed that “the Respondent’s defense relies on rejecting the possibility that Claimant may bring claims under the Treaty separately from claims arising under the Contracts,” and then held “this is a matter to be proven by the Claimant at the time of discussing the merits of its claims.”²³ Whether the Claimant has proven its claims under the Treaty is what the Tribunal considers in this Award.
96. As to the issue of devaluation, the Tribunal recognizes that the Respondent has under international law a right to devalue its currency and notes that this right has not been questioned by the Claimant. As the case has been argued by the Claimant, this is not the issue before the Tribunal. The issue is whether, by allegedly dismantling the Regulatory Framework on which the Claimant relied to

²² Decision on Jurisdiction, para. 160.

²³ *Ibid.*, para. 169.

make its investment, the Respondent has breached the commitments made under the Treaty in respect of treatment of investments.

C. CUT-OFF DATE

1. Positions of the Parties

97. The Respondent has objected to references by the Claimants to facts that may have occurred after the sale of shares in Transener and which may arguably confirm the wisdom of the sale. Conversely, the Respondent itself has referred in its defense to facts that occurred after that sale –e.g., the results of the renegotiation of the Concession after the Claimant sold its shares, and the subsequent rise in price of the shares on the Buenos Aires stock exchange—in order to prove that the Claimant's decision to sell its shares in Transener was a misguided business decision.

2. Considerations of the Tribunal

98. The dispute before the Tribunal is the dispute as it stood at the time the Statement of Claim was filed. The Tribunal may refer to events which occurred thereafter to the extent that the Parties have relied on them.

D. WAS THE CLAIMANT A DILIGENT INVESTOR?

1. Positions of the Parties

99. In its defense, the Respondent has alleged that the Claimant acted irresponsibly by paying in excess for the Concession and the “non-regulated” businesses of Transba and the Fourth Line, increasing the indebtedness of Transener to finance such businesses and selling its shares at the time it did. In brief, the

Respondent points to a line of bad business decisions which were entirely the responsibility of the Claimant and to which the losses should be attributed.

100. The Respondent alleges that the Claimant was not a prudent bidder and did not foresee the contingencies of its investment. The Respondent points out that: (a) the Claimant refers only to the process of due diligence carried out in the context of bidding for Transener but does not accompany the due diligence report in its documentation, which would show the extent to which the risk of the investment was known to the Claimant at the time it took the decision to make it; (b) the consortium of which the Claimant was part offered for Transener a 36% more than the next highest bidder and nearly three times as much as the lowest bidder; and (c) none of the written requests for clarification or information during the bidding process came from the Claimant.
101. The Claimant has explained that it was part of a consortium and that the tasks of due diligence were divided among the consortium members and each member shared the results with the others. The Claimant explains that it had engaged a law firm with worldwide experience in the privatization of the electric power sector, a reputable Argentine law firm and a well known and experienced investment banker. Furthermore, the Claimant retained a team of its own engineers to appraise the assets of the Concession and approached repeatedly the Privatization Committee to express its concern over the lack of connection between the dollar calculated tariffs and the peso denominated tariffs which resulted in Circulars 3 and 6 and in the amendment of the Contract. In addition,

the regulated asset base for purposes of the first tariff review, as calculated by ENRE, took as a point of departure the price paid for the Concession.

102. The Respondent in turn has argued that there was scant evidence of the involvement of the two law firms and that consultations with the Privatization Committee needed to be in writing, which the Claimant has disputed.

2. Considerations of the Tribunal

103. The Tribunal considers that whether the price paid for the Concession was excessive is not material to the claim presented by the Claimant. The claim for damages is not based on the price paid for the Concession. Even if it were, the regulator, ENRE, has already accepted such price for purposes of the first tariff review after discounting the portion that, in its judgment, could be attributed to the price paid for the opportunity to develop other businesses in the Argentine Republic. In any case, the thoroughness of the due diligence carried out by the Claimant prior to the decision to invest in Transener should not be considered in isolation from the overall due diligence carried out by the consortium, which was shared among consortium members.
104. As to whether the bidding conditions permitted verbal questions, the text of the bidding conditions, as evidenced by the arguments exchanged by the Parties, may be subject to more than one interpretation. No evidence has been presented indicating that the Privatization Committee had prohibited such practice. In any case, it is beyond doubt that the replies had to be in writing for the benefit of all interested bidders, whether or not they had asked questions. The replies appear in Circulars 3 and 6.

105. For these reasons, and because these arrangements were entered into as part of a detailed process of offer and acceptance by unrelated parties having considerable business sophistication and experience, the Tribunal concludes that the arguments of the Respondent with regard to lack of due diligence carried out by the Claimant in order to make the investment are without merit.
106. The Respondent has also argued that the Claimant acted imprudently by increasing its investment in Citelec in the course of subsequent years and by incurring excessive debt and incurring it in dollars.
107. The Claimant has justified its decision to increase its shareholding in Citelec in the demonstrated well functioning of the Regulatory Framework after the first tariff review. As for the level of indebtedness, it has provided comparative data for the electric power sector showing that a 1:1 debt equity ratio is a reasonable and normal level of debt. The Claimant has also argued that debt is financially cheaper than equity and, therefore, it contributes to lower tariffs than if a utility is entirely equity financed.
108. The Tribunal is satisfied that the Claimant's level of indebtedness reflects industry practice. As for the criticism that debt was incurred in dollars, this is a question related to the interpretation of article 41 of the Electricity Law. The Tribunal will now turn to this issue deferring an examination of the timing of the sale of the shares to a later point in the Award.

E. CURRENCY OF THE CONTRACT, ASSUMPTION OF THE EXCHANGE RISK AND LINKAGE OF THE CALCULATION OF THE TARIFF IN DOLLARS TO CONVERTIBILITY

1. Positions of the Parties

109. The Claimant has interpreted the Regulatory Framework as entitling Transener to a tariff expressed in pesos but calculated in dollars at the rate of exchange in effect at the date of billing. The Claimant refers first to the following statement found in the addendum to the Government's Transener Selling Memorandum of March 1973 prepared by Kleinwort Benson, Credit Suisse, First Boston and Banco General de Negocios: "All remuneration will be calculated in dollars (even though payment could take place in pesos) and will be readjusted each seasonal period according to a formula which takes into account the variation of the retail and wholesale price index in the United States."
110. Then the Claimant recounts how the draft Concession contract attached to the Bidding Conditions was amended through Circulars 3 and 6 to ensure that there was no ambiguity as to who was carrying the risk of a future devaluation of the peso. For ease of reference it will be helpful to reproduce here the original Article 15 Sub-Annex II of the draft Concession contract:
- "Todos los conceptos remuneratorios se calcularán en dólares estadounidenses. El Cuadro Tarifario resultante se expresará en pesos teniendo en cuenta para ello la relación de convertibilidad al peso establecida en el Artículo 3 del Decreto No. 2128/91, reglamentario de la Ley No. 23928 [the Convertibility Law]. La remuneración de la Concesionaria se adecuará cada seis (6) meses a partir del 1 de mayo de 1993 y tendrá vigencia semestral."
111. According to the Claimant, Mr. Williams of National Grid sought to clarify the following sentence: "la relación de convertibilidad al peso establecida en el

Artículo 3 del Decreto No. 2128/91, reglamentario de la Ley No 23.928.” To this effect, Mr. Williams allegedly approached Mr. Bastos, the Secretary of Energy, who issued Circular 3 in order to delete from Draft Article 15 the reference to the Convertibility Law, thus leaving only a reference to the exchange rate in effect:

“Todos los conceptos remuneratorios se calcularán en dólares estadounidenses. El Cuadro Tarifario resultante se expresará en pesos teniendo en cuenta para ello la relación de convertibilidad al peso vigente. La remuneración de la Concesionaria se adecuará cada seis (6) meses a partir del 1 de mayo de 1993 y tendrá vigencia semestral.”

112. According to the Claimant, the text remained ambiguous as to the timing of the conversion from dollars to pesos, so Mr. Williams allegedly sought further clarifications approaching Mr. Bastos once again. Circular 6 sought to clarify the timing of the conversion by amending the second sentence of Draft Article 15 to read thus: “El Cuadro Tarifario resultante se expresará en pesos teniendo en cuenta la relación de convertibilidad al peso vigente al momento de la facturación.”
113. Therefore, the Claimant argues, the risk of devaluation is limited to the period between the issuance of the bill and the moment such bill was actually paid. The Claimant observes that these changes introduced by Circulars 3 and 6 were reflected in the Transba Contract from the beginning, i.e., from the time Transba was privatized.
114. The understanding of the Respondent is different. The Respondent points out that the Contract is denominated in pesos not in dollars, as clearly stated in Sub-Annex II C of the Contract where all values are expressed in pesos. At the time of the first Five-Year Tariff Review in 1998, Resolution 1650/98 fixed in pesos the

tariff values for the second five-year tariff period and, although Transener requested reconsideration of certain aspects of the review, it did not object to the tariff values being expressed in pesos. Transener had no right to receive dollars from CAMMESA and under Article 619 of the Argentine Civil Code an obligation denominated in a certain currency is satisfied when it is paid in that currency. The Respondent recalls that during the privatization of Transener a potential bidder, Techint, sought clarification in writing from the Privatization Committee on Article 15 of the Sub-Annex II A to the effect that the tariff Schedule would be expressed in dollars to match the calculation of the remuneration in dollars:

“el CUADRO TARIFARIO expresará las tarifas a percibir en dólares estadounidenses, los que deberán ser convertidos a pesos al tipo de cambio vigente al cierre del último día hábil anterior al de la fecha de emisión de cada factura. Concordantemente con ello, solicitamos se establezcan en dólares estadounidenses los valores del SUBANEXO II C.”
(E-AR 95)

The request was denied by the Privatization Committee.

115. It is the view of the Respondent that obligations denominated in pesos with an adjustment clause in foreign currency represent a commitment against inflation and not against devaluation. The Respondent refers also to the amendments of Draft Article 15 and Sub-Annex C. The Respondent points out that, after the request for clarification of Techint, Circular 3 Sub-Annex A does not refer any more to the Convertibility Law and the ensuing Decree but instead refers in Sub-Annex C to “Valores expresados en pesos calculados a la relación de convertibilidad establecida en el artículo 3 del Decreto 2128 de la Ley 23928.” Next day Circular 6 amended Draft Article 15 and changing again Sub-Annex C

by deleting the reference to the Convertibility Law while maintaining the reference to the decree.²⁴

116. The Respondent has also called the attention of the Tribunal to ENRE's Resolution 28/2001.²⁵ According to the Respondent this resolution shows that there was no exchange risk assumed by the Argentine Republic and evidences a completely different interpretation of Article 15. The Respondent contends that it is constitutional under Argentine law to displace adjustment clauses when they cease to be representative of the underlying economic reality. The Convertibility Law intended to stabilize all contracts without recourse to adjustment mechanisms that could generate inflationary expectations. According to the Respondent, this is the purpose of Article 9 of the Convertibility Law, which the Claimant considers the pillar of the investment. This article dismantles all prior adjustment indices in contracts concluded before the enactment of that law. Hence Article 8 of Law 25.561, consistently with the Respondent's jurisprudential tradition, was merely meant to displace indexation in dollars or other foreign currencies.

2. Considerations of the Tribunal

117. The Tribunal concurs with the Respondent that the Contract is denominated in pesos and so are the tariffs. This is evident from the text of Sub-Annex C, but this is not the relevant point on which the Parties' expectations or *ex post-facto* interpretations differ. The real question is related to the right to calculate the tariff

²⁴ Closing Statement, Spanish Transcript, pp. 2275-2276.

²⁵ Exhibit AR-134

in dollars even if the electricity bills are denominated and are to be paid in pesos. The fact that users are billed in pesos does not address the issue of how the amount of the bill is to be calculated which may well have meant to vary depending on the relationship of the peso to the dollar.

118. At the time the shares in Transener were sold to private investors the rate of exchange was one peso to one dollar. As explained by the Claimant, its concern was what would happen if that rate changed, as it has changed so many times during the last decades of the Respondent's economic history. Hence, clarifications were sought by the Claimant and others such as Techint. The Respondent has attached particular importance to the fact that the Privatization Committee rejected Techint's request to express in dollars the tariffs in Sub-Annex C. The Respondent has also pointed out the importance of the switch to Sub-Annex C of the reference to Article 3 of Decree 2128, while the Claimant has placed emphasis on the deletion of the reference to the Convertibility Law and Decree 2128 from Article 15 of Sub-Annex A.
119. The changes introduced by Circulars 3 and 6 in these two Sub-Annexes had the result that, in Sub-Annex A, there is a reference to the convertibility relationship in effect at the time of billing, while Sub-Annex C contemplates this relationship as set forth in Article 3 of Decree 2128. This reference is the key to the argument of the Respondent linking the tariff regime to the Convertibility Law.
120. The Tribunal has difficulty in following the argument that dollar-adjustment clauses of obligations in pesos are aimed, in the Argentine Republic, to protect the creditor against inflation and not against devaluation. While such clauses

may be safeguard against inflationary adjustments such to the extent that exchange rate movements reflect inflation differences in the countries concerned, and that such clauses may, in some instances, have been used for such purpose in the Argentine Republic, the primary purpose and effect of dollar-adjustment clauses is to protect the actual value of the tariffs from the likelihood of devaluation or depreciation of the local currency. In the instant case, the protection against inflation was limited to the inflation of dollar priced goods and services by indexation to the CPI and PPI of the United States. If the purpose of calculating the tariffs in dollars had been merely to protect against peso inflation, this could have been more directly achieved by incorporating the use of a local price index. Inflation in the Argentine Republic does not seem to have been a concern at the time and a reading of the remuneration provisions makes evident the intent to maintain the value of the remuneration stream in dollar terms, either because of dollar inflation or because of changes in the parity of the peso and the dollar. To read Article 15 differently would deprive of any meaning the calculation of the tariff in dollars.

121. The Respondent has argued that there was an essential connection between the Convertibility Law and the tariff regime. There is no doubt that given the Respondent's economic history eloquently described by the Respondent, there was a need to link the tariff regime to the Convertibility Law. It is less certain, however, whether this link has the effect argued by the Respondent. The Tribunal shall address this issue with an analysis of Article 8 of the Emergency Law:

“Dispónese que a partir de la sanción de la presente ley, en los contratos celebrados por la Administración Pública bajo normas de derecho público, comprendidos entre ellos los de obras y servicios públicos, quedan sin efecto las cláusulas de ajuste en dólar o en otras divisas extranjeras y las cláusulas indexatorias basadas en índices de precios de otros países y cualquier otro mecanismo indexatorio. Los precios y tarifas resultantes de dichas cláusulas, quedan establecidos en pesos, a la relación de cambio un peso (\$1) = un dólar estadounidense (US\$ 1).”

122. The text of this article contradicts the allegation of the Respondent as to the meaning of the adjustment clauses. The last sentence of the article ensures that there is no doubt that prices and tariffs resulting from the application of the adjustment clauses are in pesos and at the 1:1 exchange rate. The legislator seems to assume that, when such adjustment clauses exist, the resulting prices or tariffs may effectively be equivalent to being in a foreign currency, hence the need to affirm “quedan establecidos en pesos.” If this were not the case, there would not be any need to refer to the currency in which the obligation is denominated. Similarly, the need to establish the parity at 1:1 reflects that the parties to the contracts contemplated in Article 8 might otherwise have been entitled to a different rate of exchange. It seems clear, therefore, that if the interpretation of the Contract by the Respondent were correct, Article 8 of the Emergency Law would have been unnecessary.
123. The Respondent also places particular emphasis on the fact that the result of Circulars 3 and 6 was to transfer the reference made to Decree 2128 from Sub-Annex A to Sub-Annex C and not to eliminate all reference to the Convertibility Law and Decree 2128. Article 15 of Sub-Annex A refers to the rate of exchange in effect at the time of billing. Such rate of exchange might have been either the

one indicated in Decree 2128 or a rate of exchange fixed elsewhere. To this extent, the Tribunal recognizes that there is some potential for contradiction between the two Sub-Annexes. However, if we assume the good faith of the Respondent and if we take into account the context in which the changes were made, the two provisions must be interpreted harmoniously so that neither is deprived of its meaning. Hence, if the parity in Article 3 of Decree 2128 did not refer to the parity in effect at the time of billing at any point in time, we must assume that this parity would have been changed accordingly.

124. The Respondent has also argued that the tariff regime in the Contract is subject to the tariff principles of the Electricity Law. Article 40 of the Electricity Law requires that the tariff shall be just and reasonable. In support of this point the Respondent has noted that Transener itself, at the time of the first five-year tariff review, appealed to the principles of Article 40 to increase the remuneration proposed by CAMMESA. According to the Respondent, this is proof that the understanding of the Concessionaire was clear as regards the overriding importance of these principles in respect of the remuneration set forth in the Contract. As indicated above, the Tribunal does not agree.

F. THE INVESTMENT OF NATIONAL GRID

1. Positions of the Parties

125. The Respondent has argued that the investment made by the Claimant is limited to its purchase of shares of Transener through Citelec and that the Transba Concession and the Fourth Line Contract are not part of the Claimant's investment. These were operations decided by Transener, an Argentine

company, and not the Claimant. It is the view of the Respondent that Transener is not a protected investor under the definition of investor in Article 1 of the Treaty. The Claimant takes the opposite view.

2. Considerations of the Tribunal

126. The actual issue raised by the Respondent is whether indirect investments are eligible as protected investments under the Treaty. The structure of the investment shows that the Claimant channeled its investment in the Argentine Republic through seven companies 100% owned by the Claimant and not necessarily British companies.²⁶ The Treaty definition of investment encompasses direct and indirect investments and, therefore, for the purpose of ascertaining which British investor ultimately qualifies for protection under the Treaty, there is no difference between an investment made by Citelec and one made through Transener for purposes of protection of the ultimate British investor under the Treaty.

G. THE ISSUE OF WHETHER TRANSBA AND THE FOURTH LINE ARE “REGULATED INVESTMENTS”

1. Positions of the Parties

127. The Respondent argues that Transba and the Fourth Line are not part of the Concession and, therefore, are not included in the protection provided by the regulatory regime of the Concession. Transener had no obligation to expand its business, but rather the opportunity to do so as a private business decision and

²⁶ Statement of Claim, Exhibit C-19.

at its own risk. The Respondent did not solicit these investments or made any promises with respect to them.

128. The Claimant on the other hand alleges that both businesses are regulated and that, while the decision to invest may have been its own, it was made in light of the assurances established in the Regulatory Framework. The Claimant refers to the affirmation contained in Respondent's Statement of Defense to the effect that: *"En lo que respecta a las alegadas garantías regulatorias a favor del concesionario Transba...en nada se diferencia de lo regulado en el Marco Regulatorio Nacional, el cual resulta asimilable al aplicado a la concesión de Transener."*²⁷ The Claimant points out that Kleinwort Benson, advisors to the Province in the privatization, sought to attract the Claimant and wrote to Mr. Dennis Elsey informing him of the recently announced intention of the Province to privatize its controlling interest in ESEBA (Transba) which represents "a major opportunity to invest in the Argentine electricity sector."²⁸
129. More specifically on the issue of regulation the Claimant draws the attention of the Tribunal to the regulatory steps taken for the realization of the investment in Transba: ENRE Resolution 51 of 1993 approving amendments to Transener's bylaws so as to include the acquisition of transmission companies within in the purposes of Transener the acquisition of transmission companies; the fact that the Government representatives on the board of Transener representing 25% of shareholding approved the decision to acquire Transba; ENRE Resolution 543

²⁷ Statement of Defense, para.158. ("The purported regulatory guarantees in favour of the concessionaire, TRANSBA...do not differ at all from the regulations of the Federal Regulatory Framework, which can be considered similar to the applied to TRANSENER's concession.")

²⁸ Exhibit C-188

approving the decision to acquire Transba; and Decree 2387 of 1997 of the Province awarding 100% of the shares in Transba to Transener.

130. As regards the Fourth Line, the Claimant points out that ENRE Resolution 525/97 approved the bidding rules and draft contract, and ENRE Resolution 1028/1997 approved the selection of Transener as the winning bidder and authorized the conclusion of the Fourth Line Contract.
131. The Claimant also addresses the question of whether the Fourth Line Contract is a contract under public or private law and refers to the “Whereas” clauses of Resolution 28/2001 of ENRE:

“Que el contrato suscripto entre las partes no representa un contrato típico en el que corresponda la aplicación de las normas del derecho privado sino que por el contrario le son aplicables varias disposiciones propias del derecho público, sin duda por la característica de ‘servicio público’ que representa una instalación de transporte de energía eléctrica.

Que el contrato fue materializado bajo la vigencia de las normas reglamentarias que son de orden público por resguardar del interés general que representa la administración del Mercado Eléctrico Mayorista (MEM).”

2. Considerations of the Tribunal

132. The reasons behind the decision to use Transener to bid for the Transba Concession and the Fourth Line Contract do not seem to respond to any obscure purpose to increase debt of Transener rather than the debt of the Claimant. Irrespective of the issue of how these contracts were financed it was clear that the opportunity to participate in these businesses was part of the Concession even if, as the Respondent had made adamantly clear, it was not an obligation. In fact, the price received for the shares in Transener was paid in part for this

opportunity as reflected in the discount that ENRE made to such price when calculating the regulated asset base (RAB) for purpose of the first tariff review.

133. The Tribunal considers that the Concession, the Transba Concession and the Fourth Line Contract are regulated businesses whether by the State or the Province. The instances in which ENRE intervened are no different between the two Concessions. As admitted by ENRE itself, the Fourth Line had sufficient elements of public interest to justify regulation. The Respondent has approvingly referred to the *Enron* award in respect of the separation of regulated and unregulated business. But the matter here seems to be different since here we have “Other Businesses” of Transener beyond the regulated business as defined by the Claimant. The distinction drawn in the *Enron* award between “regulated” and “unregulated” businesses was drawn in a different context, namely, whether the tribunal should consider as the business of TGS all of its lines of business, as actually argued by the Respondent in that case, or only those which were regulated. In contrast, one of the questions faced by the Tribunal in this case focuses on ascertaining which businesses of Transener are regulated, since it is accepted by both Parties that the claim does not refer to all businesses of Transener.
134. The Tribunal is mindful that Transener had no obligation to expand its business. However, the fact that Transener could avail itself of this option is not by itself the determinant factor as to whether a business is regulated or not. The nature of Transener’s decision to invest in the Fourth Line and Transba is no different from the decision of the Claimant to invest in Transener. These decisions were

business decisions predicated on certain conditions established in the regulatory framework adopted by the Respondent or the Province. In both cases the crucial issues are: What were these conditions? What assurances were provided to investors in the sector? What significance did they have from the perspective of the international responsibility of the Respondent under the Treaty? These questions will now be addressed by the Tribunal.

VI. BREACH OF THE TREATY

A. ARTICLE 5(1)

1. Positions of the Parties

135. The Claimant has alleged that the actions described in detail above breached Article 5(1) of the Treaty. Article 5(1) reads in relevant part as follows:

“Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of the Contracting Party on a non-discriminatory basis and against prompt, adequate and effective compensation....”

136. The Respondent has denied that it expropriated the Claimant's investment. The Respondent argues in support of its position:

First, that indirect expropriation as conceived by the Claimant does not exist in international law since its rights as shareholder remain intact until the Claimant decided to sell them at its own initiative. For indirect expropriation to exist there must be forced deprivation of shares, interference in the management, denial of access to labor or materials, or excessive or arbitrary taxes.

Second, that a breach of contract does not constitute an expropriation; the Treaty does not provide protection against

disappointing performance of the investment nor does it guarantee that the investment will be profitable.

Third, that the acts of the Argentine authorities were legitimate and proportionate regulatory acts of general application adopted in good faith and in order to protect the human rights of the population.

137. Furthermore and based on the analysis of the tribunal in *Saluka*, the Respondent contends that the rationale for regulatory measures may be refuted only by clear and convincing proof of error or inappropriate action and that, without such proof, deprivation by legitimate regulation does not give a right to compensation.
138. In its Reply, the Claimant contests these three lines of defense. First, the Claimant notes that it is possible that expropriatory measures may affect the value and economic benefit of an investment without necessarily altering the owner's formal right to his property and quotes arbitral and national case law in support of this argument. The Claimant points out that the reference by the Respondent to the Third Restatement of the Foreign Relations Law of the US does not include consideration of the key passage on taking of property.
139. According to the Claimant, the proper test as to whether a regulatory measure amounts to expropriation is not based on its reasonableness or proportionality, but on whether it reverses specific commitments given by the government to the investor which give rise to its legitimate expectations that the government will take a certain line of conduct in given circumstances. The Claimant points out that, the Respondent, while relying on *Methanex*, omits a key sentence from the quoted paragraph –the key sentence: “unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such

regulation.”²⁹ The existence of commitments, the Claimant urges, is the essential point which distinguishes the present case from those cited by the Respondent in support of its position (*Feldman, Generation Ukraine, Azinian, Saluka, Oskar Chinn and Sedco*). The Claimant observes that tribunals may focus on the proportionality or reasonableness of measures if prior specific commitments have not been established, but this test is irrelevant when specific governmental commitments have been made. Even if this were not the case, the Claimant’s position is that the Measures were, nevertheless, disproportionate and unreasonable since the Respondent had given assurances that the rules referred to above would apply in a situation of monetary instability and cost variations.

140. The Claimant argues further that the Respondent directly expropriated the Claimant’s rights in the assets of Transener. The Claimant affirms that its rights in Transener constitute an investment under the Treaty and that it had a clear economic interest in the Concessions and the Contracts which were the assets of Transener. The Claimant concludes that the destruction by the Respondent of Transener and Transba’s transmission tariff and remuneration regimes constitute a direct expropriation of the Claimant’s investment in the form of the rights in or related to the Concession and the Contracts.
141. The Respondent, on the other hand, claims that the Emergency Law and its effects on the Concession are covered by the doctrine of the police powers of the State. To sustain its argument, the Respondent refers to the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens of

²⁹ Claimant’s Reply, para. 384, citing *Methanex v. United States of America* (UNCITRAL Arbitration), Final Award on Jurisdiction and Merits of August 3, 2005 [hereinafter, *Methanex v. United States of America*].

1961 (the Harvard Draft), the *Saluka* award and the writings of Francis Mann where it is stated that a country has a right to devalue and that such devaluation does not amount to a “taking” of property. According to the Respondent, the mere loss of value of shares does not constitute an indirect expropriation and, in any event, the Claimant has not suffered a total deprivation of its investment.

142. The Respondent rejects the use of the determination of expropriation of OPIC in the *Ponderosa* case adduced by the Claimant since is not a determination by a tribunal; OPIC is an organ of the United States Government and it applies different rules with different objectives from those applied by the Tribunal.
143. The Respondent also rebuts the Claimant’s argument of direct expropriation questioning the Claimant’s alleged economic rights to the Transener’s investments. The Respondent maintains that the Claimant uses the meaning of assets in a way not recognized in the Treaty or Argentine law. The Respondent explains that the term “assets” refers only to physical assets and not to the rights which Claimant seeks to protect here. The Respondent argues that National Grid had invested as shareholder and as such it may not claim an interest or right in the contractual rights of another legal entity.

2. Considerations of the Tribunal

144. The Tribunal will dispose first of preliminary questions which have arisen in the exchange of arguments of the Parties and then address the claims of direct and indirect expropriation. First of all, the definition of “assets” protected under the Treaty is broader than physical assets as Respondent has asserted in attempting to rebut Claimant’s argument of direct expropriation. Secondly, the Tribunal

considers that the determination of OPIC in the *Ponderosa* case is of limited value as a precedent for the reasons adduced by the Respondent, namely, that it is a decision of an organ of a government, not one arrived at by an independent tribunal after hearing the parties.

145. The Tribunal is not persuaded that there has been a direct expropriation of the Claimant's rights or interests in Transener. No formal right of property has been transferred to the State or to other parties by the State. Deprivation of title to property is inherent in a direct expropriation and none has been adduced or proven in these proceedings. On the contrary, the Claimant retained title to its shares and sold them. The Measures may or may not have destroyed its investment but have not transferred ownership of it.³⁰

146. As regards indirect expropriation, the parties have argued extensively as to what may or may not constitute indirect expropriation and in particular how much the value of assets must be reduced and under which circumstances the exercise of regulatory power may give rise to a right to compensation. The Tribunal will start its analysis by considering the text of Article 5(1). This article provides for compensated expropriation, whether direct or indirect, when the expropriation or the measures that are tantamount to expropriation are for a public purpose "related to the internal needs of that Contracting Party" and non-discriminatory. The engagement of the parties in the Treaty is a negative engagement not to nationalize, expropriate or subject investments of investors to measures having

³⁰ As noted by the tribunal in *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award of May 22, 2007 [hereinafter, *Enron v. Argentina*], when faced with a similar argument, it is difficult to see how certain actions may qualify as a creeping expropriation and a direct expropriation simultaneously.

an equivalent effect, unless three conditions are met: public purpose, non-discrimination and “prompt, adequate and effective compensation.”

147. It is clear from a reading of Article 5(1) that whether the party concerned had the intent to expropriate or to nationalize in taking measures equivalent to either is not a requirement. Article 5(1) is concerned only with measures having an *effect* equivalent to nationalization or expropriation. Article 5(1) does not qualify whether the measures are taken in the exercise of a Contracting Party regulatory power or any other power a government may be entitled to exercise. The key words for the Contracting Parties are “effect equivalent to.” The measures’ effect needs to be tantamount to an expropriation or nationalization. The issue is where to draw the line.
148. The *Saluka* tribunal, quoted extensively and approvingly by the Respondent, concludes that international law,

“has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.

It thus inevitably falls to the adjudicator to determine whether particular conduct by a state ‘crosses the line’ that separates valid regulatory activity from expropriation. Faced with the question of when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.”³¹

³¹ *Saluka Investments BV v. Czech Republic*, (UNCITRAL Arbitration), Partial Award of March 17, 2006 [hereinafter, *Saluka v. Czech Republic*], paras. 263-264.

149. The cases adduced by the Parties are helpful in guiding the Tribunal in this task. In *CME* the tribunal referred to measures that “effectively neutralize the benefit of the property of the foreign owner.”³² Similarly in *Lauder* the tribunal refers to a measure that effectively neutralizes the enjoyment of the property.³³ In *Middle East Cement* the measures constituting indirect expropriation are described as measures with the effect of depriving the investor of the use and benefit of his investment.³⁴ In *Santa Elena* we read that governmental interference “deprived the owner of his rights or has made those rights practically useless,” and had caused the irretrievable loss of “the practical and economic use of the Property.”³⁵ *Tecmed* refers to radical deprivation of “the economical use and enjoyment of its investments, as if the rights related thereto...had ceased to exist.”³⁶ *Pope & Talbot* finds that a particular interference with business activities amounts to an expropriation if “that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’” from the owner and refers for support to the Harvard Draft’s definition, which requires interference that “would justify an inference that the owner...will not be able to use, enjoy or

³² Reply, para. 367, referring to (the Netherlands) *Czech Republic BV v. Czech Republic* (UNCITRAL Arbitration), Partial Award of September 13, 2001 [hereinafter, *CME v. Czech Republic*], (Legal Authorities LA-36).

³³ *Ronald S. Lauder v. The Czech Republic* (UNCITRAL Arbitration), Final Award of September 3, 2001 [hereinafter, *Lauder v. Czech Republic*], para. 200 (Legal Authorities LA-37)

³⁴ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award of April 12, 2002 [hereinafter, *Middle East Cement v. Egypt*], para. 368 (Legal Authorities LA-24).

³⁵ *Compañía del Desarrollo de Santa Elena v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of February 17, 2000 [hereinafter, *Santa Elena v. Costa Rica*], paras. 78, 81, 83 (Legal Authorities LA RA-63 and LA-9).

³⁶ *Técnicas Medioambientales Tecmed v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003 [hereinafter, *TECMED v. Mexico*], para. 115 (Legal Authorities LA-42).

dispose of the property...,” and to the Restatement which speaks of “action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of alien’s property.”³⁷ The terms used in these cases convey the effect that the measures concerned must have: neutralization, radical deprivation, irretrievable loss, inability to use, enjoy or dispose of the property.

150. The number of combinations of possible measures which may produce such effect is large and defies definition. The Respondent itself has found it useful to refer in this case and in other cases –*CMS, Enron*– to the list of items described in *Pope & Talbot* for purposes of determining whether indirect expropriation existed:

“...the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment had been detained...Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders’ activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment.”³⁸

The tribunal in *Enron* found the list of measures listed in *Pope & Talbot*, which had been invoked by the Respondent in that case, to be “representative of the legal standard required to make a finding of indirect expropriation.”³⁹

³⁷ *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL Arbitration), Interim Award of June 26, 2000 [hereinafter, *Pope & Talbot v. Canada*], para.102 (Legal Authorities LA-26).

³⁸ *Ibid.*, para. 100.

³⁹ *Enron v. Argentina Award*, para. 245.

151. The Parties have also argued concerning the significance of the existence of prior commitments for purposes of identifying the regulatory measures which would give rise to a right to compensation. Judge Higgins commenting on the *Martini* case stated that:

“In my view the right distinctions are here being drawn: governments may indeed need to be able to act qua government and in the public interest. That fact will prevent specific performance (including restitution) from being granted against them. But that is not to liberate them from the obligation to compensate those with whom it has entered into specific arrangements. That is the reasonable place to strike the balance between the expectations of foreign investors and the bona fide needs of governments to act in the public interest.”⁴⁰

152. In less categorical terms and after a review of investment treaty cases Jan Paulsson and Zachary Douglas concluded that:

“the prohibition against indirect expropriation should protect legitimate expectations of the investor based on specific undertakings or representations by the Host State upon which the investor has reasonably relied. This is by no means an exclusive test to be applied to all types of alleged indirect expropriations in isolation of other relevant factors. It is, nonetheless, a useful guiding principle that appears to cover many of the situations that have come before the modern investment treaty tribunals.”⁴¹

153. While this is a useful test and has been invoked by arbitral tribunals in cases such as *Methanex*, it may not be conclusive since there may be situations where, notwithstanding prior commitments, the regulatory effect may not be devastating

⁴⁰ Reply, para. 341, quoting R. Higgins, *The Takings of Property by the State: Recent Developments in International Law*, (III) Collected Courses of the Hague Academy of International Law, p.338 (Legal Authorities LA-7).

⁴¹ Jan Paulsson and Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, 2004, N. Horn and S. Kröll, *Arbitrating Foreign Investment Disputes* (Legal Authorities No. LA-147).

enough to constitute an indirect expropriation. Conversely, the value of an investment may be lost through regulatory measures without any existence of prior commitments and, under the Treaty, such effect on the investment would give a right to compensation.

154. In the instant case, the Claimant continued to own its shares and could exercise its rights as a shareholder and disposed of its investment by its own decision. The value of its investment was diminished but not to the extent that it could be considered worthless. For these reasons, the Tribunal finds that the Respondent did not expropriate indirectly the investment of the Claimant.
155. This conclusion finds support in the findings on indirect expropriation of other tribunals which have so far decided claims arising out of the Argentine crisis. In *CMS*, the tribunal reached its decision on the basis that the investor fully controlled its investment, and the Government did not administer the day-to-day operations of the company.⁴² Following the checklist outlined in *Pope & Talbot*, the *Enron* tribunal dismissed the indirect expropriation claim,⁴³ while the *LG&E* tribunal considered that the claimants were not deprived of the right to enjoy their investment, did not lose control of their shares in the licensees and “the effect of the Argentine State’s actions has not been permanent on the value of the Claimants’ shares, and Claimants’ investment has not ceased to exist.”⁴⁴

⁴² *CMS Gas Transmission Company v. Argentina Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005 [hereinafter, *CMS v. Argentina*], para. 263 (Legal Authorities LA-114).

⁴³ *Enron v. Argentina* Award, para. 246.

⁴⁴ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006 [hereinafter, *LG&E v. Argentina*], para. 200 (Legal Authorities LA-113).

B. FAIR AND EQUITABLE TREATMENT

1. Positions of the Parties

156. The Claimant notes that Article 2(2) does not define specifically the protections provided and observes that this “omission reflects the widely accepted principle that the fair and equitable treatment standard cannot be summarized in a precise statement of [a] legal obligation.”⁴⁵ The Claimant then goes on to argue that, based on recent case law, the fair and equitable treatment standard requires that investors be treated in accordance with their legitimate expectations including the maintenance of a stable and predictable investment environment. The Claimant asserts that “a state violates the fair and equitable treatment standard when it fails to respect the very assurances that it made to investors as an inducement to invest and on which investors relied.”⁴⁶
157. According to the Claimant, this standard does not require proving bad faith in the actions of the State and is separate from the customary international law minimum standard of treatment of aliens. The Claimant observes that, unlike other treaties, the Treaty does not refer to the international minimum standard of the treatment of aliens, and that, if the parties had wanted to equate these two concepts, they would have done so expressly. In any case, argues the Claimant, even if the minimum standard of treatment did apply, it would require that the Government respect the stability and predictability of the investment framework as held by the *CMS* and *Occidental* tribunals.

⁴⁵ Statement of Claim, para. 290.

⁴⁶ *Ibid.*, para. 297.

158. The Claimant recalls the statement by Minister Cavallo on the occasion of the signature of the Treaty in London where he referred to the “legal certainty” provided by the Treaty.⁴⁷ Similarly, when the President of the Argentine Republic presented the Treaty to the Congress he stated that “through [bilateral investment treaties] states agree, while they are in force, to maintain certain investment regulations unchanged, in the hope of establishing a stable and confident climate to attract investment.”⁴⁸
159. The Claimant alleges that the Respondent breached this standard of protection when it destroyed the remuneration regime provided for in the Regulatory Framework. The stability of this regime was critical in the electricity transmission sector and an absolutely necessary condition for Transener to obtain the required long-term financing to improve, upgrade, maintain and expand the electricity transmission infrastructure. The Claimant affirms that it on the basis of the Respondent’s promise of a stable investment environment that it decided initially to invest in the Argentine Republic and, later, to expand on the initial investment.
160. The Claimant concludes by asserting that “the test of *fundamental* alterations of the investment framework against *legitimate* investor expectations in this situation results in the Respondent’s liability for breach of this standard of treatment.”⁴⁹ The Claimant adds that the Respondent also acted unfairly and inequitably in forcing Transener and Transba to renegotiate and waive claims on pain of rescission of their contracts.

⁴⁷ *Ibid.*, para. 300

⁴⁸ *Ibid.*, para. 301. (Emphasis added by the Claimant.)

⁴⁹ Reply, para. 444. (Emphasis added by the Claimant).

161. The Respondent denies that it breached Article 2(2) of the Treaty and argues that the standard embodied in the Treaty is the minimum standard of treatment of aliens under international law. The Respondent adduces case law to show that, even if the standard has evolved since *Neer*, the standard still has a high threshold as expressed, for instance, in *Genin*: “Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”⁵⁰
162. The Respondent affirms that the process of contract renegotiation was conducted in good faith with impartiality, consistency and transparency, while the Claimant’s conduct showed anything but good faith when it presented irrational demands in the circumstances of the Argentine Republic thus evidencing the Claimant’s true objective to get rid of the investment.
163. The Respondent argues that the “fair” and “equitable” standard does not require an absolute obligation to maintain a stable and foreseeable framework for the investment in accordance with the legitimate expectations of the investors. The concept of legitimate expectations does not have the reach in international law that the Claimant contends. The investor must be aware of the political and economic realities of the country in which it invests. Investors made investments in the Argentine Republic because there was an opportunity to obtain a rate of return higher than in other countries with more stable conditions.

⁵⁰ *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award of June 25, 2001 [hereinafter, *Genin v. Estonia*], para. 367 (Legal Authorities LA-103).

164. In any case, argues the Respondent, the Argentine Republic did not breach this standard of treatment even if judged in accordance with the expansive interpretation contended by the Claimant. There is no proof that the Respondent acted unjustly or inequitably before 2002 and even thereafter the authorities acted in good faith by initiating a process of renegotiation notwithstanding the investor's assumption of the economic risk of the Concession. Furthermore, the assessment of the Respondent's conduct must take into account all circumstances of the case.
165. On the breach of the just and equitable treatment standard, the Respondent considers that definition of this standard is too broad and would be surprising to the drafters of the Treaty. The Respondent refers to recent case law to support its contention that the threshold for breaching this standard remains high. The Respondent points out that, if this Tribunal were to find that the standard of protection provided in the Treaty goes beyond the minimum international standard, then it should apply the standard relying on objective criteria and taking into account all the circumstances of the case.
166. The Respondent questions Claimant's legitimate expectations in light of the excessive price Claimant paid for the shares of Citelec, its increase in said participation, the acquisition of Transba and the participation in the Fourth Line. As recognized by the Claimant, the Respondent argues that the respect of the legitimate expectations of an investor does not mean respecting all expectations of an investor but only those which are based on specific representations or clear commitments. The Respondent then argues that there is no proof of declarations

or clear commitments of the Respondent and that Claimant's legitimate expectations need to be considered in the context of a legal framework that did not provide Transener or Transba with absolute protection against the devaluation of the currency. The measures taken by the Respondent were in response to the economic crisis; it is illogical to suggest, first, that under international law the State has a right to adopt emergency measures and then, at the same time, to insist that investors not be prejudiced by such measures. The Respondent acted in a proportionate and reasonable manner in response to the crisis; a decision that such conduct breaches the standard of just and equitable treatment under those circumstances would constitute unjustified interference with a sovereign's legitimate regulatory authority and contrary to the "high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."⁵¹

2. Considerations of the Tribunal

167. The Tribunal recalls that it has been established under the Treaty and is bound by the terms of the Treaty, which it must interpret in accordance with Article 31 of the Vienna Convention on the Law of Treaties. Hence, after first observing that there is no reference to the minimum standard of treatment under international law in the Treaty in contrast to the language of NAFTA, the Tribunal will proceed to examine the ordinary meaning of the terms "fair" and "equitable."

⁵¹ *S.D. Myers, Inc. v. Canada* (UNCITRAL Arbitration), Partial Award of November 13, 2000 [hereinafter *S.D. Myers v. Canada*], para.272. Quoted in the Rejoinder, para. 567 (Legal Authorities LA RA-102).

168. In their ordinary meaning, the term “fair” means “just,” “even-handed,” “unbiased,” “legitimate,”⁵² “reasonable.”⁵³ Equitable is defined as “fair” and “just,”⁵⁴ “just, fair, and right, in consideration of the facts and circumstances of the individual case.”⁵⁵ While the definition of each term uses the other and underlines their relationship, two aspects stand out: the idea of even-handedness and the need to consider all the facts and circumstances of an individual case.
169. The *MTD* award refers to the statement of Judge Schwebel to the effect that “the meaning of what is fair and equitable is defined when that standard is applied to a set of specific facts.” The fact-specific nature of the standard has prompted the tribunal in *Saluka* to say that:

“Whatever the merits of this controversy between the parties may be, it appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases in which the standards have been applied.”⁵⁶

170. We therefore move to consider the context in which the terms fair and equitable are used in this case. These terms are used in a treaty which the State parties had signed for a purpose, namely, to promote and protect investments. As indicated in the Preamble, this purpose is “to create favorable conditions for

⁵² Concise Oxford Dictionary.

⁵³ Black’s Law Dictionary.

⁵⁴ Concise Oxford Dictionary.

⁵⁵ Black’s Law Dictionary.

⁵⁶ *Saluka v. Czech Republic*, Partial Award, para. 291.

greater investment by investors of one State in the territory of the other State.” Another consideration of the Contracting Parties in the Preamble is “the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.” Then Article 2 of the Treaty under the title of “Promotion and Protection of Investment” provides first of all that “Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party to invest capital in its territory....” This undertaking is followed in the next paragraph by the commitment to accord at all times fair and equitable treatment to investors. Therefore, the obligation of fair and equitable treatment is placed squarely in the context of an obligation to “encourage and create” favorable conditions for investors. In this context, it seems a logical consequence that the Contracting Parties would choose not to use limitations to such treatment such as found in the expression “minimum treatment standard under international law.”

171. Early in the era of BITs, Francis Mann commented on the British BITs:

“the terms ‘fair and equitable treatment’ envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously.”⁵⁷

⁵⁷ F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 *British Year Book of International Law* (1981), p. 244 (Legal Authorities LA-40).

172. In applying them, the Tribunal recalls that the Claimant has commented on the imprecision of the standard. On that point the tribunal in *Enron* refers to a similar observation of the respondent and observes that the standards of treatment have gradually evolved over the centuries and that this evolution is “for the most part the outcome of a case by case determination by courts and tribunals.” In the specific case of “fair and equitable treatment,” this is a relatively recent occurrence.⁵⁸
173. A review of the case law adduced by the Parties shows that fair and equitable treatment is considered an objective standard that does not require bad faith by the State.⁵⁹ It also shows that this standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the State concerned. Thus, treatment by the State should “not affect the basic expectations that were taken into account by the foreign investor to make the investment.”⁶⁰ *CME* speaks of “evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.”⁶¹ *Waste Management* considered it “relevant that the treatment is in breach of representations made by

⁵⁸ F.A. Mann commented that “Although these are very familiar terms, they have hardly ever been judicially considered.” *Ibid.*, p. 243.

⁵⁹ See comment on *Genin v. Estonia* in the *LG&E v. Argentina*, Decision on Liability, para. 129.

⁶⁰ *TECMED v. Mexico Award*, para. 154.

⁶¹ *CME v. Czech Republic*, Partial Award, para. 155.

the host State which were reasonably relied on by the claimant.”⁶² In the words of the *CMS* tribunal:

“It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.”⁶³

174. Similarly, after a review of arbitral awards, the *Enron* tribunal concluded that:
- “What seems to be essential...is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest.”⁶⁴
175. The protection of investor expectations has been made subject to two significant qualifications: first, that the investor should not be shielded from the ordinary business risk of the investment and, second, that the investor’s expectations must have been reasonable and legitimate in the context in which the investment was made. In *LG&E*, for example, the tribunal considered that “the investor’s fair expectations cannot fail to consider parameters such business risk or industry’s regular patterns.”⁶⁵ In *Saluka*, the tribunal was of the view that “the scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment

⁶² *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Final Award of April 30, 2004 [hereinafter, *Waste Management v. Mexico*], para. 98.

⁶³ *CMS v. Argentina* Award, para. 277.

⁶⁴ *Enron v. Argentina* Award, para. 262.

⁶⁵ *LG&E v. Argentina*, Decision on Liability, para. 130.

cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances*."⁶⁶

The tribunal then went on to say that:

“No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.”⁶⁷

176. The Claimant made its investment at a time when, after a severe economic crisis, the Respondent was trying to offer a different image to investors. The BITs were part of this effort to attract foreign investment. As stated by the Argentine President when it presented the Treaty to Congress for ratification: “Es preciso no perder de vista el objetivo principal de este tipo de acuerdos, que es incitar a la inversión genuina y productiva. A través de ellos, los Estados aceptan mantener *inalterables* durante su vigencia ciertas normas de tratamiento de las inversiones, con lo que se espera *establecer un clima de estabilidad y confianza para atraer inversiones*.”⁶⁸
177. More specifically, the Respondent solicited the investments in the power sector internationally. It is disingenuous for the Respondent now to rely on the disclaimers in the prospectus in order to distance itself from the information given therein. The prospectus was prepared by respectable bankers on behalf of the

⁶⁶ *Saluka v. Czech Republic*, Partial Award, para. 304. (Emphasis in the original.)

⁶⁷ *Ibid.*, para. 305.

⁶⁸ Exhibit C-14 p. 2858. (Emphasis added by the Tribunal.)

Respondent and key Argentine government officials participated prominently in the road show. If information in the prospectus had been incorrect or misleading, the Tribunal has no doubt that the Respondent would have had the prospectus changed accordingly.

178. The evidence before the Tribunal shows that the Claimant relied on the key elements of the Regulatory Framework (subsequently dismantled by the Measures). In assessing the opportunity to invest in the Argentine Republic, it took into account the protections provided by the Treaty.
179. It is the conclusion of the Tribunal that the Respondent breached the standard of fair and equitable treatment because: (a) it fundamentally changed the legal framework on the basis of which the Respondent itself had solicited investments and the Claimant had made them, (b) no meaningful negotiations took place for the two years that passed between the adoption of the Measures and the sale of Transener's shares by the Claimant, and (c) the Respondent required that Transener renounce to the legal remedies it may have as a condition to re-negotiate the Concession.
180. This determination by the Tribunal, however, must be qualified in time. The Tribunal's conclusion that the Respondent has been in breach of the Treaty cannot ignore the context in which the Measures were taken. The determination of the Tribunal must take into account all the circumstances and in so doing cannot be oblivious to the crisis that the Argentine Republic endured at that time. What is fair and equitable is not an absolute parameter. What would be unfair and inequitable in normal circumstances may not be so in a situation of an

economic and social crisis. The investor may not be totally insulated from situations such as the ones the Argentine Republic underwent in December 2001 and the months that followed. For these reasons, the Tribunal concludes that the breach of the fair and equitable treatment standard did not occur at the time the Measures were taken on January 6, 2002 but on June 25, 2002 when the Respondent required that companies such as the Claimant renounce to the legal remedies they may have recourse as a condition to re-negotiate the Concession.⁶⁹

C. PROTECTION AND CONSTANT SECURITY

1. Positions of the Parties

181. The Claimant has alleged that by taking the Measures the Respondent withdrew the protection and security previously granted to its investment. It is the Claimant submission that the general duty to protect investments is linked to fair and equitable treatment. The Claimant notes that the sentence “and shall enjoy protection and constant security in the territory of the other Contracting Party” follows without any punctuation after the first sentence of Article 2(2) of the Treaty: “Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment.”
182. The Claimant argues that while this standard of protection has been mainly applied in situations of physical protection of real and tangible property, such protection may extend to other circumstances. In this regard the Claimant refers to a study by UNCTAD where it is stated that:

⁶⁹ Exhibit C-84. Decreto 1090/02.

“As the term ‘investment’ has expanded to include a broader variety of intangible forms of property, the range of protection that an investor may argue is required by the obligation of full protection and security has potentially expanded. For example, where ‘investment’ includes intellectual property, an investor may contend that the obligation to exercise reasonable care to protect intellectual property against private infringement may require making available some form of remedy against those who infringe copyrights or patents.”⁷⁰

183. The Claimant also refers to *APPL*, *AMT* and *CME* to sustain that constant protection and security embodies an objective standard of vigilance so that the due diligence or reasonable care required will depend on the circumstances of each case. At a minimum, however, the Claimant asserts that this standard is clearly infringed by “government measures that fail to apply the rules specifically designed to govern and protect the investment.”⁷¹
184. The Respondent disputes the interpretation of “constant protection and security” presented by the Claimant. The Respondent argues that the meaning and scope of this obligation is more limited than the Claimant’s interpretation. In any case, the Respondent asserts, the facts of the case do not support a separate finding that the Respondent breached this obligation whether its content is interpreted narrowly or broadly.
185. The Respondent’s view is that the case law does not support the meaning attributed by the Claimant to “protection and constant security.” In all cases – *ELSI*, *AAPL*, *AMT*, *Wena* and *Rankin*– this clause is understood to refer to physical disturbance or occupation. As for *CME*, the Respondent questions its

⁷⁰ Statement of Claim, para. 307.

⁷¹ *Ibid.*, para. 312.

value as a precedent since in that case the award was not unanimous and the reasoning of the tribunal was confined to a single paragraph.

186. The Respondent draws the conclusion that protection and constant security may not be invoked in relation to the obligation of fair and equitable treatment because, if the guarantee is limited to physical interference, the active protection is also limited to such interference. Accordingly, the Respondent submits that the obligation of the State to be diligent in providing “protection and security” is applicable only in the circumstances of physical interference does not extend to the protection of contractual obligations.

2. Considerations of the Tribunal

187. In Article 2(2), the obligation to protect and provide constant security of the Contracting Parties is linked to the fair and equitable treatment standard. As noted in the UNCTAD study referred to by the Claimant, this obligation has typically been applied in situations involving physical threats or destruction. However, Article 2(2) does not provide for such limitation nor limits the protection to physical assets. Given that these terms are closely associated with fair and equitable treatment, which is not limited to such physical situations, and in the context of the protection of investments broadly defined to include intangible assets, the Tribunal finds no rationale for limiting the application of a substantive protection of the Treaty to a category of assets –physical assets– when it was not restricted in that fashion by the Contracting Parties.
188. As for the case law, the Tribunal is not persuaded that the *CME* findings may be dismissed because the award was decided by majority or because the discussion

of the issue was not lengthy. The other cases adduced by the Respondent do not deal with the question before this Tribunal. They all deal with questions of disturbances, rebellion, physical threats, destruction of company assets, but none considered whether the scope of the protection and constant security obligation embraced non-physical situations. In the cases of *AAPL* and *AMT* the issue was whether the obligation was of an absolute character or simply an obligation of due diligence of the State to protect aliens under customary international law, a matter different from the issue in the instant case. *Rankin* is also not apposite. This claim concerned compensation for lost property and property rights arising from alleged wrongful expulsion from Iran. The case was dismissed because the claimant could not prove that his departure from Iran was caused by the alleged wrongful acts of the Iranian government. At no time the tribunal in that case considered the extent of the obligation to provide “constant protection and security” beyond the events of the Iranian revolution. The same comment applies to *Wena*. As to *Enron*, the tribunal rejected “the argument made in general about a possible lack of protection and security in the broader ambit of the legal and political system” because such argument was “not proven or even adequately developed.”⁷²

189. The Tribunal concludes that the phrase “protection and constant security” as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets. This conclusion is reinforced by the inclusion of this commitment in the

⁷² *Enron v. Argentina Award*, para. 287.

same article of the Treaty as the language on fair and equitable treatment. In applying this standard of protection to the facts of the instant case, the Tribunal finds that the changes introduced in the Regulatory Framework by the Measures, which effectively dismantled it, and the uncertainty reigning during the two years preceding the sale of its shares in Transener, with respect to any possible compensation on account of the impact of the Measures on Claimant's investment, are contrary to the protection and constant security which the Respondent agreed to provide for investments under the Treaty.

190. The Tribunal concludes that the Respondent breached its obligation to provide protection and constant security on the same date as it breached its undertaking to treat investments fairly and equitably, namely, June 25, 2002.

D. UNREASONABLE AND DISCRIMINATORY MEASURES

1. Positions of the Parties

191. The Claimant argues that the Measures were unreasonable because they dismantled the entire remuneration regime of the electricity transmission industry, were contrary to the legitimate expectations created by the Regulatory Framework, destroyed the value of the investment in the circumstances in which the guarantees given in the Regulatory Framework were designed to afford such protection, and were not even a legitimate and proportionate attempt at fair burden sharing.
192. The Claimant submits that measures may be discriminatory even if differential treatment is not based on nationality or involves different sectors of the economy, or when their effect, but not necessarily their intent, is discriminatory. The

Claimant alleges that the energy sector has been discriminated against as compared to other sectors of the economy. The Claimant recounts how the banking sector was compensated for losses deriving from the asymmetrical pesification, how the company that manages the concession of the navigation channel in the Paraná River was allowed to increase international transportation tariffs, and how the energy sector was sacrificed for the benefit of manufacturers and consumers. The Claimant refers to statements of the Minister of General Planning, Public Investment and Services, its Chief of Cabinet and ENRE to show government awareness of this unfair transfer of resources from one sector of the economy to others.

193. The Respondent affirms that there were no unjustified or discriminatory measures taken by the Respondent. Transener and Transba were a natural monopoly and it was impossible to give them the same treatment as other operators. It argues that the Measures could not be discriminatory because the Respondent acted in good faith and without any intention to discriminate. Furthermore, the term “unjustified” is related to arbitrary and the concept of arbitrariness has been established by the ICJ in *ELSI* and by arbitral practice in *Genin* and *Noble Ventures*. In the latter case, the Respondent points out that the tribunal found the measures were reasonable and well founded in the context of the social and economic collapse of the company concerned.
194. In its Reply, the Claimant submits that these arguments are irrelevant. The comparison of measures is not limited to identical monopolistic sectors and measures may be discriminatory even if not intentionally so. The Claimant points

out that the case law related to arbitrariness relied on by the Respondent is misplaced as part of the discrimination argument because the Treaty speaks of unreasonable and discriminatory measures, not arbitrary measures. In any case, according to the Claimant, the Measures were unreasonable and arbitrary.

195. In its Rejoinder, the Respondent questions the distinction between “unjustified” and “arbitrary” put forward by the Claimant. The Respondent argues that there is a close link between unjustified and arbitrary and rejects the assertion that the measures taken were arbitrary. The Measures were of a general nature, they applied to anyone irrespective of nationality. There can be only discrimination if those in like situations are treated differently. The measures to be discriminatory must be taken with the intention to cause injury, the differentiation must be without reason –unjustified- and the measures must inflict real damage.

2. Considerations of the Tribunal

196. Under Article 2(2) of the Treaty, “[n]either Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.” This provision is complemented by Article 3 on national treatment and treatment not less favorable than the treatment accorded to investments of investors who are nationals of third parties.
197. The first issue for the Tribunal is to determine whether “unreasonable” and “arbitrary” have distinct or similar meanings. The Black’s Law Dictionary defines “unreasonable” as “irrational; foolish; unwise; absurd; silly; preposterous; senseless; stupid.” The same source defines “arbitrary” variously as something

done “capriciously or at pleasure,” “without adequate determining principle,” “non-rational” or “not done or acting according to reason or judgment.” It is the view of the Tribunal that the plain meaning of the terms “unreasonable” and “arbitrary” is substantially the same in the sense of something done capriciously, without reason.

198. It is clear from the evidence before the Tribunal that the Measures were taken by the Respondent in the context of an unfolding crisis. They may have contradicted commitments made to the Claimant but each one of them provided the reasons why it was taken. As for discrimination, the Tribunal first notes that Article 2(2) does not limit discrimination to discrimination on the basis of nationality and may cover measures based on other grounds. On the other hand, Article 3 provides separate specific language to ensure that investors of either Contracting Party will not, because of their nationality, be treated less favorably than other foreign investors.
199. The thrust of the Claimant’s argument is that the public utilities were discriminated because they were owned mostly by non-voting foreign investors in Argentine elections. The Tribunal observes that the Measures affected foreign and local investors alike. The Tribunal further notes that Transener itself was at the time owned in part by Argentine nationals. Therefore, it is the conclusion of the Tribunal that the investment of the Claimant has not been discriminated against on the basis of the nationality of part-owners of Transener.
200. As to the other grounds of discrimination alleged by the Claimant, i.e., different treatment of the export and banking sectors and certain fluvial transport, they

raise the issue of what are the limits of the comparison. Should the comparison be limited to the treatment of other entities in the same sector or is it appropriate to extend it across sectors? The tribunal in *S.D. Myers* took the view that “the word ‘sector’ has a wide connotation that includes the concepts of ‘economic sector’ and ‘business sector,’”⁷³ which seems to indicate the possibility of cross-sector comparisons. In this respect and interpreting the meaning of “in like situations,” the tribunal in *Occidental* held that such phrase could not “be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.”⁷⁴ While these cases show the possibility of making comparisons across sectors, at least as such term is defined in *S.D. Myers*, the elements that may justify reasonable and objective differentiation are bound to be more numerous in cross-sector comparisons and, hence, the discrimination more difficult to establish. Furthermore, any such comparison needs to take into account “circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.”⁷⁵

201. Having considered the context of the alleged discrimination and the specific circumstances of the power sector in the Argentine Republic at the time the Measures were taken, the Tribunal considers that there is not sufficient evidence to establish that discrimination took place. No doubt the export sector in the

⁷³ *S.D. Myers v. Canada*, Partial Award, para. 250.

⁷⁴ *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN3467), Award of July 1, 2004, [*hereinafter Occidental v. Ecuador*] para.173.

⁷⁵ *S.D. Myers v. Canada*, para. 250.

Argentine Republic benefited from the devaluation. This was to be expected; since the intent to favor exports is usually one of the main reasons underlying the decision of a country to devalue its currency. There is also no doubt that in such circumstances certain economic sectors will win and others will lose. It is not for the Tribunal to reestablish the *ex ante* situation. In any case, the Respondent has also explained that it took measures to withhold the foreign exchange of the exporters, a matter which has not been pursued in much detail by either party. As to the banking and fluvial transport sectors, their characteristics are so distinct from the power sector that the Tribunal finds that there are rational policy reasons for treating these sectors differently.

E. THE UMBRELLA CLAUSE

1. Positions of the Parties

202. The Claimant raised the issue of the breach of the so-called umbrella clause only at the time it submitted its Reply. The argument of the Claimant relies on Article 2(2) of the Treaty, which in its last sentence provides “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.” The Claimant refers to the broad interpretation of this type of clause by the *SGS v. Philippines* tribunal and submits that it covers all investment-specific commitments beyond those provided in contracts. Furthermore, the Claimant finds support for this argument in *Eureko* and *LG&E*, which dealt with a similar situation in the Argentine Republic.

203. In its Rejoinder, the Respondent points out that this is a new argument which should have been made earlier and hence it is out of time, and that contractual claims need to be submitted to the local courts. According to the Respondent, to follow the Claimant's interpretation would mean that a breach of any obligation of the State would be a breach of the Treaty and would render the rest of the Treaty meaningless. In any case, the Respondent has not breached this provision of the Treaty because the claims are not based on specific commitments in a non-existent investment agreement.

2. Considerations of the Tribunal

204. The Tribunal concurs with the Respondent that the allegations made by the Claimant under this heading are out of time. Under the Arbitration Rules, Article 18(2)(c), the Statement of Claim must contain the points at issue. The breach of the umbrella clause was not raised by the Claimant when it filed its Statement of Claim. The general reference to the breach of the standards of protection under Article 2 of the Treaty without further specific allegations based on the umbrella clause is not sufficient to permit the Tribunal to find that the Statement of Claim met that requirement. Therefore, the Tribunal will not consider the claim of the Claimant under this heading.

VII. STATE OF NECESSITY

A. POSITIONS OF THE PARTIES

205. In the hypothetical case that the Tribunal might find that the Respondent had breached the Treaty by adopting the Measures, the Respondent argues that its conduct was licit and exempt of responsibility because the Measures were taken

in response to a state of necessity. The Respondent bases this defense on the cases of the *Neptunus*, *Compañía de Ferrocarriles de Venezuela*, the *Russian Indemnity*, *Dickinson Car Wheel Company*, *Société Commerciale de Belgique*, *Gabcikovo-Nagymaros Project* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The Respondent notes that its counterpart to the Treaty has itself relied on this defense in the cases of the *Caroline* and the *Torre Canyon*.

206. The Respondent then refers to the conditions set forth in Article 25 of the Draft Articles for the admissibility of the necessity defense. In *Seriatim* the Respondent addresses each of these conditions. First, the Respondent alleges that it did not contribute to the state of necessity. It argues that such contribution has to be substantive since in a situation of economic collapse one can always find some measures that could be blamed for contributing to the crisis. A strict interpretation of this requirement would render the possibility of claiming the necessity defense worthless. In this case, the Argentine crisis was created by an explosive cocktail of external factors such as the increase in the dollar rate of interest, collapse of emerging markets, devaluation of the Brazilian currency, fall of prices of exported goods, etc. The Respondent had no participation or an insignificant participation in these developments and clearly had no intention to provoke a crisis of which the Argentine Republic is the main victim.
207. Second, the Respondent argues that the measures it took were the only way to address an essential interest in the face of serious and imminent danger. The Respondent adduces the opinions of distinguished economists that the

pesification was the right manner to address the crisis, and contends that the favorable evolution of the economy since the later part of 2002 shows that the measures taken were proportionate and reasonable in the context of the emergency suffered by the country.

208. Thirdly, no essential interest of the State counterparty of the Treaty or of the international community as a whole has been seriously affected. The Respondent explains that the purely patrimonial interests at play, the context in which they have been affected and the non-discriminatory nature of the measures taken cannot constitute a violation of the rights of the State counterpart, which in no case has made this argument.

209. Fourthly, as already explained earlier, the foreign investors have not been treated differently from the national investors and the Claimant has been treated like all other companies which have invested in the electric power sector.

210. Finally, there is no provision in the Treaty which eliminates or restricts the necessity defense. On the contrary, Article 4 of the Treaty foresees and regulates one of the instances which may occur in a state of necessity.

211. In its Reply, the Claimant contests that the conduct of the Respondent may be excused under its self-proclaimed emergency, either under Article 4 of the Treaty or the necessity defense. It is the view of the Claimant that a State may not avoid international responsibility by pleading emergency rule under its domestic law, even if such excuse were condoned by its Constitution. It is also the view of the Claimant that Article 4 of the Treaty is limited to cases of physical destruction of property caused by force and in circumstances of armed conflict. The

Claimant contends the Respondent's position makes a mockery of the very notion of emergency which by definition is a temporary state of affairs which involves a danger that arises unexpectedly and requires urgent action. According to the Claimant, the Respondent has misconceived the necessity doctrine under international law, which, in addition, is a defense that cannot be invoked against a United Kingdom investor due to the consistent objection to such defense by the United Kingdom, aside from the fact that the Respondent cannot make out its constitutive elements. The Claimant considers it preposterous that the Respondent's continuous allegation of a state of necessity while, at the same time, prepays in cash its debt to the International Monetary Fund of US\$9.5 billion.

212. As regards Article 4, the Claimant argues that as recognized in *AAPL*, the aim of such provision is limited and refers to instances of compensation afforded to domestic and third-party investors. Contrary to the Respondent's contention, the Claimant looks in vain in the text of Article 4 of the Treaty for any exculpatory language. Said article lacks the language of Article XI of the US-Argentina BIT: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order [...] or the protection of its own essential security interests." Article 4 of the Treaty does not preclude but affirms certain advantages to qualifying investors. The absence of such clause is consistent with the United Kingdom's refusal to accept the necessity defense under international law.

213. The Claimant finds that its interpretation of Article 4 of the Treaty is confirmed in *CMS* where the tribunal dismissed the Respondent's submission and held that the plain meaning of the article in question was to provide a floor for the investor: "The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner."⁷⁶ According to the Claimant, this provision created an entitlement to compensation where none would otherwise exist or simply, as held in *AAPL*, confirming an entitlement to compensation that arises under other provisions of the Treaty. Also according to the Claimant, this reading of *AALP* is confirmed in *AMT*, where the tribunal held that this provision reinforces the engagement of the State to ensure the protection and security of the investments.
214. Then the Claimant places Article 4 in the context of the Treaty and explains that Articles 2(2) and 5(1) contain unqualified obligations with no reference to Article 4. Article 2(2) requires fair and equitable treatment "at all times." There is no connection between Article 4 and the other two articles; Article 4, therefore, has an entirely different function.
215. The Claimant argues further that Article 4 is in the nature of provisions which refer to "war and civil disturbance clauses" or "losses due to war" clauses. This is clear also in the case of *AAPL* relied on by the Respondent. The term "national emergency" is interposed between words which refer to circumstances of physical strife and read in its proper context "unmistakably indicates a

⁷⁶ Reply, para. 474.

nationwide situation of physical conflict and insurrection of such proportions as to constitute an emergency. Article 4 of the Treaty refers to losses directly occasioned by action taken in such an emergency –i.e., forcibly action– and not to regulatory measures taken to address political and economic difficulties.”⁷⁷

216. The Claimant also refers to a 1998 UNCTAD report which shows clearly that the term “national emergency” may not refer to economic situations. This study explains that:

“The inclusion of a provision on compensation for losses by war and civil disturbance in BITs is justified because situations of war or civil war are often exceptions to insurance contracts (or may need specific coverage) and are often treated differently from government action in time of peace. Requisition by the army in time of war may not be covered by provisions on expropriation in normal circumstances.”⁷⁸

217. The Claimant further alleges that the destruction of its investment is not a loss “wing to a state of emergency.” The Claimant explains that it does not complain of any losses caused by the economic situation in the Argentine Republic; its claims are specifically related to the Measures and, therefore, Article 4 is not relevant to the Claimant’s loss.
218. The Claimant argues that the Respondent has paid compensation in some form to other investors and not to Transba or Transener and, hence, if Article 4 were in any way applicable, the result would be to extend to the Claimant’s investment the same treatment rather than to exonerate the Respondent from responsibility.

⁷⁷ Reply, para. 486. (Emphasis added by Claimant.)

⁷⁸ UNCTAD survey, *Bilateral Investment Treaties in the Mid-1990s* (1998), p.75. (Claimant Legal Authorities LA-141.)

219. The Claimant contends that, even if the Tribunal were to accept the Respondent's views on the meaning of Article 4 of the Treaty, it is entitled to receive treatment not less favorable than other investors protected by BITs under the MFN clause of the Treaty. In this respect, the Claimant draws the attention of the Tribunal to the Spain-Argentina BIT which does not include a clause similar to Article 4. Accordingly, this Tribunal should disregard Article 4 to the extent that it might in any way lessen the protection afforded to the Claimant and its investment.
220. The Claimant then turns to the plea of necessity argued by the Respondent. First, the Claimant asserts that the Respondent does not argue that it was objectively impossible to respect the commitments accorded to its investment but that the circumstances gave it a right to ignore these commitments. As stated by the ICJ in the *Gabcikovo-Nagymaros Project* case, the ground of necessity as a basis for precluding wrongfulness can only be accepted on an exceptional basis. It is the view of the Claimant that the Respondent must prove the necessity that it has invoked and the standard of proof is higher than the balance of probabilities test.
221. The Claimant reviews the jurisprudence on the state of necessity and explains that, despite the ICJ's express recognition that Article 25 of the Draft Articles is expressive of international law, in *Gabcikovo-Nagymaros* and the *Wall in Occupied Palestine* the defense failed on the facts. The Claimant points out that the same fate was met by the plea of necessity in *CMS* and *Enron*. In the *Russian Indemnity*, the parties agreed that in certain circumstances international

law permits the necessity defense but the tribunal also dismissed that plea on the facts. In *Socobelge* and the *Dickinson Car Wheel Company* the plea of necessity was *obiter dicta*; and in the *French Company of the Venezuelan Railroads* the claim was dismissed because the acts on which the claim was based were not attributable to the State.

222. The Claimant notes that the Respondent has failed to refer to the *Serbian Loans* case where the PCIJ held that:

“The economic dislocations caused by the war did not release the debtor State [from the payment of bonds], although they may present equities which doubtless will receive appropriate consideration in the negotiations and –if resorted to– the arbitral determination for which Article II of the Special Agreement provides.”

From this holding the Claimant draws the consequence that, if the Serbian government was not excused from economic dislocations caused by war, then, *a fortiori*, it should be clear that the economic and social upheaval experienced by the Argentine Republic in 2001 and 2002 does not excuse the Respondent from complying with its international obligations.

223. The Claimant further points out that the Respondent fails to mention the *Orinoco* case which confirms that necessity may excuse the breach of an international obligation but compensation, nevertheless, needs to be paid for the breach. Furthermore, in *CMS* the tribunal recognized that the plea of necessity does not provide a license for a State to pass on the cost of necessity to an innocent party.
224. The Claimant argues that the necessity defense has to fail *ab initio* because the international obligation breached does not permit the invocation of necessity

unless the invoking State has not contributed to the state of necessity. The Claimant contends that Articles 2(2) and 5(1) are intended to protect investors precisely in times of economic emergency and that the object and purpose of the Treaty prevail over any plea of necessity as accepted in *CMS* which dismissed the plea on facts similar to those invoked by the Respondent in this case. Furthermore, the commitments made to the Claimant were designed to shield the investor from precisely the kind of economic and monetary emergency now claimed by the Respondent. In support of its allegation the Claimant refers to the *Himpurna* case and the commentary of the ILC on Article 25(2)(a) of the Draft Articles.

225. Then the Claimant addresses the issue of the contribution of the Respondent to bring about the alleged emergency situation. It is the Claimant's view that the Respondent admits that it contributed to the emergency situation as recognized by *CMS* which concluded that "government policies and their shortcomings significantly contributed to the crisis while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter."⁷⁹
226. The Respondent claimed that foreign financial markets should have foreseen the risk of an economic shock and that it obviously had no intention to create a situation in which the Respondent itself was the primary victim. As regards the first point, the Claimant considers that this argument lacks merit in the context of the necessity plea and that the Government, which was even better placed to

⁷⁹ *CMS v. Argentina Award*, para. 329.

foresee the risk, did not identify it. The Claimant also dismisses the second point because it is not a matter of the Respondent's intentions but a purely objective question.

227. The Claimant alleges that mere help or contribution to the situation of necessity is sufficient and it points out that the ICJ dismissed the plea upon finding that Hungary had "helped, by act or omission, to bring" about the alleged situation of necessity.
228. While it is the Claimant's submission that as a matter of law and fact the Respondent is barred from invoking the plea of necessity, even if the Respondent were able to make such a plea it would have to satisfy the strict requirements of Article 25(1). The Claimant alleges that the Respondent has not met them. The Claimant contends that it is impossible for the Respondent to show that the Measures were the only means available to face a "grave and imminent peril." The Respondent had other options and chose, instead, to place an unfair burden on public utilities, most of which were controlled by foreign enterprises.
229. The Claimant denies that there was a "grave and imminent peril" to the Argentine Republic's society and institutions. The difficulties in 2001 and 2002 were the result of chronic economic problems and the culmination of a process of decline; and even at its worst, when put in perspective, the crisis is not harsher than the crisis endured by Indonesia in 1998 when the rupee was devalued by 80%. The Claimant points out that institutions and social fabric survived the crisis intact. The Measures were not taken in response to public protests but the other way

around; public protests had their origin in measures taken by the Respondent which exacerbated the situation. As stated in an IMF study “Especially damaging was the government’s announcement on February 3 [2003] that bank’s assets and liabilities would be subject to asymmetric ‘pesoization.’”⁸⁰ According to the Claimant, in a few months at the end of 2001 and early 2002 the Argentine Republic’s institutions and population faced “the results of several years of misguided economic policies and chronic problems that had been allowed to fester,”⁸¹ but there was no threat to the existence of the Argentine Republic as a nation and its institutions continued to function. The unemployment and poverty indices which rose alarmingly in 2001 and 2002 reversed rapidly after the crisis.

230. In any event, argues the Claimant, a plea of necessity operates only temporarily. While the Measures remained in force, the President of the Argentine Republic has stated that economic recovery began in the second quarter of 2002. In view of the strong recovery, the Respondent finds itself in the unseemly position of advertising its continuing growth since 2002 for the purpose of attracting fresh foreign investment, insisting all the while, for other purposes, that it finds itself in a state of necessity. According to the Claimant, the “emergency” is maintained solely to justify continuation of the Measures against foreign investors in the public services: “Argentina’s primary consideration was (and continues to be) to minimize domestic political and economic cost, at the expense of (non-voting) foreign investors like National Grid.”⁸²

⁸⁰ Quoted in the Reply, para. 552.

⁸¹ Reply, para. 554.

⁸² *Ibid.*, para. 563.

231. The Claimant points out that international tribunals have required a high burden of proof to establish successfully that measures taken to safeguard an essential interest against a grave and imminent peril were the only means available. It is the contention of the Claimant that reasonable alternatives to the Measures were open to the Respondent. The very purpose of the dollar-calculated remuneration was to insulate Transener, Transba and their shareholders from the impact of future decisions to abandon the peso:dollar parity. The Claimant contests the logic of the Respondent's argument that, if convertibility became inevitable, then it necessarily followed that public-service tariffs needed to be pesified and frozen at their nominal rates. The Claimant points out, for example, that the Government did not intervene to regulate or subsidize basic consumer goods. The Claimant observes that "Argentina asks the Tribunal to rely exclusively on its own self-serving and unsupported assertions, without inquiring what other measures could have been adopted instead of those that were actually adopted."⁸³ According to the Claimant,

"the Measures were designed without any regard for the catastrophic impact that they would have on Transener and its shareholders. Rather than trying to protect vulnerable citizens, the Measures were intended to cross-subsidize Argentine producers and industrial consumers, and so revive Argentina's economy at the expense of foreign investors like National Grid –and at no cost for Argentina. On this basis alone, the Measures can find no foundation in ILC Article 25."⁸⁴

⁸³ *Ibid.*, para. 583.

⁸⁴ *Ibid.*, para. 585.

232. The Claimant further argues that in accordance with Article 27 of the Draft Articles, even an appropriate declaration of necessity brings about an accompanying obligation to make full compensation for the non-compliance with the international obligation concerned. The Claimant takes issue with the finding on necessity by the *LG&E* tribunal and contends that it is irrelevant because it is based on Article XI of the US-Argentina BIT which has no equivalent in the Treaty and underlines that the Respondent may not rely on the customary law defense of necessity. Furthermore, according to the Claimant, the *LG&E* tribunal erred in reversing the onus of proof by placing the burden on the claimant to demonstrate that the Respondent was not in a situation of necessity and also by making an erroneous finding concerning when the crisis ended. The Claimant finds somewhat puzzling the holding that the crisis ended in April 2003, when President Kirchner was elected, puzzling since the President himself has acknowledged that the crisis ended in the second quarter of 2002.
233. The Respondent further develops the argument on state of necessity in its Rejoinder. The Respondent questions the reference to the payoff of IMF debt since it occurred 28 months after the Claimant took the decision to sell its shares in Transener. The Respondent explains that the state of necessity analysis should be limited in time to the date when the Claimant took its decision to sell. The Respondent observes that the Claimant has justified the sale of shares in terms of its obligation to mitigate harm, but this charade may be maintained only up to the date when the decision to sell the shares was taken, since it is obvious that the value of the shares increased substantially later on.

234. The Respondent emphasizes that the dimensions and depth of the collapse of its economy were such that the UN General Assembly took the unusual step of reducing the Respondent's required contribution to the UN budget. The Respondent questions the comparison of growth rates presented by the Claimant and points out that in none of the other countries there had been a decrease of about 25% in GNP in the years 1999-2000.
235. Then the Respondent proceeds to rebut the Claimant's interpretation of Article 4 of the Treaty. The Respondent argues that a situation of emergency must be distinguished from the other circumstances covered in this article. Indeed, if a state of national emergency were synonymous with war or civil disobedience, there would be no need to add to those terms. Because those terms were added, the expression "state of national emergency" must be given meaning in order to construe properly the Treaty. The Respondent adds that it had a consistent practice of referring to situations of national emergency in its bilateral investment treaties. As indicated above, the fact that there is an enumeration of categories of emergencies in a certain order in Article 4 of the Treaty must mean that the concepts enumerated are not identical, as maintained by the Claimant. The Respondent then proceeds to the textual analysis of this provision based on the Dictionary of the Spanish Royal Academy and points out that the term "emergency" implies a situation of danger or of disaster which, irrespective of its cause, requires immediate action at the national level. Therefore, its meaning cannot logically be limited to mean only physical insurrection. Following Article 31.1 of the Vienna Convention, the Respondent analyzes the context in which

national emergency is used and observes that the circumstances covered in Article 4 of the Treaty are unusual or exceptional circumstances in general and not only situations derived from a war or civil unrest; national emergency is a wider concept and may come about because of economic, financial, social or institutional questions.

236. The Respondent contends that the fact that the Treaty does not specifically include measures undertaken to assure public order or the protection of essential security interests does not mean that the exercise of such power by the State is not permitted under the Treaty. It is well known that the police power of the State exists independently of its inclusion in the Treaty. In *ELSI* the ICJ stated that “Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like.”⁸⁵ The Respondent argues that it is not possible to infer that the parties to the Treaty were limiting their capacity to handle emergencies and other similar powers. It is necessary to seek a harmonization of the applicable norms and to find a balance between the investors’ rights and the powers of the State as Articles 4 and 8(4) of the Treaty do. This harmonization, for instance, would mean that, in the case concerning the standard of fair and equitable treatment, what is fair and equitable in ordinary times is not the same as what is fair and equitable in an emergency.
237. The Respondent disagrees with the statement of the Claimant that the absence in the Treaty of a provision equivalent to Article XI of the US-Argentina BIT is a reflection of the traditional position of the UK rejecting the state of necessity

⁸⁵ *U.S. v. Italy (Electronica Sicula Spa [ELSI] case)*, 1989 ICJ Reports 15 (July 20, 1989) [hereinafter, *ELSI*], pp. 74-75.

defense. The Respondent maintains that the UK has actually invoked this doctrine in several international conflicts and was in favor of including it in the Draft Articles to rule out illegality of certain types of conduct.

238. The Respondent considers that the facts in *AMT* have no bearing on the situation of the instant case and considers the conclusions arrived at by the tribunal in that case to be inapplicable here. As for the relationship between Articles 2 and 4 of the Treaty, the Respondent argues that the existence of Article 4 indicates that the principles and obligations set forth in the rest of the Treaty relate only to normal situations and not to circumstances where there is a crisis. Since in such situations a State may restrict even certain basic human rights, it would appear contrary to reason that a State could not restrict the application of certain norms regarding foreign investment. To maintain otherwise, reasons the Respondent, would mean to consider the law of foreign investment as *ius cogens*.
239. The Respondent also denies that it provided compensation to other investors as alleged by the Claimant. The Respondent points out that not all remuneration systems directly affected the general economic interests of Argentine society: for example, an airport tax, which affects very few users, cannot be compared with gas, electricity or water tariffs, which affect all the population. Where certain dollar tariffs survived, they did so because there was economic capacity to pay them and their level therefore constituted a just and reasonable tariff.
240. The Respondent then turns to state of necessity under international law and questions, on two separate grounds, the constant objection by the United Kingdom argued by the Claimant. First, the Respondent notes that the Claimant

is a private party and that only a sovereign could raise such objection, and second, there is scarce practice where the doctrine of the constant objection has been recognized. As for the statement of the Claimant that there are no modern instances in which respondent parties have argued the defense of necessity successfully, the Respondent points out that there have been no cases comparable to the emergency in the Argentine Republic.

241. The Respondent also contests the relevance of the case of the *Russian Indemnity*. The Russian claim is not comparable in terms of the magnitude of the external debt of the Argentine Republic or the Argentine crisis in general. The tribunal in that case rejected the necessity defense because the total sum owed by Turkey did not affect or put in danger the Turkish State, while the claims against the Argentine Republic would destroy the budget equilibrium, undermine its economic and financial system and affect its recuperation from the crisis.
242. The Respondent observes that the Claimant minimizes the decisions that recognized the necessity defense by pointing out that in those cases the pertinent causes were not in any way attributable to the State. The Respondent in turn draws the attention of this Tribunal to the fact that in such case law it is generally accepted that businessmen need to consider the possible causes of unrest and take them into account beforehand when making their decisions to enter a particular country.
243. The Respondent also comments on two cases adduced by the Claimant and not mentioned by the Respondent in its Statement of Defense because they were not considered relevant: the cases of the *Serbian Loans* and the case of the

Compañía General del Orinoco. The situation of the *Serbian Loans* again is not comparable to that of this case. It is true that the PCIJ decided that if payment could not be made in gold francs then payment could be made for an equivalent amount of francs, but in this case the Argentine Republic could not satisfy the claims without impairing the economic, financial and social stability of the State. It is also true that the PCIJ held, as recognized by the Claimant, that economic disruptions caused by the war could give rise to equitable considerations which would be considered in a later phase of the case.

244. As to the *Orinoco* case, Venezuela could compensate the claimant for the damages without endangering an essential interest of the State, which is not the case here. The facts are also totally different, since Venezuela had given to the claimant a license to operate with complete freedom in a part of its territory disputed by Colombia and subject to arbitration. Venezuela did not allege necessity but rescinded the contract first and then annulled it.
245. The Respondent refers approvingly to the determination of the severity of the Argentine crisis by the *LG&E* tribunal. As regards the “essential interest” requirement in Article 25(1)(a) of the Draft Articles, the Respondent observes that in the Commentary on the Draft Articles, the issue of whether an interest is essential depends on the overall circumstances of the case and cannot be pre-judged. Furthermore, in the words of Professor Ago, who was at one point special *rappporteur* of the ILC on State responsibility, an “essential interest” should be exceptional but not be limited to those instances that endanger the continuity of the State. The Respondent also finds support in the case of

Gabcikovo-Nagymaros where the ICJ stated that protection by the State of its environment qualifies as an essential interest under Article 25 of the Draft Articles even where it is limited to a specific region and not all the territory of the State. In the instant case, the actions of the Respondent had as an objective the protection of social stability and the maintenance of essential services vital to the health and welfare of the population, an objective which is recognized in the framework of the international law of human rights.

246. As to the requirement that there be a serious and imminent danger, the Respondent points out that, at the time the Measures were adopted, the Respondent had previously adopted many measures without achieving the desired results. It also cannot be ignored that the Respondent had been drifting for many months and that, at one point, it had five presidents in five days.
247. The Respondent rebuts the understanding of the Claimant of the requirement that the measures taken must be the only way to address the situation. The Respondent considers that this term cannot be interpreted *in extremis* and that such provisions do not permit international tribunals to substitute their judgment for that of the State, acting in a crisis, which had been forced to confront and choose among contradictory priorities. Seeking support from the jurisprudence of the European Court of Human Rights, the Respondent contends that States must be accorded a margin of appreciation in the manner that they handle their affairs, which has been recognized by the European Court of Human Rights. The Respondent also adduces that the Argentine Supreme Court has validated

the Measures in view of a crisis of a gravity never before experienced (cases *Massa, Bustos and Rinaldi*).

248. The Respondent contends that the requirement that a State did not contribute to the crisis must be applied only in those situations in which the contribution of the State was substantial, not merely incidental or peripheral as recognized in *LG&E*. The Respondent differs from the holding by the *LG&E* tribunal regarding the continuation of the crisis. The Respondent maintains that the crisis produced serious and continuing effects, the standard of living has been reduced drastically, inflation is rising again, and the rate of exchange of the peso with the dollar must be maintained low to keep the country competitive.
249. It is not realistic, argues the Respondent, to return to the economic arrangements that existed before the crisis when the situation in the country bears no relationship to the situation when the Concession Contract was signed. Furthermore, the Respondent argues that, if the exemption from responsibility is limited to the period of emergency during which the Measures are taken, the *raison d'etre* of the doctrine of necessity disappears. The nature of the exceptional circumstances means that their repercussions will be long lasting, continuing well beyond the immediate crisis and still in place when National Grid decided to sell its shares.

B. CONSIDERATIONS OF THE TRIBUNAL

250. The Tribunal will address first the issue of the meaning of Article 4 of the Treaty and whether the term “national emergency” therein may be expanded to include an emergency beyond situations derived from war or civil unrest.

251. It will be useful to reproduce here in full the text of Article 4 of the Treaty which under the heading of "Compensation for Losses" reads as follows:

"Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable."

252. The Tribunal observes first that this article is concerned with compensation for losses in situations of national emergency and others referred to in the text. Second, it is also concerned with losses arising from arbitrary treatment. Third, the parties provide for at least national treatment of each other's investors or, if better, the treatment accorded to investors of a third State. Fourth, the parties envisage that any compensation will be freely transferable.

253. It is evident from the foregoing that the purpose of Article 4 is not to exclude compensation for losses arising from, among other situations, national emergency but rather the contrary. The commitment of the parties is to ensure that their respective investors do not lose out in such situations. In this respect, the Tribunal finds it significant that the losses due to war, armed conflict, etc. are lumped together with those arising from arbitrary treatment which would be in breach of Article 2(2) and give rise to a right to compensation.

254. Next, the Tribunal must address the significance of the absence in the Treaty of an equivalent provision to Article XI of the US-Argentina BIT. The issue for the

Tribunal is whether, as argued by the Respondent, the fact that the Argentine Republic entered into the Treaty detracts from its capacity to handle emergencies and other similar powers.

255. The Tribunal considers that, by concluding the Treaty with the United Kingdom, the Respondent did not limit its powers that as a sovereign it would have under international law except to the extent provided in the Treaty. What these powers are in the context of the state of necessity defense argued by the Respondent are best analyzed by turning to the conditions under which such defense is recognized under Article 25 of the Draft Articles, which both Parties agree reflect the current status of customary international law. Article 25 of the Draft Articles provides as follows:

“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of the State unless the act:

(a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously imperil an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity.”

256. Before considering whether the Respondent has proven that it meets these conditions, the Tribunal will address the Claimant’s contention that the necessity

defense may not be raised against the Claimant because the United Kingdom has consistently refused to accept it. The United Kingdom may have a tradition of opposing the state of necessity defense and it is possible that, as argued by the Claimant, an article such as Article XI of the US-Argentina BIT may be missing because of the practice of the United Kingdom in this respect. However, there is evidence that such practice has known exceptions and Professor Crawford refers to the case of the *1832 Anglo-Portuguese* dispute in which Portugal appropriated the property of British subjects based on the necessity argument. At the time, the British government was advised that the necessity justification “must depend upon the circumstances of the particular case, but it must be imminent and urgent.”⁸⁶ The Respondent has adduced other instances such as the *Caroline* and the *Torre Canyon* incident. This notwithstanding, the Tribunal is not convinced even if the practice was not subject to known exceptions, that this would prevent the other Contracting Party from raising the necessity defense. It is accepted that the Draft Articles represent current customary international law and, therefore, the necessity defense is admissible under the conditions listed in Article 25 of the Draft Articles. Since the Contracting Parties did not agree to exclude it under the Treaty, either of them is entitled to raise it.

257. The Tribunal will now proceed to examine whether the conditions of Article 25 of the Draft Articles have been met by the Respondent bearing in mind that, while the state of necessity has been accepted by tribunals as an admissible defense

⁸⁶ J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (2002), p. 179.

in theory, it has rarely been found to exist in practice because of its exceptional nature. In the words of the Commentary to the Draft Articles, “necessity will only rarely be available to excuse non-performance of an obligation and ... it is subject to strict limitations to safeguard against possible abuse.”⁸⁷

258. The Tribunal will consider first the threshold question of whether the Respondent contributed to the situation of necessity which it now raises in its defense. In the Commentary to the Draft Articles, it is stated that such contribution “must be sufficiently substantial and not merely incidental or peripheral.”⁸⁸ The Claimant has pointed out that the ICJ rejected Hungary’s necessity defense in the *Gabcikovo-Nagymaros Project* case because it had “helped” to bring about the situation in question, and has interpreted “helped” to mean that mere help in the development of the crisis would make the necessity defense inadmissible. On the other hand, the Respondent has argued that:

“If this non-contribution requirement was interpreted in a way that any contribution from the state, even those unintentional or indirect, gave rise to the requirement unfulfilment [sic], in practice, it would imply the impossibility of states to resort to the state of necessity as a circumstance excluding wrongfulness. With respect to the state of necessity due to economic reasons, a reasonable interpretation of the requirement is specially important. In which general economic crisis of a state is it possible to state that there was no contribution from authorities, even through the lack of foreseeability [sic] and by failing to adopt all the necessary measures to reduce the effects of the crisis?”⁸⁹

⁸⁷ *Ibid.*, p.178.

⁸⁸ *Ibid.*, p. 185.

⁸⁹ Statement of Defense, para. 532.

259. The Respondent's expert has outlined six external elements which contributed to the crisis: the slowdown of capital flows to emerging markets after the Asian and Russian crises, the ensuing economic weakness of commercial partners of the Argentine Republic, in particular Brazil, the devaluation of the Brazilian currency early in 1999, the strengthening of the dollar between 1998 and 2001, and the restrictive monetary policy of the US from mid 1999 to mid 2000.⁹⁰ However, the same expert also refers to internal factors such as the fiscal deficit, indebtedness, which may have been caused only in part by external factors, and structural vulnerability, including a relatively closed economy because of a long history of internally oriented commercial policies, rigidity of the labor market, and the high coefficient of external debt to exports, which showed the problematic sustainability of the external debt.⁹¹
260. The evidence before the Tribunal shows that the crisis was caused by internal and external factors and that these factors were substantive and direct. As noted in the evaluation of the crisis by the IMF,⁹² both types of factors played a role and their importance varied over time but they all had a significant part in contributing to its seriousness. Internal factors such as external indebtedness, fiscal policies or labor market rigidity were under the control of the Respondent and created a fertile ground for the crisis to develop when in the late nineties the external factors adduced by the Respondent came to play. The Respondent's response to the crisis further contributed to it. In the words of the IMF study, the crisis was

⁹⁰ Report of Alfredo Roubini, pp. 7-9.

⁹¹ *Ibid.*, pp. 7 and 10-12.

⁹² IMF, *Lessons from the Crisis in Argentina*, October 8, 2003, Exhibit C-252.

“exacerbated by a series of policy mistakes...notably the capital controls, the *corralito* and *corralón*, and the asymmetrical pesoization and indexation.”⁹³

Mindful of the categorical terms of paragraph 2(b) of Article 25 of the Draft Articles, the Tribunal concludes that the Respondent has failed to show that it did not contribute to the situation of necessity on which it based its defense.

261. This conclusion is shared by the tribunals in *CMS*⁹⁴ and *Enron*.⁹⁵ On the other hand, the *LG&E* tribunal determined otherwise. In this respect, the Tribunal observes that in that case, the tribunal had previously reached the conclusion that a situation existed under Article XI of the US-Argentina BIT which provides that said treaty does not preclude “the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.” After determining that the protections under Article XI applied in the *LG & E* case, the tribunal notes that “satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC’s Draft Articles on State Responsibility) supports the Tribunal’s conclusion.”⁹⁶ Then as it proceeds to analyze the requirements under this article and, as regards the State’s contribution to the crisis, the *LG&E* Tribunal considered that the “Claimants have not proved that the Respondent has contributed to cause the severe crisis faced by the country.”⁹⁷ Thus, that

⁹³ *Ibid.*, para. 77.

⁹⁴ *CMS v. Argentina Award*, para. 538.

⁹⁵ *Enron v. Argentina Award*, para. 312.

⁹⁶ *LG&E v. Argentina*, Decision on Liability, para. 246.

⁹⁷ *Ibid.*, para. 256.

tribunal placed on the claimants the burden of proof of an allegation made by the Respondent. The lack of an article in the Treaty equivalent to Article XI and the fact that the Tribunal considers it to be the burden of the Respondent to sustain its allegations may explain the different conclusion reached by the Tribunal.

262. Having found that the Respondent's own evidence shows that its contribution to the crisis was substantial, the Tribunal does not need to address whether the state of necessity alleged by the Respondent meets the other conditions set forth in Article 25 of the Draft Articles for its admissibility since these are listed as cumulative conditions: failure to meet any of them is sufficient ground to reject the necessity defense.⁹⁸

VIII. COMPENSATION

A. POSITIONS OF THE PARTIES

263. Claimant alleges that the proper measure of economic compensation for the Respondent's breaches of the Treaty should be the loss of fair market value (FMV) of the Claimant's investment⁹⁹ in the principal business of Transener resulting from the Measures.¹⁰⁰ Claimant maintains that until January 2002, Transener was a profitable going concern and that the Measures adopted by the

⁹⁸ See ICJ judgment in the case of the *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of September 25, 1997, ICJ Reports (1997), paras. 51-52.

⁹⁹ Fair market value has been defined as: "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts." *International Glossary of Business Valuation Terms*, American Society of Appraisers, ASA website, June 6, 2001, p. 4.

¹⁰⁰ Claimant's Post-Hearing Brief, pp. 21-22, para. 91; *CMS*, paras. 409-410; *Siemens*, paras. 353-355; and *Azurix*, para. 424.

Respondent resulted in serious losses which must be compensated. Claimant takes the position that the most appropriate way of determining these losses is to adopt a discounted cash flow (DCF) approach as applied to the Claimant's investment in the principal business of Transener. Accordingly, Claimant proposes, first, to calculate the value of this investment as of 1 January 2002 *without the Measures*, then subtracting the value of the said investment as of the same date. Claimant's approach acknowledges and assumes that both the devaluation of January 2002 and the associated economic down-turn did in fact occur, but seeks to isolate from these events the impact of the Measures. Claimant calculates the resulting loss in FMV at \$59,069,583.

264. Claimant maintains that the Award should also provide compensation for the opportunity cost of equity lost by the Claimant from January 1, 2002 to the date of sale of its ownership interest in Transener, August 18, 2004, on the ground that the Claimant was improperly deprived of the benefits of its investment during that period. Claimant's position is that it should therefore be compensated for the opportunity cost of that capital at the rate of 12.94% per annum which was Transener's approved return on equity as determined by Argentine regulatory authorities. The addition of this item of compensation would yield \$22,321,139 for a subtotal of \$81,390,722.
265. Finally, in order to compensate Claimant for the lack of use of the money owed to Claimant from August 18, 2004 to the date of payment by the Respondent, the above amount should be augmented by a factor representing the time value of money. According to Claimant, the appropriate rate should reflect the historical

return on equity which the Claimant has demonstrated that it could have earned if it had invested the above amount in its own business. Claimant seeks to demonstrate that the Claimant's rate of return on equity (as confirmed by U.K. regulators) is 10.9% per annum. This calculation would add to the subtotal of \$81,390,722 (as of August 18, 2004) the sum of \$31,009,278 for a total (updated to October 1, 2007) of \$112,400,000.¹⁰¹

266. The Respondent's analysis is markedly different. In addition to denying that the Respondent has violated Claimant's legal rights, the Respondent urges that if the Tribunal should nevertheless find otherwise, it should determine that the Claimant had agreed with Transener on a different standard of compensation as set forth in the agreements with Transener, establishing the transmission and distribution concession. Any compensation should therefore be limited to the proceeds of sale of the Claimant's shares.¹⁰² The Respondent further maintains that Claimant negligently overpaid in purchasing its interest in Transener, incurring indebtedness in an unnecessary and profligate manner. The Respondent maintains that Claimant proceeded at its own risk when it decided to invest in Transba and the Fourth Line (assuming whatever losses might be implicated in those risks), and finally, disposing of its interest in Transener in an unnecessarily hurried fashion, thereby incurring further self-inflicted financial injury.

¹⁰¹ Claimant's Post-Hearing Brief, para. 131, p. 30.

¹⁰² Respondent's Rejoinder, p. 199, paras. 775-778.

267. Respondent did not present its own model or methodology attempting to evaluate the financial impact of the Measures, submitting instead an expert report purporting to show at least four serious conceptual errors and four methodological errors in the analysis presented by Claimant's expert. Respondent concludes that no compensation is payable to Claimant.
268. Finally, Respondent urges that if, contrary to their analysis and conclusions, the Tribunal should nevertheless find that any compensation is payable to Claimant in some amount, that any interest assessed should be simple interest at a normal commercial rate as provided for in Article 5 of the Treaty, such as LIBOR (the London Inter Bank Offering Rate) or the rate applicable to U.S. Treasury bills.

B. CONSIDERATION OF THE TRIBUNAL

269. Article 5 of the Treaty provides guidance regarding compensation for expropriation which the Tribunal does not find to be present here. The Treaty does not, however, provide much guidance regarding compensation standards for other kinds of violations. Thus, the Tribunal needs to revert to the principles of compensation under customary international law as reflected in the Draft Articles reflect customary international law. Article 31(1) of the Draft Articles provides:

“The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”

270. The Commission's commentary (at (2)) on this article refers to the following statement of the Permanent Court of International Justice in *the Factory at Chorzów* case:

"The essential principle contained in the actual notion of an illegal act...is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."¹⁰³

271. The Tribunal has been greatly assisted by the Parties in its study of the compensation issues involved in this case. Claimant presented as its principal expert on valuation and compensation Mr. John Wood-Collins. Mr. Wood-Collins submitted an extensive report setting forth his calculations and reasoning in support of the request of Claimant. Respondent presented several expert witnesses on the issues of valuation and compensation, including, *inter alia*, the declarations of Professors Molina, Bello, Gallino and Sruoga. The Tribunal has studied all of these experts' declarations carefully and has engaged its own expert, Professor A. Louis Calvet, whose Draft Report benefited from the comments of the Parties and the Parties' own experts. It has also had the benefit of observing each of the experts being cross-examined extensively by opposing counsel and has had the opportunity to ask questions of them directly. The Tribunal is grateful to all of the experts for their contribution to our understanding of this matter.

¹⁰³ *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)*, Judgment on the Merits, September 13, 1928, PCIJ Series A, No. 17, p. 47, cited in the International Law Commission's *Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, available at <http://www.un.org/law/ilc>.

272. The Tribunal has reviewed carefully the experts' reports and will refer to them to the extent that the Tribunal considers them relevant to its considerations.
273. The Tribunal will deal first with the Respondent's argument that the sale of the Claimant's interest in Transener to Dolphin was not a reasonable business decision intended to mitigate damages, but rather a negligent and even purposeful attempt to inflict a serious economic burden on the Respondent. Suffice it to say that the Tribunal finds no evidence that the Claimant sold its interest in Transener for a price other than the best price it could obtain in the circumstances. Regarding the allegations that it incurred a self-inflicted wound in lieu of accepting the pre-conditions to renegotiation established by UNIREN, the Tribunal does not intend to interpose its business judgment for that of the owners at the time. The Tribunal further takes note that the Claimant made an express declaration to the effect that the sale of its shares was being made without prejudice to the results of its arbitration claim before this Tribunal. Furthermore, the Respondent made it known at the time of the sale that it would hold buyers of shares, such as Dolphin, responsible for any compensation awarded to claimants such as National Grid. There seems to be little doubt that announcements of this sort would have weighed on the price paid by Dolphin, or any other buyer, pressures which would not seem to have been present in other comparable transactions.
274. The Tribunal turns now to the task of assessing the quantum of compensation for breach of Respondent's obligations under the Treaty to provide "fair and equitable treatment" as well as "protection and constant security". According to

the compensatory principles set forth above, the compensation should reflect the loss of value of the Claimant's shares in Transener as a result of the Measures and other actions taken by the government of the Argentine Republic. As indicated above,¹⁰⁴ the Tribunal recognizes that the Measures were taken at a time of economic crisis and that it is part of the task of the Tribunal, in calculating the quantum of compensation, to assess the effect of such crisis, irrespective of the Measures, on the application of the Regulatory Framework. The Claimant has attempted to deal with these complicated factual circumstances through the presentation of the so-called "Without Measures" scenario.

275. The first task of the Tribunal in determining the quantum of compensation is to select among the many valuation methodologies available including "book value," "asset value or replacement cost," "comparable transaction value," "option valuation," "discounted cash flow," and variations on all of the above. Respondent has argued in favor of valuing Claimant's interest in Transener through the use of "comparable transaction value," making use of data from transactions concluded on the Buenos Aires stock exchange¹⁰⁵. Without attempting to engage in an exhaustive evaluation of each of these various approaches, the Tribunal finds that there is a broad consensus that where, as here, the problem presented is not to fix the value of a fixed asset, but instead to

¹⁰⁴ See, e.g. para. 180, *supra*.

¹⁰⁵ This latter approach has been criticized by Claimant's expert on several grounds, including the "thinness" of the market, the limited number of transactions and number of shares traded, and finally, the inclusion of data on sales of shares which occurred years after the Dolphin sale (when the "new" Transener was operating in an entirely new tariff environment and had been shorn of approximately one-third of its debt).

determine the loss, if any, of fair market value of an operating business entity,¹⁰⁶ there is considerable merit in using the Discounted Cash Flow (DCF) method. Indeed, this approach has been endorsed in principle by the Respondent's own expert¹⁰⁷ and was applied by ENRE to determine the RAB of Transener in the first five-year tariff review.

276. The DCF method, while not without its drawbacks, has the advantage of realistically assessing the economic value of a going concern by relying on the stream of value that it can generate over its operative life. In order to function properly, the DCF approach requires that the concern in question must have a history of profitable operation.¹⁰⁸ This does not appear to be a major issue in this case, since Transener has a history of almost nine years of successful operation.¹⁰⁹ A second potential drawback is that the DCF methodology necessarily involves projecting future cash flows—calling for considerable

¹⁰⁶ See definition of “fair market value” under footnote No. 102, *supra*.

¹⁰⁷ Declaration of Fabián Bello, Hearing Transcript in Spanish, 8th. Day, July 18, 2007, pp. 2055-2056.

“Question: *Señor Bello: En los casos anteriores de CMS y BG [contra Argentina] usted estuvo de acuerdo con el señor Wood-Collins en cuanto a la superioridad de la metodología de flujo de caja descontado frente a cualquier otra metodología.*

¿Ha cambiado su punto de vista al respecto desde aquel entonces?

Señor Bello: No, lo acabo de aclarar recién cuando contesté recién que sigo sosteniendo que el método más adecuado para valorar una empresa es a través de una valuación por descuento de flujos de fondos en sus distintas modalidades y pueden plantearse distintas hipótesis y cada uno puede tener su opinión de cuál debe ser la modalidad más adecuada para valorarlo.

Pero reitero que mi posición es la prevalencia del método de flujo de caja descontado por encima de cualquier otra opción de evaluación.”

¹⁰⁸ See *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/14), Award, December 8, 2000, Section 123.

¹⁰⁹ Obviously, the Transba and Fourth Line investments are more recent, but the principles of valuation are the same and the track record of Transener is helpful.

latitude for creativity and speculation as evidenced by the conflicting views of the experts engaged by the Parties and the Tribunal.

277. In the present case, however, this potential drawback is also less worrisome for several reasons. First, as indicated earlier,¹¹⁰ the Respondent's international solicitation for investments in the power sector in 1992 relied heavily on the Regulatory Framework which functioned smoothly until it was dismantled by the Measures. Indeed, the performance of Transener was reviewed in detail by ENRE in the ordinary (pre-crisis) 1998 five-year tariff review, which essentially ratified the rate structure and other regulatory parameters. ENRE's review recognized that Transener's operations were profitable and, also, that it had resulted in reduced outages and operating costs. Similar operating conditions and results continued through the end of its accounting period in December 2001.¹¹¹ In addition, in contrast to the examination of hypothetical market prospects for an investment in, for example, steel or automotive production, the situation of Transener is less subject to speculative projections for two reasons: first, the essential ground rules for establishing fair and reasonable tariffs had already been agreed to,¹¹² and second, because the power from Transener was

¹¹⁰ Paras. 176-177, supra.

¹¹¹ Exhibit CRA-8 to the Report of John Wood-Collins.

¹¹² The legal standards applicable to the ENRE process are established in Articles 40 and 41 of the Electricity Law (Law 24,065) which provide as follows:

"ARTICULO 40 – Los servicios suministrados por los transportistas y distribuidores serán ofrecidos a tarifas justas y razonables, las que se ajustarán a los siguientes principios:

- (a) *Proveerán a los transportistas y distribuidores que operen en forma económica y prudente, la oportunidad de obtener ingresos suficientes para satisfacer los costos operativos razonables aplicables al servicio impuestos, amortizaciones y una tasa de retorno determinada conforme lo dispuesto en el artículo 41 de esta ley..."*

sold not in the private commercial market, but rather to Cammesa, an agency of the Argentine government.

278. As is normal in utility regulation, ENRE determined the RAB for Transener and then relied on that RAB to establish tariffs at a level which, as called for in the Electricity Law, would allow the utility to recover its operating costs, amortization, taxes, and a reasonable rate of return. If this process is viewed “in reverse,” the DCF value of the “free cash” element of those future cash flows, properly discounted, will necessarily equal to the RAB. As determined by ENRE, the RAB in 1998 at the time of the first five-year tariff review was \$310.9 million.
279. For Transener, it is therefore, appropriate, as Claimant contends, to begin with the RAB and then adjust it to what it would have been in January 2002. For this purpose, Claimant’s expert calculated the free cash flows forward and discounted

“Article 40 – The services provided by transmission and distribution companies shall be offered at fair and reasonable tariffs, which shall be in accordance with the following principles:

- (a) They shall provide transmission and distribution companies operating economically and prudently with the opportunity to obtain sufficient revenues to meet reasonable operating costs applicable to the services, taxes, amortizations and a certain rate of return determined in accordance with the provisions of section 41 hereunder...”

“ARTICULO 41 – Las tarifas que apliquen los transportistas y distribuidores deberán posibilitar una razonable tasa de rentabilidad, a aquellas empresas que operen con eficiencia. Asimismo, la tasa deberá:

- (a) *Guardar relación con el grado de eficiencia y eficacia operativa de la empresa;*
- (b) *Ser similar, como promedio de la industria, a la de otras actividades de riesgo similar o comparable nacional e internacionalmente.”*

Article 41 – Tariffs applied by transmission and distribution companies shall include a reasonable profitability rate for those companies operating efficiently. In addition, such rate shall:

- (a) Be linked to the company’s degree of operating efficiency and effectiveness;
- (b) Be similar, as industry average, to the rates of other activities posing similar or comparable risks both at the national and international level.

them back to the valuation date. On this basis, the Claimant's expert, using January 1, 2002 as the valuation date, determined the free cash flows and terminal value of the concession at \$320.8 million. This seems a reasonable figure, bearing in mind the investments made by the Claimant during the intervening period since the 1998 review. However, this value is of limited use to the Tribunal, as will become apparent in the considerations below.

280. For Transener's 90% interest in Transba, the available data is more limited (and no RAB was ever calculated by ENRE), but using the same approach and reasonable assumptions regarding future tariffs and costs, the resulting cash flows and terminal value are calculated by Claimant's expert at US \$112.8 million.
281. Regarding the Fourth Line, data available for use in the DCF process is found not in operating results (because of the date of the award of the contract (November 1997) and time required to complete construction), but are found instead in the revenues agreed to be paid over the first 15 years of the Fourth Line contract (Fourth Line Canon) and, after that period, on the basis of the agreed tariff regime through 2088. These revenues, subject to certain appropriate adjustments, result in a DCF value for the Fourth Line investment of US \$218.2 million as of January 1, 2002.
282. Crucial to these calculations, of course, is the development and use of an appropriate discount rate. This process is complex and is the subject of a great deal of theoretical debate in the professions of economics and finance as reflected in the experts' reports and comments on the record in these

proceedings. The situation is complicated further, in this case, by the Argentine economic crisis of 2001-2002. Clearly, neither party could have anticipated the precise features of such a crisis, but no serious effort at valuation/compensation can ignore its potential impact on the business of Transener. Claimant recognizes this and makes a serious attempt to deal with this situation. Claimant points to the Regulated Asset Base and to the terms of the Electricity Law which required the determination of a reasonable rate of return. Claimant's expert then creates a hypothetical five-year period of gradual upward adjustment for electricity rates which, had it been adopted, could have allowed some relief for purchasers of electricity in the immediate aftermath of the crisis but still preserved the "economic equilibrium" of the concession.

283. The Respondent objects to these assumptions because (1) they involve an admittedly hypothetical construct, and (2) the governmental authority was free to establish such policies and priorities as it deemed necessary in the national interest, especially at a time of national crisis. Although it is, of course, correct that the Respondent, as a sovereign government, had the authority to take the measures it saw fit under the circumstances, it does not follow that, in taking such decisions, the Respondent was liberated from the legal consequences resulting from those measures. Since we have determined that the course of action adopted by the government did not comport with its treaty obligations, we are required to establish an appropriate legal remedy to compensate the Claimant.

284. While the “without Measures” scenario proposed by the Claimant is based, to a large extent, on the principles included in the Regulatory Framework, it is nonetheless a theoretical scenario which has been criticized by the Respondent deems unrealistic given the Argentine crisis. Equally theoretical, however, is the scenario used by the Respondent’s experts to show the bad timing of the sale to Dolphin and their attempts to establish that all would have been well for Claimant had it simply retained its investment until the worst aspects of the crisis had abated. Following Respondent’s line of reasoning, the value of the Claimant’s indirect shareholding in Transener would not have diminished had it waited to sell its shares until several years after January 2002 (for example, when Petrobras Energía agreed to the offer of Eton Park).
285. As suggested by Prof. Calvet’s Draft Report,¹¹³ the Tribunal believes that in these complex and difficult circumstances it is wise, apart from Claimant’s DCF analysis, to have access to other data or approaches which may be helpful. Mainly because of the uncertainties involved in the “without Measures” scenario, the Tribunal, while not discarding the analysis and conclusions of Claimant’s DCF approach, will also have recourse to the comparable transactions method of valuation.
286. Claimant’s expert has pointed out the inherent difficulties involved in finding comparable transactions given that electricity transmission is a natural monopoly, which means that, by definition, there are no other firms competing in the same market. He examines two sales of Transener shares, namely, the sale to

¹¹³ See e.g., para. 2.4.

Dolphin of Taico's 4.88% stake in Transener and the Petrobras Energía agreed sale of its 26.32% stake in Transener to Eton Park in June 2006. Claimant's expert finds this latter transaction of limited value because of the very different conditions existing at that time from those prevailing, *inter alia*, at the time of the sale of shares by the Claimant. The Tribunal agrees that this transaction is of limited value for the purpose of assessing the reasonableness of the price paid by Dolphin for the Claimant's shares. However, the Tribunal considers that the Petrobras transaction may be a useful reference price from a different perspective.

287. Indeed, the Tribunal finds that the price agreed by Petrobras Energía presents a useful proxy to assess the value of National Grid's shares at the time had certain adjustments been made to the debt of Transener and to the Regulatory Framework with the purpose of (1) recognizing the impact of the crisis on Transener and (2) attempting to carry out the intent and spirit of the Regulatory Framework. The Tribunal considers that the rise in the price of Transener's shares, which the Respondent has repeatedly pointed to as evidence of the poor timing of the Claimant's sale to Dolphin, actually provides valuable real-world data reflecting the effect of more normal market conditions and reduced uncertainty on the share price. By June of 2006, a tariff increase had been secured and Transener had been relieved of a large portion of its debt. While the Tribunal is mindful that these measures had nothing directly to do with the agreed Regulatory Framework, these important changes to Transener's financial situation demonstrate the kinds of measures which a country in crisis might have

adopted at an early stage of the crisis in order to reduce the uncertainty faced by Transener. Those measures resemble, at least in spirit, the kinds of adjustments which the Claimant's expert has tried to construct in seeking to establish a fair value for the Claimant's interest.

288. Thus, the Tribunal will consider the price offered by Eton Park for the shares of Petrobras Energía as a point of reference for the value of the Claimant's investment, relying on this value as a surrogate for the value shares of the company on June 25, 2002. The amount offered for the shares of Petrobras Energía was \$54 million for a 26.32% stake in Transener. Based on this price, the stake of the Claimant in Transener would have been worth \$52.8 million.¹¹⁴

The Tribunal adopts this figure as the market value as of June 25, 2002, in lieu of the Claimant's "Without Measures" valuation.¹¹⁵

289. As indicated earlier, the Tribunal, in reaching these conclusions, has carefully studied the reports and declarations of each of the experts as well as the presentations of legal counsel. In lieu of relying directly or solely on the opinion or valuation of any of the experts, we have made use of their opinions and compared them to available market information. In so doing, the Tribunal has attempted to carefully evaluate the reasonableness of its conclusions. For example, in using this valuation derived from the Eton Park/Petrobras

¹¹⁴ Report of F. Bello and F. Molina, para. 228.

¹¹⁵ The Tribunal is aware that, by using this figure as the market value to reduce the "Without Measures" values arrived at by Claimant's expert based on DCF, we are mixing valuation approaches. The Tribunal takes this approach having carefully considered and made use of all of the experts' reports and declarations, documentation and circumstances surrounding this dispute. We have concluded that this approach most closely conforms to the economic and financial realities. We have attempted to achieve this objective by using the Petrobras transaction as a "reality check" on a very complex economic situation which defies the usual theoretical prescriptions.

transaction, the Tribunal has not explicitly excluded the value of the non-regulated (or “other businesses”) of Transener. The Tribunal considers, first, that it is, in one sense, valid and sufficient to say that it is not possible, in examining a market transaction, to identify what portion of the price was paid by the buyer for the regulated vs. non-regulated portion of Transener’s activities. However, to eliminate any doubt, the Tribunal would make the following additional observations. First, the valuation of Claimant’s expert, in developing his “free cash” projections, had already eliminated the non-regulated portions of Transener’s business. Therefore, by reducing Claimant’s “Without Measures” valuation by approximately 23%, the Tribunal has already implicitly taken account of the “other business” issue. Or, if one prefers to look at this issue from a different standpoint, the Tribunal notes that Prof. Calvet, in both his Draft and Final Reports, had criticized the discount rate used by Claimant’s expert, Mr. Wood-Collins, as being too low.¹¹⁶ Where Mr. Wood-Collins’ analysis had arrived at a proposed discount rate of 10.84%, Prof. Calvet suggested that a more appropriate discount rate would be in a range between 11.76% on the low side to 14.18% on the high side.¹¹⁷ Again, we note that the Wood-Collins analysis (before applying the discount rate) had already excluded the contributions from the “other businesses.” By adopting the valuation calculated from the per share value of the Etonpark/Petrobras sale, (and comparing the resulting figure to the “Before Measures” valuation reached by Claimant’s expert) the Tribunal has, in

¹¹⁶ Argentina’s experts, Bello and Molina, made similar criticisms.

¹¹⁷ The experts were in agreement that the effect of a higher discount rate would be to substantially reduce the “Without Measures” value of Transener’s business.

effect, adopted a discount rate of approximately 12% - a rate significantly higher than that used by Claimant's expert, and within the range of rates suggested by Prof. Calvet.

290. Following this approach, the Tribunal concludes that the amount of compensation due would be \$52.8 million minus the proceeds of sale of the shares to Dolphin (US \$14 million)¹¹⁸, so that the net value of the Claimant's interest in Transener, as of June 25, 2002, is valued at \$38.8 million. The Tribunal recognizes that in the complex circumstances of the the Claimant investment in Transener, many possible approaches could possibly be used to achieve a reasonably just result. Though none of the proposed approaches is perfect, the Tribunal finds that the approach adopted here appropriately reflects the impact of the Measures, while still recognizing that, because of the economic and social crisis, the situation of the Argentine economy was definitely not "business as usual."

C. ACTUALIZATION OF THE LOSS

291. The next issue to be resolved is the method for actualizing damages, i.e., adding an appropriate percentage per annum reflecting the time value of money, from June 25, 2002 to the date of the Award. As already noted, the Claimant has argued that damages should be increased by the expected return on equity for Transener, proposing a rate of 12.9% for the period between January 1, 2002 and August 18, 2004. This rate, according to Claimant's presentation, represents the return on equity which Transener could reasonably have expected to earn

¹¹⁸ This latter sum was received by National Grid in August of 2004, so it has had use of these funds since. Consistent with our approach to using the per share value from the Petrobras transaction rather than more theoretical calculations, we deduct this amount in full from the amount of the valuation determined above.

during that period in the absence of the Measures. From August 18, 2004 forward to the date of the Award, Claimant suggests a rate of 10.9% which, according to Claimant, represents the historical long-term return on equity achieved by the Claimant.

292. The Respondent has objected to such rates as well as the appropriateness of utilizing a return on equity for purposes of actualizing damages. The Respondent has further pointed out that Article 5 of the Treaty contemplates the payment of interest at a normal commercial rate until the date of payment, which the Respondent interprets to mean the rate applicable to U.S. Treasury six-month Certificates of Deposit or LIBOR.
293. The Tribunal is not satisfied with either of these approaches. Given the impact of the crisis on the Argentine economy, we do not consider reasonable to apply either the 12.9% or 10.9% rates suggested by Claimant for actualizing damages. The reason for this is that we do not believe that these rates reflect, in a realistic way, the options available to Claimant had it received this lump sum payment on June 25, 2002. Even companies as large and successful as Claimant cannot immediately absorb and invest such sums and achieve their standard rates of return. Instead, budgeting and planning for the company for that year would already have been completed. Company executives would have had to begin identifying where to invest these funds, to procure machinery and equipment (or build facilities or invest in personnel). As a result, profits on the investment of such sums would only have appeared with a considerable lag. Similarly, the Tribunal finds that the no-risk rate suggested by Respondent is inadequate to

fulfill the *Chorzów* standard, which calls for full compensation to Claimant for the consequences of the breach, including the compensation for the failure to receive what it was due for an extended period of time.¹¹⁹

294. The Tribunal believes, therefore, that it is appropriate and realistic to assume that Claimant would have applied the sums received either to eliminate existing debt or avoid incurring additional debt. We believe, therefore, that the appropriate interest rate to be applied from June 25, 2002 forward to the date of the Award should be an average interest rate which Claimant would have paid to borrow from that date to the present. In the absence of clear evidence of Claimant's borrowing rate in the record, the Tribunal will utilize a widely recognized conservative measure, which has been adopted in the awards of previous international arbitration tribunals, namely LIBOR plus 2%. The average six-month dollar LIBOR rate from 2002 to the present date has been 3.15%.¹²⁰ Adding 2% to that base rate, the operative rate for actualizing damages to the date of the Award shall be 5.15% compounded semi-annually.¹²¹ On this basis,

¹¹⁹ *Supra* at paras. 269-270. Also, as noted earlier, the guidelines provided by Article 5 of the Treaty relate to compensation for expropriation (which we have found not to be present here). In addition, the term "reasonable commercial rate of interest" has not been authoritatively defined or limited to the rates which Respondent suggests. In the absence of an authoritative definition, the Tribunal finds that the term "reasonable commercial rates" implies the need to consider both existing commercial practice and the factual context of each case.

¹²⁰ Based on U.S. Federal Reserve Bank issuance H-15.

¹²¹ While the longstanding discussion in international arbitrations regarding simple vs. compound interest has been continued by the Parties in this case, it has become clear that arbitral tribunals have increasingly accepted the commercial realism of compound interest as the approach best approximating the value lost by an investor. See, e.g., *PSEG Global v. Republic of Turkey* (ICSID Case No. ARB/02/5); *Siemens v. Republic of Argentina* (ICSID Case No. ARB/02/8). For a very thorough, though not exhaustive, review of ICSID precedents on this subject, see *Compañía de Aguas de Aconquija et. al. v. Republic of Argentina* (ICSID Case No. ARB/97/3), para. 9.2.4 and especially footnote 432. Also see generally, J. Colon and M. Knoll, "Pre-Judgment Interest in International Arbitration," University of Pennsylvania Paper 193 (2007), (Berkeley Electronic Press), <http://lsr.wellco.org/upenn/wps/papers/193>.

the interest component from June 25, 2002 to October 31, 2008 is \$14,792,439.25 bringing the total actualized damage figure up to that date to \$53,592,439.25. The interest component of this amount shall be updated to the date of the Award.

IX. COSTS

295. Each party has pleaded that the costs of the arbitration and its own legal costs be charged to the other party. Articles 40 and 41 of the Arbitration Rules provided that the costs of arbitration and the legal costs of the parties shall be allocated to the losing party. However, they permit that a tribunal decide otherwise after consideration of all circumstances of the case. Taking into account all circumstances of the instant case and the fact that the Claimant prevailed in the jurisdiction phase of the proceedings, but neither party has fully prevailed in the merits, the Tribunal decides that each party shall bear its own legal costs and that the Respondent and the Claimant shall be responsible for 75% and 25%, respectively, of fees and expenses of the Tribunal and the costs of administration of the ICSID Secretariat.

X. DECISION

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

1. Respondent has breached Article 2(2) of the Treaty by failing to accord fair and equitable treatment, and protection and constant security to the investment of the Claimant.
2. Respondent shall therefore pay to the Claimant the sum of \$53,592,439.25 updated to the date of the Award in respect of the interest component.
3. Pursuant to Articles 38 and 39 of the Arbitration Rules the costs of the arbitration are fixed as follows:
 - (a) Fees and expenses of Dr. Andrés Rigo Sureda (President): US\$330,621.68.
 - (b) Fees and expenses of Messrs. Whitney Debevoise (US\$104,209.43) and Judd Kessler (US\$336,600): US\$440,809.43.
 - (c) Fees and expenses of Prof. Alejandro Garro: US\$302,724.35.
 - (d) Expenses prior to the administration by the ICSID Secretariat: US\$6,662.20.
 - (e) Administration fees and expenses of the ICSID Secretariat: US\$261,019.64.
4. The Respondent and the Claimant shall be responsible for 75% and 25%, respectively, of the fees and expenses of the Members of the Tribunal and the administration costs both prior and during the administration of the case by the ICSID Secretariat;
5. Each party shall bear its own costs and counsel fees;
6. All other claims are dismissed; and
7. Respondent shall pay to Claimant, on all amounts awarded pursuant to the preceding paragraphs of this Award, interest at the average rate payable on six-

month U.S. Treasury bills from the date hereof until payment in full of this Award, such interest to be compounded semi-annually.¹²²

¹²² While the subject of post-award interest remains a matter in which arbitral tribunals have adopted a variety of approaches, the Tribunal considers that the function of post-award interest is essentially to protect the value of the Award against inflation. For this reason we have chosen this rate, which has been recognized as a “risk-free” rate.

Done in Washington, D.C., on November 3, 2008 in equally authoritative English and Spanish versions.

[Signed]

Alejandro M. Garro
Arbitrator

[Signed]

Judd L. Kessler
Arbitrator

[Signed]

Andrés Rigo Sureda
President