INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of the Arbitration between

EL PASO ENERGY INTERNATIONAL COMPANY

Claimant

and

THE ARGENTINE REPUBLIC

Respondent

ICSID Case No. ARB/03/15

AWARD

Members of the Tribunal:

Prof. Lucius Caflisch
Prof. Piero Bernardini
Prof. Brigitte Stern

Secretary of the Tribunal: Ms. Natalí Sequeira

Representing the Claimant:

Mr. Tom Sikora
El Paso Corp.

Mr. R. Doak Bishop
Mr. Craig Miles
Mr. Roberto Aguirre Luzi
Ms. Sarah Vasani
King & Spalding LLP

Mr. José Martínez de Hoz (h)
Ms. Valeria Macchia
Pérez Alati, Grondona, Benites, Arntsen & Martínez de Hoz (h)

Representing the Respondent:

Dra. Angelina María Esther Abbona
Procuradora del Tesoro de la Nación

Date of dispatch to the Parties: 31 October 2011

I. PROCEDURAL BACKGROUND

A. REGISTRATION OF THE REQUEST FOR ARBITRATION

1. On 6 June 2003, the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") received a request for arbitration (hereinafter the "Request") submitted by El Paso Energy International Company (hereinafter "El Paso" or "the Claimant"), a company organised under the laws of the State of Delaware (United States of America) against the Republic of Argentina (hereinafter "Argentina," "the Respondent," "the respondent State," "the respondent Government" or "GOA").

2. On the same date, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules"), the Acting Secretary-General of the Centre acknowledged receipt of the Claimant's Request.

3. In the Request, the Claimant submitted that Argentina had violated the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Republic of Argentina and the United States of America (hereinafter "the BIT")[1], as well as other Argentinian and international law instruments.

4. The Request was registered by the Centre on 12 June 2003, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention" or "the Washington Convention") [2] and Rules 6(1)(a) and 7(a) of the Institution Rules. On the same date, the Acting Secretary-General notified the Parties of the registration and invited them to constitute an arbitral tribunal as soon as possible.

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[1] Treaty between United States of America and the Republic of Argentina concerning the Reciprocal Encouragement and Protection of Investment of 14 November 1991 (entered into force on 20 October 1994), available at: http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf (hereinafter 1991 BIT).

[2] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter ICSID Convention or the Washington Convention] of 18 March 1965 (entered into force on 14 October 1966).

B. Parties

5. The present dispute is between El Paso International Energy Company and the Republic of Argentina. It raises the question of whether Argentina has breached the Treaty between the United States and Argentina of 14 November 1991 concerning the Reciprocal Encouragement and Protection of Investment as regards investments made by the Claimant in Argentina.

6. El Paso is a United States company incorporated in the State of Delaware. It had that quality "on the date on which the parties consented to submit such dispute to … arbitration" (Article 25(2)(b) of the ICSID Convention), *i.e.* when it accepted the jurisdiction of the International Centre for Settlement of Investment Disputes (hereinafter "ICSID").

7. As indicated by its name, the Claimant is an energy company. It alleges that, up until 2003, it owned indirect and non-controlling shareholdings in a number of Argentinian entities: Compañías Asociadas Petroleras (CAPSA) and CAPEX SA (El Paso contends that it held a 45% indirect interest in CAPSA which, in turn, owned 60.36% of the shares of CAPEX); Central Costanera SA (Costanera), in which El Paso claims to have acquired a 12.335% indirect interest; and Gasoducto del Pacífico SA (Pacifico), in which its indirect interest was said to amount to approximately 13.4% (preferred shares), and 11.8% (ordinary shares) respectively. These four entities have been collectively referred to, in the present proceedings, as the "Argentinian companies." El Paso further alleged an indirect controlling interest (99.92%) in SERVICIOS El Paso, another entity incorporated in Argentina, and a 61.6% interest in the Triunion Energy Company.

8. The respondent State argued, however, that these direct and indirect interests had not been proved by the Claimant. The latter had, shortly after filing its Reply, submitted an amended version of paragraphs 314-326 of that document to the Arbitral Tribunal. According to the respondent State, a comparison between the amended text and the original one yielded serious discrepancies.

9. Thus, the Claimant had alleged, in its original Reply, ownership of a 61.6% interest in Triunion, whereas the amended text referred to 71.968%. In the

original Reply, it had also been asserted that 0.0084% of Gasoducto del Pacifico (Argentina) S.A. was owned by Gasoducto del Pacifico (Cayman) Ltd., while the amended Reply spoke of 87.5%. In the initial Reply, there had been a question of El Paso holding 21.799% of Gasoducto del Pacífico (Argentina) S.A., a figure that was subsequently corrected to 12.5% (common shares) and 21.8% (preferred shares). Further discrepancies appeared in connection with Agua del Cajón (Cayman), the Reply's original text having alleged a 100% ownership of that company by El Paso, the subsequent one reducing that figure to 50%, the latter figure also appearing in documents filed by the Claimant with the United States Securities and Exchange Commission. Finally, the Claimant asserted that, through the sale of its interests in the Argentinian companies, it secured an additional equity interest of 6.3% in Gasoducto del Pacífico (Argentina) S.A., an assertion which has remained unproven as well.[3]

10. In April 1997, El Paso acquired, through KLT Power Inc., an indirect non-controlling shareholding of 12.335% in Costanera. The latter, a local company engaged in the generation and sale of electricity, with a total capacity of 2311 megawatt-hour (MWh), is the largest thermal generator in Argentina. It owns approximately 10% of the installed generation capacity in the country, with a plant that includes two state-of-the-art combined cycle units located in the city of Buenos Aires.

11. In January 1998, El Paso acquired an indirect non-controlling interest in Pacifico, which owns and operates a natural gas pipeline linking Argentina to the Chilean city of Cochabamba. That interest amounted to 13.4% of the preferred shares and 11.8% of the ordinary shares of Pacifico.[4]

12. Further observations are in order regarding SERVICIOS, Costanera and Pacifico. SERVICIOS was established by El Paso as an Argentinian subsidiary in March 1998 and entered thereafter into an agreement with an Argentinian branch of the Bank of Boston to lease a gas processing plant located on the

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[3] Respondent's Rejoinder on the Merits [hereinafter Rejoinder] of 12 March 2007, §§ 86-92.
[4] See *supra* § 7.

Agua de Cajón field in Neuquén Province. Pursuant to a ten-year gas processing agreement with CAPEX, SERVICIOS transformed gas produced at CAPEX's facilities into liquid petroleum gas (LPG) by-products that were sold by CAPEX.

13. It is alleged that, from 1997 to 2001, El Paso invested US$ 336 million in the Argentinian companies, and that its parent company guaranteed around US$ 24 million of SERVICIOS' lease obligations. El Paso sold its interest in the companies' shares in two sales, one in June 2003 – in CAPSA (consequently in CAPEX) and in SERVICIOS – another in October 2003 – in Costanera.

14. The Respondent is the Republic of Argentina.

C. Constitution of the Arbitral Tribunal and Commencement of the Proceedings

15. The Parties agreed that the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third and presiding arbitrator to be appointed by the Chairman of the Administrative Council of the Centre.

16. Accordingly, the Claimant appointed Professor Piero Bernardini (Italian) as an arbitrator and the Respondent appointed Professor Brigitte Stern (French) as an arbitrator. The Chairman of the Administrative Council of ICSID, with the agreement of the Parties, appointed Professor Lucius Caflisch (Swiss) as President of the Arbitral Tribunal.

17. Pursuant to Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), the Centre informed the Parties that all arbitrators having accepted their appointment, the Tribunal was deemed to have been constituted and the proceedings to have commenced on 6 February 2004. In accordance with ICSID Administrative and Financial Regulation 25, the Parties were also notified that Ms. Gabriela Alvarez-Avila, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

18. After consultation with the Parties, the first session of the Tribunal was held on 21 April 2004 in Geneva. The Claimant was represented at the session by Mr. R. Doak Bishop and Mr. José Alfredo Martínez de Hoz (Jr.). The

Respondent was represented by Mr. Jorge Barraguirre and Ms. María Vallejos Meana of the Procuración del Tesoro de la Nación, who were present at the session on behalf of the Procurador del Tesoro de la Nación, Dr. Horacio Daniel Rosatti.

19. At the first session, the Parties agreed that the Tribunal had been properly constituted and that they had no objection to any of the members of the Tribunal. It was agreed that the proceedings would be conducted under the Arbitration Rules in force since 1 January 2003.

20. It was decided that the Claimant would file its Memorial on the Merits within 90 days of the date of the first session, that the Respondent would file its Counter-Memorial on the Merits within 90 days of the date of receipt of the Memorial, that the Claimant's Reply would be filed within 45 days of the date of receipt of the Counter-Memorial, and that the Respondent's Rejoinder would be filed within a further 45 days of the receipt of the Reply. It was further agreed that the Respondent had the right to raise any objections it might have to jurisdiction no later than 45 days from its receipt of the Claimant's Memorial. If such objections to jurisdiction were made by the Respondent, the Claimant would have 45 days to file its Counter-Memorial on Jurisdiction from its receipt of the Respondent's Memorial on Jurisdiction. The Tribunal would decide at a later stage, after having consulted the Parties, whether a second round of pleadings on jurisdiction would be necessary.

D. JURISDICTIONAL PHASE OF THE PROCEEDINGS

21. In accordance with the agreed schedule, the Claimant filed its Memorial on the Merits on 20 August 2004. The Respondent filed its Memorial on Jurisdiction on 19 October 2004 and the Claimant filed its Counter-Memorial on Jurisdiction on 13 December 2004.

22. After having considered the views of the Parties, the Tribunal decided on 3 February 2005 that a second round of pleadings on jurisdiction was not necessary and fixed the date for the hearing on jurisdiction on 7 April 2005. On 25 February 2005, the Tribunal announced that the hearing on jurisdiction was re-scheduled for 8 April 2005.

23. The hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. on 8 April 2005. The Claimant was represented by Mr. R. Doak Bishop, Mr. José Alfredo Martínez de Hoz (Jr.), Mr. Tomasz J. Sikora, Mr. Craig S. Miles, Ms. Valeria Macchia and Ms. Angolie Singh. The Respondent was represented by Mr. Jorge Barraguirre, Ms. Gisela Makowski, and Ms. Cintia Yaryura from the Procuración del Tesoro de la Nación.

24. During the hearing, counsel for the Parties made presentations to the Tribunal, and *as per* the Respondent's request, Mr. Ed Sereno's testimony was heard. The Claimant briefly presented the witness; this was followed by cross-examination from the Respondent and redirect from the Claimant. The Tribunal then asked the witness some questions. Verbatim transcripts of the hearing were drawn up in English and Spanish and were distributed to the Tribunal and the Parties.

25. During the hearing on jurisdiction, the Tribunal requested some documents from both Parties. By letter of 14 April 2005, the Claimant responded to the request regarding the sale of its shares in Compañías Asociadas Petroleras S.A. (CAPSA), CAPEX S.A. and SERVICIOS El Paso S.R.L. On 6 May 2005, the Respondent provided certain documents to the Tribunal regarding the financial structure of Transportadora Gas del Norte and Metrogas, as well as the taxes imposed on the gas sector. In the same letter, the Respondent asked for the production by the Claimant of documents regarding its investment and the sale of its shares in the above-mentioned companies. On 10 June 2005, the Claimant objected to the Respondent's request of 6 May 2005. The Respondent answered the Claimant's objections by a letter of 27 June 2005.

26. By Procedural Order No. 1 of 28 July 2005, the Tribunal decided that "the information in possession of the Tribunal [was] sufficient to decide the jurisdictional issues raised by the Respondent and that if the proceedings were to reach the merits of the dispute, it [would] be open to the Respondent to reiterate the above request for production of documents".

27. In its Decision on Jurisdiction of 27 April 2006, the Tribunal decided that the dispute was within the jurisdiction of the Centre and within the competence of

the Tribunal. On the same date, it issued Procedural Order No. 2 by which the Tribunal confirmed the calendar agreed upon during the first session. Accordingly, the Respondent's Counter-Memorial on the Merits was due within 90 days from the date of Procedural Order No. 2, the Claimant's Reply within 45 days from its receipt of the Respondent's Counter-Memorial, and the Respondent's Rejoinder within 45 days from its receipt of the Claimant's Reply.

E. Merits Phase of the Proceedings

28. By letter of 6 June 2006, the Respondent requested the Tribunal (i) to order the Claimant to produce a number of additional documents related to its claim; (ii) to suspend the filing of the Respondent's Counter-Memorial on the Merits until the requested documents were submitted; and (iii) to extend the deadline for the filing of the Counter-Memorial on the Merits by 60 days.

29. By letter of 21 June 2006, the Claimant produced a number of the documents requested by the Respondent and objected to the production of some others, as well as to the suspension and extension for the filing of the Respondent's Counter-Memorial.

30. On 5 July 2006, the Tribunal decided to grant a 30-day extension for the filing of the Respondent's Counter-Memorial and requested the Respondent to make its observations on the Claimant's letter of 21 June 2006. By letter of 5 July 2006, the Respondent repeated its requests. On 11 July 2006, the Respondent asked the Tribunal to (i) order the Claimant to produce four sets of documents; and (ii) extend the time-limit for the filing of its Counter-Memorial on the Merits by the number of days taken by the Claimant to produce all such documents. By letter of 13 July 2006, the Claimant produced additional documents and objected to the Respondent's request for an additional extension of the time-limit.

31. On 26 July 2006, the Tribunal issued Procedural Order No. 3, by which it ordered the Claimant to produce by 3 August 2006 documents demonstrating how El Paso acquired its direct participation in Gasoducto del Pacífico (Argentina) S.A., in order to have a complete picture of El Paso's ownership in

Triunion Energy Co., Cayman. The Tribunal also took note of the Claimant's explanation of 13 July 2006 regarding CAPSA's financial statement of 2003 and invited the Claimant to make that statement available. The remaining requests submitted by the Respondent for production of documents were denied and the Tribunal fixed 1 September 2006 as the date for the filing of the Counter-Memorial on the Merits. In accordance with the schedule set by the Tribunal in its Procedural Order No. 3, the Respondent submitted its Counter-Memorial on the Merits on that date.

32. By letter of 25 September 2006, the Claimant requested a 30-day extension for the filing of its Reply. This request was objected to by the Respondent in a letter of 26 September 2006. On 4 October 2006, the Tribunal informed the Parties that it granted the requested extension and therefore fixed 28 November 2006 as the date for the filing of the Claimant's Reply.

33. By letter of 12 October 2006, the Respondent also requested a 30-day extension for the filing of its Rejoinder and a suspension of the schedule of the proceedings during January 2007. By letter of 19 October 2006, the Claimant agreed to the requested extension but objected to the suspension of the procedural schedule. On 26 October 2006, the Tribunal informed the Parties that it decided not to grant the suspension requested by the Respondent but to grant the 30-day extension for the filing of the Respondent's Rejoinder. Therefore, the Respondent's Rejoinder was due within 75 days from the receipt of the Spanish translation of the Claimant's Reply and accompanying documentation. The Claimant submitted the electronic copy of its Reply Memorial on the Merits on 28 November 2006, while the hard copy of the Claimant's Reply and the accompanying documentation were dispatched by a courier company on 29 November 2006.

34. By letter of 14 December 2006, the Respondent requested the Tribunal to disregard the Claimant's Reply because it was filed late. The Tribunal carefully examined the Respondent's request as well as the Claimant's letter of 18 December 2006 and the Respondent's observations of 20 December 2006.

35. By letter of 3 January 2007, the Tribunal decided not to disregard the filing; however – in view of the circumstances – it granted the Respondent until 12 March 2007 to file its Rejoinder. The Respondent filed its Rejoinder on that date.

36. By the Claimant's letters of 23, 25 and 26 April 2007 and the Respondent's letters of 24 and 25 April 2007, the Parties submitted their preliminary views about the conduct of the hearing on the merits scheduled for June 2007. By letter of 8 May 2007, the Tribunal confirmed that the hearing would be held from 4 through 13 June 2007 (including Saturday 9 June 2007). It decided to grant each Party equal time to present factual witnesses and experts and to make their Opening and Closing Statements. Since the Parties failed to reach agreement on the order of appearance of factual witnesses and experts, the Tribunal decided that they were to be presented in the following order: (i) the Claimant's factual witnesses; (ii) the Respondent's factual witnesses; (iii) the Claimant's experts; and (iv) the Respondent's experts.

37. The hearing on the merits was held at the seat of the Centre in Washington, D.C. from 4 to 13 June 2007. The Claimant was represented by Mr. R. Doak Bishop, Mr. Craig Miles, Mr. Adam Schiffer, Mr. Roberto Aguirre-Luzi, and Mrs. Sarah Zagata (King & Spalding); Mr. José A. Martinez de Hoz (Jr.), Ms. Valeria Macchia, Ms. Jimena Vega Olmos and Ms. Florencia Mónica Celasco (Pérez Alati, Grondona Benites, Arntsen & Martínez de Hoz); and Mr. Tomasz J. Sikora, in-house counsel of El Paso Energy. The Respondent was represented by Mr. Osvaldo César Guglielmino (Procurador del Tesoro de la Nación Argentina), Mr. Ignacio Peréz Cortés, Mr. Gabriel Bottini, Ms. Gisela Makowski, Ms. Silvina González Napolitano, Mr. Tomás Braceras, Mr. Jorge Barraguirre, Ms. Alejandra Etchegorry, Ms. Leticia Sierra Lobos, Mr. Nicolás Duhalde, Mr. Javier Gallo Mendoza, Mr. Juan Pablo Tarelli, Mr. Luciano Lombardi, Mr. Rodrigo Ruiz Esquide and Mr. Ignacio Torterola. Counsel for the Parties gave their oral presentations before the Tribunal and examined the factual witnesses and experts.

38. Verbatim transcripts of the hearing on the merits were prepared and distributed to the Tribunal and the Parties. The Tribunal invited the Parties to submit a

joint document with both Parties' corrections to the transcripts of the hearing in order to facilitate the Tribunal's review and reading of the transcripts.

39. Further to the receipt of the Claimant's letters of 20 May, 11 July and 8 September 2008, and the Respondent's letter dated 19 August 2008, the Tribunal informed the Parties that any filings made by the Parties and not expressly authorised by the Tribunal would be disregarded.

40. By letters of 21 November 2007 and 13 December 2007, it was confirmed that the members of the Tribunal had decided to retain an independent expert, who would assist them in the review of the expert reports filed by the Parties. The Tribunal requested the ICC International Centre for Expertise to provide a list of names from its database of experts.

41. The Tribunal reviewed the *curricula vitae* of a number of possible candidates and submitted their names to the Parties. Upon receipt of both Parties' observations, by 21 May 2008, the Tribunal appointed Mr. François Savagner as its independent valuation expert.

42. By letter of 12 September 2008, the Tribunal informed the Parties that it had not been able to reach an agreement with Mr. Savagner on the amount of fees that the Tribunal considered reasonable for his assignment. It invited the Parties to submit their observations on the expert's estimate to decide whether they authorised or not the continuation of the expert's appointment.

43. By letter of 30 September 2008, the Tribunal informed the Parties that since they had not reached an agreement with respect to the acceptance of the estimate, it would terminate the expert's assignment. The expert had already agreed to renounce claims to any fees and or expenses incurred before that decision.

44. By letter of 7 January 2009, the Tribunal submitted the name of another possible expert and solicited the Parties' observations. Upon receipt of the Parties' observations on 23 January 2009, the Tribunal invited each Party to submit a list of four candidates along with their *curricula vitae*. The list of each Party was to be communicated to the other Party. If there were one or more

common names on both lists, the Tribunal would proceed to make an appointment.

45. The Tribunal informed the Parties that if there were no common names on both lists, each Party was invited to comment on the other Party's list within eight days of the receipt of that list. Upon receipt of the Parties' comments, the Tribunal informed the Parties that it would make a final decision either on the basis of the lists or at its own discretion. The Parties submitted their proposals and exchanged their comments on each other's lists.

46. By letter of 15 June 2009, the Tribunal appointed Professor Patrice Geoffron as its independent expert. By letter of October 27, 2009, the Centre transmitted to the Parties an order to provide additional documentation to the expert as well as a confidentiality undertaking signed by Professor Geoffron. As ordered by the Tribunal, both Parties submitted the requested additional documentation to the expert. The Expert's Preliminary Report was circulated to the Parties on 14 April 2010. The Tribunal invited both Parties to submit any observations regarding the expert's Preliminary Report at the latest by May 14, 2010. In addition, the Tribunal invited the Claimant to submit, along with the above-mentioned observations, its answers to some further questions. By letter of May 19, 2010, the Tribunal granted an extension to the Parties for submitting their observations on the Preliminary Report. Both Parties submitted their observations on June 1, 2010. By letter of 22 November, 2011, the Tribunal circulated the Expert's July Report and a Complementary Note dated 10 July 2010, followed by the Final Report (October Report) dated 12 October 2010 and invited the Parties to submit their observations on both documents by 24 December, 2010. By letter of December 15, 2010 the Tribunal granted an extension for the Parties to submit their observations on the Expert's Final Report at the latest by 27 December, 2010. Both Parties submitted their observations on the date set by the Tribunal.

47. By letters of 22 November and 15 December 2010, the Tribunal invited the Parties to present their statement on costs, which were received on 27 December 2010. By letter dated 5 May 2011, the Tribunal declared the closure of the proceedings pursuant to Arbitration Rule 38. On June 1, 2011 the

Tribunal invited the Parties to submit their final statements of costs pursuant to ICSID Arbitration Rule 28(2). The Respondent submitted its final statement of costs on June 15, 2011, and the Claimant on 16 June 2011.

II. FACTUAL BACKGROUND

A. THE ORIGINS OF THE DISPUTE

48. The facts summarised hereafter are those considered and debated in the Parties' written pleadings and oral arguments.

49. CAPSA produces oil and, *via* CAPEX, generates electric power in Argentina; it also markets propane, butane and gasoline. From December 2001 onward, the GOA took a series of measures which, according to the Claimant, caused considerable harm to the latter, breached undertakings assumed by the respondent State when the investments were made, rendered the investments worthless, particularly those in CAPSA and CAPEX, and prevented these companies from functioning independently. These measures were alleged to be in violation of provisions of the 1991 BIT, *i.e.* those on expropriation, on discriminatory treatment, on fair and equitable treatment, and on full protection and security.[5]

50. These assertions were vigorously objected to by the Government which argued that the measures taken by it, even if they had been contrary to provisions of the 1991 BIT, were justified under Article XI of that Treaty which allows the States Parties to take measures needed for the maintenance of public order, for the fulfilment of their obligations regarding the maintenance or the restoration of international peace or security, or for the protection of their own essential security interests.[6]

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[5] Claimant's Memorial on the Merits [hereinafter Memorial] of 20 August 2004, §§ 30-33 and 37-38.
[6] Respondent's Post-Hearing Brief [hereinafter RPHB] of 2 August 2007, §§ 119-211.

B. The Legal Situation at the Time of the Investment

1. *History and General Context*

51. Prior to 1990, most of Argentina's essential economic activities were State-run. The infrastructures were unsatisfactory, however, and the public debt was high, particularly regarding the production of energy, *i.e.* electricity and hydrocarbons. This led the GOA to introduce, in 1989, a bill which was to become the State Reform Law, announcing a privatisation programme encompassing incentives as well as monetary and structural measures to promote foreign investment and to stabilise the country's economy.

52. Prior to these reforms, the electricity market had been dominated by the State. Public enterprises controlled the production, transmission and distribution of energy. In addition, some provinces ran their own energy companies. The system was flawed by insufficient funding, rife with inefficiency and was in deficit. In 1988/1989, rolling black-outs were organised owing to limited power-generating capacity.

53. The oil and gas sector, too, was essentially in the hands of the State, with private business playing a secondary role. It was characterised by low productivity, excess demand and significant deficits for the State-owned companies.

54. Laws Nos. 23,696 and 23,697, referred to respectively as the "State Reform Law" and the "Economic Emergency Law," brought a radical change by de-regulating the economy and offering some public companies for sale. In addition, Law No. 23,928, the "Convertibility Law," complemented by Decree No. 529/1991, pegged the peso to the dollar at a fixed rate of 1:1, and no increase in the domestic monetary supply would henceforth be permitted without a corresponding increase in the Central Bank's foreign currency holdings. As a consequence, inflation abated and the economy grew during the period from 1991 to 1997.

55. The State Reform Law, with its measures of liberalisation and improvement of the public sector, and the call for foreign investment, aimed at the privatisation of State companies to improve production.

56. A reform of the legislation on foreign investment was mainly brought about by Decree No. 1853/1993. That Decree encouraged foreign investment by removing various restrictions, notably the three-year waiting period for the repatriation of foreign capital, allowing for such repatriation at any time; and by opening domestic credit facilities to both foreign and national businesses on an equal footing.

57. Further to improve the domestic context, Argentina concluded about 50 bilateral investment treaties (BITs), one of which was the 1991 BIT with the United States.

58. Finally, to protect investors' long-term interests, regulatory regimes were established for the electricity and hydrocarbon sectors. Together these regimes, the Electricity and the Hydrocarbons Regulatory Frameworks, formed the new "Energy Regulatory Framework."

2. Electricity Regulatory Framework

59. To improve the supply of electricity, the GOA allowed foreign investors a dominant role in the production, transmission and distribution of electric energy. They could acquire facilities and equity interests and also proceed to direct investments. Investments had to be made within the legal framework provided by Law No. 24,065 (the "Electricity Law"), by Regulatory Decree No. 1398/1992 and related regulations, and by Resolution No. 61/1992.

60. The objectives of the Electricity Law were the promotion of private investments in the production, transmission and distribution of electrical power, the setting of appropriate rates in order to further such activities, the efficient use of electricity, and the stimulation of competition.

61. Within the Electricity Regulatory Framework, a competitive system, the Wholesale Electricity Market (WEM), was established in order to organise the

sale of energy by its generators. The two markets established within the WEM were: (i) the term market, where producers and buyers could freely agree on sales, conditions and prices; and (ii) the spot market, where energy was supplied, on an hourly basis, for a uniform price linked to the short-term marginal cost of the energy produced.

62. Distributors were, however, entitled to buy energy at a "seasonal price" fixed by the Compañía Administradora del Mercado Mayorista Eléctrico SA (CAMMESA) and approved by the GOA's Energy Secretariat. This was achieved by establishing a fixed monthly charge which was to remain stable for the first three months of the six-month seasonal price; that price was based on predictions of demand and supply in the seasonal period. After three months, adjustments would have to be made if the seasonal price, instead of reflecting the average spot-market price, significantly differed from it. This was to be done by providing compensation out of a "Seasonal Stabilisation Fund," yet another measure to protect investors.

63. The Electricity Regulatory Framework was managed by three agencies. The first was the GOA's Secretariat of Energy, endowed with regulatory powers to implement the Framework. It was to govern dispatch within the WEM and to set seasonal prices. The scheduling and physical dispatch by generators and the management of the WEM were handled by CAMMESA, an independent entity representing all WEM agents but subject to the veto of the Energy Secretariat. Thirdly, there was the Ente Nacional Regulador de la Electricidad (ENRE), an independent governmental body with regulatory and jurisdictional power over the electricity industry.

64. The spot price was the price paid at any hour to all participants in the WEM. It was uniform, based on the short-term marginal cost incurred by the least efficient generator dispatched at any given hour. This Variable Cost of Production (VCP) had to be indicated in US dollars. The most efficient producer, *i.e.* that with the lowest VCP, was dispatched first and enjoyed the largest profit, as the spot price would be set on the basis of the VCP of the last generator dispatched. Accordingly, the spot price determined by CAMMESA was not arbitrary: the most efficient generator's VCP was below the spot price,

and the difference between that price and the VCP incurred by the last generator dispatched was the margin of the most efficient producer. In other words, not all producers enjoyed the same margin.

65. The competitive system described above rewarded efficient power generators such as CAPEX and Costanera by the manner in which spot prices and margins were fixed. This, together with the security offered by the Electricity Regulatory Framework, provided an incentive for El Paso to invest.

66. By contrast, contractual energy sales could be freely negotiated. As a rule, they were made in US dollars and for one year, prices being set proportionally to the spot price and somewhat above it.

67. In addition to the sales proceeds, since 1994 power generators received "capacity payments" amounting to 10 US dollars per megawatt-hour (MWh). These payments were intended to encourage operators to upgrade and expand the electricity system. Capacity payments, with the proceeds from the sales, were the two pillars of the new Framework; according to the Claimant, the capacity payments received by CAPEX and Costanera amounted to about 27 and 92 million US dollars per year, respectively.[7] The Claimant also alleged that, on the basis of these payments, investors could legitimately expect that if a devaluation of the peso were to occur, capacity payments would continue to be paid in US dollars or, if paid in pesos, be adjusted to attain the same value;[8] and that adjustments would also be made in the pricing system.

68. The Claimant's assertions were vigorously objected to by the respondent State.[9] According to the latter, the establishment of capacity payments, and their decrease in terms of US dollars, did not, from the legal and economic viewpoint, entail an undue prejudice. The Electricity Law, while providing for such payments, left the determination of the currency and of the mode of calculation to Argentina's Department of Energy. Initially, in 1992, capacity

[7] Memorial, §§ 146-147.
[8] *Ibid.*, § 152.
[9] Rejoinder, §§ 111-126.

payments were fixed at US$ 5 dollars/MWh, this figure being subsequently raised to US$ 10 dollars. In 2002, payments decreased to AR$ 10 pesos, to be raised again to AR$ 12 pesos three months later. At the same time, the Energy Secretariat detached payment from actual dispatch, a measure favourable to the producers. There were not, accordingly, any vested rights in those respects.

69. Nor was there any undue prejudice from an economic point of view. The value of the capacity payments determined by the Secretary of Energy was, according to the GOA, compatible with the operation of the electricity market in the context of the crisis and with what would have happened, in that context, in a competitive market, given the macroeconomic circumstances prevailing at the time in the Argentine economy. At that time, a significant decrease in the demand for reliability of the electricity supplies was expected as a result of the drop of the economy's gross product and household income: "if an income drop occurs, a lower quality product at a lower price is preferred."[10]

70. At the beginning of the crisis, the electricity generation system enjoyed a high reserve margin. Despite the fact that, during the last years, no new producers had appeared, the existing ones were capable of satisfying a 12.3% increase in the peak demand. This shows that the system had excess capacity; accordingly, the reduction of capacity made perfect sense in a competitive market.

71. The Claimant considered that the capacity payment had to cover their capital costs and that the reduction in it to an amount equivalent to four dollars did not fulfill that requirement. The GOA rejected El Paso's arguments[11] linking the Claimant's capacity payments to its capital costs: there was no rule under which the main ground for capacity payments was the protection of capital costs or the recovery of investments, and in fact such payments distorted the operation of the WEM; there was no document justifying economically that the payment had to be 10 US dollars and to remain at that level; if capacity payments were to

[10] Rejoinder, § 118.
[11] Claimant's Reply on the Merits [hereinafter Reply] of 26 November 2006, §§ 99-108.

defray capital costs, they should have been detached from dispatch, which was not what happened in the past decade.

72. The alleged link between the reduction of capacity payments and the lack of investments after 2001 was also belied by the fact that the last decision to invest in the field of power generation was taken in 1996, five years before the crisis, when capacity payments still amounted to 10 US dollars/MWh.

73. Accordingly, the decline of investments in power generation resulted from the performance of the economy as such and, more specifically, from the conditions of the energy market, explained by the crisis of emerging economies followed by the economic crisis of Argentina in 2001. Thus, it cannot be maintained that, despite the crisis, the electricity market would have continued to receive investments if the capacity payments had remained at the same level.

3. Hydrocarbon Regulatory Framework

74. Initially, the hydrocarbon trade in Argentina was governed by Law No. 17,319 of 1967, which allowed for the grant of concessions to private businesses. Until 1990, this possibility was not used, however, and the near-totality of crude oil and gas production remained in the hands of Yacimientos Petrolíferos Fiscales (YPF), a State company.

75. This changed in 1989 with the adoption of a privatisation programme, which brought many changes and offered private entrepreneurs the opportunity to conduct activities in new, unexplored areas as well as in areas formerly exploited by YPF. Deregulation was implemented by a series of legislative acts, including Decrees Nos. 1055/1989 of 10 October 1989, 1212/1989 of 8 November 1989 and 1589/1989 of 27 December 1989.

76. These acts removed import and export restrictions on crude oil, and abolished withholdings and duties. At the end of 1991, the domestic oil industry was deregulated, including prices, and at the beginning of 1994 natural gas prices were deregulated as well.

77. The centre-piece of the de-regulation process was the right “freely to dispose” of extracted resources, on domestic and foreign markets, and the exemption from export duties or withholdings.

78. Additional regulation in the hydrocarbon sector included Decree No. 2411/1991 (“Reconversion Decree”), Decree No. 2178/1991, as amended by Decree No. 1271/1992 (“Plan Argentina”), Law No. 24,076 (“Gas Law”) and implementing Decree No. 1738/1992. These texts, together with those cited above in paragraph 75, formed the “Hydrocarbon Regulatory Framework.”

79. The Gas Law made it possible to privatise “Gas del Estado” (GdE). Practically all of that company’s assets were transferred to eight distribution and two transportation companies, a majority participation in each being sold to a consortium of private companies. These measures were intended to promote competition and to stimulate foreign investment in the oil and gas industry.

80. Regarding incentives for obtaining investments, the following rights and advantages were offered to entities such as CAPSA/CAPEX: (i) the right to export crude oil without the GOA’s prior approval; (ii) an exemption from fees and duties, except royalties; (iii) the right to negotiate hydrocarbon sales in the open market; (iv) the constitutional protection of investments as property or contractual rights, including those of CAPSA/CAPEX, for the sale of liquid hydrocarbons; (v) the duty, for the Federal Executive, to give twelve months’ notice before restricting the export of crude oil, and the requirement that the producer receive a price not below that of similar, imported crude oil and petroleum products; and (vi) the freedom for producers to sell their production.

4. Argentina’s Drive to Attract Foreign Investment

81. The GOA made it clear that the new Energy Regulatory Framework was aimed at attracting investments, especially foreign investments. Argentina was prepared to provide certain guarantees to domestic and foreign investors. The privatisation policy in the energy sector was carried out, on the federal level, by the Executive and Legislative Powers which agreed that foreign investors were important to achieve privatisation successfully.

82. That result was reached by emphasising three principles – credibility, certainty and legal stability – the core requirement for attracting foreign investment being foreseeability, to be obtained especially through legal stability.

83. The privatisation drive of the Menem administration and its Energy Secretariat was supported by intergovernmental agencies such as the World Bank (IBRD), the International Finance Corporation (IFC), the UN Development Programme (UNDP), and the Inter-American Development Bank (IADB) through loans and measures of technical assistance. This institutional support obviously encouraged private foreign investment.

84. With the help of its Energy Secretariat, of its Privatisation Under-Secretariat and the above-mentioned intergovernmental organisations, the GOA thus actively invited investments from abroad and, to that end, organised seminars and other promotional meetings ("road shows") in the United States, in Europe and in South-East Asia; at least part of them were financed by the UNDP. In these meetings, the new-found openness of Argentina's economy and the stability of the new investment framework were emphasised. Potential investors were led to assume that prices would be determined by market mechanisms and that costs and capacity payments be denominated in dollars.

85. The privatisation of the energy sector was successful. The electricity industry was modernised, power production almost doubled, and domestic demand rose by more than one half; equipment was renewed and upgraded; power and transmission failures became rare; and transmission lines for power export to Chile and Brazil were installed.

86. The same can be said of the hydrocarbon industry: crude oil and natural gas outputs rose by half or more, and so did the reserves of hydrocarbons. Despite the increase in production, the known natural gas reserves also rose by one third. Exports of crude oil grew from almost nothing to 15.6 million m^3, and exports of natural gas from zero to about 9.3 million m^3 per day. Energy exports now amounted to 13% of Argentina's total exports, the country thus being transformed from an energy importer into an exporter. The distribution

network was improving as well, pipelines being installed to connect Argentina with Chile, Brazil and Uruguay.

87. The Claimant argued that the privatisation drive, the circumstances surrounding it and its consequences were evidence of the GOA's intention to establish a stable framework for attracting foreign investment to the energy sector, thereby raising legitimate expectations. This view was contested by the GOA which pointed out that, whatever efforts may have been deployed by it to develop the energy sector, such development, and the rights allegedly infringed, arose not from contracts but from Argentinian law. Law is not immutable, however, be it in the field of investment or elsewhere; and States are entitled, on the strength of their sovereignty, to change them. This is particularly true in emergency situations such as that in which Argentina found herself in 2001.[12]

88. As pointed out earlier, in paragraph 57, another element in the GOA's investment strategy was the conclusion of some 50 BITs, among which was the Treaty with the United States of 14 November 1991. While such treaties are meant to cover investments of both sides, the 1991 BIT with the United States could, of course, have been viewed as an additional protection for investments to be made in the energy sector of Argentina.

C. The Economic Crisis and the Measures Taken by Argentina in the Energy Sector

1. The Advent of the Crisis

89. The years between 1991 and 1998 were good for Argentina. They brought a growth of the GDP averaging close to 6% and an important influx of capital. When deterioration began to set in, the International Monetary Fund (IMF) identified both external and internal causes therefore, including a sharp rise of the public debt from 1999 onward. This led to solvency problems which were aggravated by the rise of the US dollar and the drop of capital flows to

[12] Rejoinder, §§ 407-428.

developing market economies. Despite exceptional financial assistance by the IMF, confidence was not restored.

90. Beginning in Spring of 2001, the GOA took a series of measures: elaboration of a plan to switch the convertibility regime from the dollar to a basket of US dollars and euros; tax-exemption measures to assist the economic sectors most affected by the recession; and a "mega-swap" of outstanding government bonds for instruments with longer periods of maturation. These measures had little effect: capital flight and deposit runs generated a partial deposit freeze. When Argentina failed to comply with the fiscal targets set, the IMF declined to make a payment for December 2001.

91. At the end of 2001, savings were massively withdrawn from the banks. In order to control the situation, the Government issued Decree No. 1570/01, known as "*Corralito*," on 1 December 2001, restricting bank withdrawals and prohibiting any transfer of currency abroad. The situation led to demonstrations and tens of deaths in December 2001, and these, in turn, brought about the resignation of President de la Rúa on 20 December 2001. It can be noted that within a period of less than ten days, Argentina had a succession of five Presidents, who resigned one after the other. According to the GOA, "Argentina seemed to be on the brink of anarchy and the abyss."[13] The situation was indeed critical, and at the end of that month Argentina partly defaulted on its international obligations and abandoned the convertibility regime, replacing it by a dual exchange-rate system.

92. Argentina's crisis of 2001-2002 resulted in a massive default regarding the public debt on the domestic as well as the international level. The real gross domestic product decreased by about 10% in 2002, the cumulative decline since 1998 amounting to 20%; and inflation rose to approximately 10% in April 2002, but eventually reached 40% for that entire year. More generally, due to the over-valuation of the peso and the deterioration in the economy's competitiveness, the Buenos Aires stock market lost more than 60% between

[13] Respondent's Counter-Memorial on the Merits [hereinafter Counter-Memorial] of 1 September 2006, § 7.

1998 and 2002; conversely, unemployment rose to over 20% in 2002. Fifty-four percent of the urban population now lived on the "poverty level," while the population on an "indigence level" reached 25%; private consumption dropped by 20%. So alarming was the situation that the United Nations General Assembly resolved to reduce Argentina's membership dues on account of the crisis, which was the first case in history.

93. The above description is purely factual. The Arbitral Tribunal does not intend, at this stage, to go into the question of the inevitability of the crisis, to assign responsibility for it, or to decide on the applicability or otherwise of Article XI of the 1991 BIT to the measures taken by the GOA. These issues will be addressed later in this award §§ 627-670.

2. The Measures Taken by Argentina: Overview

94. The specific measures complained of by El Paso were adopted by Argentina in the context described above and were aimed at overcoming the crisis. Most of them were related, in one way or another, to the convertibility regime and its demise.

95. A first measure consisted in freezing bank deposits and introducing foreign exchange controls. This was achieved, initially, by Decree No. 1570 of 1 December 2001, followed by the Public Emergency Law No. 25,561 of 6 January 2002 and by implementing measures. The Public Emergency Law: (i) abolished the parity of the US dollar and the peso; (ii) converted US dollar obligations into pesos at the rate of 1:1, a measure known as "pesification"; (iii) effected the conversion, on that basis, of dollar-denominated tariffs into pesos; (iv) eliminated adjustment clauses established in US dollars or other foreign currencies as well as indexation clauses or mechanisms for public service contracts, including tariffs for the distribution of electricity and natural gas; (v) required electricity and gas companies to continue to perform their public contracts; and (vi) authorised the GOA to impose withholdings on hydrocarbon exports.

96. These measures, according to the Claimant, turned the electric power sector into a strictly regulated industry operating with price caps and other

requirements which made it difficult to earn a profit and even to retrieve investments. The Government, moreover, moved large sums of US dollars from the energy to the banking sector, which was particularly affected by the crisis, a measure which the Claimant considered discriminatory.[14] To answer this contention, the respondent State pointed to the "[t]he non-discrimination principle … [which] requires the State to treat equally investments that are in like situations,"[15] such situations arising within the same business or economic sector, and not among different sectors. But from El Paso's point of view, there was an intention to discriminate on the part of the State. However, from the Government's point of view, the discrimination must produce actual harm which the GOA did not assume to have occurred, and there were reasonable grounds for making the distinction complained of.

97. It will now be convenient to turn to the specific measures taken in each of the two sectors examined in the present case.

3. The Electricity Sector

98. Following the enactment of the Public Emergency Law and of Decree No. 214/2002, CAMMESA resolved to pesify the Electricity Regulatory Framework and, with it, the contracts existing on 6 January 2002 and the transactions on the spot market after that date. By a series of resolutions, the GOA's Energy Secretariat then extended pesification to all values in that Framework. While under the latter, VCPs, capacity payments and other values had been calculated in US dollars, power generators now had to express their VCPs in pesos at an exchange rate of 1:1, which accounted for substantially lower spot prices; electric power export agreements were, however, excluded from pesification.

99. The same was to be done for calculating the fuel reference price which determined the maximum allowable variable price on the spot market. A price

[14] Memorial, § 223.
[15] *Champion Trading Company Ameritrade International Inc. v. Arab Republic of Egypt,*[hereinafter *Champion Trading*], (ICSID Case No. ARB/02/9), Award of 27 October 2006, § 125.

cap was established which, according to the Claimant,[16] could prevent some participants from recuperating even their VCPs. This was why CAMMESA would now also dispatch producers whose VCPs were above the cap, these generators receiving the difference between that cap and the actual spot price. For generators such as CAPEX and Costanera, it no longer mattered whether they operated efficiently or not. Accordingly, the idea that the spot price would be the same for all generators, and be based on the costs incurred by the last generator dispatched, was abandoned; new price caps were imposed on the basis of new calculation methods applied by CAMMESA.

100. Another change concerned capacity payments: as reported earlier,[17] these payments initially amounted to 5 US dollars, and had been increased to 10 US dollars per MWh, which was the amount at the time of the measures. Their calculation at the rate of one dollar to one peso amounted to a decrease to almost one third of their value. Later on, they were increased from 10 to 12 pesos, a sum which, at the relevant time, was roughly equivalent to 4 (instead of 10) US dollars.

101. Regarding the legality of the measures thus taken by the respondent State, the GOA pointed out that ever since the reform of the electricity sector, the agents of and participants in the WEM were to operate under the regulations issued by the Energy Department; participants in the market were aware of the risk of changes which, however, had to be in conformity with the guidelines set by the Electricity Law (No. 24,065). There were and had been continuous adjustments in the sector. According to the GOA, this shows that "the legitimate expectations of any investor entering the market had to include the true possibility of changes and amendments to the Procedures."[18]

102. Moreover, according to the respondent State, the adjustments made were reasonable and allowed for adaptation to the new context. There was no reason to exclude the electricity industry from the pesification of the whole Argentine

[16] Memorial, § 235.
[17] See *supra* §§ 67-73.
[18] Counter-Memorial, §§ 267-276.

economy; nor was there any legal obstacle to the Energy Department's order to state costs in this or that currency. In addition, the Energy Department took account of the effect of the mega-devaluation of the peso on generators' costs. The adjustment of capacity payments was, as discussed earlier,[19] appropriate, reasonable and consistent with a competitive market.

103. The GOA further argued that the measures taken by the Energy Department to calculate spot prices were not exceptional: (a) because the exclusion of certain machines from the spot-price calculation was practised during as well as prior to the crisis; (b) because there always were price caps in the spot market; and (c) because the replacement of the formula "reference prices + 15%," substituted by that of generators' actual costs, was intended to protect producers.

104. Finally, CAPEX and Costanera had agreed to the measures later objected to by El Paso. In 2002 and 2003, before the sale of the holdings in the Argentinian companies, CAPEX challenged some of the measures taken by the respondent State. These challenges were dismissed in the federal court of Argentina, and these decisions were not appealed by CAPEX. A further challenge became moot when CAPEX – voluntarily according to the GOA – resolved, together with most participants in the WEM, to participate in the FONINVEMEM, a system created by the GOA to normalise the service and to make the necessary investment in power generation. "El Paso cannot contradict the own acts of the companies on behalf of which it is claiming."[20] The Claimant objected that the local companies' consent did not bind it and that these companies had acted under duress.[21]

4. The Hydrocarbon Sector

105. As indicated in paragraph 95, export withholdings were imposed on the hydrocarbons sector to compensate the banking sector for the imbalance

[19] See *supra* §§ 67-73.
[20] Counter-Memorial, §§ 267-325; RPHB, §§ 5-7, 9-14.
[21] Claimant's Post-Hearing Brief [hereinafter CPHB] of 2 August 2007, §§ 105-114, 122-129.

generated by the mandatory conversion of dollar-denominated deposits and credits *as per* Decree 310/2002 of 13 February 2002.

106. Decree No. 310/2002 prescribed a 20% withholding on crude oil and LPG exports, according to El Paso, or 16.67% according to Argentina,[22] the withholding on the latter being subsequently reduced to 5%[23] according to El Paso, or 4.76 according to Argentina.[24] On 13 May 2002, the Government raised export withholdings on crude oil and LPG to 25% and 20%, respectively. In August 2004, additional withholdings on crude oil, on a sliding scale, were decreed for the event that the crude oil price would reach or exceed a certain level. Such withholdings affected hydrocarbons sales abroad and depressed domestic prices by increasing the local availability of such products.[25] It must be added here that CAPEX requested and obtained, from Argentina's federal courts, a preliminary injunction suspending the restrictions on exports, and that the latter were subsequently repealed by the GOA's Secretary of Energy.[26]

107. Some withholding measures seem to have persisted for a long time, CAPSA's and CAPEX's revenues suffering as a result on both the international and domestic levels, until El Paso, in 2003, sold its shares in the Argentinian companies (on this issue, see below, paragraphs 114-120).

108. Another measure taken in the Hydrocarbon Sector was, of course, the pesification of contracts under the Public Emergency Law and Decree No. 214/2002, *i.e.* of the existing dollar-denominated obligations and claims, at the rate of 1:1. That measure had, in particular, a negative impact on CAPSA's and CAPEX's dollar-denominated crude oil sales and purchase contracts. Regarding liquid hydrocarbons, the Public Emergency Law obliged the parties to existing sales contracts to re-negotiate them, and the two companies had to accept price reductions. Agreements for the transportation of natural gas for export were not, however, affected by pesification.

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[22] Counter-Memorial, §§ 200-201.
[23] Memorial, § 330.
[24] Counter-Memorial, §§ 202-208.
[25] Memorial, §§ 200-202; Counter-Memorial, §§ 196-222; Rejoinder, §§ 246-288; RPHB, §§ 52-55.
[26] Rejoinder, §§ 246-252; RPHB, §§ 17-18.

109. To insulate domestic consumers from the rise of the price of crude oil on the international market, the GOA directed producers and refiners to enter into special sales agreements. This was done and there were, according to the respondent State, over 20 such agreements executed by it and El Paso's Argentinian companies. As it had done for the electricity sector,[27] the GOA highlighted that fact to show that the measures taken by it had been acquiesced in by the companies.[28] Again the Claimant challenged the argument mainly by asserting that the companies' consent did not engage El Paso, their foreign shareholder, and that the agreements were concluded under duress.[29] As of 1 January 2003, the reference sales price from producers to refiners was 28.50 US dollars. The barrel price of crude oil in the world market was, however, significantly higher and has risen further since then. For the depressed price prescribed, the producers were to be compensated by the refiners should the world market price remain above 28.50 US dollars for a long time, though a cap was set at 36 US dollars per barrel, which limited the duty to compensate. Nothing happened, however, and no compensation was paid.

110. The measures taken in the hydrocarbon sector spawned, among the parties, much the same discussions and controversies as over the electricity sector. These arguments, having been summarised above in paragraphs 101-104, do not need to be repeated here.

5. The Tax Depreciation Issues

111. With the depreciation of investments a tax issue arose. Under Argentina's Income Tax Law, assets were depreciated annually by prorating them according to their estimated life expectancy. The Public Emergency Law repealed the Convertibility Law, and the GOA took measures causing both a devaluation of the peso and inflation, thus reducing the amount of permissible depreciation and decreasing the tax relief the Argentinian companies could claim.

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[27] See *supra* § 103.
[28] RPHB, §§ 1-9.
[29] CPHB, §§ 105-114, 122-129.

112. Regarding the losses suffered by hydrocarbon producers and investors, the Public Emergency Law provided that losses resulting from the new exchange rate which affected dollar-denominated liabilities could only be deducted in five yearly instalments of 20%.

6. The Energy Crisis in Argentina

113. The above-described measures, prompted by the 2001-2002 crisis, resulted in depressed electricity and gas prices, which brought increased consumption. These prices, together with the reduction of capacity payments, dissuaded generators of electricity from investing in new power plants, and gas producers from exploring and drilling for further resources. As a consequence, shortages were likely and did in fact occur.

D. THE SALE OF THE CLAIMANT'S SHARES IN THE ARGENTINIAN COMPANIES

114. According to El Paso, the sale of its investment in the Argentinian companies was due to the destruction of their value by the measures of the GOA and their lack of prospects.[30] The respondent State pointed out, however, that the sale was a consequence, not of its own conduct, but of a decision made by El Paso to concentrate on its core business world-wide in order to improve its liquidity,[31] which had suffered through inadequate policies pursued by the Claimant.

115. The first phase of the sale took place on 23 June 2003. El Paso sold its interest in CAPSA (45%) (and, consequently, in CAPEX) to Wild SA, the majority shareholder of CAPSA, for 24 million US dollars. The transaction was made contingent on a stock swap with CAPEX International Business Co. (CIBCO), an entity controlled by CAPSA, by which El Paso transferred to CIBCO its interest in SERVICIOS in exchange for CIBCO's 38.4% interest in Triunion, another company of the El Paso group.

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[30] Reply, §§ 37-43.
[31] Counter-Memorial, § 263; RPHB, § 63.

116. The second phase occurred on 3 October 2003: El Paso sold its interest in Costanera (12,335%) to Empresa Nacional de Electricidad, a Chilean company, for a cash price of 4.5 million US dollars.

117. The respondent State alleged that the sale was prompted by reasons alien to the Argentinian crisis.[32] It was, moreover, an unwise move, for while El Paso had purchased its investment at a time when the Argentinian economy had reached a peak, it sold that investment when the economy hit bottom. To borrow from the GOA's colourful language, El Paso bought its investment "at the sound of the trumpets" and sold it "at the sound of the cannons."[33]

118. In reply, the Claimant asserted that the sale resulted from the Argentinian crisis, the measures taken by the respondent State, the uncertainty generated by them, and reasons of good and prudent stewardship.[34]

119. The respondent State also expressed doubts about the 24 million US dollars collected by El Paso.[35] That was the sum paid by Wild to EPEC, a company fully owned by El Paso and, also, holding 45% of CAPSA's shares on behalf of El Paso. Of these 45%, 38.5% went to Wild (via EPEC) for the above-mentioned sum of 24 million US dollars; the remaining 6.5% was handed over to Deutsche Bank for 14.1 million US dollars. This caused the GOA to doubt the reality of the price charged to Wild, the price paid by Deutsche Bank being 400% higher.

120. The Claimant explained that the 6.5% of CAPSA's shares went to Deutsche Bank, not on the basis of a sale of stock but as a guarantee for a loan of 14 million US dollars extended by the Bank to enable Wild to buy CAPSA's shares.[36] In other words, the transaction questioned by the GOA was not a straightforward sale but a loan agreement guaranteed by a security. What

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32 Counter-Memorial, §§ 61-89; RPHB, § 217.
33 Rejoinder, § 38; RPHB, § 217.
34 Reply, §§ 37-46.
35 Counter-Memorial, §§ 97-99; Rejoinder, §§ 60-71.
36 Reply, §§ 385-396.

determined the amount paid to Deutsche Bank was not the value of the shares but the amount of the loan.

E. THE FINAL SUBMISSIONS OF THE PARTIES

121. The final submissions of the Claimant read as follows:[37]

> "For the reasons stated herein, in its Memorials, and at the hearing, Claimant respectfully requests an award granting it the following relief:
> 1. A finding and declaration that the Argentine Republic violated the BIT;
> 2. An order that the Argentine Republic compensate Claimant for all damages it has suffered, plus interest compounded quarterly until the date of payment, and
> 3. An order that the Argentine Republic pay the costs of these proceedings, including the Tribunal's fees and expenses, the cost of Claimant's legal representation, and other costs."

122. The respondent State's final submissions were the following:[38]

> "Based on the arguments and evidence of the case, the Argentine Republic hereby requests this Tribunal to dismiss Claimant's claim in all its aspects and to require Claimant to pay for all the expenses and legal costs deriving from this arbitration."

III. LEGAL BACKGROUND

A. APPLICABLE LAW

1. The Parties' Positions

(i) The Claimant's Position

123. Under the first sentence of Article 42(1) of the ICSID Convention, "the Tribunal shall decide a dispute in accordance with such rules as may be agreed by the Parties." Since the Parties consented to arbitrate the dispute under the

[37] CPHB, § 186.
[38] RPHB, § 232.

1991 BIT, the latter, as interpreted and applied in accordance with general principles of international law, constitutes the "rules of law" to which the parties "agreed." Customary international law, which is explicitly incorporated by the BIT in its provisions, has a double role: (1) to clarify the terms of the BIT; and (2) to establish a floor for the treatment of investments.

124. The BIT and international law are also governing under the second sentence of Article 42(1), which provides that the Tribunal "shall apply the law of the Contracting State Party to the dispute … and such rules of international law that may be applicable." In fact, Argentina has incorporated the BIT and international law into its domestic law and the second sentence creates a duty to apply international law. Argentinian law is irrelevant for determining whether Argentina is internationally liable for its conduct, the role of such law being to "inform the content of commitments" made by Argentina to the Claimant.

125. The Claimant relies on a certain number of decisions of ICSID tribunals on the subject, including the decision adopted on 3 July 2002 by the Annulment Committee in *Vivendi Universal v. Argentina,* stating that:

> " … the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties."[39]

(ii) The Respondent's Position

126. Argentina asserts that "there is no agreement between Argentina and El Paso with respect to the law governing the dispute." The fact that the agreement between States is regulated by international law is not related to the law applicable to a dispute in which such an agreement should be applied. Whenever a treaty provides that in a specific dispute the provision of such treaty and domestic law will be applied, domestic legislation is considered to be

[39] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* [hereinafter *Vivendi Annulment*], (ICSID Case No. ARB/97/3), First Decision on Annulment of 3 July 2002, § 102.

"law" (and not a "fact"), applicable on the same level as international law (unless otherwise stated).

127. To decide whether Argentina is internationally responsible under the BIT, the rights that El Paso would allegedly have acquired under Argentina law have to be determined under such law, this being the legal system to which the investor has voluntarily become subject. It is not enough for the Claimant to establish that Argentina violated legal or contractual provisions, it must also show that its behaviour implied a violation of the BIT. As stated in the Decision on Jurisdiction, purely contractual claims not amounting to claims for violation of the BIT cannot be entertained.

2. *The Tribunal's Analysis*

128. Despite the diverging views expressed by the Parties, both have extensively relied on the BIT, international law and Argentinian law in support of their respective claims and defences. Argentina is right when calling attention to the circumstance that in the absence of an agreement between the Parties on the law governing the dispute, under Article 42(1), second sentence, of the ICSID Convention both the law of Argentina and international law are applicable. The Claimant is also right in emphasising the relevance of the BIT and international law, given the nature of the claims involved in the dispute.

129. The Tribunal shares the view that both systems – the BIT supplemented by international law as well as Argentinian law – have a role to play. The issue is to determine the role of each system for the decision on the merits, given the context of a dispute arising under an investment treaty. The advent of treaty arbitration has brought about a departure from the typical situation where the contract between the investor and the host State is the basis for the consent to ICSID jurisdiction. The basis for consent in treaty arbitration is the treaty itself, in our case the BIT, such consent covering as a rule only claims arising under the BIT ("treaty claims," as opposed to "contract claims"). The specific context characterising treaty arbitration permits in our case to define the role of the BIT and international law, on the one hand, and Argentina law, on the other.

130. The Claimant relies on Argentina's responsibility for the violation of various provisions of the BIT. According to the ILC Articles on State Responsibility,[40] "every internationally wrongful act of a State entails the international responsibility of the State." (Article 1) Further, "the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." (Article 3) Accordingly, the primary governing law in this case is the BIT, supplemented by international law to which the BIT itself makes reference in various provisions.

131. The application of the treaty as the prevailing source as well as the national law of the host State in the case of a dispute under a bilateral investment treaty has been upheld by various ICSID tribunals which have also noted the relation of the treaty to the law of the host State. In *Asian Agricultural Products Ltd v. Sri Lanka*,[41] the ICSID tribunal noted that

> "the prior choice-of-law referred to in the first part of Article 42 of the ICSID Convention could hardly be envisaged in the context of an arbitration case directly instituted in implementation of an international obligation undertaken between two States in favour of their respective nationals investing within the territory of the other Contracting State."[42]

Accordingly, the tribunal noted that both Parties acted in a manner that demonstrated their mutual agreement that the Sri Lanka-UK BIT be the primary source of the applicable legal rules and concluded that the Sri Lanka-UK BIT, as *lex specialis*, provides the applicable law in the case of a British (Hong Kong) national asserting violations of that treaty by the Sri Lanka

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[40] *Responsibility of States for Internationally Wrongful Acts*, 2001 [hereinafter ILC Articles], (text adopted by the International Law Commission (ILC) at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's Report. The Report, which also contains commentaries on the Draft Articles, appears in *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two)). Text reproduced as it appears in the annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.),available at:
http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

[41] *Asian Agricultural Products Ltd v. Sri Lanka* [hereinafter *AAPL*] (ICSID Case No. ARB/87/3), Award of 27 June 1990.

[42] *Ibid.*, § 19.

Government. The tribunal added, however, that the agreement of the parties on the application of the BIT did not exclude the application of other rules, as

> "the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of national law character or of domestic law nature."[43]

132. The ICSID tribunal in *Compañía del Desarollo de Santa Elena S.A. v. Costa Rica* concluded that Costa Rican law was "generally consistent with the accepted principles of public international law on the same subject," noting that "[t]o the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail."[44] In *Wena Hotels Limited v. Arab Republic of Egypt*, the Annulment Committee stated the following:

> "What is clear is that the sense and meaning of the negotiation leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit."[45]

133. The Committee then affirmed the original tribunal's reliance on the Egypt-UK BIT as the primary governing law, stating: "This treaty law and practice evidences that when a tribunal applies the law embodied in a treaty to which Egypt is a party it is not applying rules alien to the domestic legal system of this country."[46]

134. Authoritative scholars have expressed the same view. Thus, Professor Prosper Weil has observed:

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[43] *Ibid.*, § 21.
[44] *Compañía del Desarollo de Santa Elena S.A. v. Costa Rica* [hereinafter *Santa Elena*] (ICSID Case No. ARB/96/1), Award of 17 February 2000, § 64.
[45] *Wena Hotels Limited v. Arab Republic of Egypt* [hereinafter *Wena*], (ICSID Case No. ARB/98/4), Decision on Annulment of 5 February 2002, § 40.
[46] *Ibid.*, § 44.

> "Even where the investment instrument – be it a contract or a unilateral act – provides that the relationship between the host State and the foreign investor is entirely or partly subject to the domestic law of the host State, the existence of a Bilateral Investment Treaty raises the question of compliance with the rights and obligations contained therein to the level of a matter under international law, with respect not only to relations between the States parties to the treaty but also to relations between the host State and the investor."[47]

135. The fact that the BIT and international law govern the issue of Argentina's responsibility for violation of the treaty does not exclude that the domestic law of Argentina has a role to play too. The Tribunal agrees with the Claimant that this role is to inform the content of those commitments made by Argentina to Claimant that the latter alleges to have been violated. Thus, in order to establish which rights have been recognised by Argentina to the Claimant as a foreign investor, resort will have to be had to Argentina's law. However, whether a modification or cancellation of such rights, even if legally valid under Argentina's law, constitutes a violation of a protection guaranteed by the BIT is a matter to be decided solely on the basis of the BIT itself and the other applicable rules of international law.

136. The above approach, according to which the BIT and international law as well as Argentinian law have to be applied, is consistent with decisions of ICSID tribunals and annulment committees in disputes involving Argentina under the same BIT. Thus, in *CMS Gas Transmission Company v. Argentine Republic*,[48] the tribunal, referring to the passage of the Annulment Committee in the *Wena* decision quoted above in paragraph 132, held:

> "This is the approach this Tribunal considers justified when taking the facts of the case and the arguments of the parties into account. Indeed, there is here a close interaction between the legislation and the regulations governing the gas privatization, the Licenses and international law, as embodied both in the Treaty and in customary

[47] Prosper Weil, "The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois", 15 *ICSID Rev.– Foreign Inv't L. J.* 401, 411-412 (2000).

[48] *CMS Gas Transmission Company v. The Argentine Republic* [hereinafter *CMS*], (ICSID Case No. ARB/01/8), Award of 12 May 2005, § 117. See also Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003 and Decision of the *ad hoc* Committee on the Application for Annulment of 25 September 2007.

international law. All of these rules are inseparable and will, to the extent justified, be applied by the Tribunal."[49]

137. In *Azurix Corporation v. Argentine Republic*, the tribunal stated:

> "Azurix's claim has been advanced under the BIT and, as stated by the Annulment Committee in *Vivendi II*, the Tribunal's inquiry is governed by the ICSID Convention, by the BIT and by applicable international law. While the Tribunal's inquiry will be guided by this statement, this does not mean that the law of Argentina should be disregarded. On the contrary, the law of Argentina should be helpful in the carrying out of the Tribunal's inquiry into the alleged breaches of the Concession Agreement to which Argentina's law applies, but it is only an element of the inquiry because of the treaty nature of the claims under consideration."[50]

138. In *LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, the tribunal held:

> "The fact that there is no contract between the Argentine Republic and LG&E favours in the first place the application of international law, inasmuch as we are dealing with a genuine dispute in matters of investment which is especially subject to the provisions of the Bilateral Treaty complemented by the domestic law."[51]

139. In *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, the tribunal had this to say:

> "While on occasion writers and decisions have tended to consider the application of domestic law or international law as a kind of dichotomy, this is far from being the case. In fact, both have a complementary role to perform and this has begun to be recognised.
>
> It must be noted also that the very legal system of treaties of the Argentine Republic, like many modern systems, provides for a prominent role of treaties under both Article 27 and 31 of the Constitution. Treaties are constitutionally recognized among the sources considered 'the supreme law of the Nation.' It follows that in

[49] *Ibid.*, § 117.

[50] *Azurix Corp. v. The Argentine Republic* [hereinafter *Azurix*], (ICSID Case No. ARB/01/12), Award of 14 July 2006, § 67.

[51] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* [hereinafter *LG&E*], (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006, § 98.

> case of conflict between a treaty rule and an inconsistent rule of domestic law, the former will prevail."[52]

140. In *Sempra Energy International v. Argentine Republic*,[53] the arbitral tribunal has held that the role of Argentinian law is not limited to the determination of factual questions and has a broader role to play,[54] but that international law holds a prominent role, both Parties having invoked it in respect of a number of matters.[55] In case of inconsistency between Argentinian law and international law, the latter shall prevail.[56] The tribunal has then concluded that:

> "In accordance with the above considerations, the Tribunal will consider both Argentine law and international law to the extent each is relevant to a determination on liability."[57]

141. Accordingly, this Tribunal will apply to the merits of the case the BIT and international law, when applicable, as well as the Argentinian law, each in its role as defined above.

B. Definition of the Investment

142. It is well known that in order to qualify for protection under the ICSID/BIT mechanism, an investment has to satisfy the requirements of the definition of an investment both under the Washington Convention and the BIT. Although there is no definition of an "investment" in the ICSID Convention, case-law has emerged to allow for determination of what constitutes an investment. One of the central purposes of ICSID arbitration is the protection of foreign investments. In order for this Tribunal to entertain a claim, the latter must be related to a legal dispute arising directly out of an investment. The existence of an investment is therefore an essential requirement, and the Tribunal will ascertain what the substance of the protected investment is in this case.

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52 *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic* [hereinafter *Enron*], (ICSID Case No. ARB/01/3), Award of 22 May 2007, §§ 207-208.
53 *Sempra Energy International v. Argentine Republic* [hereinafter *Sempra*], (ICSID Case No. ARB/02/16), Award of 28 September 2007.
54 *Ibid.*, § 235.
55 *Ibid.*, § 236.
56 *Ibid.*, §§ 237-238.
57 *Ibid.*, § 240.

1. Introduction

143. Article I(1)(a) of the BIT provides:

> "For the purposes of this Treaty,
> (a) 'investment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt and service and investment contracts; and includes without limitation:
> (i) tangible and intangible property, including rights such as mortgages, liens and pledges;
> (ii) a company or shares of stock or other interests in the assets thereof;
> (iii) a claim to money or a claim to performance having economic value and directly related to an investment;
> (iv) intellectual property which includes, *inter alia*, rights relating to:
> literary and artistic works, including sound recordings,
> inventions in all fields of human endeavour,
> industrial designs,semiconductor mask works,
> trade secrets, know-how, and confidential business information, and
> trademarks, service marks, and trade names; and
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law."

144. The question to be answered is that of the extent of the "investment" or "investments" made by the Claimant, *i.e.* whether the rights protected by the BIT are limited to those pertaining to the shares held by the Claimant in the Argentinian companies, or whether they include other items, such as legal and contractual rights belonging to the Argentinian companies. The Parties disagree on this issue. Before examining the matter and expressing the present Tribunal's views thereon, it may be convenient to recall that in its Decision on Jurisdiction, the Tribunal rejected, *inter alia*, an objection of the Respondent to the effect that the Claimant lacked *jus standi*.[58]

145. That objection had been based on two arguments: (i) the investments in question had been sold by the Claimant, and claimants must retain their

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[58] Decision on Jurisdiction of 27 April 2006 [hereinafter Decision on Jurisdiction], § 139.

investor's status throughout the examination of their claim; and (ii) the Claimant had but a minority shareholding in the Argentinian companies.

146. Regarding the first argument, the Tribunal found that no rule prescribing continuous ownership of the investment could be deduced from the ICSID Convention and the BIT or from the relevant case-law.[59] All that was required was ownership of the claim at the time of consent to arbitration as well as at the time of the registration of the claim, and these conditions were met in the instant case.

147. As to the second argument, the Arbitral Tribunal considered that it had been presented too late. But even if it had been timely, pursued the Tribunal, it would have been of little help to the Respondent for reasons similar to those mentioned by the Decision on Jurisdiction in *LG&E*.[60] In that decision it is said that foreign claimants' shares in local companies "are the investment within the meaning of Article 1(1)(a)(ii) of the Bilateral Treaty"[61] and that "it is irrelevant whether the shares are majority or minority shares."[62]

148. Accordingly, the Tribunal recognised the *jus standi* of the Claimant. It remains to be seen, on the merits of the present case, what exactly the Claimant's investment consists of: the shares of the Argentinian companies only or other elements as well?

2. ***The Parties' Positions***

(i) The Claimant's Position

149. In its Post-Hearing Brief, the Claimant asserts that the term "investment" used in the BIT between Argentina and the United States includes elements other than shareholdings.[63] That term must be read as including not only shareholders' rights, but also investment contracts and legal or contractual

[59] *Ibid.*, § 135.
[60] *LG&E, supra* note 51, Decision on Jurisdiction of 30 April 2004.
[61] *Ibid.*, § 50.
[62] *Ibid.*
[63] CPHB, § 57.

rights owned or controlled, directly or indirectly, by the investor. This means, according to the Claimant, that since CAPSA and CAPEX were

> " … the investment vehicles through which El Paso invested in Argentina's hydrocarbon sector, the vested and contractual rights belonging to those entities indirectly belonged to El Paso within the terms of this Treaty [the BIT]."[64]

150. Moreover, according to the Claimant,

> " … the actions of the local operating companies – whether they choose to enter into settlement agreements, renegotiations, or seek relief in local courts – cannot waive the rights of a shareholding investor (minority or majority) under an applicable treaty; only the investor can give its consent to waive such rights."[65]

151. The above views are confirmed by the experts commissioned by the Claimant and their testimony in this Tribunal's hearings. Thus, in his Opinion of August 2004, Professor Reisman stated:

> "… in addition to the expropriation of specific contract and legal rights and frustration of legitimate expectations that resulted from the measures taken …, the cumulative effect of the measures … accomplished an indirect expropriation of El Paso's investment."[66]

152. In the present context, what is of interest in the above passage is not so much what it says about expropriation, but the fact that "it includes specific contract and legal rights" of the Argentinian companies within El Paso's investment and, hence, in the object of the alleged expropriation. This view is confirmed by an exchange that took place between the expert and counsel for the respondent State during the hearing on the merits:

> "Q. Were the legal and contractual rights of the Argentine companies
> El Paso's investment?

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[64] *Ibid.*, § 104.
[65] *Ibid.*, § 114.
[66] *Expert Opinion of Professor W. Michael Reisman* [hereinafter Reisman Report] of August 2004, p. 50, Memorial Legal Authority No. 29.

A. Yes."[67]

A few moments later, the following dialogue between counsel for Argentina and Professor Reisman was recorded:

> "Q. … Now, under the definition of investments in the bilateral investment treaty, in addition to the shares that El Paso had in the Argentine companies, would the specific contractual and legal rights held by those companies with the government qualify as protected investments under the treaty?
>
> A. In my opinion it would.
>
> Q. And in your view are specific legal and contractual rights susceptible to expropriation independent from the business of the company as a whole?
>
> A. Of course. It's such an obvious point that I needn't try to give examples, but there are some."[68]

153. These views were confirmed by Professor Schreuer, another expert consulted by the Claimant.[69] In his Opinion, Professor Schreuer asserted that Argentina had abrogated essential rights of the Claimant resulting from the latter's investment by taking, not physical assets but rights under the Electricity and Hydrocarbon Regulatory Frameworks – rights guaranteed by laws, decrees, resolutions and concession agreements – thereby depriving El Paso of a reasonably expected economic return.[70] This expert later asserted

> " … that specific rights that El Paso enjoyed under the Electricity and Hydrocarbons Regulatory Frameworks are covered by the definition of investment in the BIT and that these rights were taken from El Paso. This means that any 'right conferred by law or contract' upon El Paso is protected by the BIT."[71]

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[67] Hearing on the Merits, 4 through 13 June 2007 [hereinafter Hearing Transcript in English], Day 3, p. 784.
[68] *Ibid.*, pp. 808-809.
[69] *Legal Opinion of Christoph Schreuer*, *The Question of Breaches of the Bilateral Investment Treaty between Argentina and the United States of America* [hereinafter C. Schreuer Report] of 3 November 2006, Reply Exhibit No. 254.
[70] *Ibid.*, § 89, p. 30.
[71] *Ibid.*, § 143, pp. 48-49.

154. A confirmation of the above may be found in the conclusions of Professor Schreuer's Opinion:

> "The term 'investment' is defined in Article I(1) of the BIT. That definition includes 'a claim to money or a claim to performance having economic value and directly related to an investment' as well as 'any right conferred by law or contract, and any licenses and permits pursuant to law.' Therefore, contracts and public concessions are included in the definition of investments. This also squarely covers the rights enjoyed by El Paso under the Electricity Regulatory Framework and under the Hydrocarbons Regulatory Framework. It follows that the rights of El Paso under the Electricity Regulatory Framework and under the Hydrocarbons Regulatory Framework as well as the rights arising under permits and contracts based on these legal frameworks are covered by the BIT's provisions protecting United States investors from expropriation and measures tantamount to expropriation."[72]

155. In his testimony before the Tribunal, Professor Schreuer was asked whether he would be surprised if he were told that the Regulatory Frameworks for Electricity and for Hydrocarbons do not grant any rights to El Paso. Here is the expert's answer:

> "Yes, I would be, unless you mean 'directly,' of course. If you mean they granted rights to the Argentinian Companies in which El Paso invested, then I would not be surprised; but, if you say it did not grant any directly or indirectly, then I would be surprised."[73]

156. All in all, the Claimant and its experts clearly are of the view that the expression "investment" used in Article I(1)(a) of the BIT between Argentina and the United States must be interpreted as including both El Paso's shares in the domestic companies and the contractual and legal rights directly owned by those entities.

(ii) The Respondent's Position

157. The Respondent's view is that the legal and contractual rights of the Argentinian companies belong to the latter and not to El Paso, a foreign entity that has invested in them. Accordingly, El Paso can claim for the loss allegedly

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72 *Ibid.*, § 487, p. 159.
73 Hearing Transcript in English, Day 6, pp. 1709-1710.

caused unlawfully by the Respondent to its shares in said companies but not for allegedly unlawful damage caused to rights belonging to the latter. In its Rejoinder, the GOA asserts that

> "the claim by the foreign investor whose investment is an interest in a local company may only be founded on the detriment to the investment itself when it is in breach of the BIT, rather than on the detriment to the local company's rights."[74]

158. Similarly, in its Closing Statement, the GOA points out that

> "[a] shareholder may not claim compensation in connection with a measure concerning the rights of the company where the shareholder holds a participating interest."[75]

159. The Government's views on this issue were further developed by Professor Sornarajah,[76] one of its experts. His Opinion begins with the finding that the lack of diplomatic protection for foreign shareholders in local companies under the *Barcelona Traction* doctrine[77] became increasingly cumbersome when developing countries targeting foreign investment began to require that such investment be made through domestic companies in which foreign shareholders would usually hold minority participations.[78] This, according to the expert, is why some protection has been extended to foreign shareholders by the BITs.

160. But this protection, according to the same expert, will come to bear only if it is the shares as such which have been affected by measures such as forcible divestment or expropriation of the company; if the latter "continued to function and the shares were intact, the need for such protection would not arise."[79] The measures decided by the State thus were issues to be taken up on the domestic level by the company itself. Professor Sornarajah then points out that

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[74] Rejoinder, § 342.
[75] RPHB, § 11.
[76] *Legal Opinion of M. Sornarajah* attached to Argentina's Rejoinder [hereinafter Sornarajah Report] of 5 March 2007.
[77] *Barcelona Power, Light and Traction Co., Ltd.* (*Belgium v. Spain*) (Second Phase) [hereinafter *Barcelona Traction*], Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3.
[78] Sornarajah Report, *supra* note 76.
[79] *Ibid*., § 8, p. 9.

> "[t]he mere fact that the shares had depleted in value does not give a cause of action to a minority shareholder under an investment treaty. Had the company been expropriated, the situation would have been different as the minority shareholder has a right to compensation for the extent of his share in the value of the company."[80]

161. The expert pursues his analysis by asserting that in international law the understanding always was that "the shares in a company incorporated in a host country are not usually affected by any measures" taken by that country. In such situations, the company itself is the victim. The domestic company as such does not have the personality required to seek protection under a BIT. This finding cannot be subverted merely by showing that the protected foreigners hold minority shareholdings. The situation is different when the company itself ceases to exist, in which case foreign shareholders can claim the value of their shares.[81]

162. According to the *Barcelona Traction* ruling, customary international law does not allow for diplomatic protection by the national State of foreign shareholders. The change to this ruling brought about by the BITs is that shareholders are now given the possibility to protect shares, whether "directly or indirectly held." This can be taken to mean: (i) that the intention was to protect the shares of majority shareholders and their value when the company was expropriated, especially in States making the entry of foreign investment dependent on local incorporation; and (ii) that there was no intention to protect shares of functioning companies.[82]

163. While it is true that the Tribunal recognised the *jus standi* of the Claimant as a minority shareholder in the Argentinian companies,[83] this was a *prima facie* finding. The remaining question is whether "the investment treaty protects shareholder rights beyond the protection of their rights as shareholders and

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[80] *Ibid.*
[81] *Ibid.*, § 9, p. 9.
[82] *Ibid.*, § 9, p. 10; § 16, p. 16.
[83] See *supra* § 148.

includes the protection of the rights of the companies in which such shares are held."[84]

164. The problem dealt with next by the Respondent's expert is whether *minority* shareholders qualify as owners of a "protected investment" under Article I(1)(a) of the BIT. Such shareholders "own and control" their shares but not the company itself. Investments owned or controlled "directly or indirectly," as referred to in Article I.1 of the Treaty, is a term describing shares owned or controlled by their holders or someone higher up in the chain. It does not "extend downward" to the local company serving as a vehicle of the investment. The latter's property remains unprotected,[85] and its assets cannot benefit from the diplomatic protection of the shareholders' national State. All the BIT aims for is to transfer the object of the diplomatic protection from the foreign State to the foreign individual investor; it does not enlarge the definition of the objects protected.[86]

165. The Respondent's expert then comments on views that contractual and legal rights of the domestic companies are not protected as rights of the latters' foreign shareholders.[87] Wherever such claims were successful, this was because specific commitments had been made *directly* to the foreign investors guaranteeing these rights *via* permits or contracts. Such was the case in *CMS*,[88] where there was a license granted by decree, and in *Revere Copper v. Jamaica*,[89] where a stabilisation contract "involved a specific contractual commitment."[90]

166. The legal and contractual rights under discussion are based on Argentinian law, which brought them to life. Professor Sornarajah points out that[91] they are not enlarged at the international level but remain co-terminous with the rights as

[84] Sornarajah Report, *supra* note 76, § 10, p.11.
[85] *Ibid.*, § 17, p.17.
[86] *Ibid.*, § 17, p.18.
[87] *Ibid.*, § 11, p.12; § 12, pp.12-13; § 18, pp.18-19.
[88] *CMS*, Decision on Jurisdiction, *supra* note 48.
[89] *Revere Copper & Brass Incorporated, v. Overseas Private Investment Corporation (OPIC)* [hereinafter *Revere Copper v. OPIC*], AAA Award of 24 August 1978.
[90] Sornarajah Report, *supra* note 76, § 18, p. 18, note 17.
[91] *Ibid.*, § 19, pp. 19-20.

they stand on the domestic level: "foreign investment rights under the investment treaty can exist only to the extent permitted by the host State's law at the time of the entry."[92]

167. It is, therefore, to Argentinian law that one must turn to establish whether specific rights have been attributed to the Claimant.[93] In the case at hand, there were no such rights. Regarding the Electricity Sector,[94] changes had to be expected and, in fact, frequently occurred; changes were foreseen in the Regulatory Framework and, indeed, were accepted voluntarily by the local companies; it was the foreign minority shareholders who complained. In the Hydrocarbons Sector,[95] the situation is similar:

> "… to the extent that the measures taken during the economic crisis are reasonable within the regulatory structure, they cannot create any impact or any external system of investment protection for a wrongful infringement of treaty rights."[96]

168. Professor Sornarajah finally turns to the permanent sovereignty over natural resources, which he considers to be a principle of *jus cogens*. This means that, with the fluctuations of what can be considered as being the public interest, an element of paramount importance in this matter, the rights granted to operators and investors may fluctuate as well; entrants to the field cannot but be aware of that possibility. Pursuant to the *jus cogens* argument, what may have been possible at a given time under the angle of the *jus cogens* principle of permanent sovereignty over natural resources will no longer be at another point in time. In technical terms, this means that a supervening impossibility of performance may occur under Article 61 of the Vienna Convention on the Law of Treaties.[97] In such situations, the Respondent's expert concludes, "a

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[92] *Ibid.*, § 19, p. 20.
[93] *Ibid.*, § 20, p. 21.
[94] *Ibid.*, § 21, pp. 21-23.
[95] *Ibid.*, §§ 22-25, pp. 23-26.
[96] *Ibid.*, § 23, p. 25.
[97] Vienna Convention of the Law of Treaties [hereinafter Vienna Convention 1969] of 23 May 1969, United Nations Treaty Series, Vol. 1155, p. 331.

recovery of sovereignty is permissible."[98] According to the Respondent's expert, all BITs are subject to that limitation.

(iii) A Summary of the Discussion

169. El Paso holds the view that it may claim, not only on the basis of its shareholdings in the Argentinian companies, but also based on the legal and contractual rights of those entities.

170. The respondent Government holds that the fundamental rules to be used to define the content of foreign shareholders' rights on the international level are those governing diplomatic protection. In principle, such protection can be granted to foreign shareholders only if their personal, *i.e.* direct, rights have suffered at the hands of the State: annulment or confiscation of its shares, refusal of the right to participate in shareholders' meetings or to receive a dividend, and so on. To this, one may add, at least for majority shareholders, the expropriation of the company, especially by States making the entry of foreign investment contingent on local incorporation. By contrast, shares of functioning companies remain unprotected.

171. This was, according to the Respondent, the situation prevailing up to the *Barcelona Traction* case.[99] The only thing that changed with the advent of BITs is that, whereas in the past such claims had to be made through the channel of diplomatic protection, they can, today, be presented directly by the foreign investor. The BITs do not, however, enlarge the content of the rights protected in any way; they do not, in particular, extend to legal and contractual rights of domestic companies, except if specific commitments were made directly guaranteeing these rights to the foreign investor. Another point made was that minority shareholdings do not qualify for BIT protection.

172. The above suggests that the two essential questions to be addressed by the Tribunal are: (i) Should Article I(1)(a) of the Argentina-US BIT be construed

[98] Sornarajah Report, *supra* note 76, § 25, p. 27.
[99] *Barcelona Traction*, *supra* note 77.

narrowly, as reflecting, so far as foreign shareholders' rights are concerned, the situation prevailing in the field of diplomatic protection? and (ii) Is the protection offered by that provision limited to foreign majority shareholders?

3. The Tribunal's Analysis

173. In the present case, El Paso's right to claim is not in dispute. Being an entity incorporated in the State of Delaware, it is unquestionably a US company and, thus, placed under ICSID jurisdiction pursuant to Article 25(2)(b) of the ICSID Convention. What is in dispute is whether, in addition to El Paso's shares in the Argentinian companies, which the Parties agree qualify as "investment" according to Article I(1)(a) of the BIT, the term "investments" as defined by said Article includes other elements.

174. El Paso's basic contention is that Article I of the BIT between Argentina and the United States uses very broad language and can therefore encompass both its shareholdings in the Argentinian companies and the legal and contractual rights of which those entities had allegedly been deprived in violation of the BIT. This line of argument appears contradictory: either the domestic companies enjoy an independent legal existence, in which case it is they who own said legal and contractual rights, this meaning that the foreign investors' losses can be measured only by the diminished value of their shares in the companies. Or the domestic companies' legal existence is but a fiction, at least on the international level, and can therefore be disregarded, which would mean that the investment can practically be characterised as a direct one, the consequence being that the foreign investor may claim, as the owner of the local companies, the legal and contractual rights in question, but not its losses as a shareholder.

175. In the Tribunal's eyes, the above two views are irreconcilable, so that it is indispensable to opt for the one or the other. As things are, the Claimant's contentions in their present form do not seem viable because they amount to claiming twice for damage caused by the same events: once for the taking of the rights of the Argentinian companies and once for the diminution in value of the shares of those companies held by El Paso. That the loss of share value is

linked to the taking of the rights belonging to the local company appears obvious.

176. The Respondent's thesis appears flawed as well. It is based on the assumption that the only change from the *Barcelona Traction*[100] situation brought on by the BITs is that diplomatic protection will no longer be required because the individual foreign investor may now bring claims on the international level. Otherwise, it is argued, nothing has changed; in particular, the content of the claimable rights remains the same.

177. To remove any doubt and to ensure that its analysis is exhaustive, the Tribunal will first confirm that interests repeatedly invoked by the Claimant as having been interfered with are not investments protected by the BIT**:** this holds true for the licenses and other contracts granted to the Argentinian companies, as well as for purported investment agreements that would belong to El Paso. After this negative approach, the Tribunal will turn to a positive approach and concentrate on the definition of what does constitute El Paso's investment in Argentina, *i.e.* its shares in different Argentinian companies, thus giving an answer to the questions under paragraph 172 above. It seems however apposite, before entering into the analysis of the substance of El Paso's investment, to recall what the Claimant considers as its investment in its submissions. In its Memorial, El Paso's investment is described as follows, on the basis of Article 1(1)(a) of the BIT:

> "Applying these standards, Claimant's claims clearly arise directly out of an '*investment*.' Claimant's investment directly and indirectly include: (i) equity interests in the Argentine Companies; (ii) the ownership and control of legal rights under the Energy Regulatory Framework, including concession and contract rights, such as those arising under the Concessions and crude oil, LPG and energy supply agreements; (iii) a substantial amount of Dollars invested by Claimant in Argentina; and (iv) claims to money and performance having economic value under Claimant's Concession, contract and legal rights."[101]

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[100] *Ibid.*
[101] Memorial, § 57.

(i) What Is Not El Paso's Investment?

(a) The Licenses and Other Contracts Granted to the Argentinian Companies Are Not Protected Investments

178. Although the Claimant has not asserted that the Argentinian companies as such are its investment, it has claimed violation of rights belonging to these companies and can therefore be considered to have implicitly considered the Argentinian companies either as protected investors or protected investments. The Tribunal therefore deems it necessary to clarify whether the Argentinian companies are or are not protected investors and whether the Claimant can therefore claim for rights belonging to them.

179. In its Article 25(2), the ICSID Convention gives a definition of the companies that can be considered nationals of a given State:

> "… (2) 'National of another Contracting State' means:
>
> … (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

180. In the BIT, Article I gives the following definition of a "company":

> "b) 'company' of a Party means any kind of corporation, company, association, state enterprise, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned."

181. A first point can be dealt with quite quickly: it is not contested that CAPSA, CAPEX, Costanera and SERVICIOS are Argentinian companies under these definitions, as they are incorporated under the laws of Argentina and registered in that country.

182. The second question to be asked is whether, although they have the nationality of the Contracting State Party to the dispute – *i.e.* the nationality of Argentina – the Parties have agreed that, because of foreign control, these companies should be treated as United States nationals, and therefore their rights considered as protected investments, for the purposes of the ICSID Convention and this arbitration. It should be noted that Argentina has indeed agreed to treat the Argentinian Companies as foreign companies under Article VII(8) of the BIT for purposes of Article 25(2)(b) of the ICSID Convention, on condition of a foreign (U.S.) control over such entities.

183. For Costanera, there is clearly no control, as El Paso holds only an indirect non-controlling interest of about 12% in Costanera. The same is true for CAPSA and, through the latter, CAPEX, as there is no control by the American company El Paso over these two Argentinian entities: El Paso has only indirect non-controlling shareholdings in CAPSA and CAPEX; more precisely, El Paso owns a 45% interest in CAPSA, the latter having a 60.36% interest in CAPEX.[102] The analysis is different for SERVICIOS: both the first condition for considering it as a foreign company – El Paso owned a 99.2 % controlling shareholding in that company – and the second condition – the agreement by Argentina to consider SERVICIOS as a US company because of control – are met. However, SERVICIOS has signed no contracts or other agreements with Argentina. The conclusion is that the rights of the four mentioned Argentinian companies in which El Paso has invested cannot be considered rights enjoying the protection of the Argentina-US BIT by application of Article 25(2)(b) of the ICSID Convention.

184. A similar situation was found to exist in *CMS*.[103] That company was complaining about the treatment it received as a foreign investor during the Argentinian crisis, its investment being a minority shareholding in TGN (Transportadora de Gas del Norte), an Argentinian company to which the GOA had granted a concession for the transportation of natural gas. The Claimant,

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[102] This amounts to a 28.06% indirect interest of El Paso in CAPEX.
[103] *CMS*, *supra* note 48, Decision on Jurisdiction.

the Respondent and the Tribunal made the same analysis of the situation, considering that TGN was not a protected investor. The Respondent's position, as summarised by the tribunal in the Decision on Jurisdiction, was the following:

> "In its view, while the acquisition of shares qualifies as an investment under the Treaty, neither TGN, as an Argentine corporation, nor the License qualify as an investment under the BIT. TGN, the argument follows, has its own assets, including the License; because these assets do not constitute an investment under the Treaty, CMS's claims, based on the alleged breach of TGN's rights under the License cannot be considered to arise directly from an investment."[104]

185. The claimant did not disagree with this analysis, as highlighted again by the tribunal:

> "CMS shares the view that TGN is not an investor under the Treaty, and that it has not been agreed to treat this company as a non-Argentine national because of foreign control. Neither is the License an investment under the Treaty. However, CMS adds, its 29.42% share in TGN qualifies as an investment covered under the Treaty …"[105]

186. The tribunal concluded along the same lines and accepted jurisdiction, not on the basis of any rights of TGN or any rights relating to the License, which were not protected investments, but on account of the existence of the shareholding of CMS in the Argentinian company:

> "Because … the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License, and because the Claimant has a separate cause of action under the Treaty in connection with the protected investment, the Tribunal concludes that the present dispute arises directly from the investment made and that therefore there is no bar to the exercise of jurisdiction on this count."[106]

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[104] *Ibid.*, § 66.
[105] *Ibid.*, § 67.
[106] *Ibid.*, § 68.

187. The conclusion is therefore unavoidable: the Argentinian companies – CAPSA, CAPEX, Costanera and SERVICIOS – do not qualify as protected investors under the ICSID Convention and the BIT, and the Tribunal so holds.

188. The Argentinian companies not being protected investors, their rights and licenses cannot be considered protected investments. Throughout its submissions, the Claimant complains about interferences with "its contractual rights." A few examples can be given: in its Memorial, it mentions that "El Paso was stripped of legal and *contractual rights* and associated revenues."[107] In its Reply, the Claimant asserts that the GOA interfered with electricity sale contracts "[i]n violation of express provisions of the Electricity Law that guaranteed the right of generators to freely negotiated *contracts*,"[108] that it mandatorily converted "all Dollar denominated payments in PPAs into Pesos at a confiscatory exchange rate,"[109] that "the GOA unilaterally interfered with *contractual rights* arising from the *sale agreements*, contravening express assurances granted to CAPSA and CAPEX under the Hydrocarbon Deregulation Decrees and Decree Nº 43/1991 that granted the CAPEX Concession";[110] also, as stated by the Claimant in the same submission, "the currency conversion imposed by Law N° 25,561 and Decree N° 214 severely impacted CAPSA and CAPEX's *contracts.*"[111]

189. However, this Tribunal considers that El Paso owns no contractual rights to be protected, as it has signed no contract with Argentina. In so doing, it agrees with the analysis of the tribunal in the *CMS* case, as evidenced by the references to the licenses in the citation from the Decision on Jurisdiction in paragraph 186. It is thus the conclusion of the Tribunal that none of the contracts the interference with which is complained of by the Claimant are protected investments under the ICSID Convention and the BIT.

(b) No Investment Agreement Protected by the BIT Was Entered into

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[107] Memorial, § 31. Emphasis added by the Tribunal.
[108] Reply, § 112.
[109] *Ibid.*
[110] *Ibid.*, § 238. Emphasis added by the Tribunal.
[111] *Ibid.*, § 246. Emphasis added by the Tribunal.

between Argentina and El Paso

190. In its Decision on Jurisdiction, the Tribunal considered that it could accept *prima facie* the contention of the Claimant that there might be some investment agreements in this case, although that notion is not defined in the BIT. It is worth mentioning that while the BIT involved here fails to supply a complete definition of "investment agreements," the following definition of that notion has been given in BITs and free trade agreements concluded by the US since 1994:

> " … a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities and (ii) the investment, national or company relies upon in establishing or acquiring a covered investment."

191. According to the Claimant, the concessions granted to the Argentinian companies could be so characterised because they constitute written agreements between those companies and the Government; they grant the companies rights to natural resources belonging to the host State; and they establish investment obligations for the companies towards the Government. For example, in its Reply, the Claimant asserts that "each of the Concessions qualifies as an 'investment agreement'."[112] According to the Respondent, on the contrary, "[i]n the case under analysis, there is no investment agreement because the requirements for it to exist have not been met: (a) El Paso did not enter into an agreement with the Argentine Government; and (b) the concessions invoked by Claimant lack the elements that may internationalise them because they are governed by Argentine law, are subject to domestic courts and have been granted to Argentine Companies."[113]

[112] Reply, § 613.
[113] Rejoinder, § 302.

192. The Tribunal, in its Decision on Jurisdiction, considered that "[a]ccording to this Tribunal, the Claimant has made out a *prima facie* case that there is indeed an investment agreement as that notion may be generally understood."[114]

193. As the Tribunal is now at the merits phase, it has to re-consider its initial characterisation. The Hydrocarbon Concession and Contracts could indeed have been considered "investment agreements" if they had been signed between Argentina and a foreign investor, as results from the plain wording of Article VII(1) of the BIT which provides for the competence of arbitral tribunals over "investment disputes." That term is defined in Article VII(1) as "a dispute between a Party and a national or company of the other Party arising out of or relating to (a) *an investment agreement between that Party and such national or company*."[115]

194. As has been pointed out, CAPSA and CAPEX cannot be considered US companies. The inescapable conclusion is that the Hydrocarbon Concession and Contracts do not legally qualify as "investment agreements" under the relevant BIT. The disputes related to these agreements are therefore not, as such, investment disputes falling under the jurisdiction of this Tribunal.

195. This conclusion is corroborated *a contrario* by the decision in *Lanco International, Inc.* v. *Argentina*,[116] where the tribunal decided that the concessions were investment agreements, stating that "insofar as Lanco is a party to [the concession agreement, the latter] can be characterised as an investment agreement."[117] This conclusion was based on the fact that Lanco was not only a shareholder of the concession holder but also a party to the concession agreement, which is not the situation in the present case, where El Paso was not a party to the concession agreements, nor to any other contract with Argentina for that matter. It is also in line with the decision in *Occidental*

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[114] *CMS*, *supra* note 58, Decision on Jurisdiction, § 114.
[115] Emphasis added by the Tribunal.
[116] *Lanco International, Inc. v. The Argentine Republic* [hereinafter *Lanco*], (ICSID Case No. ARB/97/6), Preliminary Decision on Jurisdiction of 8 December 1998.
[117] *Ibid.*, § 16.

Exploration and Production Co. v. Ecuador,[118] where the tribunal, faced with the interpretation of an exclusion of tax matters similar to that found in Article XII of the BIT, had to determine whether or not an investment agreement was involved. As in *Lanco*, the tribunal found that there was indeed such an agreement, but that, as in *Lanco*, this was so because the contract was directly signed between the foreign investor and Petroecuador in the name of Ecuador:

> "In 1999, OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY ("OEPC" or "the Company"), a company registered under the laws of California, *entered into a participation contract* ("the Contract" or "Modified Participation Contract") with Petroecuador, a State-owned corporation of Ecuador, to undertake exploration for and production of oil in Ecuador."[119]

> "Investments were made by OEPC *under the Contract* in pursuance of its obligation and exclusive right to carry out the exploration and exploitation activities in the assigned area."[120]

196. This being the description of the contract, the tribunal in *Occidental Exploration and Production Company. v. Ecuador*, partly relying on *Lanco*, held that such a contract had to be considered an investment agreement:

> "The Tribunal must note … that … the Modified Participation Contract qualifies as an 'investment agreement' under the Treaty. On this point the Tribunal believes that Ecuador's argument is consistent with the *Lanco* Preliminary Award in so far as this decision identified a concession contract, albeit structured in a more complex manner, with an investment agreement between the State and the foreign investor under the Argentine-United States bilateral investment treaty."[121]

197. The present case has nothing to do with these two precedents as there never was a contract signed between El Paso and Argentina, nor was there a concession granted to El Paso by Argentina. The Tribunal considers that the concessions, having been granted to Argentinian companies and not to El Paso, do not qualify as investment agreements. It is only in partial agreement, therefore,

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[118] *Occidental Exploration and Production Company v. The Republic of Ecuador* [hereinafter *Occidental VAT*], UNCITRAL Arbitration, Final Award of 1 July 2004, LCIA Case No. UN 3467.
[119] *Ibid*., § 1. Emphasis added by the Tribunal.
[120] *Ibid*., § 28. Emphasis added by the Tribunal.
[121] *Ibid*., § 44.

with the Claimant, when the latter states in its Reply that "[t]he equity interest in CAPSA/CAPEX and the Concessions are covered investments under the BIT. Thus, the definition of investment includes Claimant's interest in CAPSA/CAPEX and the concessions they hold."[122] If indeed Claimant's shareholding in CAPSA/CAPEX is a protected investment, the contrary holds true for the concessions, which do not qualify as protected investments under the BIT entered into by Argentina and the United States.

198. The Tribunal therefore concludes that no investment agreement protected by the BIT was concluded between Argentina and El Paso and that, as a consequence, the concession agreements entered into by the Argentinian companies cannot give rise to an ICSID claim as protected investments.

(ii) What Is El Paso's Investment?

(a) The Protection of the Shares under the ICSID Convention and under Article I(1)(a) of the BIT

199. In the present case, El Paso's right to claim for interference with its shares under the ICSID Convention is not in dispute.

200. The Tribunal now turns to Article I(1)(a)[123] to address this issue in the context of the Argentina-United States BIT and the case at hand. The text of the provision is formulated in a somewhat circular way in that "investments" are defined as being "investments." There are, however, further elements making that expression more precise.

201. First, as suggested by the Claimant, the expression "investments" is conceived broadly, witness the qualifier "every kind of." Second, the investment made in one Contracting State must be "owned or controlled directly or indirectly" by nationals or companies of the other Contracting State. Hence, an investment is protected only if it is owned or controlled by such nationals or companies. The words "owned or controlled," read in conjunction with the words "directly or

[122] Reply, § 504.
[123] *See supra* § 143.

indirectly," suggest that the "investment" may be one made by a foreign national or a company incorporated under the laws of the host State but wholly or partly controlled by persons of the other Contracting State; in addition, such control may shift from persons of one foreign State to persons of another.[124] Third, "investments" may, in particular, consist of "equity, debt, and service and investment contracts," as well as "tangible and intangible property" and – this is crucial – companies "or shares of stock or other interests in the assets thereof." Other categories of "investments" mentioned are claims to money or to performance having economic value and directly related to an investment, intellectual property, and – this is important equally in the present case – "any right conferred by law or contract, and any licenses and permits pursuant to law."

202. The circular character of the initial definition of the term "investments" is amply made up for by the above elements. "Investment" covers almost any kind of economic input. It expressly includes "shares of stock" in companies, notably in entities which are incorporated under the laws of the receiving State. There is no limitation regarding the quantity of stock needed, nor are there restrictions regarding the situation of the company (in full operation, expropriated, in the process of liquidation, wound up) or the character of the claims (taking of the shares, right to a dividend, right to participate in stockholders' meetings, claims for losses in the value of shares). All this is clear evidence that the BIT, as asserted in its preamble, aims at facilitating private investment, promoting the flow of capital and creating conditions of fair and equitable treatment for investments.

203. The Respondent asserts that, according to the text of the BIT, the Parties intended to transfer to the BIT, lock, stock and barrel, the regime practised in the area of diplomatic protection and that the only change brought by the BITs was that the individual investors were now being given direct access to an international dispute settlement mechanism. This "intention" is not, however,

[124] *Vivendi Annulment*, *supra* note 39, § 50.

attested to by anything and the respondent State has not even attempted to prove it.

204. It is of course true, as the Claimant observes, that the term "investment" used in Article I(1)(a)(v) includes, "without limitation," "any right conferred by law or contract, and any licences and permits pursuant to law." But, as shown above in paragraph 175, investors cannot have their cake and eat it too. The loss of value of El Paso's shares is due, to a large extent, to the measures taken against the legal and contractual rights of the Argentinian companies. To allow claims of El Paso on both counts, for the loss of value of its shares in the companies *and* for the prejudice suffered by the latter, would amount to compensating the Claimant twice.

(b) International Practice

205. A spate of decisions of ICSID tribunals deals with the interpretation to be given to Article I(1)(a) of the Argentina-United States BIT or similar clauses of other BITs: *Lanco International, Ltd.* v. *Argentine Republic,*[125] *Goetz* v. *Republic of Burundi,*[126] *Maffezini* v. *Spain,*[127] *Genin* v. *Estonia,*[128] *CMS* v. *Argentina* (Decision on Jurisdiction and Decision of the Annulment Committee),[129] *Azurix* v. *Argentina,*[130] *LG&E* v. *Argentina*,[131] *Enron and Ponderosa Assets* v. *Argentina*,[132] *Siemens* v. *Argentina.*[133] and *Pan American Energy* v. *Argentina.*[134]

[125] *Lanco*, *supra* note 116, § 10.
[126] *Antoine Goetz and others v. Republic of Burundi* [hereinafter *Goetz*], (ICSID Case No. ARB/95/3), Award of 10 February 1999, § 89.
[127] *Emilio Agustin Maffezini v. The Kingdom of Spain* [hereinafter *Maffezini*], (ICSID Case No. ARB/97/7), Decision on Jurisdiction of 25 January 2000, §§ 65-70.
[128] *Alex Genin and others v. The Republic of Estonia* [hereinafter *Genin*], (ICSID Case No. ARB/99/2), Award of 25 June 2001, § 324.
[129] *CMS*, *supra* note 48, Decision on Jurisdiction and Decision on Annulment,.
[130] *Azurix*, *supra* note 50, Decision on Jurisdiction of 8 December 2003.
[131] *LG&E*, *supra* note 51, Decision on Objections to Jurisdiction of 30 April 2004, § 89.
[132] *Enron*, *supra* note 52, Decision on Jurisdiction (Ancillary Claim) of 2 August 2004, §§ 28-32.
[133] *Siemens A.G. v. The Argentine Republic* [hereinafter *Siemens*], (ICSID Case No. ARB/02/8), Decision on Jurisdiction of 3 August 2004, §§ 136-144.
[134] *Pan American v. The Argentine Republic*, and *BP America v. Argentine Republic* [hereinafter *Pan American*], Decision on Preliminary Objections of 27 July 2006, §§ 209-221.

206. With the exception of *Goetz* – which only deals with the specific circumstances of that case, *i.e.* the presence of foreign majority shareholders – these precedents, taken collectively, yield the following conclusions:

- the situation envisaged here is not one of diplomatic protection, as in *Barcelona Traction* and *ELSI*,[135] and the practice reflected in those cases is not necessarily relevant here;

- what is relevant is Article I(1)(a) of the Argentina-United States BIT as well as comparable provisions of other instruments, read according to their text and the preamble of the BIT;

- these instruments protect the rights of foreign shareholders in domestic companies, more precisely their own rights as shareholders (right to the shares, right to a dividend, participation in stockholders' meetings, etc.), including the right to compensation for loss of value of stocks imputable to measures taken by the host State;

- that protection is not limited to foreign majority shareholdings but encompasses minority holdings.

This last conclusion has been forcefully approved by the Annulment Committee in the case of *CMS*:

> "The Committee observes that, as regards shareholder equity, the BIT contains nothing which indicates that the investor in capital stock has to have a majority of the stock or control over the administration of the company. Investments made by minority shareholders are covered by the actual language of the definition, as also recognized by ICSID arbitral tribunals in comparable cases."[136]

To this summary of the international practice, the Tribunal will now add further observations.

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[135] *Elettronica Sicula S.p.A.* (*United States of America v. Italy*) [hereinafter *ELSI*], Judgement of 20 July 1989, ICJ Rep. 1989, p. 15.

[136] *CMS*, *supra* note 48, Decision on Annulment, § 73.

207. The problem of the admissibility of claims by foreign shareholders has produced a steady trickle of international practice. According to that practice, the national States of foreign shareholders owning shares and the rights flowing therefrom – as defined in the preceding paragraph – are entitled to claim those rights regardless of the quantity or value of the shares held. It has generally been assumed that, as long as the company's home State was in a position to claim on the international level, by way of diplomatic protection, the shareholders' national States could not claim for any infringement of the rights of the company, or could do so only if the shareholders' rights had become immediate rights against the host State as a result of the disappearance of the company itself.

208. International practice, however, shows a clear tendency also to protect the interests of foreign shareholders where the company itself belongs to the respondent State, especially where incorporation in that State is a condition for making investments. In such instances, it is thought desirable to protect such interests, for otherwise there would be no protection at all. The *ELSI* case decided by a Chamber of the International Court of Justice[137] attests to that tendency.

209. Moreover, the present instance must be viewed, not from the angle of general international law, as the International Court of Justice did in *Barcelona Traction*, but from that of treaty law, specifically Article 25 of the ICSID Convention and Article I(1)(a) of the BIT between Argentina and the United States. An examination of those provisions and of the relevant international practice show that they deviate from *Barcelona Traction* and that they were intended to do so. This has also been acknowledged by the *CMS* Annulment Committee when it stated that "[s]uch treaties [BITs] and in particular the ICSID Convention must be applied as *lex specialis.*" (§ 69).

210. Whether it can be asserted that, today, the *lex specialis* thus developed is "so prevalent that it can now be considered the general rule," as stated by the ICSID

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[137] *ELSI*, *supra* note 135, p. 15.

tribunal in *CMS*,[138] is a difficult question which the present Tribunal will not have to go into, however, since the case before it is governed by the *lex specialis* anyway.

211. Another issue regarded as unsolved by some is whether the foreign shareholding, to be protected, must be of some importance. The ICSID case-law recited earlier[139] shows that, regarding the rights of foreign shareholders, no majority is required; a minority will suffice. That raises the further question of whether that minority must be a substantial one or whether even a single share could give rise to a claim. Some concern has indeed been voiced by international tribunals that not any minor portion of indirectly owned shares should necessarily be considered an investment. In *Enron*, the Claimants had a 35.263% indirect ownership of the shares of an Argentinian company through a complex corporate structure. The tribunal considered this an investment, while adding a *caveat*:

> "The Tribunal notes that while investors can claim in their own rights under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would only have a remote connection to the affected company."[140]

212. In the present instance, El Paso's shareholding interest in the Argentinian companies is undoubtedly substantial in nature, which is why the question does not have to be answered.

(iii) Summary

213. BITs do not concern situations such as that addressed in *Barcelona Traction*: they do not pertain to diplomatic protection, nor do they reflect the rules of general international law in matters of investment protection. Interpreted in conformity with the canons of treaty law, they prescribe that rights and interests of foreign shareholders, *in casu* El Paso's shareholdings in the Argentinian

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[138] *CMS*, *supra* note 48, Decision on Jurisdiction, § 48.
[139] *See supra* §§ 205-206.
[140] *Enron*, *supra* note 52, Decision on Jurisdiction of 14 January 2004, § 52.

companies, are protected regardless of whether they are majority or minority participations.

214. The Tribunal has come to the clear conclusion that the investment protected by the BIT was constituted by the shares in the Argentinian companies that belonged to El Paso. The Claimant in fact has itself admitted this conclusion of the Tribunal, if one looks at its Memorial, where it is stated that "[i]n summary, El Paso owned certain investments in Argentina, which include indirect non-controlling shareholdings in CAPSA, CAPEX and Costanera and an indirect controlling shareholding in SERVICIOS."[141] The overall conclusion related to the definition of the protected investment could be: what is protected are "the shares, all the shares, but only the shares."

IV. THE ALLEGED VIOLATIONS

215. As stated by the Claimant in its Memorial,

> "[t]his dispute arises out of a series of laws, decrees, orders and resolutions of the GOA, mostly enacted during and since 2002, through which it fundamentally breached the *explicit and implicit obligations* it had assumed towards investors by abrogating and repudiating legal and contractual rights and radically altering the very economic, regulatory and legal frameworks that had been specifically designed to induce investment, and upon which El Paso had relied in making its investments in Argentina."[142]

216. The Respondent has a totally different approach to the events and considers that what happened was a terrible economic crisis affecting all economic actors and that El Paso was necessarily caught in these economic disturbances:

> "Isolating the foreign investor from the crisis through the ICSID is distorting the nature and purpose of the protection granted by treaties to investors only to turn them into privileged subjects that may appear before such World Bank agency seeking protection against structural crises as the one undergone by the Argentine economy. Bilateral

[141] Memorial, § 48.
[142] *Ibid.*, § 20. Emphasis added by the Tribunal.

treaties are not good business insurance or a protection against a crisis."[143]

217. The Tribunal does not see exactly what the Claimant means by "implicit" obligations, unless this is a mere formula to extend State liability. It will therefore concentrate on the explicit obligations towards American investors undertaken by Argentina when ratifying the Argentina-US BIT, to establish whether any of these obligations have been violated. If the answer is positive, the Tribunal will still have to verify whether there are circumstances, according to the BIT or general international law, under which these acts cannot be qualified as BIT violations.

218. Before examining whether the violation of the Claimant's rights amounts to a breach of one or more BIT standards, it is necessary for the Tribunal to have a full picture of the rights alleged by the Claimant which the latter considers to have been violated. These rights were stated first in the Request for Arbitration, and no new right was asserted thereafter. A distinction has to be drawn between the Electricity Sector and the Hydrocarbon Sector.

219. In the **Electricity Sector**, the following rights are said to have been violated in the Request for Arbitration:[144]

- Right to receive Capacity Payments in dollars.
- Right to have Spot Market Prices set at a uniform rate based on the marginal production cost of the system.
- Right to have Spot Prices calculated in dollars.
- Right to collect payments for spot energy supplies in accordance with pre-established conditions.[145]

[143] Counter-Memorial, § 316.
[144] *El Paso Energy International Company v. Argentine Republic*, Request for Arbitration of 6 June 2003. [hereinafter Request for Arbitration], §§ 55, 56, 58 and 60.
[145] In the Claimant's Memorial, the power generation dispute is described as an alteration of the electricity market involving the following measures, all considered as a violation of the investor's rights:
1. Alteration of Spot Price Setting Mechanisms;
2. Pesification of VCPs at an Artificial Exchange Rate;
3. Caps on Spot Prices;

220. In the **Hydrocarbon Sector**, the following rights are alleged to have been breached in the Request for Arbitration:[146]

- Right to have hydrocarbon exports exempted from export taxes and withholdings.
- Right to export freely.
- Right to dollar-denominated sale and purchase agreements.[147]

221. It is worth underscoring that El Paso does not claim that the devaluation *per se* constitutes a violation of the BIT. In fact, El Paso's core claim, really consists in claiming the violation of its right to earn a reasonable return on its investments, as appears, for example, from its own conclusion of the analysis of the measures adopted in the Electricity Sector which is found in its Memorial and where it is stated that:

> "El Paso's most fundamental right with respect to CAPEX and Costanera was the right to operate within an Electricity Regulatory Framework that would permit them to receive capacity payments sufficient to cover their investment costs, and energy prices sufficient to recover their costs of production, while also earning a reasonable return on the investment."[148]

In the same submission, it is also claimed, more generally, that "El Paso was deprived of the reasonably-to-be-expected economic benefit of its investment in the Argentine Companies."[149]

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4. Reduction in Value of Capacity Payments;
5. Additional Alterations of the Electricity Regulatory Framework;
6. Mandatory Currency Conversion of Power, LPG and Crude Oil Sale Contracts;
7. GOA's Interference in Generators' Ability to Collect Bills.

The list seems longer but it is only more detailed and refers always to the same four rights invoked in the Request for Arbitration.

[146] Request for Arbitration, §§ 68-70.

[147] In the Claimant's Memorial, the oil and gas dispute is described as a violation of the Hydrocarbon Regulatory Framework, implying a violation of the three same rights as listed in the Request for Arbitration:

1. Violation of the Right to Export Hydrocarbons Free of Export Withholdings;
2. Imposition of Restrictions on Exports;
3. The Right to Dollar-denominated Purchase and Sale Agreements Violated by Pesification.

[148] Memorial, § 324.

[149] Memorial, § 450.

222. El Paso recognises that the BIT does not protect foreign investors and their investments against devaluation. The Tribunal takes note of this position and takes this opportunity to point out that devaluation pertains to the monetary and fiscal sovereignty of the State and to indicate its agreement with the *dictum* of the tribunal in *Continental v. Argentina* relating to the question of devaluation:

> "The fixing of an exchange rate and deciding the mechanism by which the national currency may be exchanged for foreign currency and its conditions, including the possibility of maintaining accounts and deposits denominated in a foreign currency within the country, pertain to the monetary sovereignty of each State. These policies … do not render the State liable for the burden or losses that may be suffered by those affected, provided there is no discrimination or unfairness in their application."[150]

223. It should also be mentioned here that throughout its submissions, El Paso has complained about measures adopted after the sale of its investments.[151] The Tribunal must however note that these measures cannot – from a logical point of view alone – be taken into account to evaluate whether the sale of El Paso's shares was or was not entirely forced by Argentina's measures, or whether these measures played, among other factors, a significant role in the sale.

224. Before it begins to evaluate the facts and contentions of the Parties in this case, in order to ascertain whether or not they show violations of the international standards of protection of foreign investments, the Tribunal wishes to insist on the specificity of the facts of each case and considers it appropriate to identify the legal framework within which the factual aspects can and must be examined. As stated in *Continental,*

> "each case addressing Argentina's crisis, with its different parties, claims and legal texts, raises its own special issues and particular considerations. Guided by the issues in the present case, the Tribunal

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[150] *Continental Casualty Company v. Argentine Republic* [hereinafter *Continental*], (ICSID Case No. ARB/03/9), Award of 5 September 2008, § 278. This case arose after the Parties had made their submissions, and for this reason, the Tribunal does not rely on it for its decision, but it considers it interesting to point to some convergences of the reasoning in that case with the one adopted by this Tribunal.

[151] Memorial, § 327: "Furthermore, the situation in the electricity market, particularly for power generators, has deteriorated progressively and significantly since El Paso sold its investments in CAPSA/CAPEX in June 2003 and in COSTANERA in October 2003."

> has made its own analysis and has arrived at its own conclusions based upon the materials presented by the Parties in these proceedings."[152]

Once ascertained, the facts as they result from the record have to be analysed taking due account of the applicable rules. It is therefore of utmost importance to try to identify the content and scope of the different standards of protection benefitting foreign investors under the BIT.

A. GENERAL OBSERVATIONS ON THE DIFFERENT STANDARDS OF PROTECTION

225. The standards of protection applicable to foreign investments, in addition to the protection against expropriation provided for in Article IV (1), are stated in Article II(2)(a) and (b).

Article IV (1) of the BIT prescribes:

> "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)."

Article II(2)(a) and (b) provides that:

> "(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
>
> (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory, notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party."

226. ICSID case-law has developed in a way that generates some confusion and overlap between these different standards of protection found in most BITs. In

[152] *Continental*, *supra* note 150, § 103.

view of this situation, which is not conducive to security of the legal framework and predictability of its application to foreign investments, the Tribunal will endeavour to clarify as much as possible the scope of the different standards of protection, for it is convinced that they should not be used indifferently one for the other. Before doing so, it thinks it appropriate to give a few examples of the prevailing confusion which, in its view, justifies its approach.

227. There is not always a clear distinction between *indirect expropriation* and *violation of legitimate expectations,* as can be seen from an excerpt of the Claimant's Memorial stating that "measures that are inconsistent with an investor's legitimate expectations constitute an expropriation"[153] or of the Claimant's Reply, where it is asserted that

> "[s]everal other ICSID cases have held that an indirect expropriation occurs when the State repudiates fundamental commitments in frustration of an investor's legitimate expectations deriving from the rights granted in contracts, law or decrees (which, under the BIT, clearly are "investments" protected against any form of expropriation)."[154]

According to this Tribunal, the violation of a legitimate expectation should rather be protected by the fair and equitable treatment standard.

228. Sometimes, there is also *no distinction between the fair and equitable treatment (FET) and the full protection and security (FPS)* standards. This has been the position adopted by the tribunal in *Azurix*:

> "The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security … when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds

[153] Memorial, § 432.
[154] Reply, § 451.

> that the Respondent also breached the standard of full protection and security under the BIT."[155]

Another example of this confusion can be found in the so-called VAT arbitration, *Occidental Exploration and Production Company v. Ecuador*, where the tribunal declared that "treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment."[156] The Claimant in our case takes the same position and assimilates FET and FPS, alleging that the FPS has been breached because Argentina has adopted laws interfering with the Claimant's investment:

> "The GOA not only failed to protect the investment of El Paso, but affirmatively disregarded the terms of the Electricity Regulatory Framework, the Hydrocarbons Regulatory Framework and the Concessions, and destroyed the very protections and security provided by law. In Law N° 25,561 and its progeny, the GOA nullified essential vested rights it offered and promoted to investors. Thus, the GOA failed to provide full security and protection to El Paso's investments."[157]

229. Sometimes there is *no distinction between several standards of treatment*, which are all amalgamated, as was done by the tribunal in *Noble Ventures*, stating that:

> "Considering the place of the fair and equitable treatment standard at the very beginning of Art.II(2), one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor."[158]

230. The distinction seems also often difficult *between arbitrary or discriminatory treatment* and *violation of the FET*. It must of course be emphasised that it is quite non-controversial that an arbitrary or discriminatory treatment is necessarily a violation of the FET as well, as mentioned for example in *CMS*:

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[155] *Azurix*, *supra* note 50, § 408.
[156] *Occidental VAT*, *supra* note 118, § 187.
[157] Memorial, § 562.
[158] *Noble Ventures, Inc. v. Romania* [hereinafter *Noble Ventures*], (ICSID Case No. ARB/01/11), Award of 12 October 2005, § 182.

> "The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment." [159]

This is of course true, but the reverse might not necessarily be, as violations of the fair and equitable treatment standard could result from types of situations other than arbitrariness or discrimination. The difference should be sufficient to prevent an assimilation of the two categories of violations. It is, in fact, the Tribunal's view that FET is designed to guarantee that, in situations where the other more precise standards are not violated, but where there is an unreasonable interference bringing about an unjust result regarding an investor's expectations, that investor can claim a violation of the FET and obtain reparation therefore.

231. In conclusion, it seems to the Tribunal that, in order not to engage in redundant analyses, interferences with a foreign investment should be analysed successively with reference to the different standards of protection in a sequential order, proceeding from expropriation to violation of the FPS. In other words, the Tribunal will examine first whether there is an indirect expropriation, second whether there is arbitrary or discriminatory treatment, third whether there is a violation of the FET, and fourth whether there is a breach of the FPS.

B. ARTICLE IV: INDIRECT EXPROPRIATION

232. The Tribunal will first address the complaints of El Paso concerning acts of the GOA, other than tax measures, which the Claimant considers as expropriatory. It will then deal with the tax measures complained of, which only enter into the Tribunal's jurisdiction if they amount to expropriation. Before scrutinising the facts, the Tribunal will set the applicable analytical framework.

1. Indirect Expropriation in General

[159] *CMS*, *supra* note 48, § 290.

(i) The Tribunal's Legal Analysis of the Applicable Principles

233. Much has been said about the concept of indirect expropriation in the written and oral submissions of the Parties in this case, as well as in contemporary legal writings. The Tribunal will endeavour to clarify that concept and present first its analysis in a nutshell, before developing it in more detail. In summary, it is the Tribunal's view that:

1. Some general regulations can amount to indirect expropriation

    a. As a matter of principle, general regulations do not amount to indirect expropriation.

    b. By exception, unreasonable general regulations can amount to indirect expropriation.

2. A necessary condition for expropriation is the neutralisation of the use of the investment

    a. This means that at least one of the essential components of the property rights must have disappeared.

    b. This means also, *a contrario*, that a mere loss in value of the investment, even an important one, is not an indirect expropriation.[160]

(a) Some General Regulations Can Amount to Indirect Expropriation

234. No absolute position can be taken in such delicate matters, where contradictory interests have to be reconciled. In this sense, the Tribunal subscribes to the decisions which have refused to hold that a general regulation issued by a State and interfering with the rights of foreign investors can *never* be considered expropriatory because it should be analysed as an exercise of the State's sovereign power or of its police powers. This Tribunal is, for example, in agreement with the following statement made in *Tecmed*:

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[160] Charles Leben summarised the practice of ICSID tribunals in relation to indirect expropriation in the following manner: "*1. Les éléments essentiels du droit de propriété doivent avoir disparu. 2. Une simple perte de valeur de l'investissement ne peut être assimilée à une expropriation.*" See "La liberté normative de l'Etat et la question de l'expropriation indirecte," in Ch. Leben (ed.), *Le contentieux arbitral international relatif à l'investissement,* Louvain-la-Neuve, Arthemis, 2006, 163, at 173-174.

> " … we find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement, even if they are beneficial to society as a whole – such as environmental protection – particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever."[161]

235. By the same token, the Tribunal shares the view expressed by the tribunal in *Pope & Talbot*, when it declares that "… a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation."[162] The same idea was expressed in *Saluka v. The Czech Republic*, where the tribunal listed the exceptions to the principle that general regulations do not as a rule amount to expropriation:

> "These exceptions do not, in any way, weaken the principle that certain takings or deprivations are non-compensable. They merely remind the legislator, or, indeed, the adjudicator, that the so-called 'police power exception' is not absolute."[163]

236. Therefore, in order to differentiate between situations where a general regulation can be considered tantamount to expropriation and situations where it cannot, the Tribunal has to start from the principle and then look at the exceptions. It considers that the most appropriate approach is to admit that, as a matter of principle, a general regulation – whose object is not the taking of property as in the case of direct expropriation – does not amount to an indirect expropriation (a). This evident proposition finds support in State practice, doctrine and arbitral case-law. Of course, the general principle suffers exceptions and has to be set aside in some circumstances on account of the content of the regulations (b).

1. As a Matter of Principle, General Regulations Do Not Amount to Indirect Expropriation

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[161] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* [hereinafter *Tecmed*], (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003, § 121.

[162] *Pope & Talbot Inc. v. The Government of Canada* [hereinafter *Pope & Talbot*], UNCITRAL (NAFTA), Interim Award of 26 June 2000, § 99.

[163] *Saluka Investments BV v. The Czech Republic* [hereinafter *Saluka*], UNCITRAL, Partial Award of 17 March 2006, § 258.

237. The above principle is accepted both by writers and arbitral case-law.

238. Thus, Professor Ian Brownlie has stated that:

> "State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation."[164]

The same principle is clearly stated in the *Third Restatement of the Foreign Relations Law of United States* 1987,[165] which is often quoted as a formula of reference and which many consider as reflecting customary international law on this point:[166]

> "A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory."

239. Several arbitral tribunals have also restated this fundamental principle. In *Feldman v. Mexico*, the ICSID arbitral tribunal said that:

> "Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."

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[164] Ian Brownlie, *Principles of Public International Law*, supra note 293, p. 532. This principle has not been only considered in international legal scholars' opinions but it has also been included in several international instruments. See, for example, Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 262, section 1; Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, in L.B. Sohn / R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", 55 *Am. J. Int'l L.* 545 (1961), at 554.

[165] *Restatement of the Law Third*, American Law Institute (1987), Vol. 2, Section 712, commentary g.

[166] See in this sense, *Marvin Roy Feldman Karpa v. United Mexican States* [hereinafter *Feldman*], (ICSID Case No. ARB(AF)/99/1), Award of 16 December 2002, §§ 103 and 105.

…

> "… not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation … Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations … those changes may well make their activities less profitable or even uneconomic to continue." [167]

A similar general statement is found in *Tecmed*:

> "The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is indisputable."[168]

But the clearest and strongest assertion of the principle can be found in the *Saluka* award, an UNCITRAL investment arbitration under a BIT:

> "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare." [169]

240. In sum, a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process. In other words, *in principle, general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a duty of compensation.*

2. By Exception, Unreasonable General Regulations Can Amount to Indirect Expropriation

[167] *Ibid.*, §§ 103 and 112. *See* also *Ronald S. Lauder v. The Czech Republic* [hereinafter *Lauder*], UNCITRAL,,Award (Final) of 3 September 2001 §§ 200-201; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* [hereinafter *Middle East Cement]*, (ICSID Case No. ARB/99/6), Award of 12 April 2002, § 153.

[168] *Tecmed*, *supra* note 161, § 119.

[169] *Saluka*, *supra* note 163, § 255.

241. If general regulations are unreasonable, *i.e.* arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor's property rights. The need for reasonableness and proportionality of State measures interfering with private property has been stressed by the tribunal in *LG&E*:

> "With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed."[170]

242. The Claimant itself cites the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens[171] which provides that a taking of property may include any

> "*unreasonable interference* with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to *use, enjoy, or dispose of the property* within a reasonable period of time after the inception of such interference."[172]

In the Claimant's Memorial, indirect expropriation is precisely said to result from "unreasonable interference that significantly deprives an owner of the control, use, or reasonably-to-be-expected economic benefits of property, rights or interests."[173]

243. The Tribunal will now review some examples where such general regulations have been considered as possible expropriations. A first example is that of an *intentionally discriminatory regulation* or *an objectively discriminatory regulation*. Although it did not find that in the case under review there had

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[170] *LG&E*, *supra* note 51, Decision on Liability, § 195.
[171] Memorial, § 422.
[172] Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 10(3)(a), in L.B. Sohn /R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", 55 *Am. J. Int'l L.* 545, at 553 (1961). Emphasis added by the Tribunal.
[173] Memorial, § 430.

been an indirect expropriation, the tribunal in the *Methanex* case clearly distinguished discriminatory regulations from non-discriminatory ones:

> "In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alias*, a foreign investor or investment is not deemed expropriatory and compensable 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."[174]

Another example would be a *disproportionate regulation*, meaning a regulation in which the interference with the private rights of the investors is disproportionate to the public interest. In other words, proportionality has to exist between the public purpose fostered by the regulation and the interference with the investors' property rights, as recognised in *Tecmed*:

> "After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality ... There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[175]

In other words, discriminatory or disproportionate general regulations have the potential to be considered as expropriatory if there is a sufficient interference with the investor's rights, as will be explained now.

2. A Necessary Condition for Expropriation: The Neutralisation of the use of the Investment

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[174] *Methanex v. United States* [hereinafter *Methanex*], UNCITRAL (NAFTA), Final Award of 3 August 2005, § 7 of Part IV - Chapter D.

[175] *Tecmed*, *supra* note 161, § 122.

244. Etymologically, "ex-propriation" refers to the taking of property or property rights. In *S.D. Myers v. Canada*, a clear distinction was drawn between deprivation amounting to expropriation and interference with property by regulations not amounting to expropriation:

> "Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs."[176]

(i) At Least One of the Essential Components of the Property Rights Must Have Disappeared

245. The Tribunal considers that at least one of the essential components of the property rights must have disappeared for an expropriation to have occurred. It emphasises that the overwhelming majority of investment arbitration cases stand for the proposition that an expropriation usually implies a "removal of the ability of an owner to make use of its economic rights."[177] It is generally accepted that the decisive element in an indirect expropriation is the "*loss of control*" of a foreign investment, in the absence of any physical taking.

246. In the case of *Pope & Talbot*, Canada stated that "mere interference is not expropriatory; rather, a significant degree of deprivation of fundamental rights of ownership is required",[178] and the tribunal accepted this approach when it said that "the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner."[179] In the case of *Tecmed*, the same approach was adopted, the tribunal holding that there is an indirect expropriation when "the economic value of the use,

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[176] *S.D. Myers, Inc. v. Government of Canada* [hereinafter *S.D. Myers*], UNCITRAL (NAFTA), First Partial Award of 13 November 2000, § 282.
[177] *Ibid.*, § 283.
[178] *Pope & Talbot*, *supra* note 162, § 99.
[179] *Ibid.*, § 102.

enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed."[180]

247. This approach has also been adopted in several of the Argentinian cases resulting from the crisis which brought about the present litigation. In *CMS*, the tribunal first mentioned the general criterion to be applied in order to ascertain whether there has been an expropriation:

> "The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation."[181]

248. Then, applying this test to the case at hand, the tribunal considered that the measures adopted by the State did not deprive the investor of control over its investment and therefore concluded that there was no expropriation. In *Enron*[182] as well as in *Sempra*,[183] the tribunals held that for expropriation to exist there must be a substantial deprivation and that such a deprivation occurs when the investor is forced to lose control over the investment. If the measures do not interfere with the control of the property, there can be no expropriation. This has been confirmed more recently by the award in another Argentinian case, *Continental*, where an indirect expropriation was defined as amounting to

> " … limitations and hampering with property, short of outright suppression or deprivation, interfering with one or more key features, such as management, enjoyment, transferability, which are considered as tantamount to expropriation, because of their substantial impact on the effective right of property."[184]

(ii) A Mere Loss in Value of the Investment, even though Important, Is Not an Indirect Expropriation

249. In the Tribunal's view, a mere loss in value of the investment, even if important, is not an indirect expropriation. This was also stated, for example, in

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180 *Tecmed*, *supra* note 161, § 116.
181 *CMS*, *supra* note 48, § 262.
182 *Enron*, *supra* note 52, § 245.
183 *Sempra*, *supra* note 53, § 285.
184 *Continental*, *supra* note 150, § 276.

the *Waste Management* case where the tribunal explicitly pointed out that "the loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one."[185] The Tribunal is, of course, aware of some cases or general *dicta* that might seem to support the idea that a substantial deprivation of the value of an investment can also be viewed as an expropriation. But a careful scrutiny of those cases, some of which were cited by the Claimant, does not support such a conclusion, as will be shown now.

250. In *Middle East Cement v. Egypt*, relied on by the Claimant,[186] an ICSID tribunal found that Egypt had violated the provision on expropriation of the Egypt-Greece BIT. In that case, the Egyptian General Authority for Investment and Free Zones had granted a 10-year license to a Greek bulk cement importer for the importation and storage of cement. Some years later, Egypt issued a decree prohibiting the importation of certain types of cement. This decree, which on its face did not purport to take the investor's property or affect the investor's import license, nevertheless paralysed the investor's operations. In the ensuing arbitration proceedings, the foreign investor argued that, although the license technically remained in effect after the decree, the latter destroyed the economic benefit of the investment. The tribunal concluded that there was an expropriation, although the decree remained in force for only four months, with the following explanation:

> "As also Respondent concedes that, at least for a period of 4 months, Claimant was deprived, by the Decree, of rights it had been granted under the License, there is no dispute between the Parties, that in principle, a taking did take place. When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of its investment even though it may retain nominal ownership of the respective rights being the investment, the measures are often referred to as 'creeping' or as 'indirect' expropriation, or, as in the BIT, as measures the effect of which is tantamount to expropriation. As a

[185] *Waste Management, Inc. v. The United Mexican States* [hereinafter *Waste Management II*], (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004, § 159.
[186] Memorial, § 434; Reply, § 451. See also *Middle East Cement, supra* note 167.

> matter of fact, the investor is deprived by such measures of parts of the value of its investment."[187]

The Tribunal wishes to point to the fact that, if indeed a reference is made to the deprivation of the benefit of the investment, the formula used by the tribunal in *Middle East Cement* refers more precisely to the deprivation of "the use and benefit." The loss of benefit is a result of the impossibility to use the investment – equivalent to a loss of control over the investment – and not an expropriation *per se.*

251. In *Goetz and Others v. Republic of Burundi*, another case invoked by the Claimant,[188] the tribunal held:

> "Since … the revocation of the Minister for Industry and Commerce of the free zone certificate forced them to halt all activities … , which deprived their investments of all utility and deprived the claimant investors of the benefit which they could have expected from their investments, the disputed decision can be regarded as a 'measure having similar effect' to a measure depriving of or restricting property within the meaning of Article 4 of the Investment Treaty."[189]

In this case also, there is a reference to the deprivation of the expected benefit, but this was a result of the cancellation by the State of a free-zone certificate which prevented the investor from continuing any economic activity, which is indeed a situation where it can be said that the investor was expropriated as it completely lost the use of its property.

252. *Metalclad* is often mentioned, and was cited by the Claimant,[190] in support of the proposition that a mere loss in value of an investment is an expropriation. It is true that the tribunal in this case used a very general formulation, which could be misconstrued if it were truncated:

> "Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or

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[187] *Middle East Cement*, *ibid.*, § 107.
[188] Memorial, § 435; Reply, § 463, citing *Goetz*, *supra* note 126.
[189] *Goetz*, *supra* note 126, § 124 (translation by the Tribunal).
[190] Memorial, § 436; Reply, § 448 and § 455, citing *Metalclad Corporation v. United Mexican States* [hereinafter *Metalclad*], (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000.

> formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[191]

Two remarks are worth making here. First, as in the former examples, *the loss of benefits is a result of a deprivation of the use* of the investment. Second, considering the facts and not the mere broad language, it is evident that the tribunal in *Metalclad* did not hold that there was an expropriation because the benefits of the investor were not as expected, but decided that there was an expropriation of the investment because, after the investor was granted the federal permit to exploit the landfill, and given assurances that it would receive the municipal permit to the same effect, the latter was not granted, rendering the whole project impossible to pursue: it was because there was a complete neutralisation of the investment project that an expropriation was found.

253. Nor does another case cited by the Claimant, in the Tribunal's view, support the idea that a loss in value is an expropriation. In *Tecmed,*[192] the claims were related to an investment in land, buildings and other assets relating to a controlled landfill operation with hazardous industrial waste. A resolution cancelling the authorisation to run the waste landfill operation was adopted, among other reasons, because of the strong opposition of the local population. The tribunal had to study the resolution cancelling the permit. In order to decide on the existence of an indirect expropriation, the tribunal made the following analysis:

> "To establish whether the Resolution is a measure equivalent to an expropriation under the terms of section 5(1) of the Agreement, it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the Landfill or to its exploitation – had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder

[191] *Metalclad, ibid*., § 103.
[192] Memorial, § 437; Reply, § 454, citing *Tecmed*, *supra* note 161.

> and the extent of the loss. This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a *de facto* expropriation that deprives those assets and rights of any real substance."[193]

Here again, it was not just a loss of benefits that was considered to be expropriatory; it was the cancellation of the permit which neutralised the whole investment, as no other activity could be performed on the landfill. This was underscored by the tribunal, according to which there is an indirect expropriation when "the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed."[194]

254. Even in *Consortium R.F.C.C. v. Morocco*, also cited sometimes to support the idea that loss of value is sufficient to find an indirect expropriation, careful reading shows that in fact the tribunal based its reasoning on the necessity of a neutralisation of property rights. The tribunal started by referring to the fact that for an expropriation to exist, the measures taken by the State must have

> " … [s]ubstantial effects of a definite intensity that decrease and/or make disappear the benefits that can be legitimately expected from the exploitation of the rights that were the object of the measure to such an extent that they render the possession of those rights useless**.**"[195]

In the preceding paragraph, the tribunal had been quite clear that this disappearance of benefits had to be the result of a loss of control or access to the property rather than of a change in the assets' value:

> "The expropriation of an asset or a right is characterised by the disappearance, for the expropriated person, if not of the title to property at least of the enjoyment of the said property or of the access to it."[196]

[193] *Tecmed, ibid*, § 115.
[194] *Ibid.*, § 116.
[195] *Consortium R.F.C.C. v. Kingdom of Morocco* [hereinafter *Consortium v. Morocco*], (ICSID Case No. ARB/00/6), Award of 22 December 2003, § 69. Translation by the Tribunal.
[196] *Ibid.*, § 68. Translation by the Tribunal.

255. Finally, it is worth mentioning that in all the Argentinian cases decided so far, the loss in value of the investment was not considered a sufficient basis for a finding of expropriation, even where the loss was quite significant and comparable to the losses claimed in the present case by El Paso. In *LG&E*, for example, although according to the claimant the value of LG&E's holdings in the licenses had been reduced by more than 90% as a result of Respondent's abrogation of the principal guarantees of the tariff system, the tribunal did not find an expropriation, as the measures themselves did not interfere "with the investment's ability to carry on its business,"[197] even though the profits were drastically diminished. Regulations that reduce the profitability of an investment but do not shut it down completely and leave the investor in control will generally not qualify as indirect expropriations even though they might give rise to liability for violation of other standards of treatment, such as national treatment or fair and equitable treatment.

256. In conclusion, the Tribunal, consistently with mainstream case-law, finds that for an expropriation to exist, the investor should be substantially deprived not only of the benefits, but also of the use of his investment. A mere loss of value, which is not the result of an interference with the control or use of the investment, is not an indirect expropriation.

(iii) The Parties' Positions on the Existence of an Expropriation

257. According to the Claimant, "[t]he Argentine Republic expropriated Claimant's investments directly, indirectly or by measures tantamount to expropriation."[198] The list of the expropriatory acts presented by the Claimant is the following: abrogation and repudiation of contractual rights of the Argentinian companies; violation of the right to collect payments as promised, which constitutes a taking of CAPEX's and Costanera's rights, legitimate expectations and revenues without compensation; pesification of capacity payments at an artificial exchange rate, which amounts to an expropriation of legal rights, legal

[197] *LG&E*, *supra* note 51, § 191.
[198] Memorial, § 468.

expectations and significant revenues from CAPEX and Costanera; fundamental alteration of the price-setting mechanism for electrical generators, which resulted in the expropriation of the legal rights, legitimate expectations and specific revenues of CAPEX and Costanera; pesification of VCPs at an artificial exchange rate which constitutes a taking of El Paso's rights, legitimate expectations and revenues; violation of the right to freely dispose of production, which interfered in the business decisions and management of CAPSA and CAPEX; and violation of the right freely to dispose of production, which constituted a direct taking of CAPSA's and CAPEX's revenues.[199]

258. More generally, it is the Claimant's contention that it was expropriated because, due to all the adverse measures taken against the Argentinian companies in which it had invested, it was "forced" to sell its shares in those companies at a considerable loss. In its Reply, the Claimant states that expropriation results from measures

> " … destroying 100% of the equity value of SERVICIOS, 83% of the equity value of CAPSA/CAPEX, and 91% of the equity value of COSTANERA and compelling El Paso to sell its interests in the Argentine Companies for less than 15% of what would have been their value in the absence of the measures."[200]

259. According to Argentina, none of the rights invoked by El Paso are rights protected under the BIT. The measures adopted in the context of the crisis did not amount to expropriation. Argentina argues that: the pesification of the whole economy was not an expropriation and benefited the Argentinian companies; the restrictions on oil and gas exports were not expropriations; nor were the measures adopted to make electric power generation consistent with the new context. Neither on account of their effect nor in view of their nature can these measures be considered expropriatory.

[199] Memorial, §§ 470-497.
[200] Reply, § 422.

260. First, it is Argentina's position that these measures did not interfere substantially with rights possessed by the Claimant. According to the Respondent:

> "In effect, the *pesification* of the whole economy and the measures adopted in connection with the oil and electric power generation industries did not substantially deprive the Claimant from the use and profits of its investment [paraphrasing the tribunal in the *Otis Elevator* case]. On the contrary, the Argentine Companies continued and continue operating and obtaining profits despite the crisis."[201]

261. Second, the Respondent contends that the measures challenged by El Paso were non-discriminatory regulatory decisions taken in good faith and included in the police power of the State. Therefore, no compensation would be due.

262. Third, Argentina affirms that, contrary to what the Claimant pretends, the sale of El Paso was not forced by Argentina but provoked by the Claimant's own problems. These problems are addressed both in the Counter-Memorial[202] and the Rejoinder,[203] and are summarised in the former in the following way:

> "Unlike El Paso's allegation, the Argentine crisis was not the cause why it decided to sell its assets in Argentina but this was the global situation of the company itself.
>
> The energy crisis in California, the link with Enron's policies, the accusations of questionable accounting and business practices, an unfavourable court decision related to illegal practices, the strong fall in the value of its shares, the accumulation of a major debt, liquidity issues, the lack of market confidence, the resignation (and even suicide) of top executives, among others, were the events that led to the serious crisis in El Paso." [204]

263. The analysis of all these elements brings the Respondent to the conclusion that there is no causal link between the measures adopted by Argentina to face the crisis and the sale of El Paso's shares in the Argentinian companies:

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[201] Counter-Memorial, § 582. Emphasis by the Respondent.
[202] Counter-Memorial, §§ 61-89.
[203] Rejoinder, §§ 1-59. It is to be noted that this was the very first argument developed by the Respondent in its Rejoinder.
[204] Counter-Memorial, §§ 100-101.

> "The only cause of the damages, the compensation for which is claimed in this arbitration, is El Paso's global situation that forced it to sell its interests around the world, including those located in Argentina. The fact that Argentina was in the midst of a crisis had a negative impact on the price collected by El Paso on account of the sale of its assets in Argentina, but it was not what determined that the transaction had to be carried out."[205]

264. In other words, the sale was not due to Argentina's measures but to a reasoned decision taken by El Paso, in light of its financial difficulties all over the world, to focus on its traditional business, natural gas transportation and production.[206]

(iv) The Tribunal's Analysis of the Alleged Expropriation of El Paso's Property Rights

265. Although the Claimant has complained about direct expropriation, it can be declared by the Tribunal from the outset, without extensive reasoning, that no such expropriation occurred. It is enough here to recall the definition given to direct expropriation by Professor Sacerdoti: "the coercive appropriation by the State of private property, usually by means of individual administrative measures."[207] In direct expropriation, there is a formal transfer of the title of ownership from the foreign investor to the State engaged in the expropriation or to a national company of that State, and it has never been asserted that the shares of El Paso in the Argentinian companies have been transferred by the State to itself or to another public or private company.

266. Thus the only question which remains is whether there has been an indirect expropriation, which concept will be considered as including "measures tantamount to expropriation."[208]

(a) Analysis of the Claim of the Alleged Expropriation of Legal and Contractual Rights of the Argentinian Companies

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[205] Counter-Memorial, § 105.
[206] Counter-Memorial, § 3.
[207] Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", 269 *Collected Courses, Hague Academy of International Law* (1997), at p. 379.
[208] Counter-Memorial, §§ 530, 533, 535.

267. According to the Claimant,

> " … the GOA undertook a policy that … effectively expropriated CAPEX's and COSTANERA's contractual right to receive Dollar-denominated prices for their sale of electricity and liquid hydrocarbons … The GOA measures also expropriated SERVICIOS' rights to receive Dollar-denominated payments under the Gas Processing Agreement."[209]

The Claimant reiterated that position later in its Memorial, when stating that "the GOA's measures deprived CAPSA, CAPEX and Costanera of the exercise of their vested legal and contractual rights, which were abrogated and repudiated by the GOA."[210] The Tribunal does not need to decide if this could be an expropriation, as it has no jurisdiction over the Argentinian companies and can only rule on an expropriation of the foreign investor's rights.

268. The same reasoning must apply to the claim that sums owed to CAPEX and CAPSA were in fact transformed into contributions to the Stabilization Fund, and subsequently into stock of a new power plant to be financed with the proceeds to this Fund, which plant will be operated by the Government. El Paso considers this as "a forceful novation of the receivables owed by CAMMESA to the generators, which amounts to a confiscatory action that interferes with the ability of the generators to operate their own business."[211] These are rights belonging to the Argentinian companies, over which the Tribunal has no jurisdiction, and not to El Paso. In addition, the Tribunal is inclined to consider that a change in the form of a credit cannot amount to a confiscation.

269. The Tribunal wishes to emphasise next that, if this point had to be decided, it would certainly be difficult to find an expropriation of the rights of the Argentinian companies. In effect, the impugned measures adopted in connection with the oil and electric power generation industries did not substantially deprive the Claimant of the use of and profits from its investment.

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[209] Memorial, § 305.
[210] Memorial, § 416.
[211] Memorial, § 320.

On the contrary, the Argentinian companies continue operating and earning profits despite the crisis. For example, CAPSA had income in the amount of over ARS 111 million in 2003.[212] CAPSA, CAPEX, Costanera and Gasoducto del Pacífico are still operating on the Argentine market and their survival is not in danger. SERVICIOS was absorbed by CAPEX, which is still profitable in the LPG processing business. According to the Respondent's Rejoinder, CAPSA's Financial Statements show that "[i]ncome in 2006 is more than 10 time higher [in US$] than the company's income in 1997, when El Paso acquired interests in CAPSA."[213]

(b) Analysis of the Sale of El Paso's Shares in the Argentinian Companies as an Alleged Expropriation

270. The Tribunal must ascertain a last point, which is whether the sale was or was not the automatic consequence, *i.e.* the only and unavoidable consequence, of the measures taken by the GOA, so as to be equivalent to an outright expropriation, as contended by the Claimant in its Memorial:

> "These measures *amount to an expropriation* of El Paso's investment, violate commitments to Claimant and constitute unfair and inequitable treatment in violation of the BIT, international law and Argentina law. Due to these measures, *El Paso was forced to sell* its investments in the Argentina Companies at prices that represented less than 10% of El Paso's investment."[214]

In its Reply, the Claimant reverts to this idea under the title "Argentina Expropriated Claimant's Investment:"

> "In its Memorial, Claimant demonstrated the various ways in which Argentina's measures violated the BIT's prohibition against expropriating without compensation, whether directly or indirectly by measures tantamount to expropriation. These include: … (iii) taking measures … compelling El Paso to sell its interests in the Argentine

[212] See Claimant's Document Production of 3 August 2006, Annex C, CAPSA's 2003 Financial Statements, p. 5.
[213] Rejoinder, § 52.
[214] Memorial, § 36. Emphasis added by the Tribunal.

> Companies for less than 15% of what would have been their value in the absence of the measures."[215]

271. The Respondent, on the contrary, insists that causes other than the Argentinian measures explain the sale of the shares of El Paso:

> "The cause for El Paso's losses is not related in any way to the measures but to the time in which it was forced (due to its own issues) to sell its assets in Argentina. Had it not faced the serious issues that it underwent globally, El Paso would have profited from the gradual improvement in Argentina's conditions, by the increase in oil and gas prices around the world, and by the *normalisation* of the Argentine economy."[216]

272. The Tribunal has thus to examine the question of whether the sale was "freely" entered into or whether it was effectively "compulsory," intrinsically linked to Argentina's measures, in such a way that it was the only possible consequence of these measures. Only if the sale was the only possible consequence of the Argentinian measures could one consider that these measures were expropriatory as they entailed a loss of control directly attributable to Argentina. In order to answer the question raised by the contradictory views of the Parties on that issue, the Tribunal will scrutinise the context of the sale and look into contemporary or subsequent public statements emanating from El Paso. The Tribunal has closely examined the different documents contemporaneous with the sale or subsequent to it in order to ascertain the causes of the sale, among others the reports to the United States Securities and Exchange Commission (SEC), usually considered as one of the main sources of information for the market relating to companies.

273. A first point to be made is that the measures adopted after the sale of El Paso's shares, of which the Claimant repeatedly complains, cannot be considered as a cause of such sale, being subsequent to it. Therefore, the Tribunal will not take into account, for ascertaining the causes of the sale, the numerous measures adopted after the sale complained of by El Paso, among which a few can be

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215 Reply, § 422.
216 Counter-Memorial, § 12. Emphasis added by the Respondent.

mentioned: Resolution SE N° 826/2004, which invited the power generators to a mandatory conversion of their unpaid receivables for energy sales and future gross margins into either (i) equity in two new power plants or (ii) a Government monetary commitment that would become payable in 10-year instalments from the revenues of the two new power plants once they become operational; Law N° 26,095, dated 26 April 2006, which authorises the Executive Branch to apply "charges" to electricity and gas distribution tariffs to finance "new" investments in the energy sector; Law No. 26,217, published on 16 January 2007, which extended the export taxes through 2012;[217] various measures imposed on the electricity sector after 2003; and export withholdings imposed and extended on various dates from 2004-2007.

274. It is worth noting that in its 2005 Annual Report filed with the SEC, no mention was made by the Claimant itself either of the deterioration in the economic conditions of Argentina nor of any adverse regulatory changes in Argentina to explain the restructuring of El Paso and the sale of the shares in the Argentinian companies.[218] In its 2004 Report,[219] the focus was also on general problems, with no specific mention of any adverse measures taken by the GOA.

275. It is true that in the 2002 and 2003 Reports to SEC, El Paso mentioned the economic situation of Argentina, but only the Argentinian economic crisis, more specifically "the deteriorating economic conditions" in the country, with no specific reference made to measures adopted by the Government, in contrast to what was done for other countries, and more specifically for its power generators in Australia, where the Claimant explained its divestiture by "regulatory difficulties." In the same 2003 Report, a world-wide change in strategy of El Paso was announced.

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[217] CPHB, § 79.

[218] Counter-Memorial, § 63, citing EDGARonline, Excerpt from a 10-K/A SEC Filing, filed by EL PASO CORP/DE on 4/8/2005. Available at: http://sec.edgar-online.com/el-paso-corpde/10-ka-amended-annual-report/2005/04/08/section3.aspx. Respondent's Exhibit RA 174.

[219] El Paso Corporation, 2003 Annual Report pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934 filed at the United States Securities and Exchange Commission [hereinafter 2003 El Paso Report filed with the SEC]. Respondent's Exhibit RA 144, p. 48.

276. The Tribunal has taken note of the fact that, according to Argentina, "[i]t was the Claimant's decision to sell its assets in the country in the worst time of the Argentine crisis, in the need for facing its own global crisis, which caused the damage alleged by El Paso."[220] Indeed, it appears from the file that El Paso has sold assets worldwide in 2002 and 2003, among others:

(a) all the businesses related to electric power generation in the United States;[221]

(b) all the assets and investments in the electric power generation business around the world, except for Brazil;[222]

(c) all of El Paso's petroleum businesses;[223]

(d) all the business related to LNG development;[224]

(e) the assets located in Canada, Indonesia, and Hungary;[225]

(f) El Paso's interest in GulfTerra and all the assets related to processing and storage in the south of Texas;[226]

(g) the storage units located in Wyoming;[227]

(h) the *midstream* assets located in the Mid-Continent and Northern Louisiana regions;[228]

(i) the long-haul and metro dark fiber business;[229]

(j) the asphalt business;[230] and

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[220] Counter-Memorial, § 788.
[221] 2003 El Paso Report filed with the SEC, *supra* note 219, p. 3.
[222] *Ibid.*, p. 3 n.1.
[223] *Ibid.*, p. 20.
[224] El Paso Corporation, 2002 Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934 filed at the United States Securities and Exchange Commission [hereinafter 2002 El Paso Report filed with the SEC]. Respondent's Exhibit RA 79, p. 56.
[225] 2003 El Paso Report filed with the SEC, *supra* note 219, p. 11.
[226] *Ibid.*, p. 21.
[227] *Ibid.*, p. 59.
[228] *Ibid.*
[229] *Ibid.*, p. 70.
[230] News Release, El Paso Corporation. El Paso Corporation announces It Has Exceded Fifty Percent of Its 2003 Non-Core Asset Sales Goal, (27 March 2003), available at:

(k) El Paso's interest in the ECK generation project in the Czech Republic.[231]

277. It is not reasonable to assume that, with such an overall picture of divestment, the decision to sell in Argentina was unrelated to the situation of El Paso in the rest of the world and was solely due to the measures taken by Argentina. In the Tribunal's view, the global situation of El Paso worldwide as well as that of the Argentine economy and the measures taken by Argentina are elements to be taken into account to explain the sale.

278. The Tribunal notes that El Paso did not suffer any interference with its property, as is shown by the fact that it could decide what to do with it and chose to sell its shares. Argentina did not confiscate the Claimant's shareholdings in the Argentinian companies. It is therefore the Tribunal's conclusion that El Paso did not suffer any major interference with its property rights, as is evidenced by the fact that it decided to sell its shares; thus the Tribunal cannot find that there was an indirect expropriation.

279. The fact that no direct automatic causal link is recognised by the Tribunal between Argentina's measures and the sale has important consequences for the evaluation of possible damages owed to El Paso. More precisely, although the sale, in other words the quasi-total loss of El Paso's investment, was not an unavoidable and direct consequence of Argentina's measures, and cannot be the basis of a claim for expropriation, it must still be ascertained whether, if the measures breach another standard of protection of the BIT, compensation should be granted for the contribution of those measures to the loss of value of the shares at the time of the sale, if it is demonstrated that they had a detrimental effect on that value. If some of the impugned measures violating BIT standards made the sale less profitable, the Tribunal considers that the Claimant should receive compensation.

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http://investor.elpaso.com/phoenix.zhtml?c=97166&p=irol-newsArticle&ID=394930&highlight=. Respondent's Exhibit RA 156.

[231] *Ibid.*

280. It must to be noted, therefore, that it is indeed quite possible to consider, in the Tribunal's view, that the sale of El Paso's investments in Argentina was not an expropriation, as it was not exclusively determined by Argentinian measures, and yet to conclude that those measures were the prevailing cause of the sale and, therefore, if the Tribunal finds this to be a violation of the FET, that the Respondent can be held responsible for damage resulting from this violation.

C. INDIRECT EXPROPRIATION IN RELATION TO ARTICLE XII ON TAX MATTERS

1. ***The Parties' Positions***

281. It is worth noting that at first sight the Claimant's Memorial looks as if El Paso had not included the tax withholdings among the expropriatory acts of Argentina. This is what results from the table of contents, under the heading "The GOA's Expropriatory Acts":

(i) Abrogation and repudiation of contractual rights

(ii) Withholdings of hydrocarbon exports

(iii) Violation of right to collect payments as promised

(iv) Pesification of capacity payments at an artificial exchange rate

(v) Fundamental alteration of the price-setting mechanism for electrical generators

(vi) Pesification of VCPs at an artificial exchange rate

(vii) Violation of right to dispose freely of production

(viii) Failure to mitigate impact of Law N° 25,561

(ix) Restrictions on deductions for losses from Law N° 25,561

(x) Interference with crude oil sales.

However, the tax measures enacted from 2002 onward are complained of under three of these headings.

282. Firstly, under the heading "Withholdings *of* hydrocarbon exports," El Paso is in fact complaining about "Withholdings *on* hydrocarbon exports," alleging that violation of the right to *export freely* hydrocarbons *includes* the right to *export hydrocarbons free of export withholdings*. And the Claimant concludes that "Export Withholdings on crude oil constitute (i) a direct taking of export revenues of CAPSA and CAPEX and (ii) an indirect taking from [*sic*] by artificially depressing domestic crude oil and LPG prices."[232]

283. Secondly, under the heading "Failure to mitigate impact of Law N° 25,561," El Paso explains that, with the devaluation of the peso and the inflation deriving therefrom - that reached 118% in 2002 -, the non-recognition of inflation for tax depreciation purposes was unreasonable and confiscatory. As a result, there has been an expropriation: according to the Claimant, the policy of the Government "artificially diluted the amount of depreciation that the CAPEX [*sic*] and COSTANERA are allowed to claim for tax purposes, thus resulting in confiscatory taxation and a taking of revenues."[233]

284. Thirdly, under the heading "Restrictions on deductions for losses from Law N° 25,561," El Paso also complains about tax measures. More specifically it states that "[t]he GOA unreasonably limited the tax deductions of the Argentine Companies in light of the significant losses caused by the devaluation of the Peso."[234]

285. The two last claims of expropriation are based on the idea that a foreign investor has a right to certain tax deductions. This was asserted by the Claimant when it stated that

> "[w]hile it is fair and reasonable for an investor to expect that no inflation adjustment be used in a low inflation environment, it is also reasonable that the same investor can expect that inflation will be

[232] Memorial, § 474.
[233] Memorial, § 493.
[234] Memorial, § 494.

> recognized for tax depreciation purposes in the context of high inflation such as occurred in 2002."[235]

286. According to Argentina, the claims regarding tax issues in the BIT are limited to assumptions of expropriation, transfers, or investment agreements. Analysing the question of whether there could be a finding of expropriation, Argentina states first the general principle according to which a State is free to modify its tax regime. Only if excessive taxes with a confiscatory effect equivalent to an expropriation are imposed may international law be deemed to have been violated. Following this general approach, the Respondent argues that

> "[t]he creation of export duties on oil and gas within the context of the crisis is a reasonable governmental regulation. The regulations issued in connection with income tax [and those not issued] are also a part of Argentina's freedom *to act in the broader public interest through new or modified tax regimes*."[236]

Moreover, in the view of Argentina, the limited impact of the taxes could by no means be equivalent to an expropriation:

> "Exports duties of 16.67% on oil and gas did not deprive El Paso from the benefits of its investment *completely or in a significant portion*. On the contrary, the increase in international oil and gas prices and the fall in costs resulting from the mega-devaluation of the peso allowed oil and gas producing companies to increase their benefits *significantly*, even when paying export duties."[237]

287. As far as the deductions from taxations are concerned, Argentina stresses that a decision was taken in 1992, well before the Emergency Law, which simply did not modify the existing arrangement. This is acknowledged by the Claimant in its Memorial, where it admits that:

> "Law N° 24,073, enacted on February 4, 1992, froze all applicable indices and provisions for inflation adjustment purposes, including those related to tax depreciation, as from April 1, 1992. This was a

[235] Memorial, § 369.
[236] Counter-Memorial, § 486. Emphasis by the Respondent.
[237] Counter-Memorial, § 495. Emphasis by the Respondent.

> reasonable measure at the time there was hardly any inflation in Argentina."[238]

What El Paso complains about, therefore, is not a change in the law but a change in the economic circumstances:

> "Law Nº 24,073 ceased to be appropriate in January 2002 when Law N° 25,561 repealed the Convertibility Law and the GOA took a number of measures that caused a huge devaluation of the Peso ... This sudden and unexpected change of circumstances materially altered the context in which the freezing of inflation indices for tax purposes had been issued pursuant to Law Nº 24,073."[239]

Argentina contends that it is not possible for El Paso to demand "an economic compensation because the applicable tax system has not been modified since 2002 according to what it considers convenient."[240] Moreover, the two claims related to deductions from the tax basis were only brought for CAPEX and Costanera, and according to Argentina, neither of these two companies paid taxes in the years before the sale of El Paso's shares.[241]

288. The Respondent's conclusion is thus that, there being no expropriation, the tax measures do not come under the Tribunal's jurisdiction according to the BIT. This has far-reaching consequences, according to Argentina, as it contends that 93% of the claims are based on export withholdings.[242]

2. *The Tribunal's Analysis*

(i) The Tribunal's Legal Analysis of the Applicable Principles

289. Article XII of the BIT provides:

> "1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

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238 Memorial, § 366

239 Memorial, § 367.

240 Counter Memorial, § 450.

241 Counter-Memorial, §§ 459 and 477. See also § 32: "CAPSA does not pay income tax because it would be exempt therefrom since 1999."

242 RPHB, § 162.

> 2. Nevertheless, the provisions of this Treaty, and in particular Articles VII and VIII, shall apply to matters of taxation only with respect to the following:
>
> (a) expropriation, pursuant to Article IV;
>
> (b) transfers, pursuant to Article V; or
>
> (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time."

290. The tax policy of a country is a matter relating to the sovereign power of the State and its power to impose taxes on its territory. The Tribunal agrees that the State has a sovereign right to enact the tax measures it deems appropriate at any particular time. Every year, governments around the world propose the adoption of tax measures which constitute either new initiatives or amendments to the existing fiscal legislation. There is a presumption of validity in favour of legislative measures adopted by a State, and it is up to those who challenge such measures to demonstrate their invalidity. This idea has been embodied in Article XII of the BIT, the effect of which is to only limit slightly the State's power to levy taxes.

291. As Article XII grants an important margin of freedom to the host State in relation to its fiscal policy towards foreign investors, the States Parties indicate in paragraph 2 of Article XII that this policy should not be unfair or inequitable. Considering both the language used – "each Party should strive" – and the fact that Article XII (2) excludes, except in specific and limited cases, any review of a possible violation of the fair and equitable treatment standard, the Tribunal concludes that Article XII (1) creates only a best-effort obligation.

292. In its Decision on Jurisdiction, the present Tribunal has already decided that the duties imposed on exports "are a tax measure,"[243] and this conclusion is reiterated here. The Tribunal also found that it had limited jurisdiction over only three issues:

> "The Tribunal concludes that it has jurisdiction over tax matters, but only insofar as the tax measures complained of are linked with: (a) expropriation, pursuant to Article IV; (b) transfers, pursuant to Article V; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII(1)(a) or (b). In other words, the only claims that the Tribunal can consider at the merits stage are the tax claims based on the existence of an expropriation and on the violation of an investment agreement or authorization. Everything else is beyond the competence of the Tribunal."[244]

293. Since El Paso did not file any claim in connection with transfers (point b), and since the Tribunal has already decided[245] that there is no investment agreement benefiting El Paso (point c), the only issue which remains to be addressed is whether such taxes could qualify as an expropriation (point a).

(ii) The Tribunal's Analysis of the Facts of the Case

294. A significant portion of El Paso's claims are related to tax issues. These issues include the claims related to the export duties established by the Emergency Law and the deductions on income tax. Like any other activity, foreign investments are subject to taxes imposed by the host State and "the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change … during the period of the investment,"[246] even though that may reduce its economic benefits, except if a stabilisation of the tax regime (at least for certain taxes) was agreed on by the State.

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243 Decision on Jurisdiction, *supra* note 58, § 112.
244 *Ibid.*, § 116.
245 See *supra* §§ 190-198.
246 *EnCana Corporation v. Republic of Ecuador* [hereinafter *EnCana*], UNCITRAL, LCIA Case No. UN3481, Award of 3 February 2006, § 173.

295. The Tribunal will examine the different tax measures complained of and will summarily dismiss the claims against the regime of tax deductions which was in place since 1992, as there were no complaints from the Claimant during ten years. In this arbitration, the Claimant does not complain about a change of the law; it complains about "no change in the law." The only claim here is that the State has not modified its laws in order to alleviate the economic problems resulting for the economic actors from the new economic situation. Without needing to enter into a discussion on this point, the Tribunal seriously doubts that, as alleged by the Claimant, "[i]nvestors have a reasonable and legitimate expectation to be able to adjust their fixed assets for tax purposes in periods of high inflation."[247] A State cannot be considered to have a duty to adapt its tax regime to the best interests of foreign investors. An unfavourable calculation of taxes cannot be equated with an expropriation, especially as the Claimant has not quantified its alleged losses.

296. The Tribunal will now look into the export-tax withholdings in order to decide whether they can be considered an expropriation. Before analysing them, it is appropriate to recall the content of the impugned measures. First, the Emergency Law adopted on 6 January 2002 decided on the principle of such a tax, known as withholding on oil and gas:

> "The Executive Branch of Government shall be entitled to establish compensatory measures to avoid the unbalancing of financial institutions resulting from the provisions set forth in the preceding paragraph. These measures may include the issue of guaranteed national public bonds in foreign currency. For purpose of funding such guarantee, *an export tax on hydrocarbons is hereby created* for the term of FIVE (5) years, and the Executive Branch of Government shall be entitled to determine the corresponding tax rate."[248]

Then, as far as *crude oil exports* were concerned, on 13 February 2002, the GOA enacted Decree N° 310/2002, which placed a 20% withholding on crude

[247] Memorial, § 362.
[248] Law No. 25,561 (Emergency Law), Title IV, Chapter I, Art. 6 § 2. Emphasis added by the Tribunal.

oil exports: this amounts to a 16.67% export duty on crude oil exports[249], as in Argentina the withholding is included in the amount used to calculate export duties and, therefore, a 20% export duty implies an actual 16.67% withholding.[250] Such export duty began to be levied on 1 March 2002 and was still effective when El Paso sold its equity interests in the Argentinian companies.

Regarding *LPG exports*, a new tax was imposed on 13 May 2002: during a term of fifteen days in 2002 (from 14 May through 31 May 2002), a 20% export duty was also applied to LPG exports,[251] which implies, for the same reason as stated above, a 16.67% export withholding. From 1 June 2002 onward, the duty was reduced to 4.76% as a result of the Agreement for the Stabilisation of the Liquefied Petroleum Gas Wholesale Price in the Argentine Market (hereinafter: the LPG Price Stabilisation Agreement). This Agreement was entered into in July 2002 between the Minister of Economy and the main LPG producers in Argentina. One of the companies that signed the agreement was CAPEX. From the execution of the LPG Price Stabilisation Agreement until May 2004, the LPG export duty remained at 4.76%. El Paso sold its equity interests in CAPSA – and, consequently, in CAPEX – in mid-2003, and in Costanera in autumn 2003. This reduced export duty was therefore still effective at the moment of the two sales in June and September 2003.

297. Turning now to the analysis of these measures, the Tribunal considers, first, that the creation of export duties on oil and gas is *a reasonable governmental regulation within the context of the crisis*. According to the Respondent's expert Roubini, "it made total economic sense to have a 'compensated devaluation' by relying on export taxes to raise revenues in the sectors that had most benefited from the devaluation."[252] The devaluation of the peso entailed

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[249] See Presidential Decree No. 310/2002 of 13 February 2002, Section 1. See also Presidential Decree No. 809/02, Section 3. The tariff positions established in regulations are defined in the Mercosur (Southern Common Market) Common Nomenclature, approved by Presidential Decree No. 2.275/94.

[250] This was acknowledged by LECG. See LECG Report, n. 69. See also MacroConsulting Report, § 178.

[251] See Presidential Decree No. 809/02 of 13 May 2005, Sections 2 and 3.

[252] Counter Memorial, § 153, citing the Expert Report by Nouriel Roubini [hereinafter Roubini Report] of 24 August 2006, § 42.

extraordinary revenues for the exporting sectors which did not arise from increased efficiency but from the devaluation. It is thus logical to establish a tax on exports to be levied on a portion of this extraordinary income. By mid-2002, the Argentine peso had lost 200% against the US dollar. At the same time, the price of oil climbed; as stated by Argentina,

> "[f]rom mid-1998 (when recession started in Argentina) to mid-2003 (when El Paso sold its share in CAPSA and in Servicios), the WTI crude oil barrel rose from below USD 13/bbl to over USD 30/bbl, even peaking over USD 35/bbl."[253]

Faced with this new economic situation, the export duties imposed on oil and gas amounted to only between 4.76% and 16.67%. According to the Tribunal, this may be regarded as reasonable. Therefore, the tax on unexpected income, resulting from the mega-devaluation of the Argentine peso and the increase in the international price of oil cannot be considered an expropriation. In this sense, the Tribunal is supported in its analysis by the approach followed in *Aminoil v. Kuwait*,[254] where the tribunal noted that it was acceptable to impose taxes on the oil industry in connection with unexpected income attributable to the "explosion" of oil prices rather than to efforts made by the concession holders.

298. Second, the tax measures had only a *limited impact on Claimant's property rights*. On crude oil, the withholdings were fixed at 20% (16.67%). On LPG, the rate, first established at 20% (16.67%), was later reduced to 5% (4.46%). Only after El Paso's sale, on 13 May 2004, did Argentina increase the export withholdings imposed on crude oil from 20% to 25% and on LPG exports from 5% to 20%, and reinstated the previously abolished withholdings on exports of gasoline and other by-products at a rate of 5%. A first remark is that the export withholdings imposed in May 2004 cannot have caused a forced sale constituting an expropriation of El Paso's shares in the Argentinian companies subjected to these withholdings, or constitute an expropriation by themselves.

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[253] Counter-Memorial, § 423.
[254] *American Independent Oil Company (Aminoil) v. Kuwait,* [hereinafter *Aminoil*], Award of 24 March 1982, 66 *ILR* 518 (1984).

A second remark is that, without needing to enter into sophisticated reasoning or calculations, it is obvious that a tax of such a percentage is by no means an unreasonable measure that could be deemed expropriatory: under no circumstances may a tax of under 20% on exports be characterised as expropriation of an investment. The impact of the imposition of export withholdings, at a rate of 4.76% for LPG and a rate of 16.67% for oil, on El Paso's shares cannot be deemed to be expropriatory.

299. In conclusion, the Tribunal, having analysed the different tax measures, does not consider that they amount to indirect expropriation, as they were reasonable and did not result in the neutralisation of the property rights of the Claimant.

D. Article II(2)(b): Discriminatory and Arbitrary Treatment

300. Article II(2)(b) of the 1991 BIT states:

> "Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party."

1. ***Discriminatory Treatment: Has El Paso Been Discriminated Against?***

(i) The Parties' Positions

301. According to the Claimant's Memorial, the energy companies were discriminated against:

> " … the GOA's measures have been designed to benefit other sectors of the economy at the expense of energy companies, thus constituting a politically-motivated and discriminatory transfer of wealth from energy companies to other sectors of the economy;"[255]

[255] Memorial, § 35.

> " … in an obvious display of discrimination, the GOA effectively took billions of Dollars from the energy sector and transferred that money to other economic groups;"[256]

> "… [t]he Energy Secretariat's acts were driven by the GOA's decision to manipulate energy prices in order to disproportionately distribute the damage caused by the GOA's alterations to the system so that generators shouldered a larger burden than other participants."[257]

The same position was taken in the Claimant's Reply:

> " … the measures adopted by the GOA regarding the energy sector were not a mere result of Argentina's economic condition, but part of a specific policy adopted by the GOA to discriminate against the energy sector, abrogating fundamental rights and assurances granted under the Energy Regulatory Framework."[258]

302. And the discrimination is described as follows:

> "Many of Argentina's measures had a *disproportionate effect* on foreign investors in the energy sector and thus constitute a clear case of *de facto* discrimination … Essentially, <u>Argentina forced the energy sector to bear a disproportionate brunt of Argentina's financial difficulties in order to cross-subsidize the rest of its economy by US$ 10.7 billion</u>."[259]

303. The Respondent presented a different view of what constituted unauthorised discrimination. The GOA considered that the measures were not discriminatory and expressed the following view on the conditions for measures to be discriminatory:

> "The differential treatment between national and foreign investors does not necessarily lead to the violation of international law standards. In order for a State's action or measure to be discriminatory in the sense that it is prohibited under international law, two requirements should be present. In the first place, the measure must result in actual damages to the foreign investor; in the second place, the action or measure must have been taken to harm the foreign investor. If these

[256] *Ibid.*, § 223.
[257] *Ibid.*, § 237.
[258] Reply, § 353.
[259] *Ibid.* § 670. Emphasis by the Claimant.

> requirements are not present, there will be no discriminatory action by the State that is protected by international law."[260]

304. In addition to this abstract view of what constitutes discrimination, Argentina contended that, according to the facts of the case, the energy and oil and gas companies had not been concretely discriminated against. According to the Respondent,

> "[a]ll the sectors of the economy were impacted by the crisis and had to adapt to the new context. El Paso has filed a claim for investments related to electric power generation and oil and gas production. Although these sectors could not remain alien to the crisis, they were not, at any rate, among the most disfavoured ones."[261]

(ii) The Tribunal's Analysis

305. On the one hand, the Tribunal does not agree with Argentina's contention that discriminatory intent is necessary for a measure to be discriminatory. It is sufficient that, objectively, two similar situations are not treated similarly. As stated by the ICSID tribunal in *Goetz v. Burundi*, "discrimination supposes a differential treatment applied to people who are in similar situations."[262] Professor Kenneth Vandevelde further explains that anti-discrimination provisions in BITs prohibit measures that are "discriminatory in effect as well as those which are intentionally discriminatory,"[263] which implies that while discriminatory intent gives rise to a finding of discrimination, the discriminatory effect of a measure is sufficient for such a finding. On the other hand, the Tribunal can also not accept the Claimant's view according to which any discrimination against an investor is a violation of the BIT. The Claimant has cited many authorities and stated that, according to Professor A. F. M. Maniruzzaman,

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[260] Counter-Memorial, § 659.
[261] Counter-Memorial, § 9.
[262] *Goetz*, *supra* note 129, Award of 10 February 1999, § 121 : "*Une discrimination suppose un traitement différentiel appliqué à des personnes se trouvant dans des situations semblables*."
[263] Kenneth J. Vandevelde, *United States Investment Treaties: Policy and Practice*, Boston, Kluwer Law and Taxation, 1992, p. 77.

> "[t]he concept of discrimination entails two elements: first, the measures directed against a particular party must be for reasons unrelated to the substance of the matter, for example, the company's nationality. Second, discrimination entails like persons being treated in an inequivalent manner."[264]

306. The protection against discrimination in the BIT is a protection against discrimination of foreign investors as such. In the Tribunal's view, the standard of the BIT according to which *foreign investors* are protected against discrimination does not entail the far-reaching consequence that a State cannot treat differently the economic actors in different sectors of the economy, as long as this differential treatment applies equally to national and foreign investors. None of the impugned measures adopted to face the economic crisis differentiated in legal terms between Argentinian nationals or companies, on the one hand, and foreigners or foreign or foreign-owned companies, on the other. It appears moreover from the file that, in practice, no foreign investor has received treatment different from that granted to its Argentinian counterparts, and El Paso has received the same treatment as other investors in the same sector.

307. The Tribunal has not been convinced by the Claimant allegation that

> " … the measures adopted by the GOA regarding the energy sector were not a mere result of Argentina's economic condition, but part of a specific policy adopted by the GOA to discriminate against the energy sector, abrogating fundamental rights and assurances granted under the Energy Regulatory Framework."[265]

308. The conclusion of this Tribunal is that no *de jure* discrimination between national and foreign investors, or different foreign nationals, resulted from the measures adopted to face the crisis.

309. The question that remains is whether there has been *de facto* discrimination. According to the Claimant, the banks are mainly Argentinian and the oil and

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[264] Memorial, § 556, citing A. F. M. Maniruzzaman, "Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview", 8 J. *Transnat'l L. & Pol'y 57* (1998) (footnote omitted). Claimant's Legal Authority No.133.

[265] Reply, § 353.

gas sector companies mainly foreign-owned: as the banking sector and the energy sector have not been treated in the same manner, there has been *de facto* discrimination according to the Claimant.

310. It has been said, and is indeed confirmed by the text of the relevant law, that the export withholdings were established to compensate for the difficulties of the Argentinian banking sector. According to the Claimant,

> " … [t]he mandatory conversion of Dollar-denominated bank deposits and bank credits created an imbalance in the system that was termed *asymmetrical pesification*. This imbalance occurred because Decree Nº 214 converted Dollar-denominated bank deposits into Pesos at a rate of US$ 1 = per Arg.$1.40, while Dollar-denominated bank loans were converted into Argentine currency at a rate of US$ 1 = Arg$ 1. According to Law N° 25,561, the hydrocarbon export withholding was created to compensate the banking sector for this imbalance."[266]

It is not denied that the banking and the hydrocarbon sectors were not subject to the same measures, but the Tribunal thinks that the measures concerning each of these sectors were reasonable and did not discriminate against either of them. On the contrary, the overall scheme adopted by the Argentine Government had the objective of balancing for each sector the advantages and disadvantages of the general economic situation.

311. The banking sector was at a disadvantage because the Government had imposed an asymmetrical pesification, the loans being pesified at a lower exchange rate than the deposits, which created a greater loss for the banking system than symmetrical pesification would have. This was acknowledged by the tribunal in the award in *Continental* when it analysed the same Decree:

> "The Government intervened massively to support the banks in the asymmetric pesification. This scheme would have brought the banks otherwise to bankruptcy, since they had to 'pay back' to depositors 1.40 pesos for each dollar, while their credits were converted at 1:1."[267]

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[266] Memorial, § 329.
[267] *Continental*, *supra* note 150, § 144.

This is a very specific application of pesification which placed the banks in a situation that cannot be considered as similar or comparable to that of the oil and gas companies but, on the contrary, was less favourable. The GOA practised discrimination in favour of the banks and then a sort of reverse discrimination to equalise the playground. In other words, what Decree Nº 214 and Law N° 25,561 did was what is called in another context "*inégalité compensatrice*"[268] and does not amount to discriminatory treatment of foreign investors.

312. The same analysis was made in *Metalpar v. Argentina,* where the claimants – two companies which had invested in Argentinian companies engaged in the manufacturing of bus bodies – alleged that Argentina, through Law No. 25,561, Law No. 25,789, and Presidential Decree No. 905/2002, had discriminated against them in favour of the financial sector, just as El Paso claims to have been discriminated against in favour of the banking sector. The answer of the tribunal was simple and is shared by this Tribunal:

> "The Tribunal considers that a State's power to create its legal system – through its competent authorities – allows it to establish different rules to govern different subjects. If Claimants neither were nor are financial institutions, they cannot argue that the Argentine Government should have treated them as such."[269]

313. Moreover, as far as the Hydrocarbon Sector was concerned, the exports being expressed in dollars and the costs in Argentina being sustained in pesos, the hydrocarbon companies seemed to be in a more favourable position than those

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[268] At the time of the New International Economic Order (NIEO), the idea was to give advantages to developing countries in order to foster a more balanced relationship with developed countries. The idea was for example expressed in Article 18 of the Charter for Economic Rights and Duties of States, embodied in General Assembly Resolution 3182 of December 1974, which reads: "Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organizations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations, the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favour."

[269] *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* [hereinafter *Metalpar*], (ICSID Case No. ARB/03/5), Award of 6 June 2008, § 161.

which did not export. Argentina argued that "[w]ithholdings captured only one portion of the extraordinary profitability obtained by exporters, who had suddenly benefited as a result of the mega-devaluation of the local currency."[270] The Tribunal here refers to a statement by Mr. Fernandez, who declared in February 2004, when he was Chief of Cabinet:

> "We are referring to various sectors of the economy which shall bear the cost of this increase, most of them are exporters who have enjoyed the possibility to export their products in dollars while paying a very low tariff for gas and electricity in pesos."[271]

314. The Tribunal also takes note of a statement made by the Claimant itself, making the same analysis when saying that "those who export their production … benefited from the devaluation of the Peso since the Peso equivalent value of their exports tripled."[272] It was thus reasonable for the Government to institute a tax on the unexpected profits made by the oil and gas companies to re-balance the situation of the banking sector. Far from being discriminatory, this measure aimed at equalising the playground of the different economic actors, by distributing more equitably the burden of the country's economic crisis among all those affected. This idea was indeed spelled out in Section 11 of the Emergency Law, which pointed to "the principle of shared efforts." To these considerations one should add that it was common knowledge that at the time of the Argentine crisis the international price of oil increased tremendously, which was all to the benefit of the exporting companies. Argentina explained that

> "[i]n the oil and gas sector, export duties were established levied only on a minor portion of the extraordinary profits generated by the mega devaluation of the Argentine peso for tradable goods producing sectors. The increase in the international price of crude oil was an additional issue that also benefited the sector dramatically. Domestic oil and gas prices increased at a pace that exceeded domestic inflation

[270] Rejoinder, § 255.
[271] Statement during a press conference given on 13 February 2004, by the Chief of Cabinet, Mr. Fernandez, Minister of Federal Planning, Public Investment and Service, Mr. De Vido, and the Secretary of Energy, Mr. Cameron. Claimant's Exhibit No.125.
[272] Memorial, § 244.

> and converted this sector into one of the most favoured ones within the context of the crisis."[273]

Therefore, as stated by Mr. Roubini, expert for the Respondent, "it made total economic sense to have a 'compensated devaluation' by relying on export taxes to raise revenues in the sectors that had most benefited from the devaluation and the sectors that were most able to afford an increased tax imposition."[274]

315. It is this Tribunal's view that a differential treatment based on the existence of a different factual and legal situation does not breach the BIT's standard. Here the Tribunal is in line with the approach of other tribunals already cited and finds itself in agreement with the tribunal in *Enron*, which found no discrimination between the different sectors of the economy, although they were indeed treated differently, as there was no "capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities or sectors."[275] The Tribunal finds that the Claimant has not proved any improper differentiation.

316. Last but not least, the Tribunal recalls that the application of standards in the BIT other than that of protection from expropriation is excluded for tax matters. The question that was discussed in the preceding paragraphs is therefore somewhat academic, although, if it had had to decide the issue, the Tribunal would have considered it important to state that, for the reasons presented, it held that there had been neither *de jure* nor *de facto* discrimination against El Paso during the Argentine crisis.

2. Arbitrary Treatment: Has El Paso Been Treated Arbitrarily?

(i) The Parties' Positions

317. The Claimant argues in its Memorial that the decisions of the Argentinian authorities were arbitrary, but without really saying more than that "the GOA

[273] Counter-Memorial, § 10.
[274] Counter-Memorial, § 153, citing the Roubini Report, *supra* note 253, § 47.
[275] *Enron*, *supra* note 52, § 282.

took a series of politically-motivated measures,"[276] without elaborating on the possible political motives behind these measures. Later on, some explanation was given of this idea of political motivation in the testimony of Mr. Bastos, the former Secretary of Energy: "the changes that have been introduced are political ones aimed mainly at preventing an increase in the price of energy ..."[277]

318. The Respondent considers that the measures were not arbitrary and were designed to improve the global economic situation. They were adopted after extensive discussions in the Government and the ministries, and their sole aim was to face the crisis in the best way possible.

(ii) The Tribunal's Analysis

319. *Black's Law Dictionary* defines the word "arbitrary" as "not governed by any fixed rules or standard," "performed without adequate determination of principle," "without cause based upon the law," or resulting from a "failure to exercise honest judgment."[278] In addition, "arbitrary and capricious" is defined as "characterization of a decision or action taken by an administrative agency . . . [as] wilful and unreasonable action without consideration or in disregard of facts or law or without determining principle."[279] According to international law, "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[280]

320. The Tribunal sees no arbitrariness in Argentina's reaction to the crisis. Of course, if one is faced with a difficult economic situation, there are always several methods for dealing with it, depending on the circumstances, the political constraints incumbent on governments and their economic analyses. It

[276] Memorial, § 21.
[277] Memorial, § 377, citing the Bastos Report.
[278] *Black's Law Dictionary*, 6th ed. (1990), p. 104.
[279] *Ibid.*, p. 105.
[280] *ELSI*, *supra* note 135, § 128.

is clear that neither the causes of, nor the answers to, Argentina's economic crisis at the end of 2001 have been the object of unanimous appraisal.

321. The Tribunal has heard various experts, all knowledgeable, having opposite perceptions of the same reality. Some experts stated that the pesification was the only solution; others said that dollarisation would have been much preferable.[281]

There is no common analysis of the origin of the crisis, as was pointed out by the tribunal in the *CMS* case, which was dealing with the same crisis:

> "This crisis … stemmed basically from economic conditions that made it impossible to maintain the fixed exchange rate and which gradually led to the greatest default on foreign debt in history and the collapse of the Argentine financial markets. Some tend to fault foreign investors and put the blame on excessive privatization and globalization, while others see in it the result of not having carried out the liberalization program in its entirety and having allowed major governmental interferences in the functioning of the economy."[282]

It cannot be denied also that the reactions to the crisis could have been different, as stated by the tribunal in *LG&E*:

> " … Argentina faced severe economic and social hardships from 2001 onwards and had to react to the circumstances prevailing at the time. Even though the measures adopted by Argentina may not have been the best, they were not taken lightly, without due consideration."[283]

322. The Tribunal thinks that the GOA certainly tried to take the best measures to cope with the situation. Judging whether the measures taken were or were not the best is very difficult as shown by the diverging views expressed on the

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[281] See for example, Reply, § 747, Claimant's developments on the subject: "An additional alternative available to Argentina was "dollarization." Argentina could have adopted the Dollar as legal tender, as other countries (such as Ecuador and Panama) did. Under this option, the Central Bank of Argentina could have used its Dollar reserves to exchange all pesos in circulation for dollars, and all Peso-denominated obligations would have been transformed into dollar-denominated obligations at the exchange rate of 1:1, which was the exchange rate in force during the currency board system. The peso was already pegged to the Dollar under the currency board system, and the Argentine Central Bank possessed the dollar reserves necessary to maintain that peg. 'Dollarization' was thus an obvious and logical alternative that was frequently discussed in 2001. It had the support of senior US officials, making it "highly likely that had Argentina opted for dollarization, both the Bush Administration and the multilateral institutions would have supported the policy." (footnotes omitted.)

[282] *CMS*, *supra* note 48, § 153.

[283] *LG&E*, *supra* note 51, § 162.

subject by commentators of the Argentinian crisis of 2001. Something had to be done. The only item to be verified by the Tribunal is whether the measures were taken arbitrarily. In view of the extensive file before it, which it has studied exhaustively, it appears to the Tribunal that the measures adopted in the context of the crisis were not arbitrary but reasonable and consistent with the aim pursued. They were intended to face the extremely serious crisis that Argentina was going through and emanated from the police power regularly exercised by governments.

323. It is also apposite to note that all measures were taken in the framework of the existing constitutional order, as stressed by the tribunal in *Continental*:

> "It is worth noting that ultimately the crisis did not affect the functioning of the democratic constitutional order of Argentina beyond emergency measures enacted on the basis of the Constitution. Civil liberties were not restricted, nor constitutional guarantees suspended. This is apparent now; but it certainly could not be assumed in late 2001 and 2002."[284]

324. It could moreover be said that the subsequent evolution of the Argentinian economy might give some confirmation of the adequacy of the policy followed.[285] The Claimant itself has recognised this positive evolution more than once. For example, in its Closing Statement, it was indicated that the GDP growth was the following: + 8.83 for 2003; + 9.03 for 2004; + 9.18 for 2005; + 8.46 for 2006; and approximately + 7.5 for 2008. Moreover, in a letter dated 20 May 2008 sent by its counsel to the Tribunal, the Claimant recognised the positive effects of Argentina's policies, stating that "Argentina's economy has been growing at record rates since 2003." According to the Embassy of Argentina in Washington, D.C., "Argentina's economy has been growing at a fast pace since 2003 (9% average during 2004-2006), having overcome its major crisis in modern history." In her first annual address to the Argentine

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[284] *Continental*, *supra* note 150, § 153. Footnote omitted.

[285] See for example, an article published in the French economic newspaper "Les Echos", 22-23 February 2008, with the Title "Cinquième année de forte croissance en Argentine," in which one can read: " … The dynamism and the willpower for revenge of Argentina, which recovered with a spectacular velocity from the terrible financial crisis that brought it down at the end of 2001, cannot be denied." Translation by the Tribunal.

Congress, President Cristina Kirchner characterised Argentina's record growth as "the greatest growth period in Argentina in the last 100 years."

325. The conclusion of the Tribunal is that the measures taken by Argentina were based on a reasoned scheme to answer a major crisis and effectively had the desired result, which means that they cannot be considered as tainted by arbitrariness.

E. ARTICLE II(2)(a): FAIR AND EQUITABLE TREATMENT

326. Article II(2)(a) of the BIT prescribes:

> "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."

327. Two main issues are raised by the application of the fair and equitable treatment (FET) standard in an arbitration case: the first concerns the relation of FET with general international law, whereas the second is the determination of its content and scope.

1. *The Parties' Positions*

328. The Claimant has an all-encompassing conception of FET, as is shown by the summary of the development of this concept given in its Memorial:

> "In summary, government measures violate the fair and equitable treatment standard when they are inconsistent with the reasonable and legitimate expectations of the parties. It is both reasonable and legitimate for investors to expect that a government will conform its conduct to accepted standards such as its own treaties, constitution, laws, regulations, customary international law, and general usage that falls into the category of a norm. Indeed, this is the essence of the rule of law. It is also unfair and inequitable for a government to violate the principles of honesty and good faith, to act in a non-transparent manner, to act in a manner inconsistent with representations and inducements offered to attract foreign investment, to revoke or alter arbitrarily or for political reasons regulatory approvals or conditions upon which the investor relied, to abuse its legal rights or its discretionary powers, to interfere with property rights unreasonably and to unforeseeably change the essential rules of the game upon which investors relied in such a way as to frustrate the very purpose of the investment. These standards are all fundamental and well

> accepted. They encompass the most elementary principles of fairness and economic morality, and in a practical sense, they are necessary preconditions for the confidence based upon the stability and predictability that comes with respect for the rule of law that is so necessary both to attract foreign investment and for any economy to prosper and grow."[286]

Without wishing to analyse at this stage the details of this conception of FET, the Tribunal notes that, in the Claimant's view as expressed in this excerpt, any violation by a State of any of its laws or its regulations is a violation of FET. In its Reply, the Claimant examined the relation between the concept of FET and general international law and contended that fair and equitable treatment as prescribed in the BIT established a different and higher standard than that prevailing in customary international law.[287]

329. The Respondent began its discussion of FET by stating that "[t]he treatment standards are provided by the international customary law minimum standard. This is thus established by the BIT, practice and international legal scholars."[288] As far as the content of the notion is concerned, Argentina points out that FET cannot be interpreted to mean that no change in the legal framework may be made if circumstances so require. In the GOA's Counter-Memorial, it is thus stated that

> "[c]ountries with unstable economies – such as Argentina – did not undertake to refrain from undergoing economic crises again. If El Paso's interpretation of the standard were allowed, bilateral investment treaties would only be used to worsen the crisis when making the country in trouble compensate the investors affected and thus keep them isolated from the crisis."[289]

2. The Tribunal's Analysis of the Legal Standard

330. The Tribunal will address in turn the two issues raised by the FET.

(i) The Relation of Fair and Equitable Treatment with the International

[286] Memorial, § 525.
[287] Reply, §§ 540-552.
[288] Counter-Memorial, § 604; see also Rejoinder, § 389 and its footnotes.
[289] Counter-Memorial, § 631.

Minimum Standard

331. As far as the relation between FET and the minimum standard of international law is concerned, two main approaches have been adopted by ICSID tribunals, to which one may add an intermediate, undecided position.

332. Under the first approach, FET has to be equated with the minimum standard of treatment provided for by general international law. This has been, for example, the position adopted by the *CMS* tribunal:

> "In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is *not different from the international law minimum* standard and its evolution under customary law."[290]

333. The second approach deals with FET as an autonomous concept, considered in general as more demanding and more protective of investors' rights than the minimum standard of treatment provided for by general international law. The *Azurix* tribunal, for example, took this position:

> "The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as *higher standards than required by international law*. The purpose of the third sentence is to set a floor, not a ceiling in order to avoid a possible interpretation of these standards below what is required by international law."[291]

However, after this statement of principle, the *Azurix* tribunal contradicted it, or at least emptied it of any significance, when it added that:

> " … the Tribunal does not consider that it is of material significance for its application of the standard of fair and equitable treatment to the facts of the case. As it will be explained below, the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is *substantially similar* whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law."[292]

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[290] *CMS*, *supra* note 48, § 284. Emphasis added by the Tribunal.
[291] *Azurix*, *supra* note 50, § 361. Emphasis added by the Tribunal.
[292] *Ibid*. Emphasis added by the Tribunal.

334. Between these two approaches, some tribunals chose not to decide. This was the case of the tribunal in *BG v. Argentina* which adopted the following position:

> "For the reasons set out below, this Tribunal has concluded that the measures adopted by Argentina fall below the minimum standard and it is consequently not necessary for this award to examine whether the Argentine-UK BIT provides a more generous independent standard of protection."[293]

335. The Tribunal considers this discussion to be somewhat futile, as the scope and content of the minimum standard of international law is as little defined as the BITs' FET standard, and as the true question is to decide what substantive protection is granted to foreign investors through the FET. The issue is not one of comparing two undefined or weakly defined standards; it is to ascertain the content and define the BIT standard of fair and equitable treatment.

336. This being said, it is the view of the Tribunal that the position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law[294] and with the identical role assigned to FET and to the international minimum standard. The Tribunal wishes to emphasise what is, in its view, the specific role played by both the general international minimum standard and the FET standard as found in BITs. The role of these similar standards is to ensure that the treatment of foreign investments, which are protected by the national treatment and the most-favoured investors' clauses, do not fall below a certain minimum, in case the two mentioned standards do not live up to that minimum. As stated by Ian Brownlie, "[s]ince the beginning of the present century, legal doctrine has opposed an 'international minimum standard,' 'a moral standard for civilized states,' to the principle of national treatment."[295] This has been highlighted

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[293] *BG Group Plc v. Argentina*, UNCITRAL [hereinafter *BG*],, Award of 24 December 2007, § 291.

[294] Although this is not applicable to our case, one may note that in the FTA between the United States and Chile it was held that the fair and equitable treatment and full protection and security standards included in Article 10(4) and Chapter 10 on Investments "do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." Free Trade Agreement between Chile and the United States of 6 June 2003, Article 10.4(2).

[295] Ian Brownlie, *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, p. 524.

already in two arbitral awards. In *Genin*, it was asserted by the tribunal that, under international law, this requirement is generally understood to "provide a basic and general standard which is detached from the host State's domestic law."[296] Then, in *Saluka*, the same idea was elaborated on:

> " … the 'fair and equitable treatment' standard requires the Contracting States to accord to foreign investors treatment which does not fall below a certain minimum, this minimum being in any case detached from any lower minimum standard of treatment that may prevail in the domestic laws of the Contracting States."[297]

337. In conclusion, it is the Tribunal's view that the FET is not to be viewed with reference to national law – in which case it could be lower than required by international law – but has to be interpreted with reference to international law, the result being that it cannot go below what is required by international law, which is the standard to be applied. But if national law or the treatment accorded to some foreigners exceeds this minimum international standard, it is one of the former that has to be applied. In a sense, it could be said that the foreign investor is entitled to the most favourable treatment, be it national law, rules applied to some foreigners or the international minimum standard embodied in FET. The Tribunal thus considers that the FET of the BIT is the international minimum standard required by international law, regardless of the protection afforded by the national legal orders.

(ii) The Content and Scope of Fair and Equitable Treatment

338. The true problem is in fact to establish the content and scope of the FET. In most BITs the term "fair and equitable treatment" is not defined. Pursuant to the 1969 Vienna Convention on the Law of Treaties, a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." At the

296 *Genin*, *supra* note 128, § 367.
297 *Saluka*, *supra* note 163, § 295.

outset, the Tribunal wishes to cite a general comment made by the *ad hoc* Annulment Committee in the *CMS* case,[298] with which it cannot but agree fully:

> "The Committee would only note that the fair and equitable standard has been invoked in a great number of cases brought to ICSID arbitration and that there is some variation in the practice of arbitral tribunals in this respect."

339. The Tribunal can also agree with a general description of the FET given by the Claimant in its Memorial in the following citation, although it cannot approve all aspects of this standard as they are presented later in the same submission, quoted in paragraph 328 of this Award:

> "The contours of fair and equitable treatment have gradually come into focus in the past few years. It has become clear that the basic touchstone of fair and equitable treatment is to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith."[299]

340. Within this general acceptable definition, some tribunals have however extended the scope of the FET to a point where, according to this Tribunal, the sovereign power of the State to regulate its economy is negated, as will be developed below.

3. The Different Conceptions Used by Arbitral Tribunals

341. One of the broadest conceptions of FET is that the State has *a duty to adopt a proactive behaviour in favour of the foreign investment.* This has been stated for example in the case of *MTD*, where the tribunal, although referring to *Tecmed*, seems to have even expanded on it, when it said:

> "In terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a proactive statement – 'to promote,' 'to create,' 'to stimulate' – rather

[298] *CMS*, *supra* note 48, Decision on Annulment, footnote 86.
[299] Memorial, § 506.

> than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors."[300]

342. Sometimes, the description of what FET implies looks like *a programme of good governance that no State in the world is capable of guaranteeing at all times*. The exigencies of FET have been detailed in *Tecmed* in the following manner:

> "To provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."[301]

343. It is, according to this Tribunal, interesting to note that the *ad hoc* Annulment Committee in the *MTD* case distanced itself from the very broad definition in *Tecmed* on which the *MTD* tribunal had relied. It did so in the following terms:

> "According to the Respondent, 'the *TecMed* programme for good governance' is extreme and does not reflect international law. The *TECMED* dictum is also subject to strenuous criticism from the Respondent's experts, Mr. Jan Paulsson and Sir Arthur Watts ...

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[300] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* [hereinafter *MTD*], (ICSID Case No. ARB/01/7), Award of 25 May 2004, § 113.
[301] Tecmed, *supra* note 161, § 154.

> The Committee can appreciate some aspects of these criticisms. For example the *TECMED* Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have."[302]

The *ad hoc* Committee goes on to take a closer look at the definition of FET given by the *MTD* tribunal and expresses some concerns about the scope of States' obligations under that definition:

> " … a standard formulated in the terms of paragraph 113 is defensible. No doubt the extent to which a State is obliged under the fair and equitable treatment standard to be pro-active is open to debate, but that is more a question of application of the standard than it is of formulation. *In any event the emphasis in the Tribunal's formulation is on 'treatment in an even-handed and just manner*.'"[303]

344. Another only slightly less far-reaching conception implies that the State is under *an obligation to stabilise the legal and business framework* in which the foreign investment was made. For example, in the VAT case of *Occidental Exploration and Production Co. v. Ecuador*, the tribunal stated:

> "Although fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the parties that such treatment 'is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.' The stability of the legal and business framework is thus an essential element of fair and equitable treatment."[304]

The Tribunal further stressed this point by saying that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made."[305]

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[302] *MTD*, *supra* note 300, Decision on Annulment of 21 March 2007, §§ 66-67.
[303] *Ibid.*, § 71. Emphasis added by the Tribunal.
[304] *Occidental VAT Award*, *supra* note 118, § 183.
[305] *Ibid.*, § 185.

345. This conception was also followed by ICSID tribunals in some of the already decided Argentinian cases by relying on the Preamble in order to identify the object and purpose of the treaty. The *CMS* tribunal turned to the Preamble of the Argentina-US BIT to clarify the standard of fair and equitable treatment:

> "The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable 'to maintain a stable framework for investments and maximum use of economic resources.' There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."[306]

346. Similarly, the tribunal in *LG&E* referred to the Preamble of the same BIT to determine the object and purpose of FET, and concluded:

> "In considering the context within which Argentina and the United States included the fair and equitable treatment standard, and its object and purpose, the Tribunal observes in the Preamble of the Treaty that the two countries agreed that 'fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources.' . . . In light of these stated objectives, this Tribunal must conclude that stability of the legal and business framework is an essential element of fair and equitable treatment in this case …."[307]

347. But there are also much narrower conceptions of FET, which come closer to the *Neer* test.[308] Such an approach, which considers that FET is only violated by *wilful bad faith behaviour of the State*, has been used by the tribunal in *Genin*:

> "While the exact content of this standard is not clear, the Tribunal understands it ... [as] a *minimum* standard. Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[309]

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306 *CMS*, *supra* note 48, § 274.
307 *LG&E*, *supra* note 51, § 124. It should be mentioned that if a tribunal states that, if FET is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources, this implies that a stable framework is an essential element of FET, it should also be concluded that the maximum effective use of economic resources should be considered an essential element of that standard.
308 *LFH Neer & Pauline Neer (USA) v. United Mexican States*, (1926) IV RIAA 60.
309 *Genin*, *supra* note 128, § 367.

348. As can be seen, there is a broad range of conceptions of FET emerging from ICSID case-law. However, the legitimate expectations of the investors have generally been considered central in the definition of FET, whatever its scope. There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith. This has been aptly stated by the tribunal in *Waste Management II*: "In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[310] And the tribunal in *Saluka* reiterated the same idea, when stating: "The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard."[311]

349. The Tribunal will now present its own understanding of this standard of protection of foreign investors.

4. The Tribunal's Understanding of Fair and Equitable Treatment

350. In the Tribunal's view, if the often repeated formula to the effect that "the stability of the legal and business framework is an essential element of fair and equitable treatment" were true, legislation could never be changed: the mere enunciation of that proposition shows its irrelevance. Such a standard of behaviour, if strictly applied, is not realistic, nor is it the BITs' purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered *ad infinitum*. Such an outcome based on the holdings of some tribunals has been criticised by Professor Vaughan Lowe, when he analysed some of the cases based on this kind of conception, in the following terms: "The tenor of the cases suggests that it is now regarded as 'unfair' or 'inequitable' for a state to make material changes in the business environment that prevailed when the investor committed itself to its

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310 *Waste Management II*, *supra* note 185, § 98.
311 *Saluka*, *supra* note 163, § 302.

investment."[312] The Claimant itself did accept the view that things cannot remain unaltered.

351. Indeed, in its Reply, El Paso stated that:

> "Claimant does not call into question Argentina's right to change its laws or regulations. It has never been Claimant's position that the BIT imposes an absolute obligation not to alter the regulatory framework."[313]

adding however that

> "… [i]t is certainly foreseeable that a government will adapt the regulatory framework to the needs of the country. But the complete alteration of the regulatory framework in a manner that does not reasonably protect existing capital investments promoted by the government necessarily frustrates the legitimate expectations of investors."[314]

352. In other words, the Tribunal cannot follow the line of cases in which fair and equitable treatment was viewed as implying the stability of the *legal* and *business framework*. Economic and legal life is by nature evolutionary.

353. Some of the specific claims of El Paso show that, if pushed to its logical consequences, this conception of FET cannot be tenable. In its Reply, the Claimant asserted the following claims:

> "Claimant seeks compensation for BIT violations resulting from the abrogation and repudiation by Argentina of approximately *12 key rights* that were granted to investors (such as Claimant) under the Electricity Law, the Energy Regulatory Framework, the Hydrocarbon Regulatory Framework, and the Concessions, which include:
>
> - a uniform Spot Price for sales of electricity to the WEM that reflect the economic costs of the system;
>
> - the payment by electricity distributors of a uniform energy price plus transmission costs sufficient to cover

[312] Memorial, § 523 citing Vaughan Lowe, "Regulation or Expropriation?", 55 Current Legal Problems (2002) , p. 447, at p. 455, Claimant's Legal Authority No. 116.
[313] Reply, § 570.
[314] *Ibid.*, § 572.

the prevailing Spot Price;

- electricity distribution tariffs payable by end users that reflect the full cost of the energy they purchase in the WEM;

- variable costs of production (VCPs) based upon reference prices of fuel that reflect their undistorted market prices;

- natural gas distribution tariffs calculated in Dollars and natural gas distribution tariff adjustments in Dollars;

- market-driven electricity and natural gas wellhead prices;

- capacity payments during 90 hours a week of US$ 10 per megawatt per hour (*i.e.*, US$ 900 per week per MW);

- the right to export crude oil without prior government consent;

- exports of hydrocarbons exempt from any existing or *future* fees, duties, rights or withholdings, and no taxes, whether federal, provincial or municipal, on CAPSA's production of liquid hydrocarbons;

- the commitment of the GOA to give 12 months' prior notice before imposing restrictions on crude oil exports. In the event such restrictions are imposed, producers are entitled to receive, in respect of each production unit, a price not lower than that of crude oil in similar conditions;

- the right of hydrocarbon producers to freely sell their production and the right to freely dispose of the percentage of foreign exchange sale proceeds set forth in the relevant contract, bidding or renegotiation document, set at 70%; and

- the right to enter into electricity and hydrocarbon sale contracts with distributors, large users, marketers and refiners, and freely agree contractual terms, including price and currency."[315]

[315] Reply, § 21. Emphasis added by the Tribunal.

354. Suffice it here to take two examples to understand why it is inconceivable that a foreign investor would benefit forever, because there is a BIT, of "capacity payments during 90 hours a week of US$ 10 per megawatt per hour." In the same manner, can it really be seriously contended, as the Claimant does, that the latter benefits from an internationally protected right that variable costs of production (VCPs) would be based upon reference prices for fuel that reflect their undistorted market prices, and that that right was violated because "Resolution SE 240/2003 excluded from the VPC used to determine the spot market price the cost paid by generators using more expensive liquid fuels"?[316]

355. The Tribunal, for its part, is inclined to accept the overwhelming jurisdictional trend mentioned above, which considers that the concept of fair and equitable treatment must be analysed with due consideration of the legitimate expectations of the Parties, but it will elaborate on the interpretation to be given to such a statement. If legitimate expectations of the foreign investors are to be taken into account at all, it has to be stressed that of course all the elements that the investors would like to rely on in order to maximise their benefits, if they are indeed expectations, cannot be considered legitimate and reasonable. The Tribunal will thus endeavour to specify what it thinks can be viewed as legitimate and reasonable expectations.

(i) The Linkage of Fair and Equitable Treatment with Objective Legitimate and Reasonable Expectations of Foreign Investors

356. On the one hand**,** if this Tribunal indeed agrees that FET can be linked to foreign investors' legitimate and reasonable expectations, it insists, on the other hand, that these expectations, as well as their violation, have to be examined *objectively*. It must be emphasised that, as aptly stated by the *CMS* Annulment Committee,

> "[a]lthough legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as

[316] CPHB, § 38.

> such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT."[317]

The Tribunal considers that the notion of "legitimate expectations" is an objective concept, that it is the result of a balancing of interests and rights, and that it varies according to the context.

(a) Legitimate Expectations Can Be Breached even in the Absence of Subjective Bad Faith of the State

357. This means, firstly, that the Tribunal considers that a violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and that such a violation does not require subjective bad faith on the part of the State. This approach of the Tribunal has been followed in several earlier arbitral awards.

In *Loewen*, the tribunal clearly explained this point:

> "Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the interpretation according to its terms."[318]

Likewise, in *CMS*, the t http://italaw.com/alphabetical_list.htmribunal said:

> "The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard."[319]

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[317] *CMS, supra* note 48, Decision on Annulment, § 89.

[318] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* [hereinafter *Loewen*], (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003, § 132.

[319] *CMS, supra* note 48, § 280.

This analysis was also followed in *LG&E*, where the tribunal declared that it was "not convinced that bad faith or something comparable would ever be necessary to find a violation of fair and equitable treatment."[320]

(b) Legitimate Expectations Result from a Confrontation of the Objective Expectations of Investors and the Right of the State to Regulate

358. This means also, secondly, that legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations than can be deduced from the circumstances and with due regard to the rights of the State. In other words, a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest. The *Saluka* tribunal insisted on this necessary equilibrium and concluded:

> "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."[321] … "a foreign investor protected by the Treaty may in any case properly expect that the [Government] implements its policies *bona fide* by conduct that is, as far as it affects the investor's investment, reasonably justifiable by public policies and that such conduct does not violate the requirements of consistency, transparency, even-handedness and non-discrimination."[322]

In other words, an interpretation of the fair and equitable treatment standard in the light of the object and purpose of the BIT may not exclusively rely on the interests of foreign investors. The Tribunal refers here to the father of the ICSID Convention who had said that:

> "The purpose of the Convention is to promote private foreign investment by improving the investment climate for investors and States alike. The drafters have taken great care to make it a balanced

[320] *LG&E*, *supra* note 51, § 129.
[321] *Saluka*, *supra* note 163, § 305.
[322] *Ibid.*, § 307.

instrument *serving the interests of the host States as well as investors*."[323]

(c) Legitimate Expectations Necessarily Vary with the Circumstances

359. Moreover, according to this Tribunal, legitimate expectations necessarily vary with the surrounding circumstances, as stated in *Noble Ventures, Inc. v. Romania*, where the tribunal explained that:

> "Although in this respect Art. II(2)(a) mirrors standard clauses in BITs and other international instruments and courts and tribunals have been concerned with violations of fair and equitable treatment standards, the question whether those standards have been violated has to be considered in the light of the circumstances of each case."[324]

360. It has thus been recognised that legitimate expectations might differ between an economy in transition such as that of Ukraine and a more developed one. As the tribunal in *Generation Ukraine v. Ukraine* pointed out:

> "The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls."[325]

361. It was also observed by a tribunal that an investor cannot pretend to have legitimate expectations of stability of environmental regulations in a State such as California, where concern for the protection of the environment and of sustainable development are high:

> "Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously

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[323] Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 136 *Collected Courses, Hague Academy of International Law*, (1972-II) at p. 335 and p..348. Emphasis added by the Tribunal.

[324] *Noble Ventures, supra* note 158, § 181. See also, *Waste Management II, supra* note 185, § 99; "... the standard is to some extent a flexible one which must be adapted to the circumstances of each case."

[325] *Generation Ukraine Inc. v. Ukraine* [hereinafter *Generation Ukraine*], (ICSID case No. ARB/00/9), Award of 16 September 2003, § 20.37.

> monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process. Methanex appreciated that the process of regulation in the United States involved wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists. Methanex itself deployed lobbyists. Mr Wright, Methanex's witness, described himself as the government relations officer of the company … Methanex entered the United States market aware of and actively participating in this process. It did not enter the United States market because of special representations made to it."[326]

362. More recently, the tribunal in *Continental* insisted on the importance of taking account of circumstances when evaluating a violation of FET:

> " … the content of the obligation incumbent upon the host State to treat a foreign investor in a fair and equitable manner, even when applicable 'at all times' as specified in Art. II(2)(a) of the BIT, varies in part depending on the circumstances in which the standard is invoked: the concept of fairness being inherently related to *keeping justice in variable factual contexts*."[327]

363. It is this Tribunal's view that, if the circumstances change completely, any reasonable investor should expect that the law also would drastically change. It is reasonable to foresee that a small change in circumstances might entail minor changes in the law, while a complete change might entail major changes in the law. This has been underscored by the Iran-US Claims Tribunal in *Starrett*:

> **"**… investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken."[328]

364. In sum, the Tribunal considers that FET is linked to the objective reasonable legitimate expectations of the investors and that these have to be evaluated

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[326] *Methanex*, *supra* note 174, § 9 of Part IV - Chapter D.
[327] *Continental*, *supra* note 150, § 255. Emphasis added by the Tribunal.
[328] *Starrett Housing Corporation v. Islamic Republic of Iran* [hereinafter *Starrett v. Iran*], 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (1983), 156.

considering all circumstances. As a consequence, *the legitimate expectations of a foreign investor can only be examined by having due regard to the general proposition that the State should not unreasonably modify the legal framework or modify it in contradiction with a specific commitment not to do so*, as will be shown below.

(ii) The Definition of Fair and Equitable Treatment

(a) Fair and Equitable Treatment Implies that there Is No Unreasonable or Unjustified Modification of the Legal Framework [329]

365. A preliminary point to be emphasised by the Tribunal is that, despite the standard reference to "the stability of the legal and business framework," this cannot mean that when concluding a BIT a State gives any guaranty to foreigners concerning its economic health and the maintenance of the economic conditions for business prevailing at the time of the investment. This Tribunal shares the views of the tribunal in *Saluka*, which stated that

> " … while it subscribes to the general thrust of these and similar statements [referring to the stability of the business and legal framework], it may be that, if their terms were to be taken too literally, they would impose upon host States obligations which would be inappropriate and unrealistic."[330]

366. Firstly, *economic stability* cannot be a legitimate expectation of any economic actor, as stated quite clearly at the beginning of the last century by the Permanent Court of International Justice (PCIJ), whose *dictum* still rings true today:

> "No enterprise – least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates – can escape from the changes and hazards resulting from general economic conditions. Some industries may be able to make large

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[329] See Christoph Schreuer, for whom the FET "is not absolute and does not amount to a requirement for the host state to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect. It is clear that a reasonable evolution of the host state's law is part of the environment with which investors must contend." "Fair and Equitable Treatment in Arbitral Practice", 6, *Journal of World Investment & Trade*, 357, at 374 (2005).

[330] *Saluka*, *supra* note 163, § 304.

> profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change."[331]

367. Secondly, it is inconceivable that any State would accept that, because it has entered into BITs, it can no longer modify pieces of legislation which might have a negative impact on foreign investors, in order to deal with modified economic conditions and must guarantee absolute *legal stability.*

368. In the Tribunal's understanding, FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements. The same approach was followed recently by the ICSID tribunal in *Parkerings*:

> "It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment."[332]

369. It will be noted, that in the two cases mentioned earlier (in §§ 345-346), the reference to the Preamble said that its object and purpose was to maintain "a stable framework for investment and maximum effective use of economic resources;" however, in determining what these purposes implied for the interpretation of FET, the tribunals in these two cases only retained the first purpose, in order to conclude that a stable legal and business environment is an essential element of fair and equitable treatment, without taking into account the goal that any State has to pursue as well, which is to guarantee to its population maximum effective use of its economic resources.

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[331] *Oscar Chinn (United Kingdom v. Belgium)* [hereinafter *Oscar Chinn*], Judgement of 12 December 1934, 1934 P.C.I.J. Rep., Serie A/B, No. 63, p. 88.

[332] *Parkerings-Compagniet AS v. Republic of Lithuania* [hereinafter *Parkerings*], (ICSID Case No. ARB/05/8), Award of 11 September 2007, § 332.

370. The idea that the foreign investor is not protected against reasonable changes was also put forward by the tribunal in the Argentinian case *Continental*, where it was stated that “the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.”[333]

371. The State has to be able to make the reasonable changes called for by the circumstances and cannot be considered to have accepted a freeze on the evolution of its legal system. This has indeed been acknowledged by the tribunal in *CMS*, but mainly as a general statement of principle with no legal practical consequences on the settlement of the case:

> “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.”[334]

The same point concerning a State’s regulatory power was made in *Enron*, where the tribunal noted **“**that the stabilisation requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State**.**”[335]

372. Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze. This point was also made by the tribunal in *Continental*:

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333 *Continental*, *supra* note 150, § 254.
334 *CMS*, *supra* note 48, § 277.
335 *Enron*, *supra* note 52, § 261.

> " … it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT's Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable."[336]

373. In other words, fair and equitable treatment is a standard entailing reasonableness and proportionality. It ensures basically that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances. FET is a means to guarantee justice to foreign investors.[337]

374. There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total.

(b) Fair and Equitable Treatment Implies that there Is No Modification of the Legal Framework when Contrary Specific Commitments Have Been Made towards the Investor

375. A reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor. The Tribunal considers that a special commitment by the State towards an investor provides the latter with a certain protection against changes in the legislation, but it needs to discuss more thoroughly the concept of "specific commitments." In the Tribunal's view, no general definition of what constitutes a specific commitment can be given, as all depends on the circumstances. However, it seems that two types of commitments might be considered "specific": those

[336] *Continental, supra* note 150, § 258.

[337] The same idea is expressed in *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, [hereinafter PSEG], (ICSID Case No. ARB/02/5), Award of 19 January 2007, § 239: "Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards."

specific as to their addressee and those specific regarding their object and purpose.

376. First, in order to prevent a change in regulations being applied to an investor or certain behaviour of the State, there can indeed exist *specific commitments directly made to the investor* – for example in a contract or in a letter of intent, or even through a specific promise in a person-to-person business meeting – and not simply general statements in treaties or legislation which, because of their nature of general regulations, can evolve. The important aspect of the commitment is not so much that it is legally binding – which usually gives rise to some sort of responsibility if it is violated without a need to refer to FET – but that it contains a specific commitment directly made to the investor, on which the latter has relied.

377. Second, a commitment can be considered specific if its *precise object was to give a real guarantee of stability to the investor*. Usually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course. However, a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.[338]

378. The tribunal in *Continental* addressed the question of what can be considered a special commitment giving "reasonable legitimate expectations" to the foreign investor with care and insight. It insisted on "the specificity of the undertaking" that can give rise to reasonable legal expectations, and for that purpose distinguished:[339]

- Political statements which can – "regrettably but notoriously" says the tribunal – create no legal expectations;

[338] These two aspects seem to have been implicitly taken into account in *Continental*, *supra* note 150, where the tribunal examined both general legislation and contractual commitments, both capable of giving rise to some expectations, the force of which would depend on the circumstances.
[339] *Continental*, *supra* note 150, § 261.

- general legislative statements which "engender reduced expectations;"
- contractual undertakings by governments which can create more legitimate expectations and "deserve clearly more scrutiny," as "they generate as a rule legal rights and therefore expectations of compliance." But even there, the tribunal says, whether the FET standard has been violated will depend on "the context, reasons and effect" of the unilateral modification.

379. The Tribunal will follow the same logic for deciding whether El Paso can be considered to have had legitimate expectations that the Regulatory Frameworks for oil and electricity would not be modified during the full course of its investment. It considers that special commitments have to be carefully analysed as a coherent behaviour from the State, the purpose of which was to have the foreign investor expect that it would be protected against overly drastic changes.

F. THE TRIBUNAL'S APPLICATION OF THE FAIR AND EQUITABLE TREATMENT STANDARD TO THE FACTS OF THE CASE

380. Before the end of the 1990s, the Argentinian economy was mainly State-owned or -controlled: in the Electricity Sector, thermal and hydroelectric generating facilities, transmission lines and the most important electricity distribution utilities were all controlled by State-owned companies; and in the Oil and Gas Sector, approximately 95% of the exploration and production of crude oil and gas were carried out by Yacimientos Petrolíferos Fiscales (YPF), a State-owned company. This scheme was modified at the end of the 1990s, in both sectors, to deregulate the market and to attract foreign investors. The legal framework adopted at the end of the 1990s in both sectors was modified during the Argentinian economic crisis. It is precisely the measures adopted then by Argentina that are impugned by the Claimant as a breach of its right to fair and equitable treatment under the BIT.

1. *The Parties' Positions*

(i) The Violation of the Fair and Equitable Treatment Standard by the

Measures Enacted in the Electricity Sector

381. The Electricity Sector was reorganised in 1989. In that Sector, as stated in the Request for Arbitration,

> "[g]eneration was reorganized as a competitive market, in which independent generators, such as CAPEX and Costanera, could sell the power that they produce both in the spot market and under bilateral contracts in the term market."[340]

The Claimant explained that "[a] competitive market known as the Wholesale Electricity Market (the WEM) was established so that generators could sell the power that they produced."[341] This did not mean, however, that the Government which, before the structural reforms of the electricity market in the 1990s, owned and operated the generation, transmission and distribution sectors in a vertically integrated organisation, did not keep some important regulatory powers in such a sensitive sector. The existence of these powers is duly acknowledged by El Paso in its Memorial:

> "The structure of the Electricity Regulatory Framework was established through three interrelated agencies. The first agency is the Secretariat of Energy ("SE"), a governmental body with authority to issue rules and regulations to implement the Electricity Regulatory Framework. The SE governs the technical and economic dispatch of the WEM. It also sets the Seasonal Prices for the distribution companies based on calculations made by CAMMESA.
>
> Second, the scheduling and physical dispatch of the generating units and management of the WEM is carried out by CAMMESA, an entity that was intended to be quasi-independent from the Government (although the Energy Secretariat always maintained veto power over CAMMESA) and represents all agents of the WEM.
>
> Third, the Ente Nacional Regulador de la Electricidad ("ENRE") was created as an independent governmental body of the GOA with both regulatory and jurisdictional power over the power industry. These

[340] Request for Arbitration, § 36.
[341] *Ibid.*, § 107.

> last two bodies were created as part of the new regulatory framework."[342]

The main features of the electricity market established at the end of the 90s were: payments based on Spot Prices based on variable costs of production (VCP, expressed in dollars), favouring the most efficient actors and payments based on freely negotiated contracts denominated in dollars, plus capacity payments in dollars to induce investors to upgrade the system.

382. The Claimant considers that the changes introduced at the end of 2001 and the beginning of 2002 to cope with the crisis transformed the existing system into a completely different one. This amounted to unfair and inequitable treatment of the economic actors in the electricity market:

> "In summary, through several laws, decrees and resolutions, the GOA has severely and unfairly intervened into a competitive market, distorting a previously established set of rules in a manner that interferes with El Paso's legitimate and reasonable expectations, depriving it of duly acquired rights."[343]

More specifically, El Paso claims that it had a legitimate expectation that the devaluation would have no effect on the capacity payments:

> "Since the Electricity Regulatory Framework set capacity payments in Dollars, and since such capacity payments were designed to encourage investments and ensure adequate levels of generation capacity availability, investors also had legitimate expectations that *if a devaluation of the Peso occurred, capacity payments would be kept in Dollars at their original value* or, alternatively, adjusted in Pesos proportionally to the devaluation. Since investment costs are essentially and foreseeably incurred in foreign currency, a devaluation of the Peso should not change their Dollar value."[344]

[342] Memorial, §§ 118-120.
[343] Memorial, § 322.
[344] *Ibid.*, § 153. Emphasis added by the Tribunal.

More generally, El Paso claims that there had been assurances that "the variables impacting its business were not dependent on changes in the foreign exchange policy."[345]

383. The Respondent insists on the fact that, although deregulated, the electricity market was subject to the State's regulatory power, as was indeed acknowledged by the Claimant:

> "The generation of electric power is a considerably deregulated activity that is carried out within the context of a regulatory structure that has been modified since the creation of the WEM, while the Executive Branch has not assumed any commitment not to amend such regulations."[346]

As a result, Argentina contends that El Paso had no "right not to have the electric power generation system changed or adjusted, and no right not to be subject to the general pesification of the Argentine economy."[347] According to the GOA, El Paso "cannot invoke a right not to have WEM regulations changed because that was an intrinsic characteristic of the sector."[348] To illustrate this statement, it has indicated in its Counter-Memorial that, from their creation to the enactment of the Emergency Law in January 2002, the procedures in the WEM had already been modified many times. According to Argentina:

> "Since the enactment of the Electricity Law in 1991, the Energy Department Secretary issued several resolutions that modified the WEM operation. For instance, the Energy Department modified the available capacity payment in 1992 and the method to calculate the spot price in 1995, among many other amendments. In 2001, before the crisis, the Argentine Executive Branch issued a presidential decree that also introduced significant changes to the sector.
>
> ... In late 2001, when the crisis began, the Procedures had already been modified by the Energy Department 131 times."[349]

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[345] *Ibid.*, § 157.
[346] Counter-Memorial, § 259.
[347] *Ibid.*, § 266.
[348] *Ibid.*, § 270.
[349] *Ibid.*, §§ 271 and 273.

This leads the Respondent to the conclusion that "the legitimate expectations of any investor entering the market had to include the true possibility of changes and amendments to the Procedures."[350]

(ii) The Violation of the Fair and Equitable Treatment Standard by the Measures Enacted in the Oil and Gas Sector

384. In the Oil and Gas Sector, the Claimant explains that, at the end of the 90s, private companies were allowed to conduct operations in new and unexplored areas as well as in those oil fields that had been exploited only by YPF, and could freely own and sell their production, either locally or abroad, due to the abolition of hydrocarbon import/export restrictions and the elimination of duties and withholdings on exports and imports of hydrocarbons guaranteed to them. El Paso complains about some restrictions on exports but mainly about the withholding taxes on exports, relying in particular on Article 3 of Decree 1589/1989 providing that "[e]xports of hydrocarbons shall be exempt from any existing or future fees, duties, rights or withholdings" and on Article 403 of Law 12,161 prescribing that "except for royalties, no other taxes, whether federal, provincial or municipal, shall be imposed on the production of liquid hydrocarbons." Moreover, the Claimant considers that its right to dollar-denominated purchase and sale agreements was violated by the mandatory pesification at the artificial and confiscatory exchange rate of US$ 1 = 1 Peso.

385. The Respondent, for its part, holds that none of the rights invoked by El Paso existed, and that the oil and gas Framework implied a right of the State to regulate the market in the general public interest. The GOA asserts that there is no right to the non-application of restrictions on oil and gas exports, no right to the non-creation of export duties, and no right for anyone to be excluded from the effects of the *pesification* of the whole Argentine economy.

386. Concerning the *general regulatory power*, the Government retained, as it did in the Electricity Sector, some regulatory powers: for example, according to

[350] *Ibid.*, § 276.

Article 6 of Decree 1589/1989, it could impose restrictions on crude oil exports, on twelve-month prior notice. It is also provided in the Hydrocarbons Law of 1967 that the concessionaires shall own the oil and gas they extract and may transport, market, industrialise and trade the related derivatives, "in compliance with such regulations as the Executive Branch may issue, on reasonable technical-economic bases that consider the needs of the domestic market and seek to encourage oil and gas exploration and exploitation."[351]

387. As far as *exports* are concerned, the Respondent explains that,

> "[a]s the primary aim of the oil policy is to supply the Argentine market, oil and gas exports are subject to self-supply, the application of reasonable prices and the Executive Branch's prior authorization."352

Indeed, Section 6 §4.4 of the Hydrocarbons Law provides:

> "The Executive Branch shall allow exporting oil and gas or derivatives not required to satisfy adequately domestic needs, provided that these exports are made at reasonable commercial prices and, in that case, the criteria that shall govern the domestic market operations may be established to allow all producers in the country to participate therein on a rational and equitable basis."

388. As for *withholdings* on exports, Argentina explains that whether one looks at the Mining Code or the Hydrocarbons Law applicable to CAPSA's concessions, or at the Presidential Decree No. 43/91 of 7 January 1991 granting CAPEX its concession, as well as the different regulatory decrees, there was no vested right to tax stabilisation, the State having explicitly retained its fiscal regulation power towards both companies.

389. Finally, as far as *pesification* is concerned, the Respondent considers that, on the one hand, the crude oil producers and refiners voluntarily adjusted their contracts to the new context and that, on the other hand, and in any case, the Argentinian companies benefited from the pesification process.

2. The Tribunal's Analysis: General Approach

[351] Hydrocarbons Law, 1967, section 6 § 1.
[352] Counter-Memorial, § 353.

390. The Tribunal does not doubt that

> "[t]he legal rights granted by the Government of Argentina through the Electricity Regulatory Framework, the Hydrocarbons Regulatory Framework and the BIT were very important to El Paso's decision to invest in Argentina,"[353]

but this does not *ipso facto* grant El Paso a right to have this framework unaltered throughout the years, whatever the economic circumstances. The Claimant does not seem to question the sovereign right of a government to adopt new rules; in its Reply, the Claimant acknowledges that "[o]f course, the Government can alter its laws and regulations at any time in the public interest,"[354] but adds immediately that "there are and must be some limits."[355] And El Paso indeed finds that Argentina's measures go beyond the limits authorised by the BIT: in its view, the decisions and regulations in issue did not result from a normal exercise of regulatory powers but, in reality, were measures that brought a radical alteration of key rules, effectively eviscerated the existing regulatory frameworks, and therefore exceeded normal regulatory powers. This emerges, for example, from the following passage in its Memorial: "… the totality of the GOA's actions has radically changed the regulatory regime so that the electricity generators are forced to suffer the consequences of the Argentine crisis."[356] But why and on what legal basis should El Paso have been immune from the severe economic crisis faced by Argentina at the end of 2001? The Respondent asserts that it adopted reasonable measures to deal with the serious economic circumstances prevailing at the end of 2001 and insists that, knowing the economic history of Argentina, El Paso could not have had reasonable expectations of guaranteed stability of all the parameters in place when it decided on its investment:

> "When the Claimant invested in the oil and electric power industries in Argentina, it knew that such economy was under development and that

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[353] Memorial, § 201.
[354] Reply, § 4.
[355] *Ibid.*, See also *ibid.*, § 570: "Claimant does not call into question Argentina's right to change its laws or regulations. It has never been Claimant's position that the BIT imposes an absolute obligation not to alter the regulatory framework."
[356] Memorial, § 324.

> it had a long history of growth cycles followed by serious crises. Investing in these types of economies permits to obtain higher profits than in stabler economies, but there are also higher risks. The Claimant was aware of these advantages and risks."[357]

The Claimant mentions that, in order to promote investments in the Electricity Sector and to explain the Regulatory Framework, the Government had organised road shows, conferences and seminars to explain the main features of the Framework and to give assurance to investors that their rights would be protected.

391. The Tribunal will try to ascertain what El Paso could reasonably have expected when it decided to invest in Argentina and whether there were any commitments on the part of that State not to change the basic tenets of the Regulatory Frameworks put in place.

392. At the beginning of the 1990s, the GOA aggressively targeted foreign investors and conducted several road shows in the United States, Europe and Southeast Asia to promote privatisation; US investors were the focal points of these trips. The Claimant asserts that strong legal value should be attached to such unilateral declarations of Argentina, comparing them to those made by France in the *Nuclear Tests* cases[358] between Australia and New Zealand, on the one hand, and France, on the other, where France in her pleadings, had presented unilateral declarations before the World Court and the ICJ had concluded that these declarations created binding obligations for France. It is the Tribunal's view, however, that what is involved here are two totally different types of unilateral declarations – one made before the highest judicial body in the world, the other in commercial meetings – and that no lesson can be drawn from the *Nuclear Tests* cases to give legal weight to investment-promoting road shows. In the Tribunal's view, such political and commercial incitements cannot be equated with commitments capable of creating reasonable expectations protected by the international mechanism of the BIT.

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[357] Counter-Memorial, § 644.

[358] *Nuclear Tests* cases *(Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, p. 253.

393. The Tribunal will next consider the position of the Claimant, which has laid much emphasis on legal or political representations made to foreign investors and attesting to the good intentions of the GOA regarding the stability of its regulations. Statements contained in Argentina's legislation or made by the President of the Republic as the country's highest authority were relied on by the Claimant, especially:

> - the preamble of Decree No. 1589/1989, which stated that the Decree had been enacted "to set clear and definitive rules that guarantee the legal stability for the contractual arrangements in the hydrocarbon sector;"
>
> - the message of Carlos Menem, President of the Republic, made jointly with the Minister of Economy, Domingo Cavallo, delivered at the National Congress on 13 June 1991 regarding the Electricity Regulatory Framework Law. This message asserts that the enactment of the Electricity Law "give[s] the required legal certainty to the process of transformation of the electricity sector, thus preventing the ancient lack of stability of the rules of the game."

394. The Tribunal however cannot consider that any rule or even clear commitment embodied in a general piece of legislation or regulation – as in Decree No. 1589/1989 – is in itself a special commitment towards the foreign investors,[359] as such a conclusion would again immobilise the legal order and prevent any adaptation to circumstances. These items might only raise reduced expectations which do not guarantee complete stability and have to be analysed in relation to other undertakings and with due regard to all circumstances.

395. Moreover, a declaration made by the President of the Republic clearly must be viewed by everyone as a political statement, and this Tribunal is aware, as is every individual, of the limited confidence that can be given to such political

[359] *PSEG*, *supra* note 337, where the Tribunal said: "Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed." § 241.

statements in all countries of the world. It might well be that these representations contributed to inducing potential investors to invest in the sectors concerned, as many of them – including El Paso – actually did. But it is one thing to be induced by political proposals to make an economic decision, and another thing to be able to rely on these proposals to claim legal guarantees.

396. The Tribunal does not consider that the GOA made a specific commitment to foreign investors not to modify the existing framework, which was designed to attract them. It seems uncontested that the Executive was endowed with broad regulatory powers over the Electricity Sector and the Oil and Gas Sector.

397. In the *Electricity Sector*, El Paso complains about the changes introduced in the WEM. The question is whether it had a legitimate expectation that such changes would never occur. The Argentinian Electric Power Sector is regulated by Laws Nos. 15,336 and 24,065 (Electricity Law), as well as by the administrative orders based thereon. According to Sections 35 and 36 of the Electricity Law, the Secretary of the Energy Department is in charge of regulating the WEM.[360] The Tribunal notes that Presidential Decree No. 186/95, Section 6, established that "the agents and participants of the wholesale electric market (WEM) shall operate pursuant to the regulations issued for such purpose by the Energy Department."[361] As a consequence, it is clear that the Secretary of the Energy Department Secretary could introduce changes in the functioning of the WEM.

398. In other words, it is the Tribunal's view that the legitimate expectations of any investor entering the energy market had to include the real possibility of reasonable changes and amendments to the procedures governing the WEM.

399. The same can be said of the *Oil and Gas Sector*. Section 6 of the Hydrocarbons Law of 1967 provided that concessionaires shall own the oil and gas they extract and may transport, market, industrialise and trade the related

[360] See Law N° 24,065 (the "Electricity Law"), published in the Official Gazette on 16 January 1992. Claimant's Exhibit No. 37.

[361] Presidential Decree 186/95 of July 25, 1995, Respondent's Exhibit RA 43, cited in the Counter-Memorial, § 267.

derivatives, "in compliance with such regulations as the Executive Branch may issue, on reasonable technical-economic bases that consider the needs of the domestic market and seek to encourage oil and gas exploration and exploitation." In order to meet these objectives, the Government may use any relevant tool: as asserted by the Respondent, "[t]he self-supply at reasonable prices may therefore be subject to established export quotas, export duties or other instruments that the Government may deem appropriate for the circumstances undergone by the country."[362]

400. It is therefore also the view of the Tribunal that the legitimate expectations of any investor entering the oil and gas market had to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law.

401. As a general statement, the Tribunal agrees with the Republic of Argentina that

> "[i]solating the foreign investor from the crisis through the ICSID is distorting the nature and purpose of the protection granted by treaties to investors only to turn them into privileged subjects that may appear before such World Bank agency seeking protection against structural crises as the one undergone by the Argentine economy. Bilateral treaties are not good business insurance or a protection against a crisis."[363]

The same concern was expressed by Professor Ian Brownlie in his Separate Opinion on the Final Award in *CME Czech Republic B.V. v. Czech Republic*, where he stated:

> "It would be strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of liabilities 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population' …."[364]

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362 *Ibid*., § 368.

363 Respondent's Counter Memorial, § 316. See also, *Maffezini*, *supra* note 127, § 64; *Azurix*, *supra* note 50, § 291.

364 *CME Czech Republic B.V. v. The Czech Republic* [hereinafter *CME*], UNCITRAL, Separate Opinion on Final Award of 14 March 2003, § 78.

402. The Tribunal will thus consider whether any of the measures complained of by El Paso can be considered as adopted outside *the acceptable margin of change* that must be taken into account by any investor and therefore be characterised as unfair and inequitable treatment, before considering the issue of a possible violation of the FET standard by the accumulation of all the measures complained of. The question is therefore whether the measures adopted exceeded the normal regulatory powers of the State and violated the legitimate expectations of the Claimant.

3. The Tribunal's Analysis of the Measures Adopted in the Electricity Sector

(i) General Remark

403. It has been stated by the Tribunal that the FET standard can be breached if there is a violation of a special commitment.

404. It is a fact that El Paso never entered into any concession contract with the GOA embodying a stabilisation clause. There is no contractual relationship whatsoever with the State resulting in rights capable of being invoked by El Paso. There was no particular relationship between El Paso and the GOA before this arbitration, and no special commitment on which El Paso could reasonably rely. The legitimate expectations of any investor entering the electric power generation market of Argentina had therefore to include the possibility of changes in the procedures regulating the WEM. The Tribunal will however, for the sake of completeness, also examine whether there were any specific commitments in the concessions granted to CAPEX and CAPSA, of which El Paso was an indirect shareholder.

(ii) Presentation of the Wholesale Electricity Market

405. Power generators obtained their revenues from three main sources: (i) sales to the Spot Market at Spot Prices through the WEM; (ii) sales through the WEM to the Term Market by means of power purchase agreements (PPAs) at contractual prices; and (iii) capacity payments.

406. In the WEM, the price was determined on an hourly basis, taking into consideration the marginal cost of the least efficient generator who was dispatched at any given hour. It was fixed on an hourly basis, taking into account the (marginal) cost of generating one additional megawatt-hour (MWh) to supply such possible increase in the system's demand at that time. This price was known as the Spot Price or Market price, which could undergo significant variations from hour to hour.

407. Electricity distributors may purchase electric power at the Spot Price, but also through a stabilised (or seasonal) price system. With respect to the latter, every quarter, and based on CAMMESA's estimates, the Energy Department established in advance the seasonal energy price applicable to such period. This was the price at which distribution companies would buy in the Spot Market. The differences between both prices (hourly spot and seasonal prices) were accumulated in a special account called the Stabilisation Fund. This system benefited efficient generators since it enabled them to receive larger gross margins (that is, the difference between the Spot Price and the generator's actual variable costs of production (VCP)).

Power generators could also enter into PPAs, in which the price was freely determined. Typically, term contracts were concluded for one year and denominated in dollars.

408. In addition to the price thus received, generators were entitled to "capacity payments" which were designed to encourage investors to expand and upgrade generation facilities. These payments were mainly designed to cover the fixed costs (*i.e.* investments and financing), since the competitive energy Spot Price system basically only remunerated variable (*i.e*. operating) costs. Capacity payments were set in dollars because investment costs would essentially and foreseeably be incurred in foreign currency. Originally, these payments were

set at 5 US dollars per megawatt/capacity-compensation hour; later on, they doubled and were set at 10 dollars[365] before the impugned measures were taken.

409. On the basis of the Electricity Law, the electricity market was regulated by the Department of Energy. Article 35 of that Law provided:

> "The Department of Energy shall determine the rules applicable to the DNDC[366] for the performance of its duties, which shall guarantee the transparency and fairness of decisions, according to the following principles:
>
> …
>
> b) To dispatch the required demand, based on the acknowledgment of prices of energy and capacity set forth in the following article, to which market players shall expressly commit, in order to be entitled to supply or receive electricity not freely agreed-upon by the parties."

Article 36 of the Law established uniform Spot Prices for electricity generators:

> "The Department of Energy shall issue a resolution containing the economic dispatch rules for energy and capacity transactions included in article 35(b) to be applied by the DNDC. Said rule shall provide that generators be paid such rate in each location of delivery as established by the DNDC for the energy sold by them, which rate shall be the same for every generator and based on the economic cost of the system."

(iii) Were the Measures Changing the Functioning of the WEM in Breach of the Fair and Equitable Treatment Standard?

410. The Claimant considers that the changes introduced at the end of 2001 and at the beginning of 2002 to cope with the crisis transformed the existing de-regulated system into a completely different one, amounting to unfair and inequitable treatment of the economic actors in the electricity market.

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365 Resolution SE N° 61/1992, Section 2.5.2.1 of 1 May 1994.

366 This is the Argentine Load Dispatch, an agency in the form of a corporation "whose majority shareholding shall be initially held by the Energy Secretariat, and where the various participants in the WEM will be entitled to hold shares."

411. It has to be clear that the Claimant does not explicitly seek damages due to the devaluation, *i.e*. the abrogation of the Convertibility Law, but bases its claims on the consequences drawn by the Government from this abrogation in the electricity market: "The alteration of the rules governing the Spot Market cannot be attributed to the repeal of the Convertibility Law."[367] However, if the issue is examined closely, it appears to the Tribunal that many of the claims are implicitly based on damage caused by devaluation more than by the regulatory measures.

412. For example, caps on Spot Prices for deficit situations have resulted in damage, not because of the cap which was set in pesos – as it always was – but because the pesos thus earned could no longer be converted into dollars at the market rate but had to be converted at the rate of one to one. The Claimant explains this quite clearly in its Memorial:

> "The Energy Secretariat has also converted into Pesos, at an artificial rate of US$1 = Arg.$1, caps that are to be placed on the Spot Price when deficits occur due to system failures. Depending on the deficit level, the following caps have been imposed on the price of electricity in hours of unsupplied demand: Arg.$120MW/h, Arg.$170MW/h, Arg.$240MW/h and Arg.$1500MW/h. The Electricity Regulatory Framework set similar values, but in Dollars not Pesos. *As a consequence of the conversion of those Dollar values into Pesos* at an artificial rate of exchange of US$1 = Arg.$1, the energy payments that a power generator can receive in deficit situations have been reduced to 1/3 of their original value and are artificially low."[368]

413. The mechanism of setting the Spot Price and the Seasonal Price was also altered, but the Tribunal does not consider that such changes were unfair and inequitable, as the unpaid balances due to the creditors in the electricity market were consolidated and either repaid when the Seasonal Stabilization Fund had funds available or transformed into shares of a new company or bonds payable in energy.

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[367] Memorial, § 241.
[368] *Ibid*., § 256. Emphasis added by the Tribunal.

414. The Claimant equally complains about the exclusion of machines using liquid fuels instead of natural gas due to the shortage of the latter. But the Tribunal notes that this measure was decided in the second half of 2003. Therefore, it could not affect El Paso's investment in CAPEX since, a few months before the measure was adopted, the Claimant sold its interest in CAPSA and, consequently, also in CAPEX; and its impact on El Paso's interest in Costanera would have been minimal as that company was sold a month and a half afterwards. Such a minor change cannot amount to a violation of the FET standard.

415. More generally, according to Argentina, the new method for calculating the Spot Price was adopted in order to alleviate the problems raised by the new financial situation resulting from the devaluation:

> "The increase in periodicity, the replacement of the *reference price + 15%* method for the declaration of each VPC component (and not only the fuel price) and the consideration of the variation in the foreign exchange rate implied higher revenues for generators than the ones that would have been earned with the original mechanism."[369]

416. In sum, the Tribunal cannot see in the measures taken to adapt the WEM to the new economic circumstances anything but direct consequences of the devaluation, which is not impugned as such by the Claimant, or technical adaptations of a sophisticated pricing system that did not fundamentally change its structure and its functioning. Therefore, the measures adapting the functioning of the WEM cannot be characterised, *in isolation,* as a violation of the FET standard.

[369] Counter-Memorial, § 165.

(iv) Was the Change in the Amount of Capacity Payment a Violation of the Fair and Equitable Treatment Standard?

417. The Claimant in fact asserts a right to a 10-dollar capacity payment or its equivalent in pesos, stating that such a right was conferred on it by law,[370] and considers therefore that any lower amount would breach the FET standard.

418. As to the capacity payments, they were set in dollars in order to cover capital investment costs that were dollar-denominated. Thus, it can be argued that there was a kind of necessary link between the dollar value or a peso value equivalent to the dollar value, so that the foreign investors, having made their equipment investments and paid for them in dollars, could be guaranteed to recoup their investments. The question therefore is whether the change in value was such as to amount to unfair and inequitable treatment.

419. A first observation that can be made is that, contrary to the Claimant's contention, the law does not provide for capacity payments to be stated in dollars. A second observation is that if the parameters for deciding the level of the capacity payments were indeed provided by the law, no amount was fixed in it, again contrary to what the Claimant contends, and the parameters of reference left a margin of appreciation which has been used by the administration. As an indication of this necessary flexibility, it is possible to quote a Selling Memorandum emanating from the Ministry of Economy, Public Works and Utilities of the Republic of Argentina for the privatisation of the generator Hidroeléctrica Norpatagonica presented by the Claimant in its Exhibits and quoted by the Respondent in its Closing Statement:

> "The Secretary of Energy is responsible for setting the capacity payment. The value of capacity has been set at US$ 5 per MW per hour for the period from November 1, 1992 to April 30, 1994. It has been decided to increase the value of capacity to US$ 10 per MW per

[370] See expert statement by Carlos Bastos to the effect that " … the 10 dollar capacity payment is a computation provided by law." Hearing Transcript in English, Day 5, p. 1211.

> hour from April 30, 1994 and it currently is expected that the value will remain at this level over the medium term."[371]

This language is by no means an indication of an immutable value, written in stone.

420. There have been many submissions and exchanges concerning the figure of 10 dollars. The Claimant's damages expert, LECG, seems to differentiate between what a non-expropriating government could have done and what Argentina has done:

> "LECG admits that the Secretary of Energy not only had the authority to modify the amount of the capacity payment but also that, within the framework of the crisis, a non-expropriatory government would have reduced such amount."

In this respect, LECG stated:

> "The changes in relative prices in the economy following the devaluation of the peso would naturally provide an opportunity for a *non-expropriatory Government* to re-examine the appropriateness of the level of capacity payments."[372]

Having concluded that a *non-expropriatory government* would have reduced the levels of capacity payments, LECG affirmed that the "appropriate" level was, in 2002, a little over USD 5.[373] However, there is no evidence showing that this amount is more appropriate than ARS 12 (approximately USD 4). Anyhow, the Claimant's expert itself confirmed that a capacity payment of USD 5 could not be considered expropriatory. It would thus be difficult to assert that a one-dollar difference would amount to a violation of the FET standard.

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[371] Respondent's Closing Statement during the Hearing on the Merits, p. 33.

[372] *Damages Expert Report of Pablo T. Spiller and Manuel A. Abdala* (hereinafter LECG Report) of 18 August 2004, § 322, Claimant's Exhibit No.12. See also *ibid*., Graph XX; Hearing Transcript in English, Day 6, pp. 1643-1644, 1689-1691.

[373] LECG Report, Graph XX, Flows Sheet "Electricity Rev. CAPEX," cell H79; Hearing Transcript in English, *id.*, pp. 1644-1646, 1689-1691.

421. The Tribunal concludes that in the new economic circumstances, a capacity payment equivalent to 4 dollars was not, *in isolation*, a violation of the FET standard.

422. In conclusion, none of the measures adopted in the electricity sector is considered by the Tribunal, *per se*, as a violation of the WEM, nor a violation of FET.

4. The Tribunal's Analysis of the Measures Adopted in the Oil and Gas Sector

(i) Presentation of the Overall Regulation of the Hydrocarbon Sector

423. CAPSA is governed by the Mining Code first passed in 1887 and updated by Law No 12,161 enacted in 1935. CAPEX is governed by Law No. 17,319, the Hydrocarbons Law enacted in 1967, which to date governs all hydrocarbon-related activities that are not subject to the Mining Code. These two laws established the general principles and the legal system applicable to the exploration, exploitation, industrialisation, transportation and trading of oil and gas, before the reforms at the end of the 90s and the new measures adopted during the economic crisis. At the end of the 90s, the oil and gas sector was privatised and liberalised, and the monopoly of the State-owned company ended. Private entities were generally allowed to conduct operations in oil fields and could freely own and sell their production, locally or abroad. This reform, effected by the State Reform Law of 28 August 1989, was mainly enacted through what has come to be known as the "Hydrocarbon Deregulation Decrees," *i.e.* Presidential Decrees N° 1055/1989, 1212/1989 and 1589/1989, published in the Official Gazette on 12 October 1989, 14 November 1989 and 4 January 1990.[374] These Decrees allow investors freely to dispose of their hydrocarbons and to export them, within the parameters of Argentina's legislation. The scope of the rights granted and the extent of the State powers have been hotly disputed between the Parties and will be thoroughly examined by the Tribunal.

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[374] Presidential Decrees Nos. 1055/1989, 1212/1989 and 1589/1989 published in the Official Gazette on 12 October 1989, 14 November 1989 and 4 January 1990. Claimant's Exhibit No. 46.

(ii) Was the Restriction of the Right to Export Freely a Violation of the Fair and Equitable Treatment Standard?

(a) The Extent of the Right to Export Freely

424. The Claimant argued that it had a vested right to dispose freely of its hydrocarbon production, including the right to export freely liquid hydrocarbons. This right has been provided for in three Deregulation Decrees, more precisely in Article 15 of Presidential Decree No. 1055/89, Articles 4 and 9 of Presidential Decree No. 1212/89, and Article 5 of Presidential Decree No. 1589/89.

425. Argentina, on the other hand, explains that

> "[t]his free availability provided for by the Deregulation Decrees entailed setting aside the policy implemented by the mid-80s according to which the Argentine Government (through YPF) was the only producer enjoying the free availability of crude oil and the other producers were obliged to sell their whole production to the state." [375]

According to the GOA, there is no absolute right freely to export hydrocarbons, as such exports are subject to restrictions by the Government in accordance with Article 377 of the Mining Code and Article 6 of the Hydrocarbons Law.

426. The Tribunal will examine successively the possible entitlement of the two Argentinian companies of which El Paso was a shareholder to a vested right of free availability of hydrocarbons.

427. As far as CAPSA is concerned, this right of free availability was first stated in Law No. 12,161, incorporated into the Mining Code in 1935 and into the three Deregulation Decrees mentioned above, none of which could be incorporated as contractual rights in the mining concession granted to CAPSA before 1925. This right of free availability appears not to have been considered as unlimited. Section 377 of the Mining Code expressly provides that the Executive Branch

[375] Rejoinder, § 197.

may restrict or ban fluid oil and gas exports. Also, section 6 of the Hydrocarbons Law provides that:

> "Permit holders and concessionaires shall be the owners of any hydrocarbons extracted by them and, as a result, they may transport, sell and industrialize them, as well as sell their by-products, in accordance with the regulations enacted by the Executive Branch, based on reasonable technical and economic considerations which shall bear in mind the best interest of the domestic market and attempt to promote the exploration and exploitation of hydrocarbons.
>
> During periods in which the national production of liquid hydrocarbons is not enough to meet domestic needs, the use in the country of all available hydrocarbons of national origin shall be mandatory, except in cases where it is not convenient due to sufficient technical reasons. As a result, the new refineries or extensions shall adapt to the rational use of national oils.
>
> If during such a period the Executive Branch sets the prices for selling crude oil in the domestic market, such prices shall be equal to those set for the relevant state-owned company, but not lower than the price levels for imported oils of similar characteristics. Where the prices of imported oils significantly increase due to special circumstances, they shall not be taken into consideration when fixing the sales price in the domestic market and, in that case, they may be set on the basis of the actual exploitation costs of the state-owned company, such amortization as may be technically appropriate, and a reasonable interest rate on the updated and depreciated investments made by such state-owned company. If the executive sets the prices for by-products, they shall be consistent with the oil prices calculated on the basis of the above criteria.
>
> The Executive Branch shall allow the export of hydrocarbons or by-products which are not required for properly satisfying domestic needs, provided that such exports are carried out at reasonable commercial prices. In such case, it may establish the criteria that shall govern transactions in the domestic market, in order to allow all of the country's producers to participate in it in a reasonable and equitable manner.
>
> The natural gas produced may be used, first, to satisfy the needs characteristic of the exploitation of the fields from which it is extracted and of other fields in the area, whether or not they belong to the concessionaire and in pursuance of the provisions of section 31. Any state-owned company providing public gas distribution services shall be given preference in the acquisition, within acceptable terms, of the amounts remaining after the abovementioned use at agreed-upon prices

> which may ensure a fair return on the relevant investment, bearing in mind the specific characteristics and conditions of the field.
>
> With the approval of the enforcement authority, the concessionaire may decide on the destination and terms of use of the gas not employed in the manner indicated above.
>
> The sale and distribution of gaseous hydrocarbons shall be subject to the regulations enacted by the Argentine Executive Branch;"[376]

428. As far as CAPEX is concerned, the concession of Agua del Cajón was granted by Presidential Decree No. 43/91 in January 1991. Regarding free availability, Article 6 of that Decree establishes the following:

> "The concession holder shall have the free availability of hydrocarbons produced in such area, pursuant to the provisions of Articles 6 and 94 of Law No. 17?319, Article 15 of Presidential Decree No. 1055/89, and Articles 5 and 6 of Presidential Decree No. 1589/89, *the terms of which are incorporated to this concession*."[377]

429. In other words, the Hydrocarbons Law and the Deregulation Decrees apply to CAPSA as general legislation and to CAPEX as contractual commitments. Before considering whether this entails a difference in the conclusions to be reached by the Tribunal relating to the claimed violations of El Paso's rights, the Tribunal considers it necessary to analyse the content of the rules that were incorporated in CAPEX's concession.

Article 6 of Law 17,319 of 1967[378] prescribes:

> "Permit holders and concessionaires shall have the ownership of the hydrocarbon which they produce, and consequently, they may transport, market and refine the same and market the products manufactured therefrom, subject to such reglamentation as may be dictated by the Executive Power upon reasonable technical and economic bases, in the benefit of the domestic market and of stimulating the exploration and exploitation of hydrocarbons.

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[376] Hydrocarbons Law, Respondent's Exhibit RA 10.
[377] Presidential Decree No. 43/91 of 7 January 1991. Respondent's Exhibit No. 243. Emphasis added by the Tribunal.
[378] Article 94 is irrelevant, as it deals with the obligations of State-owned enterprises.

> …
>
> The Executive Branch shall allow exporting oil and gas or derivatives not required to satisfy adequately domestic needs, provided that these exports are made at reasonable commercial prices and, in that case, the criteria that shall govern the domestic market operations may be established to allow all producers in the country to participate therein on a rational and equitable basis."

The objective of satisfying the country's need for hydrocarbons explains why Article 6 grants free disposal of the oil and gas in Argentina but, on the contrary, calls for an authorisation in case of exportation.

430. Article 15 of Presidential Decree No. 1055/89 provides that:

> "Free availability of the hydrocarbons ... will be governed by the following rules:
>
> > a) They may be freely commercialized both in the domestic and foreign market *within the framework of the rules in force*."[379]

Article 6 of Presidential Decree No. 1589/89 states that:

> "... Concerning export restrictions. If the Executive Branch were to establish restrictions on exports of crude oil and by-products, Article 6 of Law N° 17,319 shall apply, by virtue of which producers, refiners and exporters, shall be entitled to receive per unit of production a value that is not lower than the one of petroleum and by-products of similar condition."

The conclusion to be drawn from a reading of the rules incorporated in the CAPEX concession is that no absolute right of free availability existed but, rather, a right contingent on limitations that could be decided by the Government.

431. The Tribunal therefore concludes that CAPSA – of which El Paso was an indirect shareholder – had a right to the free disposal of its hydrocarbons recognised by law, while CAPEX – of which El Paso was also an indirect

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[379] Emphasis added by the Tribunal.

shareholder – had a vested right to the free disposal of its hydrocarbons, including the right to export freely, incorporated in its concession agreement, both within the framework of the rules in force. It cannot be denied that the regulatory framework in force included the Argentine Mining Code and the Hydrocarbons Law, which expressly provided for the possibility of limiting or prohibiting hydrocarbon exports to satisfy domestic needs.

(b) Has the Right to Export Freely Been Violated?

432. Were these rights to free disposal, respectively granted to CAPSA by law and to CAPEX by contract, violated by Argentina's measures? It is the Tribunal's view that the rights arising from a concession must be clearly distinguished from the rights flowing from the regulatory framework applicable to a concession.

433. Concerning CAPSA, in the Tribunal's view, the right to export freely that was granted by law was not unrestricted. As any right, it was subject to reasonable restrictions decided by the Government for reasons of public interest, for example in order to satisfy the domestic market. This was provided for by Article 377 of the Mining Code of 1887, incorporated in Law 12,161 of 1 April 1935, applicable to CAPSA's concessions:

> "The Executive Branch *may restrict or ban the import or export* of fluid oil and gas when, in urgency cases, this is advisable for public interests reasons, which shall be reported, when appropriate, to Congress."[380]

434. The Hydrocarbons Law No 17,319 of 30 June 1967 also ensured the power of the Government to regulate the Hydrocarbon Sector in all aspects. Article 2 provides:

> "Activities related to exploration, exploitation, manufacturing, transportation and marketing of hydrocarbons shall be entrusted to State-owned enterprises, and private or mixed enterprises, in accordance with the rulings of this present law and with any relevant reglementation that may be dictated by the Executive power."

[380] Emphasis added by the Tribunal.

Nothing is said in this Article about free disposal, but there is a clear insistence on the fact that all activities entrusted to concessionaires in the field of hydrocarbons will be subject to that Law and to any future executive regulation.

Along the same line, Article 3 of Law No 17,319 prescribes:

> "The National Executive Power shall establish the national policy of the activities mentioned in the preceding Article 2, in deference to the primordial objective of satisfying the country's need for hydrocarbons with the output from the country's natural deposits."

435. According to this Tribunal, it is only if the regulations were unreasonable, for example not adapted to the purpose of satisfying the national market, that a violation could be found. The Tribunal, however, does not consider it necessary to examine the issue of the reasonableness of the measures adopted, for reasons that will shortly be explained.

436. The question which has to be asked is whether a somewhat different analysis is needed of the right to export freely granted by Argentina to CAPEX in the concession agreement. The answer must be in the negative, as the texts granting powers of regulation to the State were also incorporated in the concession.

437. Irrespective of whether the right of free disposal was granted by law or incorporated in a contract, the Tribunal does not deem it necessary to examine the question of a possible violation of the FET standard, since the restrictions on crude oil export were effective for less than 60 days.[381] More precisely, during the first half of 2002, it was noted that there might be problems to supply the domestic market with hydrocarbons. Therefore, the President of Argentina issued Presidential Decree No. 867/2002 on 23 May 2002 adopting certain measures to regulate the export of oil and gas:

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[381] Resolution SE 341/02, 26 July 2002, published in the Official Gazette No. 29,951, 30 July 2002. Respondent's Exhibit No. 124.

> "It declared the emergency in the oil and gas supply in the whole Argentine territory until 30 September 2002"[382]

> "It empowered the Energy Department ... to determine the domestic production volume of crude oil and LPG that should be used to supply the domestic market."[383]

Moreover, in June 2002, the Energy Department imposed certain limitations on the export of crude oil to ensure domestic supply.[384] Twenty-three days afterwards, these measures became more flexible.[385] Less than sixty days after the measures had been taken, on 25 July 2002, they were abrogated.[386] The limitations on the exports of crude oil lasted only from 30 May to 31 July 2002.

438. The Tribunal notes – and this confirms its analysis – that in the recitals of Presidential Decree No. 867/02, in which a state of emergency regarding hydrocarbons supply was declared throughout the Republic of Argentina, the following was stated:

> "This measure does not impair the essence of the right to freely dispose, *i.e*. the right of producers to dispose of the product at freely agreed upon price, in the domestic and foreign market, and in the latter case, in compliance with the provisions of Article 6 of Law No. 17,319."

439. The Tribunal considers that the short-term restrictions on the right freely to export hydrocarbons cannot amount, *in isolation*, to a violation of the FET standard.

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[382] Presidential Decree No. 867/2002 of 23 May 2002, Article 1, published in the Official Gazette No. 29,905, 24 May 2002. Claimant's Exhibit No. 87; Respondent's Exhibit No. 107.
[383] *Ibid*., Article 3.
[384] Resolution SE 140/02 of 30 May 2002, published in the Official Gazette No. 29,912, 3 June 2002. Respondent's Exhibit No. 111.
[385] Resolution SE 166/02 of 31 July 2002, published in the Official Gazette No. 29,928, 26 June 2002. Respondent's Exhibit No. 116.
[386] Resolution SE 341/02, *supra* note 381.

(iii) Was the Enactment of Export Withholding Taxes a Breach of the Fair and Equitable Treatment Standard?

440. To find a violation of the FET standard under this heading, the following conditions should be fulfilled: first, the Tribunal must have jurisdiction over tax matters; second, there must be a violation of a right belonging to the Claimant which could result from a confiscatory law providing for an excessive tax, or a violation of a contractual right to tax exemption on exports, in other words of a tax stabilisation clause if such a clause is found to have been granted to the foreign investor.

441. There have been extensive discussions between the Parties on the question of whether or not a stabilisation clause was included in the concession contracts of CAPSA and CAPEX.

442. As far as *CAPSA's concessions* are concerned, two legislative provisions concerning taxes and withholdings were cited by both Parties, Law N° 12,161 of 1935 integrated into the Mining Code and Article 3 of Decree N° 1589/1989. First, Article 403 of Law N° 12,161 establishes that "[e]xcept for royalties, no other tax, whether federal, provincial or municipal, shall be imposed on the production of liquid hydrocarbons." Second, Article 3 of Decree N° 1589/89, which applies to all hydrocarbons concessions, provides that "[e]xports and imports of hydrocarbons and by-products are authorised, which shall be exempt from all existing or future duties, rights or withholdings."

443. The Parties hold diverging views on different aspects of these rules. First, they disagree on the applicability of Article 403 to CAPSA: for Argentina, "this Section was added to the Argentine Mining Code several years after CAPSA was granted the Concessions;"[387] for the Claimant, "Article 403 was immediately applicable to the Concession under Argentine law as soon as it was enacted."[388] The Parties also have different views on the interpretation of Article 403, the Claimant saying that it was all-encompassing and included

[387] Counter-Memorial, § 401.
[388] Reply, § 179.

exports, the Respondent contending that the reference to "production" has to be interpreted as relating only to production, thus excluding exports. The Parties further disagree on the consequence of Article 403: for the Claimant, it is a vested right which could not be interfered with, for Argentina it is a right given by law which can be modified by a new legislative enactment. More specifically, the Claimant says that "[o]nce Article 403 was enacted, it took on the status of a vested right that has express legal recognition under Argentine law, and since it is still in full force and effect,[389] it is binding under Argentine law and the BIT."[390] The Respondent, on the contrary, considers that, "like any other law within the legal framework, this regulation can be repealed or modified with no responsibility attached."[391] Moreover, the Parties' views diverge on the applicability of Article 3 of Decree N° 1589/1989, taking the same positions as those adopted in relation to Article 403.

444. The debate was even more heated over the *CAPEX concession*: that concession was governed by Article 7 of Presidential Decree No. 43/91 and Article 3 of Presidential Decree No. 1589/89. The question discussed was whether the right in question was or was not incorporated into CAPEX's concession and, thereby, transformed into a contractual right.

Article 7 of Presidential Decree No. 43/91 granting the concession to CAPEX provides:

> "*The concession holder shall be subject to the general tax laws that may be applicable to it*, and such holders shall not be subject to any provisions that may impose taxes, discriminately or specifically on the person, legal condition or activity of the holders or the property devoted to the execution of the relevant tasks."[392]

[389] Law No. 17,319 ("Hydrocarbons Law"), 30 June 1967. Claimant's Exhibit No. 45 and Respondent's Exhibit RA 10. Article 8 expressly maintains in full force the provisions of the Mining Code and provides: "Mining properties of hydrocarbons already in the possession of private enterprises before the date of enforcement of this law shall continue to be governed by the rules whereby they were awarded, without prejudice to the rights of the holders thereof to claim the benefits of this present law, in accordance with the procedure which shall be established by the Executive Power."
[390] Reply, § 179.
[391] Counter-Memorial, § 402.
[392] Emphasis added by the Tribunal.

445. According to Argentina, contrary to what happened with the right to export freely, where legislative and executive rules were incorporated into CAPEX's concession, there is no incorporation of the right to be exempt of tax withholding granted to the investors by Article 3 of Presidential Decree No. 1589/89, quoted in paragraph 442. On the contrary, according to the Claimant, this right, like the right freely to dispose of hydrocarbons, was incorporated into the concession.

446. There were also sophisticated discussions on the hierarchy of the different Argentinian enactments, but the Tribunal does not consider it necessary to summarise them, as this would unduly complicate the Award by considerations which are of no relevance for the outcome of the case.

447. There is certainly, in the Tribunal's view, room for discussion of these divergences between the Parties. However, considering the restrictions on the Tribunal's jurisdiction in relation to tax matters and the Tribunal's previous conclusion that the tax withholdings did not amount to an indirect expropriation, it is clear that the Tribunal cannot entertain a claim that the establishment of tax withholdings – whether or not in conformity with a right deriving from a law, a decree or a contract – amounts to a violation of the FET standard. It does not, therefore, have to settle the controversy between the Claimant and the Respondent over the extent of the commitment not to raise any new taxes allegedly received by El Paso from Argentina; in particular, it does not need to rule on the interpretation of Article 403 of the Mining Code,[393] nor does it have to decide whether, when mentioning the "exploitation of liquid hydrocarbons mines," it also refers to the export of the same. Nor does it need to rule on the incorporation of a general tax exemption into the different concessions.

448. Decisions on these controversies might have been necessary in the absence of Article XII of the BIT. But the violation of a contractual commitment not to

[393] It can be recalled that Article 403 of the Mining Code provides that except for royalties "no other tax, whether federal, provincial or municipal, shall be imposed on the exploitation of liquid hydrocarbons mines."

impose new taxes, in other words the breach of a fiscal stabilisation clause, could only be discussed, unless the amount of the tax were totally confiscatory, as a violation of the FET standard and not as an expropriation. If considered as a breach of the FET standard, the impugned measures are excluded from the Tribunal's analysis by virtue of Article XII. It is therefore unnecessary and even outside the Tribunal's jurisdiction to settle the controversy between the Parties over the existence of fiscal stabilisation clauses or over any other issue raised by this claim, such as the possible invocation by El Paso of a fiscal stabilisation clause benefiting not directly El Paso but companies whose shares are indirectly owned by it.

449. In sum, even if the enactment of the withholding tax were in violation of the FET standard, either because of its excessively high amount or because of a contractual commitment not to levy such taxes, the Tribunal would have no jurisdiction over such claim.

5. The Tribunal's Analysis of the Pesification in Both Sectors

450. Another claim presented by El Paso results from the compulsory pesification of the contracts entered into by the Argentinian companies. On 3 February 2002, Decree No. 214/2002 provided the "conversion into PESOS of all obligations to pay money … expressed in dollars" at one to one.

451. Before the crisis, some elements were valued in Argentine pesos and some in dollars, and the system was workable as the peso was pegged to the dollar through a currency board. With the devaluation, a huge imbalance would have been introduced into the economy if the Government had omitted to decide what it did decide, *i.e.* pesification. According to the pesification scheme, despite the devaluation, the existing contracts in dollars had to be transformed into contracts in pesos, at the rate of 1 peso to 1 dollar. What happened was a mandatory de-dollarisation, *i.e.* a pesification of contracts, deposits, debts and utility tariffs. It appears that, from an economic viewpoint, if this had not been done after a devaluation of the peso of more than 300%, the prices of electricity and energy would have increased and been multiplied by three. The question

here is whether the pesification of contracts amounted to a violation of the FET standard.

452. In fact, CAPEX and CAPSA re-negotiated their contracts but El Paso, as their indirect shareholder, considers that they did not do this freely and that the fact that they were forced by the Government to participate in such re-negotiation amounts to a violation of the FET due to El Paso.

453. The Tribunal wishes to state at the outset that many contracts were excluded from pesification and that it is important to give a full picture of the contracts affected by pesification.

454. First, the emergency decree which was enacted for the application of the Emergency Law excluded from pesification the agreements for the export of fuel power and associated electric power.[394] Generators of electricity, with export agreements, among them Costanera in which El Paso was a stockholder, were favoured by such a measure because, while many of their costs decreased in terms of US dollars, as a result of the devaluation, their revenues remained in dollars. In this regard, El Paso stated, in its Memorial, that Costanera was better able to withstand the impact of the crisis due to its agreements with Brazil to export electricity, under which it received payments for capacity and the sale of electricity in US dollars.[395]

455. Second, the pesification of the whole economy did not affect oil and gas exports. In early 2002, the Executive Branch excluded from pesification the export agreements entered into, including oil and gas export agreements.[396] Therefore, so far as the Argentinian companies were concerned, the agreements to export CAPSA's crude oil and CAPEX's LPG were not pesified. In the same manner, the agreements to transport natural gas for export were not

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[394] See Presidential Decree No. 1491/02 of 16 August 2002, Articles 1-3, published in the Official Gazette, No. 29, 965, 20 August 2002. The Decree had retroactive effect to 6 January 2002. Respondent's Exhibit No. 127.

[395] Memorial, note 16.

[396] See Decree No. 410/2002 of 1 March 2002, Section 1(a), (e) and (g), published in the Official Gazette of 8 March 2002. Claimant's Exhibit No. 80. Amended by Presidential Decree No. 704/02 of 30 April 2002, published in the Official Gazette, No. 29.889, 2 May 2002. Respondent's Exhibit No. 102. See also Decree No. 689/02 of 26 April 2002, published in the Official Gazette, No. 29,889, 2 May 2002. Respondent's Exhibit No. 100.

affected by pesification. In April 2002, the President of Argentina excluded such agreements from pesification.[397]

456. The narrow impact of pesification on the Argentinian companies is acknowledged by El Paso. In the Claimant's Reply, it is stated that:

> "Claimant's hydrocarbon claim does not relate in any way to the pesification of oil and gas exports, which in any case were not affected by pesification but only by the imposition of export withholdings. Claimant's claim involves the pesification of CAPSA's and CAPEX domestic supply agreements and SERVICIOS' Gas Processing Agreement."[398]

As far as the pesified contracts are concerned, the Respondent has insisted on the fact that "the *pesification* of credits and debts in US dollars provided for in the Emergency Law was advantageous for the Argentine Companies."[399]

Interestingly, the same conclusion can be drawn from the report of the Claimant's expert, LECG, in which the following table can be found:

(in million USD)	**CAPSA**	**Capex**	**COSTANERA**
Pesified credits	14.3	3.1	-
Pesified debts	48.0	15.7	58.4
Benefits of *pesification*	27.8	7.5	29.6
Prejudice of *pesification*	5.4	1.2	-
Net Benefit	**22.4**	**6.3**	**29.6**

457. Both the Respondent and the Claimant being in agreement on the fact that the pesification did not damage the Argentinian companies, CAPSA, CAPEX and Costanera, the Tribunal cannot see any basis on which a breach of the FET standard could be asserted in relation to these companies.

458. In conclusion, it appears from the file that pesification has not caused any damage to the Argentinian companies of which El Paso was a shareholder and cannot therefore be considered as having created a damage of which the Claimant can complain. The Tribunal thus considers that no claim for violation

[397] See Presidential Decree No. 689/02, *supra* note 396, section 3.
[398] Reply § 258.
[399] Rejoinder, § 97. Emphasis by the Respondent. See also Counter-Memorial, §§ 440-446 and 550-563.

of the FET standard can be derived from the mandatory pesification of contracts.

6. *The Tribunal's Analysis of the Cumulative Effect of those Measures*

459. The fact that none of the measures analysed – that were not outside the Tribunal's jurisdiction or not excluded from consideration by the Tribunal because they did not result in any significant damage – were regarded, *in isolation,* as violations of the FET standard does not prevent the Tribunal from taking an overall view of the situation and to analyse the consequences of the general behaviour of Argentina. In order to obtain an overall picture, the Tribunal has to revisit the causes of El Paso's sale of shares. It has already held that the transaction was not an automatic and unavoidable consequence of Argentina's measures, and this prevented it from finding an expropriation. But this does not mean, of course, that the impugned measures did not play an important role in the sale; and the Tribunal will thus successively assess the overall role of Argentina's measures in the sale of El Paso's shares and their overall impact with regard to the FET standard.

(i) The Overall Role of the Argentinian Measures in the Sale of El Paso's Shares

460. The Parties' positions regarding expropriation have been described in paragraphs 270-271. Argentina has invoked a series of circumstances which, in its view, caused the sale of El Paso shares, to which El Paso has objected. In particular, El Paso has objected to Argentina's argument that the sale was not a consequence of the GOA's measures but the result of a decision taken by El Paso's parent company to concentrate on its "core business," divesting assets not related to that business, in order to increase liquidity.[400] Before the Tribunal addresses the Parties diverging views on the causes of the sale of El Paso, it has first to deal with the existence and exact nature of this sale which has been the subject of heated controversies between the Parties.

[400] Reply, § 336.

(a) The sale by El Paso of its interest in the Argentinian Companies

461. As previously mentioned (*supra,* §§ 115-116), El Paso sold the shares in the Argentinian companies in two steps, one in June 2003 and another in October 2003.

462. The first transaction occurred in June 2003 and concerned the sale of El Paso's interests in CAPSA, CAPEX and SERVICIOS. In exchange for the sale of its interest in SERVICIOS, El Paso received a 6.3% interest in GASODUCTO, allegedly worth about Arg. $19.3 million, and US$ 29 million in cash, but had to pay US$ 20 million to exercise the option to purchase SERVICIOS' lease for the LPG plant ultimately transferred to CAPEX.[401] The second transaction occurred in October 2003 and concerned the sale of El Paso's equity interest in Costanera for a cash price of US$ 4.5 million.[402]

463. The Claimant's indirect participating interest in CAPSA was sold under a Share Purchase Agreement dated 23 June 2003 by the Claimant, as Seller, to Wild S.A., as Purchaser.[403] By virtue of this Agreement, the Claimant sold 100% of the share capital it owned in EPEC Energy Argentina S.A. ("EPEC Argentina"). EPEC Argentina in turn owned 45% of the share capital of CAPSA, the remaining 55% being held by the Purchaser. Since CAPSA owned 60.3% of CAPEX' share capital, by selling its entire participation in EPEC Argentina, the Claimant sold all of its investments in CAPSA and CAPEX to Wild, for a total price of US$ 24 million (Section 2.1 of the Share Purchase Agreement).

464. The Claimant's indirect controlling interest in SERVICIOS was sold under a Share Exchange Agreement made by and between Agua del Cajón (Cayman) Company and Capex International Business Company ("CIBCO") on 23 June 2003.[404] The Agreement in question records in its relevant part the sale by

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[401] Memorial, § 51; LECG Report, *supra* note 373. In the LECG Report of 23 November 2006, Table IX on p. 92, the amounts received or paid by Claimant are different.
[402] *Ibid*.
[403] Share Purchase Agreement between El Paso Energy International Company and Wild S.A. dated 23 June 2003, Claimant's Exhibit No. 21.
[404] Share Exchange Agreement by and between Agua del Cajón (Cayman) Company and Capex International Business Company dated 23 June 2003, Claimant's Exhibit No. 21

Agua del Cajón of its entire participation in SERVICIOS, equal to "one hundred percent (100%) of the total issued and outstanding quotas of SEP," *i.e.* SERVICIOS (Recital A) to CIBCO in exchange for the transfer by CIBCO to Agua del Cajón of 38.4% of the total issued and outstanding shares of Triunion Energy Company ("Triunion) (Section 2.1 of the Share Exchange Agreement). The Agreement provides that, after the Closing, CIBCO would pay an "Adjustment Amount" to Agua del Cajón to adjust for the difference between the Working Capital of SERVICIOS and the Working Capital of Triunion (Section 2.4 (a) of the Share Exchange Agreement).

465. Under a Termination and Set-Off Agreement dated 23 June 2003 by and between Bank Boston N.A., Servicios El Paso S.r.l., Fleet National Bank, El Paso Corporation and Agua del Cajón (Cayman) Company,[405] SERVICIOS, as Lessee under a Lease Agreement with Bank Boston, Lessor, covering the lease of the LPG plant operated by SERVICIOS, agreed to pay to Bank Boston an Agreed Purchase Price equal to US$ 11,797,910.85 (Section 1.2 of the Termination and Set-Off Agreement), plus VAT, to exercise the purchase option on the lease for the LPG plant and to terminate the Lease Agreement.[406]

466. The Claimant's indirect participating interest in Costanera was sold under a Share Purchase Agreement dated 3 October 2003 by and between KLT Power Inc., as Seller, and Empresa Nacional de Electricidad S.A., as Purchaser.[407] Under the Agreement, Seller sold to Purchaser its participating interest in Costanera, equal to 11% of the latter's capital stock, and its 100% participation in KLT Power (Bermuda) Ltd., the latter owning a 1.35% participation in Costanera (Recital B, C and D and Sections 1.1 and 2.1 of the Share Purchase Agreement). The Purchase Price for all share participations made subject to the sale was US$ 4,500,000.00 (Section 2.2(b) of the Share Purchase Agreement).

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[405] Termination and Set-Off Agreement between Bank Boston NA Buenos Aires Branch, Servicios El Paso SRL, Fleet National Bank, El Paso Corporation and Agua del Cajón Cayman Company dated 23 June 2003, Claimant's Exihbit No. 21**.**

[406] According to LECG, an amount of US$20 million was ultimately paid. LECG Report, *supra* note 377, § 176.

[407] Share Purchase Agreement of 3 October 2003 between KLT Power Inc. and Empresa Nacional de Electricidad S.A., Claimant's Exhibit No. 21.

467. The respondent State argued that the Claimant had not sufficiently proven the interests it claimed in the Argentinian companies.[408] In its Reply, the Claimant submitted arguments and additional evidence in response to Argentina's contestation.[409] This response and the related evidence were amended and integrated by the Claimant in its submissions on 5 December 2006.[410]

468. In its Rejoinder, the respondent State emphasised the differences between the Claimant's description of its participating interests in the Argentinian companies in the original Reply as compared to the amended Reply,[411] concluding that "El Paso failed to adequately prove its participating interest in the companies for which it claims."[412]

469. Having carefully reviewed and analysed the evidence proffered by the Claimant and the respondent State's critical arguments, the Tribunal is satisfied that adequate proof has been given by the Claimant evidencing the level of its direct participating interest in the Argentinian companies or, when such interest was held indirectly, the corporate relations with the seller of an interest in the Argentinian companies under each transaction. The analysis has included the Claimant's corporate relation to EPEC Argentina,[413] Agua del Cajón and Triunion[414] and KLT Power.[415] It has not considered GASODUCTO since the sales of El Paso's shares in 2003 did not involve this Company. These corporate relations at the time of the sales are evidenced by the Officer Certificate filed by the Claimant on 5 December 2006 (Exhibit No. 223).

470. As to Agua del Cajón and Triunion, the Officer Certificate shows that Claimant:

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[408] Counter-Memorial, §§ 49-59.
[409] Reply, §§ 314-329
[410] Enclosing Officer's Certificate dated December 5, 2006, Claimant's Exhibit No. 223, and Supplemental Witness Statement of Cristian Bussio, Claimant's Exhibit No. 221.
[411] Rejoinder, §§ 86-92.
[412] *Ibid.*, § 92.
[413] As per the Agreement described in § 646.
[414] Asper the Agreement described in §§ 647-648.
[415] As per the Agreement described in § 649.

(a) owned a 100% participation in Agua del Cajón through the intermediary of four 100% owned subsidiaries and that Agua del Cajón owned 99.92% of SERVICIOS (Annex A);

(b) owned a 23.2% interest in Triunion through the intermediary of two 100% owned subsidiaries and another 38.4% interest in Triunion through the intermediary of three 100% owned subsidiaries (Annexes B and C).

471. The Officer Certificate does not record the corporate relations between the Claimant and EPEC Argentina, on the one side, and KLT Power, on the other. However, the following may be noted in that regard. The Claimant's 100% ownership of EPEC Argentina is indicated in the Share Purchase Agreement between the Claimant and Wild,[416] and is confirmed in documents annexed to such Agreement. It is only logical to assume that the Purchaser had satisfied itself of the 100% ownership by the Claimant of 100% of EPEC Argentina shares since this was the object of its purchase. No further inquiry appears therefore necessary. Ownership of KLT Power was acquired by the Claimant under a Stock Purchase and Sale Agreement made on 2 July 1998 by and between KLT Inc., as Seller, and the Claimant, as Purchaser.[417] The Respondent has not challenged the Claimant's 100% ownership of KLT Power.

472. According to the Claimant and its accounting expert, the result of the various transactions on 23 June 2003, including the value of the 6.3% interest acquired in GASODUCTO, allegedly worth about US$ 19.3 million, was "a net divestiture price for El Paso of US$ 28.2 million in current dollars."[418] According to the Respondent, there are doubts regarding the amount of the sale transactions in June 2003. Specifically, GOA has contended that the party that bought 45% of the Claimant's indirect interest in CAPSA had sold in that month 6.5% of that company's share for an amount exceeding 400% of the price agreed for the purchase by Wild.[419] The level and value of the

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[416] *Supra* § 646, Recital A.
[417] Claimant's letter of 21 June 2006, Annex D**.**
[418] Memorial, § 51; LECG Report, *supra* note 377, § 176.
[419] Counter-Memorial, §§ 97-98; Rejoinder, §§ 60-79.

participating interest acquired in GASODUCTO are uncertain,[420] while the amount paid by El Paso as a termination fee in the context of the sale of the interest in SERVICIOS, allegedly equal to US$ 20 million, is not proven.[421] Argentina's contentions will be examined below.

473. The Respondent's doubts regarding the sale price of the participating interest in CAPSA are based on the circumstance that the purchaser had sold to Deutsche Bank, during the same month, 6.5 % of CAPSA's shares for a price in pesos equivalent to US$ 14.1 million at the then current exchange rate. That price was 400% higher than that of US$ 24 million reported by the Claimant, which should have been US$ 94.4 million.[422]

474. The Claimant does not deny the existence of a second transaction between EPEC Argentina and Deutsche Bank nor the price agreed on for the 6.5% of CAPSA's shares, but contends that the operation was not a sales transaction but one of collateral financing and a contingent loan arrangement.[423] The 6.5% of CAPSA's shares was received by Deutsche Bank as a security in the context of the financing of the purchase price to be paid by Wild of EPEC Argentina, and the price thereof was fixed without any reference to the market value of those shares at the time of the transfer.[424] Such financing consisted in (i) a loan to Wild for a US$ 14 million from EPEC Argentina (which, in turn, had received the same amount as a loan from Deutsche Bank), and (ii) a direct loan of US$ 10 million from Deutsche Bank to Wild.[425]

475. According to the Claimant, the repayment of the loan of US$ 14 million was secured by: (i) a put option granted by Wild to Deutsche Bank to transfer to Wild 6.5% of CAPSA's shares at a price equal to the amount of the loan; (ii) the assignment to Deutsche Bank by EPEC Argentina of its rights against Wild under the loan agreement pursuant to which it had reloaned to Wild the US$ 14

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[420] *Ibid.*, § 92.
[421] *Ibid.*, §§ 94-95.
[422] *Ibid.*, §§ 97-98; Rejoinder, §§ 60-79.
[423] Reply, §§ 385-396.
[424] *Ibid.*, § 388.
[425] *Ibid.*, § 389.

million; (iii) the endorsement to Deutsche Bank of the promissory note evidencing the amount of the EPEC Loan Agreement with Wild; (iv) the assignment by Wild of 55% of CAPSA's shares to a trust created for the benefit of Deutsche Bank; and (v) a pledge on 51% of CAPSA's shares for the benefit of Deutsche Bank, to become effective upon notice to CAPSA of the transfer of the 6.5% of its shares to Deutsche Bank.[426]

476. Having thoroughly analysed the various documents to which the Parties have made reference as evidence in support of their respective positions, the Tribunal is satisfied that the transaction regarding the 6.5% of CAPSA's shares is in the nature of a financing arrangement to secure to the purchaser Wild a portion of the amount of the purchase price equivalent to US$ 14 million. This conclusion is based on the following reasons.

477. The contract by which Wild acquired 6.5% of CAPSA's shares from EPEC Argentina, dated 23 June 2003, is a contract of sale and rightly was so recorded in a number of documents in the file of these proceedings on which the GOA relies to assert that a sale was the true nature of this transaction. However, in the Tribunal's view, this contract must not be considered in isolation but as part and parcel of a more complex contractual arrangement consisting of various instruments, including but not limited to the contract in question.

478. As a matter of fact, that contract was part of a Trust Agreement dated 23 June 2003 between Wild, the Claimant, Deutsche Bank, EPEC Argentina and First Trust of New York.[427] Following the Respondent's request of 23 March 2007 and the Tribunal's direction of 26 March 2007, by letter of 9 April 2007, the Claimant filed the exhibits to the Trust Agreement, all dated 23 June 2003.

479. The exhibits so filed consist of:

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[426] *Ibid.*, §§ 390-391.
[427] Trust Agreement of 23 June 2003, between Wild S.A., El Paso Energy, Deutsche Bank S.A., EPEC Energy Argentina S.A. and First Trust of New York [hereinafter Trust Agreement**],** Claimant's Exhibit No. 246.

- Exhibit A, *Contrato de Compraventa de Acciones* between EPEC Argentina, as seller, and Wild, as purchaser, relating to the sale of the 6.5% of CAPSA's shares;

- Exhibit B, Model of *Contrato de Préstamo* between EPEC Argentina and Wild (the "EPEC Loan Agreement"), whereby EPEC Argentina loans to Wild an amount equivalent to US$ 14 million to finance the payment of a portion of the purchase price to be paid by Wild under the Share Purchase Agreement relating to the sale by the Claimant of 100% of EPEC Argentina's shares;

- Exhibit C, Model of *Contrato de Cesión de Derechos y Asunción de Deuda Eventual* between EPEC Argentina, as assignee, Wild, as Assigned Debtor, First Trust New York as Assignor, and Deutsche Bank.

480. The content of these various agreements is consistent with the Claimant's description of the various guarantees provided to Deutsche Bank for the repayment by Wild of the loan of US$ 14 million.[428]

481. Were the transaction relating to 6.5% of CAPSA's shares just a sale between EPEC Argentina and Deutsche Bank, there would be no reasonable explanation why: (i) all the contractual instruments described above were concluded on the same day as the Share Purchase Agreement between EPEC Argentina and Wild, 23 June 2003; (ii) in addition to the sale of 6.5% of CAPSA's shares, Deutsche Bank had to be guaranteed by a number of securities of different nature and extent; (iii) the amount for the exercise of the put option granted to Deutsche Bank under the Trust Agreement was the same as the amount paid by Deutsche Bank for 6.5% of CAPSA's shares, *i.e.* US$ 14 million, thus protecting Deutsche Bank from any risk that at the time of exercise of the put option the value of the 6.5% of CAPSA's shares would be lower than US$ 14 million while permitting Deutsche Bank to retain said shares should their value increase

[428] *See supra*, § 655.

in the meantime above US$ 14 million;[429] (iv) clauses 1.1. and 1.3 of the Contrato de Compraventa de Acciones[430] provide for a condition ("*condición resolutoria*") by virtue of which this contract would become null and void if Wild did not pay to the Claimant, by a fixed date, the price for the purchase of 100% of EPEC Argentina's shares; (v) the 6.5% of CAPSA's shares sold to Wild were not delivered to the latter but were transferred to First Trust of New York as "*Fiduciario*,"[431] subject to the "*condición resolutoria*" mentioned under (iv) above.

482. The foregoing analysis leads the Tribunal to conclude that:

(a) the transaction between EPEC Argentina and Wild under the Contrato de Compraventa de Acciones was a sales transaction covering 6.5% of CAPSA's shares, subject to a reversionary right in favour of EPEC Argentina of such shares upon occurrence of the condition subsequently provided therein;

(b) when viewed not in isolation but as part and parcel of a more complex scheme under the Trust Agreement and all its exhibits, the transaction reveals its true nature as a loan arrangement to secure the financing to Wild of a portion of the purchase price, equal to US$ 14 million, that Wild had to pay to the Claimant for the purchase of 100% of EPEC Argentina's shares.

483. The respondent State has cast doubt on the percentage of equity interest acquired by El Paso as a result of the transaction regarding SERVICIOS and the value of such interest.[432] For the Claimant's expert, LECG, the percentage amounts to 6.3% and is worth about US$ 19.3 million according to GASODUCTO financial statements of June 2003.[433]

484. As to the percentage interest acquired in GASODUCTO as a result of the Share Exchange Agreement, the following may be noted. Under that Agreement CIBCO transferred to Agua del Cajón (a 100% subsidiary of the Claimant)

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[429] For example, as a result of a sharp increase of crude oil prices in the international market.
[430] Exhibit A to Trust Agreement, *supra* § 660, § 19.
[431] *Ibid.*. Recital III; Contrato de Compraventa de Acciones, Article 1.4.
[432] See *supra*, § 653.
[433] LECG Report, *supra* note 373, § 176.

38.4% of Triunion's shares, the latter owning indirectly 21.8% of GASODUCTO's shares.[434] Accordingly, the percentage interest should be 8.4%, as contended by the respondent State, not 6.3%, as indicated by the Claimant. Following the Tribunal's request for clarifications, by letter dated 1 June 2010, Claimant has documented that the interest actually acquired is equal to 6.1%, considering that a portion of the 8.4% interest, equal to 2.3%, was already (indirectly) owned by Claimant through its indirect holding in Capex.[435] Having reviewed Claimant's position and the evidence to which it refers, the Tribunal is satisfied that the percentage acquired in GASODUCTO is equal to 6.1%.

485. As to the value of the participation so acquired in GASODUCTO, the Claimant confirms in its letter of 1 June 2010 that the book value of the 6.1% interest transferred to El Paso, based on GASODUCTO's and Gasoducto del Pacífico (Argentina) S.A.'s 30 June 2003 financial statements, is equal to US$ 19,271,152. Having reviewed the said financial statements,[436] the Tribunal accepts that the value of GASODUCTO's shares acquired indirectly by the Claimant, equal to 6.1%, is equal to US$ 19,271,152.

486. The Claimant alleges that it paid US$ 20 million for the termination of the lease agreement for the LPG plant operated by SERVICIOS.[437] According to the GOA, this amount is not proven.[438]

487. Under the Termination and Set-Off Agreement, the price to be paid for the purchase option was US$ 11,797,910.85,[439] to which the value-added-tax for ARS 6.9 million must be added.[440] After converting the amount in ARS into US dollars at the rate of ARS 2.79 for one US dollar prevailing in June 2003, the total is equal to US$ 14,271,029. As indicated in the Claimant's letter of 1

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[434] Reply, §§ 322-326 and footnote 550; Officer's Certificate, *supra* note 410; see also CIBCO's Financial Statements 2003, p. 31.
[435] Claimant's letter of 1 June 2010, point 1, pp. 1-3.
[436] GASODUCTO's and Gasoducto del Pacifico (Argentina) S.A.'s 30 June 2003 unaudited financial statements have been annexed by Claimant as Annex 1 to its letter of 1 June 2010.
[437] Memorial, § 51; LECG Report, *supra* note 373.
[438] Counter-Memorial, §§ 94-95.
[439] *Supra*, § 602, Section 1.2.
[440] *Ibid*., Section 2.2.

June 2010, under the Compensation Agreement of 23 June 2003 between Fleet National Bank and the Claimant, the latter had to pay to Fleet National Bank the amount of US$ 5,619,531.22 in connection with the purchase option.[441] The aggregate price paid by the Claimant for the termination of SERVICIOS' Lease Agreement amounts therefore to US$ 19,895,003.35.[442] This amount is accepted by the Tribunal based on the available evidence.

(b) The Argentinian measures were the prevailing reason of the sale

488. The Tribunal shall address the Parties' diverging views regarding the causes of El Paso's sales in 2003 by focusing on two issues which are at the root of the debate, namely, El Paso's liquidity problems since late 2001[443] and that company's "core business" at the time of the sales, since, as alleged by the Respondent and denied by the Claimant, to face its liquidity problems El Paso was led into divesting its "non-core" assets.[444] The Tribunal has already decided that the measures were not the unique cause of El Paso's sale entailing a finding of expropriation; it has now to deal with the Respondent's view that the Argentinian measures did not contribute at all to the decision to sell El Paso's Argentinian assets.

489. The existence of liquidity problems since late 2001 is not denied by El Paso. The 2002 Report filed with the US Security and Exchange Commission (SEC) by El Paso Corporation on 31 March 2003 mentions that:

> "In response to industry events, the credit ratings agencies, including Moody's and Standard and Poor's, re-evaluated the ratings of companies involved in energy trading activities. As a result, the ratings of many of the largest participants in the energy trading industry, *including us*, were downgraded to below investment grade."[445]

[441] Claimant's Exhibit No. 220, Section 1.1.
[442] As indicated in the Reply, § 309.
[443] Counter-Memorial, §§ 82-85.
[444] Reply, § 334.
[445] 2002 El Paso Report filed with the SEC, *supra* note 224, p. 33. Respondent's Exhibit RA 79. Emphasis added by the Tribunal. See also Counter-Memorial, §§ 15, 26, 63.

The downgrading of El Paso Corporation's credit ratings had a significant impact on that company's liquidity.

490. The Claimant contends that, in order to meet its liquidity problems, an orderly disposition of certain assets was planned in a time-frame of three to five years but that "the Argentine assets of El Paso were not sold either because they were considered non-core assets or to increase El Paso's Corporation's liquidity."[446] The Tribunal shares this position for the following reasons.

491. First, El Paso's 2002 Report filed with the SEC indicates that several steps had been taken since the last quarter of 2001 "to address the issues affecting us" and that significant progress had been made "to meet the demands on our liquidity and to strengthen our capital structure."[447] The Report lists nine different steps taken for that purpose, among which only one refers to the divestiture of assets, in terms that suggest the orderly disposition of such assets.[448] The 2003 Report filed by El Paso with the SEC enumerates the resources available to El Paso Corporation to increase its liquidity, in addition to the sale of assets (which was therefore only one of the various resources available):

> "We rely on cash generated from our internal operations as our primary source of liquidity, as well as available credit facilities, project and bank financing … and the issuance of long-term debt, preferred securities and equity securities."[449]

It is on record that a large number of assets were divested by El Paso Corporation in 2002-2004, although the divestiture of individual assets apparently did not entail the level of losses experienced by the sale of El Paso's investment in Argentina.[450]

492. Second, the contribution of the sales of its Argentinian assets by El Paso was so marginal (US$ 33 million) as to make it unlikely that the decision to sell in

[446] Reply, § 337 (relying on Baker's Witness Statement, §§ 9, 22).
[447] 2002 El Paso Report filed with the SEC, *supra* note 224, p. 33.
[448] "The establishment of an exit strategy for our trading business, including the planned orderly liquidation of our existing trading portfolio" (*id.*, pp. 33-34).
[449] 2003 El Paso Report filed with the SEC, *supra* note 219, p. 38.
[450] See the list in § 276 *supra*.

Argentina was motivated by the liquidity problems of El Paso's parent company. As mentioned by the Claimant, had the liquidity problems been the cause of the divestiture of such assets, El Paso Corporation would have chosen to divest its investments in the power sector in Brazil, worth approximately US$ 2 billion in 2003 (which investments were kept).[451]

493. Third, it is not correct that, as asserted by the Respondent, only non-core business assets were divested in Argentina to meet liquidity problems, while core-business assets were kept.[452] Evidence before the Tribunal shows that core-business assets were also sold by El Paso in July and October 2003. This issue is analysed below based on evidence showing what the core business of El Paso was immediately before the sales of its Argentinian assets.

494. By a News Release of 5 February 2003, El Paso announced its 2003 business plan based upon five key principles:

> "- Preserve and enhance the value of the company's core business
>
> - Exit non-core business quickly, but prudently
>
> - Strengthen and simplify the balance sheet while maximizing liquidity
>
> - Aggressively pursue additional cost reductions
>
> - Continue to work diligently to resolve litigation and regulatory matters
>
> El Paso is committed to:
>
> - Preserving and enhancing the value of its core business – natural gas pipelines, production, midstream and non-merchant power. The

[451] Reply, § 339.

[452] Counter-Memorial, § 82: "In late 2001, El Paso decided to focus on its core business (natural gas production and transportation) and to sell *quickly* all the assets not related thereto so as to reduce its debt significantly." Emphasis by the Respondent. The Respondent relies on two documents to assert that natural gas production and transportation was El Paso's core business in late 2001. The first document (EDGARonline, El Paso Corp., Filing Date, 30 September 2004, Respondent's Exhibit RA 231) mentions that in late 2001 El Paso's focus changed by, *i.e*., "returning to our core natural gas business," which does not mean that natural gas was the only core business. The other (an article by Kenneth Betz dated 25 June 2002, Respondent's Exhibit RA 115) does not deal at all with El Paso's core business.

> company will continue to invest efficiently in these businesses to maintain its leadership positions. The company's capital expenditure plan reflects that commitment with 87 percent of 2003 capital devoted to the pipeline and production businesses.
>
> - Exiting non-core business quickly, but prudently…"[453]

495. In its 2002 Report filed with the SEC on 31 March 2003, El Paso, after confirming the above plan, states:

> "We will also continue to focus on winding down our non-core business including energy trading and petroleum markets as well as other capital intensive businesses such as liquefied natural gas (LNG) operations."[454]

The Report states that the divestiture plan focused on "those businesses and operations that were not core to our long-term objectives or *that were not performing consistently with the expectations we had for them at the time we made the investment*."[455]

The Report then indicates the four primary business segments into which El Paso operations are divided: "Pipelines," "Production," "Field Services" and "Merchant Energy," which were all considered to be "strategic business units that provide a variety of energy products and services."

496. The "Production" segment is described by the Report as covering "our natural gas and oil exploration and production activities."[456] The "Merchant Energy" segment consisted in 2002 of three primary divisions: "global power," "petroleum" and "energy trading."[457] The "global power division included ownership and operation of domestic and international power generation facilities," the commercial focus being "to develop projects in which new long-term power purchase agreements allow for an acceptable return on capital."[458]

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[453] Press Release, El Paso Corporation, *El Paso Corporation Announces 2003 Operational and Financial Plan*, 5 February 2003, Respondent's Exhibit RA 256, p. 1.
[454] 2002 El Paso Report filed with the SEC, *supra* note 224, p. 2.
[455] Quoted in Counter-Memorial, footnote 89. Emphasis by the Respondent.
[456] 2002 El Paso Report filed with the SEC, *supra* note 224, p. 2.
[457] *Ibid.*, p. 3; See also Rejoinder, § 31.
[458] 2002 El Paso Report filed with the SEC, *supra* note 224, p. 18.

CAPEX/CAPSA was included in the "global power" division, as shown by the list of power plant projects existing as at 31 December 2002.[459] The Report mentions that "as part of our 2003 Operational and Financial Plan, we have announced the planned sales of some of these power generation assets."[460] "Petroleum," as one of the divisions of the "Merchant Energy" segment, presumably covered areas other than those included in the "Production" segment.

497. In the 2003 Report filed with the SEC on 30 September 2004,[461] El Paso's purpose is described as follows:

> "Over this two-year period [2002-2003] we refocused on our natural gas assets and divested or otherwise sold our interest in a significant number of assets,"[462] indicating the sales of CAPSA/CAPEX and COSTANERA in the Section 'Divestitures,' under the 'Merchant Energy' segment[463] as part of the 'global power' division."

498. El Paso's "Long Range Plan" was announced after the sale of El Paso's Argentinian assets had been completed,[464] following the change in the Corporation's management. This Plan's objective was to turn El Paso into "a strong natural gas provider."

499. The above analysis makes it possible to conclude that El Paso's core business prior to the sales in 2003 comprised natural gas and oil exploration and production activities (the "Production" segment), while the non-core business during the same period included power generation facilities, petroleum markets, energy trading and LNG.

500. Confronting El Paso's sales of 2003 with the above-defined core- and non-core businesses of El Paso, it may be concluded that:

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[459] *Ibid.*
[460] *Ibid.*, p. 18.
[461] 2003 El Paso Report filed with the SEC, *supra* note 219.
[462] *Ibid.*, p. 2.
[463] *Ibid.*, p. 122.
[464] Press Release, El Paso Corporation, *El Paso Corporation Announces Long-Range Plan,* 15 December 2003. Respondent's RA 264.

(a) the sale of CAPSA, a company mainly engaged in oil exploration and production, was not consistent with the idea of focusing on the core business;

(b) the sale of CAPEX was also not consistent with the idea of focusing on the core business, to the extent to which that company was engaged, in addition to electric power generation, in natural gas production. Since CAPSA owned a 60.36% interest in CAPEX, the sale by El Paso of the former's shares entailed the sale of its indirect participation in the latter; however, had CAPSA been profitable in 2003, it would have been kept by El Paso in view of its core-business activity, even if this had meant keeping the electric power generation activity of CAPEX (a non-core business but on the same assumption a profitable one), as was done in Brazil;

(c) the sale of SERVICIOS (a company engaged in LNG production and sale) was consistent with the programme of exiting non-core business;

(d) the sale of Costanera, a company engaged in the generation and sale of electricity, was consistent with the plan of divesting power generation projects that did not meet expectations;

(e) keeping PACIFICO (a company engaged in natural gas transportation) and even increasing indirect shareholding in this company on the occasion of the sale of June 2003 was consistent with the programme of preserving and enhancing the value of core business.

501. While the sale of Costanera and SERVICIOS was thus in line with the objective of exiting non-core business, the sale of CAPSA/CAPEX was not. It is therefore to be assumed that such sale was due to other reasons. One such reason can only have been the perceived lack of prospects of recovery from the loss of value suffered by the two companies in 2002 and until the date of their sale. PACIFICO was not sold since it was part of the core business and, not having been economically prejudiced by the GOA measures, was performing consistently with expectations.

502. It is interesting to note that in the 2003 Report filed with the SEC, El Paso defines the year ending on 31 December 2003 as "a year of significant change

in our business strategy and our financial conditions."[465] The Report continues by stating that in 2003:

> "We completed the sale of a number of assets and investments including production properties … Total proceeds from these sales were approximately $3.3 billion;
>
> a. We completed a number of financial transactions that allowed us to maintain our access to needed capital to meet our cash requirements, simplify our capital structure, and eliminate a significant amount of off-balance sheet obligations and preferred securities;
>
> b. We implemented a cost reduction program …;
>
> c. We completed the Western Energy Settlement which became effective in June 2004, resolving a substantial uncertainty arising from the California energy crisis in 2001; and
>
> d. We announced our Long-Range Plan that, among other things, defines our core business, establishes a timeline for debt reductions, sets a timetable for existing non-core business and assets and sets financial goals for the company."[466]

This confirms that the sale of assets was just one of various measures taken by El Paso Corporation to meet the problems that had emerged in the preceding period, including the liquidity issues. It is doubtful that the sale of the Argentinian assets, due to the modest price, was intended to contribute to the solution of these problems.

503. The Tribunal has considered the Respondent's contention that "[i]t was the Claimant's decision to sell its assets in the country in the worst time of the Argentine crisis, in the need for facing its own global crisis, what caused the damage alleged by El Paso."[467] It has been mentioned that El Paso Corporation's policy was based on the orderly disposition of assets. With specific reference to the Argentinian assets, it is on record that El Paso had received an offer to buy part of those assets (the 45% indirect interest in

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465 2003 El Paso Report filed with the SEC, *supra* note 219, p. 36.
466 *Ibid.*
467 Counter-Memorial, § 788.

CAPSA/CAPEX) as early as in November 2002, at a price equal to US$ 24 million.[468] El Paso's reply of 21 November 2002 was non-binding and made subject to conditions,[469] which shows that El Paso was not under pressure to sell. The Tribunal shares the Claimant's view that the fact that the sales were made later in 2003, one and a half years after the measures were adopted, is indicative of a prudent decision,[470] aimed at mitigating future damage in the presence of a scenario which, at that time, was far from being predictable.[471]

504. The Tribunal has considered the further contention by the Respondent that there is no official document from which it may be inferred that the sale by El Paso was due to the GOA's measures.[472] The Respondent points to the Reports filed with the SEC by El Paso Corporation for the years 2002 and 2003, which state that the cause of the losses suffered as a result of the sale of its assets in Argentina was the economic crisis, with no mention of the GOA measures.[473] By contrast, concerning the sale of the power generation investments in Australia, the 2003 Report states that the losses were due to regulatory difficulties.[474]

505. Regarding the above contention, it may be noted that the SEC filings by El Paso, although important,[475] do not exhaust the range of circumstances that may be taken into account by the Tribunal to form its judgment. It has been shown that, contrary to the Respondent's assumptions, the sale of the Argentinian assets was neither made to assist in improving El Paso's liquidity and solving

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468 Letters from Enrique Götz to EPEC Energy Argentina dated 14 and 28 November 2002, Annex G to Claimant's 21 June 2006 filing.

469 Response letters from El Paso dated 21 November and 6 December 2002, Annex G to Claimant's 21 June 2006 filing.

470 Reply, § 374.

471 As shown by the continuing validity of the GOA measures and the adoption of further measures (including the increase of the withholding tax up to 45%).

472 Rejoinder, § 26.

473 *Ibid.*, § 18.

474 *Ibid.*, § 20.

475 It may be noted that the 2002 Report covers the year preceding the sales of El Paso assets in Argentina, so that its relevance is doubtful. The page of the 2003 Report quoted by the Respondent (Rejoinder, footnotes 31 and 32) contains a chart allegedly recording "our impairment charges and gains and losses on sales of equity investments during 2003, 2002 and 2001," where CAPSA/CAPEX are shown as having been sold in 2002 (at a loss of $262 million) due to "weak economic conditions in Argentina." The reference to a sale of CAPSA/CAPEX in 2002 shows a lack of accuracy in the Report.

other problems; nor did it involve non-core business only. The decision was made at a time when, according to the Claimant's evaluation, the financial conditions of the Argentinian companies (except for PACIFICO) had deteriorated to the extent of a loss of value of about 90% and when "the prospects for the near and mid-term future appeared bleak."[476]

506. In conducting its evaluation, the Tribunal has also considered that other energy and utilities companies have divested their investments in Argentina following the enactment of the Respondent's measures,[477] losing approximately 90% of their investment according to the Claimant, although others did not divest their investments while faced with the same economic measures.

507. In the light of the preceding analysis and after due consideration of the Parties' arguments and the evidence in the file, the Tribunal concludes that the GOA measures were, if not the only, certainly the prevailing reason for El Paso's sales in 2003. It remains to determine the consequences to be drawn from that conclusion. This point will be addressed hereafter.

508. The Claimant has asserted that since the GOA measures "forced" it to sell, this was evidence of discriminatory and arbitrary treatment of its investment, in breach of Article II(2)(b) of the BIT which protects the investor if the effect of this kind of measures is to "impair … the <u>disposal</u> of investments." [478] The Tribunal has already decided that the GOA measures do not amount to discriminatory or arbitrary treatment of El Paso's investment.[479] No discrimination or arbitrariness having been found in the measures taken by the Respondent, no breach of the above-mentioned provision of the BIT can derive from the sales made by El Paso, even if they were in part caused by these measures.

509. Now that it has been found that Argentina's measures can be considered a contributory cause of the losses suffered by El Paso, it remains to be seen

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[476] Reply, § 369.
[477] A list of these companies is contained in the Chart contained in the Memorial, § 618; see also Reply, § 363.
[478] Reply, § 380. Emphasis by the Claimant.
[479] See *supra*, §§ 315 and 325, respectively.

whether these measures can, by their cumulative effect, be considered a violation of the FET standard.

(ii) The Overall Cumulative Impact of the Measures with Regard to the Fair and Equitable Treatment Standard

510. According to the Claimant, "[a]n investor will never invest if it expects that the rules of the game will be completely altered in a manner it cannot predict."[480] It asserts that there were commitments by the GOA that it would not be affected by a new crisis in that country because all the main parameters were either in dollars or linked to the dollar: the electricity Spot Price was connected with the US PPI, adjusted bi-annually (a kind of *de facto* dollarisation); the VPCs were declared in dollars bi-annually; and the capacity payments were in dollars. According to El Paso, as a foreign company investing money in Argentina's economy, it relied on the overall setting of the legal framework, which was clearly aimed at protecting the foreign investor from a devaluation of the dollar. These features were of the utmost importance due to the economic history of Argentina.

511. For example, the fact that capacity payments would be in the same currency as the investment, so that they would be immune from devaluation, was a strong incentive to invest in Argentina despite the frequent crises that had occurred throughout the country's history. The dollar calculation was intended to protect the investor from devaluation. According to Robert L. Perez, an expert witness for the Claimant, the existence of capacity payments made investments in companies such as CAPEX and Costanera attractive to potential investors such as El Paso because they could make the investment, knowing that they would be able to upgrade the plant without the risk of losing their capital costs:

> "These capacity payments would be in U.S. Dollars because investors would only be able to capitalize their investment in U.S. Dollar terms (including loans, equity, etc…. since it was highly unlikely that Argentine banks could supply the amounts needed by investors to upgrade facilities. Thus, the declarations of variable production costs

[480] Reply § 91.

> and the denomination of capacity payments in U.S. Dollars was significant to potential foreign investors like El Paso. When El Paso made its decision to enter Argentina's electricity sector, it fundamentally relied on the assurance of these capacity payments in assuring that CAPEX would be able to service US Dollar debt and be able to provide a reasonable return to us."[481]

512. The problem, therefore, was not so much whether the capacity payment should be at 4, 5 or 10 dollars; it was the calculation in US dollars that mattered to the foreign investor. But the GOA disregarded the very reason for which capacity payments were created, which was to attract investment to expand capacity by allowing generators to recover their capital expenditures in US dollars, in destroying the link between capacity payments and computation in dollars.

513. In the same manner, based on the assurances generally contained in the Electricity Regulatory Framework, investors such as El Paso could reasonably expect that a devaluation of the peso would not substantially alter the dollar value of Spot Prices.

514. The fact that the contracts were in US dollars could also be viewed as a special commitment towards the companies in which El Paso invested, and the pesification as entailing a violation of freely agreed terms and conditions.

515. Although they may be seen in isolation as reasonable measures to cope with a difficult economic situation, the measures examined can be viewed as cumulative steps which individually do not qualify as violations of FET, as pointed out earlier by the Tribunal, but which amount to a violation if their cumulative effect is considered. It is quite possible to hold that Argentina could pesify, put a cap on the Spot Price, etc., but that a combination of all these measures completely altered the overall framework.

516. According to the Tribunal, this series of measures amounts to a composite act, as suggested by the International Law Commission in its Articles on State

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[481] *Witness Statement of Robert L. Perez* [hereinafter Perez Witness Statement], 17 August 2004, §§ 50-52, Claimant's Exhibit No. 8.

Responsibility (Article 15).[482] Such an analysis is not without precedent. The tribunal in *Société Générale*, for example, referred to the concept of composite act and stated clearly that acts that are not illegal can become such by accumulation:

> "While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation …"[483]

517. It cannot be denied that in the matter before this Tribunal the cumulative effect of the measures was a total alteration of the entire legal setup for foreign investments, and that all the different elements and guarantees just mentioned can be analysed as a special commitment of Argentina that such a total alteration would not take place. As stated by the tribunal in *LG&E*, when evaluating the same events, "here, the Tribunal is of the opinion that Argentina went too far by completely dismantling the very legal framework constructed to attract investors."[484]

518. The Tribunal considers that, in the same way as one can speak of *creeping expropriation*, there can also be creeping violations of the FET standard. According to the case-law, a creeping expropriation is a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result. A *creeping violation of the FET standard* could thus be described as a process extending over time and

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[482] The General Assembly of the United Nations took note of the Articles on Responsibility of States for Internationally Wrongful Acts, presented by the International Law Commission, and commended them to the attention of governments, in a resolution adopted on 12 December 2001, UN Doc. A/RES/56/83; see also *Report of the International Law Commission on the Work of its Fifty-third Session* (2001), UNGA Official Records. Suppl. No. 10, A/56/10, pp. 43-365. For a number of general comments, see James Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge, Cambridge U. Press (2002).
[483] *Société Générale v. The Dominican Republic* [hereinafter *Société Générale*], LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction of 19 September 2008, § 91.
[484] *LG&E*, *supra* note 51, § 139.

comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.

519. The Tribunal, taking an all-encompassing view of consequences of the measures complained of by El Paso, including the contribution of these measures to its decision to sell its investments in Argentina, concludes that, by their cumulative effect, they amount to a breach of the fair and equitable treatment standard.

G. FULL PROTECTION AND SECURITY

1. ***The Parties' Positions***

520. According to the Claimant, the full protection and security (FPS) provision of the BIT is, like FET, a standard different from and higher than the full protection and security required by international law:

> "The duty to provide full protection and security creates an independent treaty obligation that is distinct from a state's obligation under customary international law."[485]

The Claimant considers that FPS imposes obligations of due diligence and vigilance on Argentina and is not limited to physical security or the performance of its basic police functions by the State. For the Claimant, the FPS standard is sufficiently broad "to provide protection against the measures taken by the GOA;"[486] and in its view, "by its ordinary meaning, the phrase 'full protection and security' must include the 'full' security provided through legal and regulatory frameworks, not mere physical security."[487] As a consequence of this broad interpretation, the Claimant asserts in its Reply that "Argentina, acting in its sovereign capacity, failed to provide full protection and security to El Paso's investment by, *inter alia*:

[485] Reply, § 630.
[486] *Ibid.*, § 633.
[487] *Ibid.*, § 634.

- disregarding and violating numerous key provisions of the Electricity Law;

- transforming the electricity sector from a competitive, market-based system to a fully-regulated industry characterized by government intervention and price manipulation;

- radically altering the Spot Price setting mechanism by creating Spot Price caps and artificially lowering the Maximum Recognized VCP through the market price of various fuels from the setting of the Spot Price and the generators' VCPs that exceeded the VCPs allowed by the Energy Secretariat;

- converting capacity payments from Dollars, as offered by the GOA in the Electricity Regulatory Framework in order to attract investments, to Argentine Pesos at a rate that decreased such payments to 40% of their original value;

- locking generators into frozen and depressed electricity prices by freezing the Seasonal Price at the nominal value in Pesos and failing to fund the Seasonal Stabilization Fund;

- imposing Export Withholdings on crude oil and LPG exports through Article 6 of Law Nº 25,561 and Decree Nº 310/2002, in violation of the stabilization provisions of the Mining Code and the Hydrocarbon Deregulation Decrees that enjoy legislative status, and the Concessions;

- violating CAPSA's, CAPEX's and COSTANERA's contractual rights by imposing a mandatory conversion of Dollar-denominated energy, LPG, and crude oil term contracts with third parties to Pesos at an artificially-low and confiscatory exchange rate;

- violating SERVICIOS' contractual rights by pesifying its Gas Processing Agreement at an artificially-low exchange rate;

- imposing quotas on LPG and crude oil exports in direct violation of Decrees Nº 1589/1989, N° 1055/1989 and Nº 1212/1989, which guarantee the right to export freely; and

- coercing CAPSA and CAPEX to renegotiate and enter into new LPG and crude oil supply agreements."[488]

[488] *Ibid.*, § 647. Footnotes omitted.

521. According to the Respondent, on the contrary, "like the fair and equitable treatment standard, the protection and security standard relates to the international law minimum standard."[489] In order to give content to that standard, Argentina contends that:

> "In conformity with this interpretation, the protection and security standard is no more than the traditional obligation to protect aliens under international customary law. It is a residual obligation provided for the cases in which the challenged acts may not be in themselves attributed to the Government, but to a third party. In these assumptions, the Government must act diligently to prevent and penalize illegitimate acts by third parties damaging aliens."[490]

The obligation of due diligence implies a certain number of consequences, among which the most important is that the State authorities are "obliged to protect aliens from acts not attributable to themselves, but stemming from third parties."[491] In light of this first condition, the Respondent points out that, in the present case, none of the measures challenged by El Paso stems from a third party; all of them were taken by the State itself. Consequently, according to the Respondent, such measures should only be examined in the light of the other standards of the BIT and not under the full protection and security standard.

2. ***The Tribunal's Analysis***

522. The BIT requires that Argentina provide "full protection and security" to El Paso's investment.[492] The Tribunal considers that the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party. The case-law and commentators generally agree that this standard imposes an obligation of vigilance and due

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[489] Rejoinder, § 466.
[490] *Ibid.*, § 467.
[491] *Ibid.*, § 469.
[492] BIT, Article II(2)(a).

diligence upon the government.[493] The *AAPL* decision quotes with approval Professor Freeman's definition of due diligence:

> "The 'due diligence' is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."[494]

And in the *AMT* case, the tribunal explained:

> "These treatments of protection and security of investment required by the provisions of the BIT of which AMT is beneficiary must be in conformity with its applicable national laws and must not be any less than those recognized by international law. For the Tribunal, this last requirement is fundamental for the determination of the responsibility of Zaire. It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law."[495]

523. The minimum standard of vigilance and care set by international law comprises a duty of prevention and a duty of repression. A well-established aspect of the international standard of treatment is that States must use "due diligence" to prevent wrongful injuries to the person or property of aliens caused by third parties within their territory, and, if they did not succeed, exercise at least "due diligence" to punish such injuries. If a State fails to exercise due diligence to prevent or punish such injuries, it is responsible for this omission and is liable for the ensuing damage. It should be emphasised that the obligation to show "due diligence" does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is "reasonable" or "due," depends in part on the circumstances.

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[493] See, e.g., *American Manufacturing. & Trading, Inc. (AMT) v. Democratic Republic of Congo* (earlier referred to as Republic of Zaire) [hereinafter *AMT*], (ICSID Case No. ARB/93/1), Award of 21 February 1997, § 6.05; *AAPL*, *supra* note 41, § 50. See also: Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, The Hague, Kluwer Law International, 1995, pp. 60-61.

[494] *AAPL*, *supra* note 41, § 77.

[495] *AMT*, *supra* note 493 § 6.06.

524. However, El Paso does not complain about a violation by Argentina of an obligation of prevention or repression. In the *Tecmed* case, the tribunal made the same interpretation as this Tribunal and said the following:

> "The Arbitral Tribunal considers that the Claimant has not furnished evidence to prove that the Mexican authorities, regardless of their level, have encouraged, fostered, or contributed their support to the people or groups that conducted the community and political movements against the Landfill …"[496]

El Paso did not specify or determine the duty to act against a third party that has allegedly been breached by Argentina under the BIT: all the impugned acts that allegedly violate the FPS standard are directly attributable to the GOA and not to any third party. In the present case, none of the measures challenged by El Paso were taken by a third party; they all emanated from the State itself. Consequently, these measures should only be assessed in the light of the other BIT standards and cannot be examined from the angle of full protection and security.

525. The conclusion is that there is no trace of a violation of the full protection and security standard by any of the GOA's measures impugned by the Claimant.

H. ARTICLE II(2)(c): THE UMBRELLA CLAUSE

526. The so-called umbrella clause contained in Article II(2)(c) provides as follows:

> "Each Party shall observe any obligation it may have entered into with regard to investments."

1. ***The Parties' Positions***

527. According to the Claimant, the Respondent violated the BIT by failing to observe its obligations under Article II(2)(c).[497] In particular, the breach of some contractual rights of the Argentinian companies was complained of under

[496] *Tecmed*, *supra* note 161, § 176.
[497] Memorial, §§ 539-546.

that provision. The Claimant asserted that under Article II(2)(c) Argentina had assumed an obligation, *inter alia*:

> "To respect the terms of the Concessions that provide fiscal stability and not impose in the future either Export Withholdings nor discriminatory taxes.
>
> To respect the right of power generators and hydrocarbon producers, like CAPSA, CAPEX and COSTANERA, to freely sell their production and agree on the terms governing its sale, including price and currency.
>
> …
>
> To respect the license agreements with gas distribution companies and power distributors to pass through to their tariffs the market price of the gas and electricity they acquire from gas producers and power generators."[498]

These are all contractual rights belonging to the Argentinian companies, CAPSA, CAPEX and Costanera.

528. The Respondent's answer can be summarised as follows: According to Argentina, the umbrella clause only applies to investment agreements entered into with foreign investors, not to hydrocarbon concessions granted by the State to national companies. In other words, there are no contractual commitments directly between the Claimant and Argentina, as any such commitments were made to CAPSA and CAPEX *via* the concessions and are not protected rights under the BIT.[499]

529. In its Reply, the Claimant has added to its initial analysis the idea that even if they are not elevated to the rank of treaty claims under Article II(2)(c), the contractual claims should still be seen as having led to a violation of this provision, as the concessions can be characterised as "investment agreements":

> "Nonetheless, even if Argentina's characterization of the scope of the Umbrella Clause were correct, which it is not, Argentina's abrogation

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[498] *Ibid*., § 545; see also Reply, § 602.
[499] Counter-Memorial, §§ 669-705.

> and repudiation of its commitments in the Concessions, the CAPSA Hydrocarbon Regulatory Framework, the Hydrocarbon Regulatory Framework, and the Electricity Regulatory Framework would still violate the Umbrella Clause because each of the Concessions qualifies as an 'investment agreement' under the BIT."[500]

And there follows a list of alleged contractual breaches of these investment agreements:

> "The GOA violated the Umbrella Clause by:
>
> > - unilaterally interfering in the contracts of private parties (*i.e.,* the electricity and hydrocarbon sale contracts of CAPEX, COSTANERA and CAPSA and SERVICIOS' Gas Processing Agreement) by decreeing that their price terms be converted from Dollars to Pesos at the artificially low exchange rate of US$ 1 - to - Arg. 1;
> >
> > - breaching the CAPEX Concession (which had generally incorporated the provisions of Decree N° 1589/1989) and the CAPSA Concessions that benefited from the tax exemption established by Article 403 of the Mining Code by imposing Export Withholdings;
> >
> > - breaching the license agreements of gas and electricity distributors by pesifying them and abrogating their US price index and US Dollar terms, which had a direct and immediate financial impact on electricity generators."[501]

530. The Respondent again rejected this line of argument, stating that

> "[t]he Argentine Republic did not violate the umbrella clause [because] … (a) the scope of the umbrella clause is limited to the commitments assumed in an investment agreement; (b) there is no investment agreement in the present case."[502]

In order to explain why no "investment agreement" was at stake here, Argentina explained that

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[500] Reply, § 613.
[501] *Ibid.*, § 627.
[502] Rejoinder, § 488.

"CAPSA and CAPEX concessions may never be put at the same level as an investment agreement since:

(a) they were not concluded between Argentina and a foreign investor, but granted by the Argentine Republic to local companies;

(b) they are governed by Argentine law and subject to Argentine courts; and

(c) they do not have any element internationalising it or provision linking them – not even indirectly – to the investment protection system provided for in bilateral investment treaties."[503]

2. The Tribunal's Analysis

531. In its Decision on Jurisdiction, the Tribunal rejected the argument that the so-called umbrella clause included in Article II(2)(c) could elevate any contract claim to the level of a treaty claim:

> "In other words, the Tribunal, endorsing the interpretation first given to the so-called 'umbrella clause' in the Decision *SGS v. Pakistan*, confirms what it mentioned above, namely, that it has jurisdiction over treaty claims and cannot entertain purely contractual claims, which do not amount to a violation of the standards of protection of the BIT. It adds that, in view of Article VII(1) of the US-Argentina BIT, a violation of an investment agreement entered into by the State as a sovereign and an American national or company is deemed to be also a violation of the Treaty and can thus give rise to a treaty claim."[504]

532. This means that a contract claim is not transformed into a treaty claim by the umbrella clause, while an "investment agreement" claim can be viewed as a treaty claim by virtue of a combination of Articles VII(1) and II(2)(c): "[m]oreover, Article II, read in conjunction with Article VII(1), also considers as treaty claims the breaches of an investment agreement between Argentina and a national or company of the United States."[505] In other words, although in general a contract claim is not a treaty claim, the violation of an investment

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503 *Ibid.*, § 501.
504 Decision on Jurisdiction, *supra* note 58, § 85.
505 *Ibid.*, § 84.

agreement can be considered a treaty claim as it is an obligation entered into with regard to investments under Article VII(1).

533. The Tribunal has already decided that El Paso has no contract claim based on contracts or licenses (see *supra* §§ 178-189) and that there is no investment agreement entered into by El Paso (see *supra* §§ 190-198). As a consequence, the question of their elevation to the level of a treaty claim does not arise.

534. The Tribunal wishes to add that this position finds support in the Annulment Decision in the *CMS* case.[506] It may be recalled that the ICSID tribunal dealing with that case had concluded in its Award of 12 May 2005 that there was a violation of the so-called umbrella clause included in Article II(2)(c):

> " … the obligation under the umbrella clause of Article II(2)(c) of the treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty."[507]

In particular, this finding applied to two aspects of the commitments that the claimant CMS considered to have been made by Argentina in its favour, *i. e.*

> " … two stabilization clauses contained in the License that have significant effect when it comes to the protection extended to them under the umbrella clause. The first is the obligation undertaken not to freeze the tariff regime or subject it to price controls. The second is the obligation not to alter the basic rules governing the License without TGN's written consent."[508]

535. The *ad hoc* Committee criticised the tribunal's findings concerning the violation of the umbrella clause, stating that it was "impossible for the reader to follow the reasoning on this point,"[509] and therefore annulled this part of the decision for failure to state reasons. At the same time, it tried to reconstruct the possible reasoning of the Tribunal and, while doing so, gave some hints as to what could, in its view, be the possible meaning of an umbrella clause or, to be

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506 *CMS, supra* note 48, Decision on Annulment.
507 *CMS, supra* note 48,§ 303.
508 *Ibid.*, § 302.
509 *CMS, supra* note 48, Decision on Annulment, § 97.

more precise, as to what could not be the meaning of an umbrella clause. Thus, two points were made clear by the *ad hoc* Committee.

536. First, according to that Committee, the umbrella clause, if it had any meaning – a question on which it did not take a position – could only concern consensual obligations and not general obligations:

> "In speaking of 'any obligations it may have *entered into* with regard to investment,' it seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT … They do not cover general requirements imposed by law."[510]

537. Second, the *ad hoc* Committee also made it clear that, in its view, a contractual obligation towards a non-protected investor cannot be transformed by the magic of the so-called umbrella clause into a treaty obligation towards a protected investor:

> "The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.* the persons bound by it and entitled to rely on it) are likewise not changed because of the umbrella clause."[511]

538. It is evident that the Tribunal cannot find any violation of a right pertaining to El Paso under the so-called umbrella clause, for the reason that the so-called umbrella clause cannot not elevate any contract claims to the status of treaty claims as El Paso cannot claim a contractual right of its own in this case.

[510] *Ibid.*, § 95. Emphasis added by the *ad hoc* Committee.
[511] *Ibid.*, § 95. Emphasis added by the *ad hoc* Committee.

V. CAN THE VIOLATIONS COMMITTED BY ARGENTINA BE PREVENTED OR EXCUSED?

A. CAN THE VIOLATIONS COMMITTED BY ARGENTINA BE EXCUSED ON ACCOUNT OF THE CONSENT ALLEGEDLY GIVEN THROUGH THE SIGNATURE OF AGREEMENTS?

1. The Parties' Positions

(i) The Respondent's Position

539. The Republic of Argentina contends that El Paso's argument is inconsistent with the very actions of the Argentinian companies it is now claiming for. As a matter of fact, both CAPSA and CAPEX (together with many other companies in the same sector) entered into at least eight agreements with the GOA during the years 2002 and 2003 by which they recognised the Government's power to impose export duties on oil and gas and to take other measures. Through these agreements, the companies obtained advantages which, naturally, proved beneficial to their shareholders. In its damages estimate, El Paso omitted to consider these benefits.

540. Even if El Paso was a non-controlling shareholder of the companies in question and not a party to the various agreements with the Government, the fact remains that the companies entered into agreements by which the GOA's powers were recognised. Furthermore, there is no evidence that these agreements were concluded under duress, as alleged by El Paso, nor has any producer in the last five years challenged the voluntary nature of these agreements.

541. All the measures contested by El Paso (except for the export restrictions and the pesification*)* were expressly consented to by the Argentinian companies. A shareholder may not claim compensation for a measure concerning the rights of a company in which it holds a participating interest when the company in question has consented to such a measure. As a minority shareholder, El Paso should address its claim to the majority shareholder, not to the GOA.

(ii) The Claimant's Position

542. The Claimant contends that it was not a Party to the agreements with the Government, the latter having been signed by the Argentinian companies together with other oil companies. In addition, El Paso was a minority, non-controlling shareholder, and therefore not in a position to determine the decisions of the companies.

543. The Claimant also disputes the purported voluntary nature of these agreements, arguing that they were signed under duress. In fact, the GOA had threatened to impose higher export duties or artificially to depress domestic prices in the event of a failure to accept the agreements. Thus, to sign them was a way to mitigate damages.

544. Regarding the Crude Oil Special Arrangements, in the absence of Government pressures, no rational crude oil producer would have agreed to a US$ 28.50 reference value for which the producers received nothing in exchange. Similar pressure was exercised regarding the LPG Price Stabilisation Agreement, which was concluded under the Government's threat to depress domestic prices artificially.

545. None of the agreements signed by CAPSA, CAPEX or Costanera, while El Paso was a shareholder, contains any acquiescence to the export withholdings or any waiver of legal rights, express or implied. In international law, waivers require a clear and unambiguous expression of consent.

546. In any event, as shown in *CMS* and *LG&E*, the presence of duress will not only invalidate a waiver but, in addition, confirm that the State has breached the BIT.

547. No objections were filed by El Paso before the courts of Argentina for a number of reasons, including the risk that raising a claim before the local courts could trigger the "fork-in-the-road" clause of the BIT (Articles VII (2) and (3)).

548. The Respondent's waiver claim assumes that El Paso is bound by the signing of the special agreements by CAPSA, CAPEX and Costanera. This, according to the Claimant, is wrong. As illustrated by *GAMI Investments v. Mexico*,[512] the decision of the local company (in that case, to pursue domestic remedies) cannot affect the right of a minority shareholder to claim under the applicable treaty. The same conclusion was reached by the *LG&E*, *Enron* and *Azurix* tribunals in their awards against the Republic of Argentina.

2. The Tribunal's Analysis

549. As noted by the Tribunal in its Decision on Jurisdiction when referring to the Decision on Jurisdiction in the *LG&E* case, the shares owned by El Paso in the Argentinian companies constitute the Claimant's investment in Argentina within the meaning of Article I (1)(a)(ii) of the BIT. This has been reiterated in paragraph 214 of the present Award. A clear distinction must therefore be made between the Claimant as an investor under the BIT and the Argentinian companies in which the Claimant participated and which operated in Argentina under local laws and regulations. Bearing in mind this distinction, the Respondent's contention that El Paso consented to export withholdings or other measures taken by the GOA by not objecting to the signing by CAPEX, CAPSA and Costanera of a number of agreements with the Government may not be shared. El Paso may not, in fact, be equated to the companies in which it was only a minority, non-controlling shareholder. Actions by the Argentinian companies cannot affect El Paso's rights as an investor under the BIT, except to the extent to which it has consented to such actions. However, there is no evidence of such consent.

550. Contrary to the Respondent's allegation, El Paso is not claiming *for* the Argentinian companies; nor is it acting for their benefit or on their behalf. The claims filed by El Paso in these proceedings are those of an investor requesting compensation for the breach by the State of a certain number of guarantees

[512] *GAMI Investments Corp. v. The Government of the United Mexican States* [hereinafter *GAMI*], UNCITRAL (NAFTA), Final Award of 15 November 2004, § 38.

provided by the BIT, an international treaty. El Paso is therefore claiming in its own right, not in somebody else's. The fact that El Paso as a shareholder may have derived benefits from the agreements entered into by the companies and that such advantages have to be considered when evaluating its damages does not contradict this conclusion. The shareholding in the companies being the investment made by El Paso in Argentina, the damage to that investment caused by the breach of the BIT must obviously be calculated by taking into account any benefits accruing from the agreements in question or from the Government's measures.

551. This being the nature of El Paso's claims, and in the absence of any consent to the Argentinian companies entering into the agreements with the Government, no waiver of rights and claims accruing under the BIT may be imputed to El Paso. The Argentinian companies' decisions and their agreements with the GOA therefore have no impact on El Paso's rights under the BIT, the breach of which is the cause of action in these proceedings.

B. CAN THE VIOLATIONS COMMITTED BY ARGENTINA HAVE BEEN PREVENTED OR BE EXCUSED ON ACCOUNT OF THE EXISTENCE OF A STATE OF NECESSITY?

552. The Tribunal will first examine the defense allegedly provided by Article IV (3) of the BIT. It will then address the two other Articles invoked by Argentina to avoid any responsibility for the measures taken to face the economic crisis, Article XI of the BIT and Article 25 of the ILC Articles on State Responsibility. The Tribunal will concentrate on the arguments based on Article XI first because, as was also stated by the tribunal in the case of *Continental*, "the application of Art. XI in the present case (if warranted) may be such as to render superfluous a detailed examination of the defense of necessity under general international law applied to the particular facts of the present dispute."[513] Of course, Article XI has to be interpreted taking into account general principles of international law, some of those being embodied in Article 25, as mentioned below in paragraph 590. And only if Article XI is found by

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[513] *Continental*, *supra* note 150, § 162.

the Tribunal not to apply in the case would an analysis of Article 25 be performed. Article XI is the *lex specialis*, Article 25, the *lex generalis.* As the Tribunal will consider Article XI of the BIT to apply to the case, it can dispense to fully analyse and to apply as such Article 25 of the ILC Articles.

553. It is however appropriate for the Tribunal to emphasise the difference between the two defences based on Article XI of the BIT and on Article 25 in general international law. Under Article XI, measures necessary "for the maintenance of the public order" or for "the protection of essential security interests" are not in breach of the relevant BIT, and therefore it would have been appropriate for the Tribunal to analyse the existence of a situation of necessity under Article XI even before evaluating the different measures adopted. On the contrary, if the rules of general international law regarding necessity apply, this is a ground for precluding the wrongfulness of an act not in conformity with an international obligation and thus implies that the acts be analysed first. This difference was clearly emphasised in a statement found in the Annulment Decision in *CMS*:

> "Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations."[514]

554. In other words, in order to analyse the consequences of Article XI, the first question to answer is whether there was a situation of emergency as defined by that Article. If the answer is in the affirmative, all the acts considered necessary by the Tribunal to cope with this situation are excluded from the scope of the BIT, the contrary being true of the acts not considered necessary by the Tribunal. If the answer is in the negative, the Tribunal has to examine the different measures taken in order to determine whether or not they are in violation of one of the BIT standards of treatment of foreign investments. To analyse the consequences of Article 25, the reverse approach is required. The Tribunal should first analyse whether or not the measures constitute a violation of the standards of treatment of the BIT. If the answer is no, this marks the end

[514] *CMS, supra* note 48, Decision on Annulment, § 129.

of the inquiry. If the answer is in the affirmative, the Tribunal has to consider whether the illegality can be set aside on account of a state of necessity.

555. However, in order to analyse the consequences of Article XI, the Tribunal has chosen to proceed as follows. It will first answer the question whether by its behaviour the State has contributed to endangering its public order or essential security interests. If the answer is in the affirmative, the defence under Article XI shall not apply since the challenged measures would fail to qualify as "necessary" under that Article. If the answer is in the negative, the Tribunal has to examine whether there was a situation of emergency as defined by Article XI, in which case, in the affirmative, all acts considered necessary by the Tribunal to cope with that situation are excluded from the scope of the BIT."

1. Can the Violations Committed by Argentina Be Excused on the Basis of Article IV(3)?

556. Article IV (3) of the BIT provides:

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

(i) The Parties' Positions

557. According to the Claimant, "[i]n reality, Article IV(3) of the BIT is completely irrelevant to Argentina's defense of necessity."[515] As explained by El Paso, that provision deals with possible measures taken by a State to compensate losses that have occurred due, for example, to war or civil disturbances. It does not apply as an excuse based on necessity or emergency: "Since Article IV(3) relates to compensatory measures rather than acts that cause an investor's loss,

[515] Reply, § 806.

it provides no guidance as to whether such acts are excusable in a given context."[516]

558. The Respondent has a different interpretation of Article IV(3), arguing that the emergency measures challenged are indeed authorised by that provision:

> "The BIT expressly mentions the adoption of emergency measures by a state, which may generate losses to the investments of the other contracting party. Not only does it point out this possibility, but it also legitimises the act from Government [*sic*]…."[517]

In fact, Argentina equates "measures adopted in relation to losses due to an emergency situation" with "measures to be adopted to mitigate the crisis or emergency"[518] and then concludes that the only obligation of a State during a period of emergency is to accord foreign investors'' treatment that is not discriminatory. Stating that "upon the state of emergency, El Paso received the same treatment as the other national and foreign companies that were engaged in the provision of similar services,"[519] it concludes that Argentina fully complied with its obligations towards the foreign investor. The position of the GOA is that "Article IV(3) provides for a special solution in the event of an exceptional situation, which proves that the general obligations contained in the treaty are only applicable in 'normal' circumstances."[520]

(ii) The Tribunal's Analysis

559. The Tribunal cannot accept the Respondent's interpretation, which goes against the plain meaning of the text, and it agrees with the Claimant that Article IV(3) applies to measures adopted in response to a loss, not to measures that cause a loss. The plain meaning of the provision is that the standards of treatment of the BIT – national treatment and most favoured nation treatment – have to be applied when a State tries to mitigate the consequences of war or other

[516] *Ibid.*, § 816.
[517] Counter-Memorial, § 724.
[518] *Ibid.*, § 724.
[519] *Ibid.*, § 731.
[520] Rejoinder, § 527.

emergency. This is in line with the analysis of the same provision made by the tribunal in *CMS* when it pointed out that:

> "The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreigners. The Article … ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner."[521]

560. It is therefore the conclusion of the Tribunal that the violations committed by Argentina cannot be excused by Article IV (3), as that provision does not deal with the matter at hand.

*2. **Can the Violations Committed by Argentina be Excused on the Basis of Article XI?***

561. In its written and oral presentations, Argentina has justified its conduct by invoking Article XI of the 1991 Argentina-US BIT. That provision reads:

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

This is obviously an important provision, as recognised by Professsor Michael Reisman, an expert called by the Claimant, who stated during the hearing that:

> "Obviously the Parties felt that this assurance was critical to them. Whether this could have been available as a matter of general international law to the Parties is another matter. But by establishing this particular regime in Article 11 the Parties indicated that customary international law that might otherwise govern would not govern, and that this would be the provision for those circumstances, what we generally refer to as necessity."[522]

562. This provision raises the following questions: Who is entitled to interpret Article XI authoritatively? Do the provisions of that Article apply to the

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[521] *CMS*, *supra* note 48, § 375.
[522] Hearing Transcript in English, Day 3, p. 752.

present dispute? If so, does its applicability exonerate Argentina from any duty to pay compensation?

(i) The Question of Whether Article XI Is Self-judging: Who Is Entitled to Interpret Article XI?

(a) The Respondent's Position

563. In its pleadings, Argentina, partly basing itself on expert legal opinions,[523] contended that each Contracting Party was entitled to interpret the terms of Article XI of the Argentina-US Treaty with final effect, subject only to the principle of good faith. Argentina's thesis can be summarised as follows.

564. It is true that, unlike the provisions of other treaties, such as Article XXI of the GATT,[524] Article XI of the 1991 Argentina-US BIT does not expressly state that it is self-judging. It nevertheless exhibits that characteristic because this is the position of both Contracting Parties: that of the United States since 1986, when it argued, in the *Nicaragua* case, that the International Court of Justice (hereinafter: ICJ) had to examine[525] whether a similar provision contained in the Treaty of Friendship, Commerce and Navigation (hereafter: FCN) concluded on 21 January 1956 between the US and Nicaragua[526] was self-judging in character; this was the position of Argentina was well.

565. The self-judging character of Article XI of the BIT can, according to the respondent State, be deduced from its text, read in its context, and from the object and purpose of the Treaty, the preparatory work and the circumstances surrounding its conclusion.[527] This character also results from the position

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[523] Rejoinder, §§ 533-546; *Witness Statement of Anne-Marie Slaughter and William Burke-White* [hereinafter Slaughter/Burke-White Report] of 4 March 2007; Respondent's Rejoinder, Annexes, §§ 15, 18-36; Sornarajah Report, *supra* note 76, §§ 107-109.

[524] Article XXI of the GATT 1947 (United Nations Treaty Series, Vol. 55, p. 187) provides that "[n]othing in the Agreement shall be construed … (b) to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests."

[525] *Case concerning Military and Paramilitary Activities in and against Nicaragua* (hereinafter *Nicaragua v. United States*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14.

[526] Slaughter/Burke-White Report, *supra note* 523, §§ 18-36. For the text of the FCN, see http://untreaty.un.org/unts/1_60000/10/37/00019817.pdf

[527] *Ibid.*, § 16. Article 31 of the 1969 Vienna Convention of the Law of Treaties runs as follows:

taken by the US Department of State at the time of the BIT's approval by the US Senate, which amounts to an interpretative declaration in the sense of Article 31 of the 1969 Vienna Convention on the Law of Treaties.[528]

566. Regarding the texts of Articles XXI of the GATT and XXI of the Nicaragua-US FCN, they are not, according to Argentina, relevant for interpreting the Argentina-US BIT; they are not, in particular, part of that instrument's context in the sense of Article 31 of the 1969 Vienna Convention on the Law of Treaties. The same can be said of Article XX(1)(d) of the Iran-US Treaty of Amity, Economic Relations and Consular Relations, of 15 August 1955.[529]

567. So far as the ruling of the ICJ in the *Nicaragua* case is concerned, Argentina considers it to have no bearing on the present arbitration because: (i) at the time when that case was decided, the evidence for ascertaining the Parties' positions was insufficient, and the US began to make statements on the matter precisely on the basis of that case; (ii) Nicaragua and the US held conflicting views in the *Nicaragua* case, the former contending that the contested provision was not self-judging, the latter holding the opposite view, whereas in the present arbitration the States involved are of the same opinion, namely, that Article XI of the 1991 BIT *is* self-judging; and (iii) the circumstances surrounding the two cases are different, the US having invoked the self-judging character of the relevant clause in *Nicaragua* to legitimise the use of force against another State, whereas, in the present instance, Argentina does so to justify domestic

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"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

[528] Slaughter/Burke-White Report, *supra note* 523, § 16.

[529] *Ibid.*, § 33.

economic measures "sought to pacify the country, maintain public order and national security."[530]

568. According to the respondent State, there is evidence showing that both the US and Argentina considered Article XI of their BIT to be self-judging. One evidential element is the fact that in August 1992, barely one year following the conclusion of the Treaty but prior to its ratification, the US Department of State submitted five BITs and a model BIT to the US Senate for approval. Each provision of the Model BIT was accompanied by commentaries; and the commentary on Article X – whose text is identical to Article XI of the Argentina-US BIT – explained that the provision was self-judging and that this feature was carefully recorded by the US State Department in each negotiation.[531]

569. In *LG&E*,[532] the tribunal considered the date of conclusion of the Argentina-US BIT rather than that of ratification to be relevant for ascertaining the meaning of treaty clauses, says Argentina. But, in view of the declaration by the US Senate,[533] there are strong reasons to believe that even at the time of concluding their BIT, both the US and Argentina believed its Article XI to be self-judging. Further, when Argentina ratified the BIT in 1994, it was well aware of the position taken by the United States in 1992.

570. It may be presumed, always according to Argentina, that all bilateral investment treaties concluded by the US follow the 1992 Model Treaty, unless the State Department, in its letter accompanying the text of treaties on the occasion of their submission to the Senate, indicates otherwise, which is not the case here. As no contrary evidence has been presented by the Claimant, Article XI of the Argentina-US BIT must be deemed self-judging.

571. The same obtains on the side of Argentina, the other Contracting Party. True, when the BIT between the US and Russia was being negotiated, it was the

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[530] Rejoinder, § 537.
[531] *Ibid.*, § 538.
[532] *LG&E*, *supra* note 51.
[533] Rejoinder, § 539; Slaughter/Burke-White Report, *supra* note 523, § 20.

Russian negotiators who wished to specify that the Treaty's provision corresponding to Article XI of the Argentina-US Treaty was self-judging. This cannot, however, be taken to mean, *a contrario*, that Article XI, for the United States, does not have that characteristic as well.

572. The United States view, while it has grown more explicit, has not changed at least since 1984, when it was put forth in the *Nicaragua* case. An inevitable consequence of that view is, as explained by the US Government to the US Senate, that self-judging clauses in BITs could also be invoked, on the basis of reciprocity, by the other Contracting Party, to the detriment of US investors, this being the price to pay for the United States' freedom of action under the BITs.

573. Argentina concludes its arguments by asserting that the self-judging nature of provisions such as Article XI of the Argentina-US BIT promotes, rather than undermines, international law. It confirms the contractual freedom of States within the mandatory framework of *jus cogens* and, accordingly, strengthens the concept of sovereignty. Another restriction based on the power of self-judging clauses is that recourse to such a clause is limited by the principle of good faith.

(b) The Claimant's Position

574. The Claimant contends that Article XI of the Argentina-US BIT is not self-judging.[534] It begins its argument by pointing out that the evidence adduced by Argentina to establish the self-judging character of Article XI exclusively pertains to the "essential security interests" element in that provision, and that there is no evidence showing that the US Government has considered self-judging the "public order" element or the reference to international peace and security contained in that same Article.

575. Moreover, says the Claimant, in reality the "essential security interest" feature of Article XI is not self-judging. As a rule, treaty provisions are self-judging

[534] Reply, §§ 827-850.

only if the States Parties to the treaty clearly say so, which is not the case here. Article XI is phrased in the same objective manner as the other provisions of the BIT, the review of which is the object of a compulsory adjudication procedure.

576. There is, according to the Claimant, no ambiguity in the text of Article XI. In the absence of any contrary indication, it is up to this Tribunal to review the existence of necessity under that Article, as it is within its competence to interpret the BIT by virtue of Article VII of that Treaty and the acceptance of the Tribunal's jurisdiction by the Parties. Adjudication being the mode of review established by the BIT, the existence of a self-judging mechanism for a given provision must be attested to by explicit language, such as that found in Article XXI of the GATT. The difference of language in that instrument and in Article XI of the 1991 BIT is striking: "action which *it* [the State] *considers* necessary" in Article XXI of the GATT, as compared to "measures necessary" in Article XI of the BIT.

577. According to the Claimant, a similar situation arose in the *Nicaragua* case, where the ICJ had to establish the meaning to be attributed to Article XXI(1) of the 1956 Treaty of Friendship, Commerce and Navigation (FCN) between Nicaragua and the US. The provision in question prescribed that "the present Treaty shall not preclude the application of measures … (d) … necessary to protect essential security interests." The Court concluded that the reference to "essential security interests" in Article XXI(1) of the 1956 Treaty fell within the Court's jurisdiction as defined in the dispute settlement provision of Article XXIV of the same Treaty. The Court then compared the language of Article XXI(1) of the 1956 Treaty of FCN ("necessary") to that of Article XXI of the GATT ("which it [the State] considers necessary"). The latter provision, the Court explained, constituted an exception to the "normal implementation" of the General Agreement by allowing a Contracting Party to take action which it "considers necessary for the protection of its essential security interests" in fields such as nuclear fission and arms, whereas Article XXI of the 1956 Treaty

"speaks simply of 'necessary' measures, not of those considered by a Party to be such."[535]

578. Is it believable, asks the Claimant, that the United States did not learn from the ICJ's judgment that self-judging provisions must be identified by explicit language? Could the US have thought it possible, a mere five years after the *Nicaragua* judgment, to make the reference to "essential security interests" in Article XI self-judging, without any explicit indication to that effect? According to the Claimant, it could not.

579. To this, the Claimant adds that in the wake of the *Nicaragua* case, the United States showed that it knew how to draft a self-judging clause when necessary. The Protocol appended to the BIT with Russia,[536] negotiated in the same period as that with Argentina, states that "the Parties confirm their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging."[537] No similar statement was made in connection with the 1991 Argentina-US BIT; and whereas the Protocol accompanying the latter does comment on Article XI, it says nothing about its alleged self-judging character, as it surely would have done had the Parties intended to give it such a character. This is especially so since, in subsequent BITs with El Salvador and Bahrain, the US saw to it that the "which it *considers* necessary" formula suggested in the *Nicaragua* judgment found its way into their texts.[538]

580. Turning to the evidence of Argentina's legal experts, the Claimant asserts that not a single word uttered in the 1991 Treaty or any element in its context denotes any intent on the part of the United States or Argentina to confer self-judging status on Article XI of the Treaty.

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[535] *Ibid.*

[536] Treaty Concerning the Encouragement and Reciprocal Protection of Investment of 17 June 1992, International Legal Materials (I.L.M.), Vol. 31, 1992, p. 799.

[537] *Ibid.*, p. 809, point 8.

[538] *Ibid.*

581. Next, the Claimant turns to unilateral assertions made by the United States, in connexion with other BITs, in the course of internal debates. Specifically it refers to exchanges between the US Department of State and the US Senate in 1988 and 1992 relating to the "essential security interests" clause in other BITs and in the 1992 Model Treaty.[539] These exchanges, the Respondent argued, were evidence of the American attitude regarding the Model Treaty and suggested that the US position on Article XI of the 1991 BIT must have been the same during that period; and, since there is no contrary evidence, Argentina must have shared that attitude. According to the Claimant, there is no reason to have recourse to supplementary means of interpretation.

582. Indeed, the text of Article XI of the Argentina-US BIT, read in its context and in light of the Treaty's purpose, is "quite clear." In such situations, the 1969 Vienna Convention on the Law of Treaties does not authorise the use of supplementary means of interpretation. And, even if it did, and if Article 31(4) of the Vienna Convention[540] were relied on to establish that the treaty terms in issue have a special meaning, inconsistent with that resulting from the application of Article 31(1) of the Vienna Convention, such a meaning would have to be established "conclusively" and by "decisive" proof.[541] All the respondent State has to offer are internal statements which dwell on other treaties and do not support the idea that the US silently willed Article XI of the 1991 BIT to be self-judging. Moreover, says the Claimant, given Argentina's history of economic emergencies, it is unlikely that the US would have intended to clothe the Article XI with self-judging character. Even if it had wished to do so, it would have had to inform Argentina and to obtain its consent.

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[539] Article XIV(1) of the Treaty between the Government of the United State of America and the Government of the Republic of El Salvador concerning the Encouragement and Reciprocal Protection of Investment, signed at San Salvador on March 10, 1999; Article 14(1) of the Treaty between the Government of the United State of America and of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investment, signed on September 29, 1999.

[540] Reply, § 847.

[541] *Ibid.*, § 839, referring to the Sofaer Opinion [note 500 below], § 31, citing Sir Humphrey Waldock's *Third Report on the Law of Treaties*, Yearbook of the International Law Commission 1964, Vol. II, p. 5. That provision, it will be recalled, specifies that "[a] special meaning shall be given to a term if it is established that the parties so intended."

583. In other words, according to the Claimant, the Argentinian legal experts have failed to show the Parties' *mutual* intention to vest Article XI of the 1991 Treaty with self-judging character; nor can such an intention be derived from that instrument's context. According to Article 31(2) of the Vienna Convention on the Law of Treaties, the "context" includes, in addition to the text proper, the preamble and the annexes, (a) any agreement relating to the treaty "made between all the Parties in connection with the conclusion of the treaty," and (b) any instrument "made by one or more Parties in connection with the conclusion of the treaty and accepted by the other Parties as an instrument related to the treaty." It follows from this that what the US may have intended with regard to Article XI, according to the Respondent, would not be relevant context. The status of relevant context would be limited to intentions *agreed upon* by the Parties, and there is no evidence of agreement on this point. Treaty interpretation does not consist in looking for the unilateral and silent wishes of a Party.

584. In the absence of relevant contextual elements, the interpreter should stick to the "ordinary meaning" of Article XI and to the Treaty's "object and purpose."[542] As pointed out already, the ordinary meaning of the relevant provision is that, like other Articles of the Treaty, it is of an objective rather than self-judging nature. This view is buttressed by the fact that the Treaty's object and purpose is to protect investments made by investors of one Party on the territory of the other. A self-judging interpretation of Article XI of the 1991 Treaty would enable Argentina to interfere almost limitlessly with US investments, subject only to a good faith standard.

585. To justify a departure from the above reasoning, Argentina would have to show that *both* Parties intended to give Article XI of the 1991 Treaty a special meaning under Article 31(4) of the Vienna Convention on the Law of Treaties. There is no evidence, however, that they did. Consequently, the ordinary

[542] *Opinion of Abraham D. Sofaer* [hereinafter Sofaer Opinion] of 14 November 2006, § 31. Claimant's Exhibit No. 302.

meaning of the text of the provision, viewed in the context of its object and purpose, must prevail.

586. The question of the self-judging nature of Article XI of the 1991 BIT came up, and was answered in the negative by the tribunal in *CMS*.[543] Accordingly, that tribunal's task was not limited to establishing whether the plea of necessity had been invoked and whether the challenged measures were taken in good faith. The tribunal was called upon to examine whether, as a matter of substance, Argentina's recourse to Article XI was justified. The *LG&E* tribunal[544] reached the same conclusion.

587. Finally, according to the Claimant, even if one were to decide otherwise, and if the self-judging power allegedly inherent in Article XI of the 1991 BIT were limited only by a good faith standard, Argentina's views could not prevail. Indeed, the continuous repudiation of the Claimant's rights, on the basis of an emergency that had long ceased to exist, is inconsistent with the good faith standard invoked by the respondent State.

(c) The Tribunal's Analysis

588. The Tribunal will ascertain the meaning of Article XI of the 1991 Argentina-US BIT by applying Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. Before doing so, it wishes to point out, as the Claimant has done,[545] that the evidence presented by the Respondent relates to a single element of Article XI, "essential security interests." That Article, however, mentions two other possible justifications: the maintenance of public order and the fulfilment of the State's obligations regarding the maintenance or restoration of international peace or security. This could be taken to suggest that the self-judging character of Article XI is, at any rate, limited to "essential security interests" and cannot extend to the other elements, in particular the maintenance of public order. At first glance, the present case does not,

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[543] *CMS*, *supra* note 48, §§ 370, 373.
[544] *LG&E*, *supra* note 51, §§ 207-214.
[545] See *supra*, § 574.

however, seem to concern (external) security interests but possibly the maintenance of (internal) public order, which would not be a self-judging matter at all under Article XI of the BIT.

589. It is not necessary to pursue this line of argument, however, since the Tribunal believes that Article XI contains no self-judging elements, as it will now show by examining the content of that provision in the light of the canons of treaty interpretation of Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

590. The Tribunal considers that, pursuant to Article 31(1) of the Vienna Convention, any interpretation has to begin with an examination of the *terms* of the treaty taken in their ordinary meaning. The wording of the treaty is deemed to express the intention common to the Parties, and what the Parties effectively agreed to, even though a Party might have wished otherwise on one or another point. As long as such wishes are not expressed, the content of the treaty's provisions is paramount, and what is not there cannot be read into them. This prompts the further conclusion that in principle treaty rules must be regarded as being objective in nature, which means that, unless the contrary is specified, they are not self-judging: a State Party is not entitled to interpret unilaterally the terms of a treaty in an authoritative manner.

591. In principle, the ordinary meaning of a treaty provision is that given to its terms at the time of its conclusion, in the present case in 1991, as was pointed out by the tribunal in *LG&E*.[546] Changes occurring elsewhere, at a later stage, for instance when other, similar treaties are being negotiated or when a model treaty is being submitted to a national authority for approval, even if they happened before the treaty to be interpreted is ratified or comes into force, are irrelevant for establishing the meaning to be given to it. This means that Argentina cannot rely on the BITs negotiated after 1991 or on the 1992 Model Treaty.

[546] *LG&E, supra* note 51, §122.

592. Treaty provisions allowing for exceptions to the rights guaranteed in the same treaty must be attributed the ordinary meaning resulting from their text, without reading self-judging clauses into them, especially when the treaty contains compromissory clauses, as is the case here. This clearly results from the case-law and from international practice.

593. In this respect, *Nicaragua* is evidently the leading case, where the ICJ was confronted with an "essential security interests" clause found in Article XXI of the 1956 Nicaragua-US Treaty of FCN ("the present Treaty shall not preclude the application of measures … (d) … necessary to protect its essential security interests"). That same Treaty also contained a compromissory clause placing disputes pertaining to the interpretation and application of its provisions under the ICJ's jurisdiction. The ICJ thought that the above clause was not self-judging and found that it had jurisdiction to determine whether the essential security interests clause was applicable – a question it answered in the negative. In this precedent, the Court establishes that, in the absence of qualifying language, the text of the relevant provision must be interpreted as it is, according to its ordinary meaning. To buttress its conclusion, the ICJ cites, *a contrario*, Article XXI of the GATT, which does contain qualifying language ("Nothing in this Agreement shall be construed … (b) To prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests").

594. The above precedent is of particular relevance in the present instance because it relates to a treaty which, though not a BIT, also defines and protects rights of individuals of one Party on the territory of the other and because the 1991 Argentina-US BIT, like the Nicaragua-US Treaty of FCN, contains a compromissory clause. The *Nicaragua* judgment was rendered in 1986; the Argentina-US BIT was concluded in 1991, barely five years later. It is most unlikely that within this short time-span the US could have forgotten the lesson of *Nicaragua* which amounted to saying that if one wishes a treaty clause to be self-judging, one has to say so and to obtain the other Party's assent. The conclusion emerging from these elements is that at the relevant time, the US did not seek to attribute self-judging character to Article XI of the 1991 BIT.

595. This conclusion is supported by two decisions of ICSID tribunals bearing on the very same provision, *i.e.* Article XI of the 1991 BIT. In *CMS*, the tribunal said:

> "The Tribunal is convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing [*sic*] non-compliance with obligations assumed in a treaty, they do so expressly."[547]

The arbitral tribunal then explained that if measures taken by Argentina are considered justified by that State under Article XI of the BIT, it is not up to Argentina to determine unilaterally that such justification is legitimate. It is not sufficient, in other words, merely to invoke Article XI and to assert that the State's measures were taken in good faith. It is also necessary to show that those measures were effectively covered by the language of Article XI.[548]

596. The above views were shared by the arbitral tribunal in *LG&E*. In its decision, that tribunal said:

> "Based on the evidence before the Tribunal regarding the understanding of the Parties in 1991 at the time the Treaty was signed, the Tribunal decides and concludes that the provision [Article XI] is not self-judging."[549]

The passage just cited is of particular interest because it emphasises what has been said earlier,[550] namely, that what matters is the Parties' common intention at the time of signature in 1991, when negotiations had been concluded, rather than subsequent events.

597. The case-law reported above is particularly persuasive because the US has been one of the champions of self-judging clauses, a device which it has used at least since the end of World War II, witness the so-called Connally amendment embodied in the declaration made by the United States on 26 August 1946 under Article 36(2) of the Statute of the ICJ. In that declaration,[551] the US

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[547] *CMS, supra* note 48, § 370.
[548] *Ibid.*, §§ 367-374.
[549] *LG&E*, *supra* note 51, § 212.
[550] See *supra* § 564.
[551] See ICJ Yearbook 1985-1986, p. 60.

accepted the Court's compulsory jurisdiction, except for matters falling within its domestic jurisdiction "as determined by the United States." Surely the inclusion of that clause – which only ceased to exist when the US withdrew its declaration in 1985 – shows that the possibility of introducing a self-judging mechanism, coupled with the necessity of doing so explicitly, had been known to the US for many years and that the *Nicaragua* judgment did not, on this point, come as a surprise, even though, in that case, the ICJ did examine whether, implicitly, Article XXI of the Nicaragua-US Treaty of FCN of 1956 had a self-judging character.

598. Article 15 of the 1950 European Convention on Human Rights[552] allows States Parties, in time of war or other public emergency threatening the life of the nation, to derogate from their obligations under the Convention – except regarding Articles 2, 3, 4(1) and 7 – to the extent strictly required by the exigencies of the situation, provided that such derogations are not inconsistent with the Parties' other obligations under international law. A similar clause can be found in Article 27 of the 1969 American Human Rights Convention.[553] The case-law of the European Court of Human Rights shows that these provisions, despite their being emergency clauses, are far from being self-judging. In concrete cases brought before the Court and involving derogations formulated on the basis of those provisions, it is the European Court which determines whether they meet the conditions provided for in Article 15.[554]

599. According to Article 31(1) of the 1969 Vienna Convention, the terms of a treaty must be interpreted *in their context* (Article 31(1)). That notion is defined by Article 31(2) of the Convention as including, besides the body of the treaty, its preamble and its annexes – the "narrow" context – as well as (a) "agreements"

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[552] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, with Protocols Nos. 1, 4, 6, 7, 12 and 13*, available at: http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf

[553] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose, Costa Rica,"* available at: http://www.oas.org/Juridico/english/treaties/b-32.html.

[554] Human Rights in International Law. Collected Texts, 2nd ed., Strasbourg, Council of Europe Publishing, 2000, p. 453. See, for example, *Brannigan and McBride v. United Kingdom*, Judgment of 26 May 1993, ECHR Reports, Series A, No. 258-B, §§ 38-74; *Aksoy v. Turkey*, Judgment of 18 December 1996, ECHR, Reports 1996-VI, §§ 68-87; and *Demir and Others v. Turkey*, Judgment of 23 September 1998, ECHR Reports 1998-VI, §§ 42-58.

relating to the treaty made by all its Parties in connection with its conclusion; and (b) instruments "made" by one or several Parties to the treaty and accepted as such by the other Parties to the treaty. These agreements and instruments form what may be called the "wide" context.

600. So far as the 1991 BIT between Argentina and the US is concerned, it may be argued that its preamble and the body of the text show that this Treaty aims at creating a stable and prosperous investment climate in both countries. That aim could not be attained if the exceptions allowed by Article XI were considered self-judging. Remaining within the "wide" context, one may note that there are no "agreements" relating to the treaty made by all Parties in connection with its conclusion (Article 31(2)(a) of the Vienna Convention), nor are there any "instruments" emanating from one or more Treaty Parties, accepted by the other Parties and "connected with the conclusion of the treaty." Whatever may be and has been invoked by the respondent State – other BITs, the 1992 Model Treaty, etc. – is certainly not "connected *with the conclusion*" of the 1991 BIT between Argentina and the US.

601. Article 31(3) of the Vienna Convention does, however, mention elements *not connected with the conclusion of the treaty* and subsequent to the latter, *i.e.* (a) subsequent agreements between the Parties to the treaty regarding the interpretation or application of the latter's provisions; (b) any subsequent practice which establishes the agreement of the Parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the Parties.

602. While the above-mentioned sub-paragraphs (a) and (c) of Article 31(3) of the Vienna Convention do not appear relevant here, a closer look at sub-paragraph (b) – any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation – seems necessary. Indeed, it has been contended by Argentina that the views of the US on self-judging provisions of BITs and other agreements changed in 1992 and that Argentina accepted the change, the aggregate amounting to a subsequent agreement on the interpretation of Article XI of the 1991 Argentina-US BIT. There is, to be sure, a "subsequent practice" consisting in a changed negotiating

position; Argentina did not, however, have to approve or disapprove it since it did not relate to the interpretation of the 1991 BIT but to the American attitude in future negotiations with other States.

603. Even if this were not so, internal exchanges between the organs of one Contracting State, coupled with the silence of the other State, are not sufficient to produce an agreed practice of interpretation; at least *some* communication must be shown to have occurred, which is not the case here. According to the respondent State, the Argentinian "agreement" consists, *inter alia*, in Argentina's "awareness" that in its argument before the ICJ in the *Nicaragua* case, the US had alleged that the exception embodied in Article XXI of the US-Nicaragua Treaty of FCN – essential security interests – was self-judging and that, this being the case, the idea of self-judgment was also implicit in Article XI of the 1991 BIT between Argentina and the US. This line of argument seems far-fetched, and there is no evidence to support it. The provision in issue in the *Nicaragua* case defined the ICJ's jurisdiction in matters covered by the treaty and an exception thereto, related to "essential security interests," while the 1991 Argentina-US BIT pertains to substantive rights of individuals and companies and, moreover, contains not one but three exceptions in its Article XI (essential security interests, performance of obligations for the maintenance or restoration of international peace and security, maintenance of public order). Furthermore, the argument wholly overlooks the judgment in the case, which refuses self-judging character to a provision not unlike Article XI of the 1991 BIT. In reality, the signal received by both Argentina and the US in *Nicaragua* is likely to have been that no provision is self-judging unless the Parties clearly say so, which is not the case for Article XI. Finally, the "awareness" of Argentina seems to be of recent origin, having made its first appearance in the written pleadings on the substance of the present dispute.

604. A further element of interpretation to be examined is the *object and purpose* of the treaty (Article 31(1) of the Vienna Convention of the Law of Treaties). The purpose of BITs such as the present one is to establish a climate inducing investors of one State to invest on the territory of the other by creating, for both sides, reasonable conditions for the making of investments and for their

protection. The three elements embodied in Article XI of the 1991 Argentina-US BIT – and in similar provisions of other BITs – are part and parcel of the balance that must exist in such treaties. That balance would be disrupted if the legality of invoking one of the three elements present in Article XI were to be interpreted unilaterally by the State on whose territory the investments have been made. One could of course reply that the balance is restored by the fact that the recognition of a power of self-judgment for one Party entails the same power for the other Party on the basis of reciprocity. Would this re-adjust the balance? Not quite. BITs are about funds invested by foreign nationals, not about direct relationships between States. Therefore, self-judging exceptions such as that allegedly introduced into Article XI of the Argentina-US BIT by tacit consent would give extremely large powers to the State on whose territory the investment was made – the reference to good faith is of little help – and expose the investors to large risks.

605. The Vienna Convention on the Law of Treaties however departs from the rules in paragraphs 1 to 3 of Article 31 by stating, in its paragraph 4, that "[a] *special meaning* shall be given to a term if it is established that the Parties so intended." Article 31(4) must be read in conjunction with Article 32 of the Convention according to which recourse may be had to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion," if the interpretation obtained from the elements listed in Article 31: (a) leaves the meaning of a provision ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. Article 32 of the Vienna Convention adds that the supplementary means of interpretation mentioned by it – preparatory work, circumstances surrounding the treaty's conclusion – may also be used to confirm an interpretation already obtained *via* the elements listed in Article 31, which carries the implication that said supplementary means may equally be used to invalidate that interpretation.

606. To sum up, supplementary means of interpretation may be used:

- to establish a special meaning;
- to confirm or invalidate interpretations obtained by applying the elements listed in Article 31;

- to correct results so obtained if they are ambiguous, obscure, manifestly absurd or unreasonable.

607. Despite opinions according to which the supplementary means of interpretation cannot normally be resorted to – and this also seems to be the Claimant's view – the above explanations show that in practice it is always possible to have recourse to them.

608. The next question to consider is thus whether the results of the interpretation of Article XI of the 1991 BIT obtained by the application of Article 31 of the Vienna Convention are confirmed or invalidated if one turns to the supplementary means of interpretation mentioned in Article 32 of that Convention.

609. The Tribunal is not aware of any element suggesting that the interpretation of Article XI based on Article 31(1) to (3) of the Vienna Convention is wrong, ambiguous, obscure, manifestly unreasonable or absurd. On the contrary, insofar as any of the elements mentioned in Article 32 of the Convention can be identified, their use would confirm or at least not contradict the conclusion previously reached, *i.e*. that Article XI does not have self-judging character. Indeed, no *travaux préparatoires* to the contrary have been identified – declarations made in connection with other BITs or the 1992 Model Treaty do not qualify as preparatory work related to the present Treaty – and the same is true for the circumstances surrounding the latter's conclusion. The ICJ's Judgment in the *Nicaragua* case makes it clear that, to render a treaty provision self-judging, the intention to do so must be explicitly stated – which it was not – particularly where the treaty is equipped with a dispute-settlement mechanism, as is the case of the 1991 BIT.

610. For all these reasons, the Tribunal considers that Article XI of the 1991 Argentina-US BIT is not self-judging. In other words, it is the duty of the Tribunal first to interpret Article XI and then to decide whether or not the situation that prevailed in Argentina at the time of the impugned measures can be subsumed under the exceptions listed in that Article.

(ii) The Interpretation of Article XI: a General Approach

611. As far as the interpretation of Article XI is concerned, the Tribunal wishes to emphasise that a state of emergency can be of an economic nature, as stated by other ICSID tribunals in the Argentinian cases.

612. It will also be noted that no compensation must be awarded for damage suffered during the period of emergency, as the BIT does not apply in such a period, except if the State has substantially contributed to create it, while damages might be awarded for measures taken during the state of emergency and not cancelled when the state of emergency has ceased to exist.

(iii) The Interpretation of Article XI: Admissibility of the State's Defence under Article XI

613. As any other provision of the BIT, Article XI is interpreted on the basis of the Vienna Convention on the Law of Treaties. Further, as also recognised in *Continental*,[555] concepts used in Article 25 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts[556] "assist in the interpretation of Article XI itself." When interpreted in light of the above principles, the requirement under Article XI that the measures must be "necessary" presupposes that the State has not contributed, by acts or omissions, to creating the situation which it relies on when claiming the lawfulness of its measures.

614. Article 31 (3) of the Vienna Convention provides that the terms of a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to those terms in their context and in the light of the object and purpose of the treaty. As indicated in the preamble, the object and purpose of the BIT between Argentina and the US is to promote and improve the investment climate between the Contracting Parties, notably by establishing some stability regarding the status of investments.

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555 *Continental*, *supra* note 150, § 168.
556 ILC Articles, *supra* note 40.

615. That such stability cannot be total is stating the obvious. The world changes and so does the environment for foreign investment, especially when extraordinary circumstances appear. The host State is generally not responsible for the consequences of a state of emergency. It will be responsible, however, for the consequences of a state of emergency if it has significantly contributed to that situation. Holding otherwise would mean that Article XI of the Argentina-US BIT is not being interpreted in the light of its object and purpose, for that Treaty cannot possibly allow for the possibility that if the host State itself has caused or significantly helped to cause, intentionally or by omission, the situation and the consequences complained of, that State may shirk its obligations under the BIT by invoking Article XI. This conclusion is supported by other elements.

616. According to Article 31 (3) of the Vienna Convention, the interpretation of treaty rules should take into account, *inter alia*, "any relevant rules of international law applicable in the relations between the Parties." This approach to the interpretation of a treaty has also been adopted by the Iran-US Claims Tribunal in the *Amoco* case, where it stated:

> "As a lex specialis in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary international law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions."[557]

617. Surely one of those general rules of international law is that codified in Article 25(2) of the ILC's Articles on the Responsibility of States, which provides, in part, that: "In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: ... (b) The State has contributed to the situation of necessity."

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[557] *Amoco v. Iran*, Case No. 56, Chamber 3, Award No. 310-65-3 of 14 July 1987, § 112.

618. In its commentary on the above provision, the Commission points out, however, that "the [State's] contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral."[558] That this rule, as framed by the Commission, forms part of general international law is shown by the case-law of the International Court of Justice. Indeed, in its Judgment in the case of the *Gabčikovo-Nagymaros Project*, the Court held that:

> "Hungary would not have been permitted to rely on that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission, to bring it about."[559]

619. The rule in question has also been applied in interpreting Article XI of the Argentina-US BIT. As mentioned by the arbitral tribunal in *LG&E*,

> "[i]t seems logical that if the State has contributed to cause the emergency, it should be prevented from invoking the state of necessity. If there is fault by the State, the exception disappears, since in such case the causal relationship between the State's act and the damage is produced."[560]

And in *Continental*, the arbitral tribunal said, in connection with "essential security interests," which, under Article XI of the Argentina-US BIT, allows recourse to that Article, that

> " … if a Contracting Party to the BIT has contributed to endangering its essential security interest, for the protection of which it has then adopted the challenged measures, those measures may fail to qualify as 'necessary' under Article XI, since that Party could have pursued some other policy that would have rendered them unnecessary."[561]

620. The general applicability of the rule barring the invocation of necessity when the State concerned itself has created that necessity or has significantly contributed to it is also supported by other provisions of the ILC Articles

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[558] James Crawford, *The International Law's Commission Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge, Cambridge University Press 2002, p. 185.

[559] *Gabčikovo-Nagymaros Project* [hereinafter *Gabčikovo-Nagymaros*], (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, p. 43, § 57 *in fine*.

[560] *LG&E*, *supra* note 51, § 256. The award refers to the state of necessity under Article 25 of the ILC's Draft Articles, but its finding reflects a principle of general application.

[561] *Continental*, *supra* note 150, § 234.

dealing with the preclusion of wrongfulness. Thus, Article 23 (1) of that text, dealing with *force majeure*, provides that to invoke the latter, the event creating the necessity must have been "beyond the control of the State." Article 24(2)(a), for its part, relates to "distress" and rules out the preclusion of wrongfulness "if the State has contributed to the situation of distress." Thus, the rule expressed in Article 25(2)(b) of the ILC Articles concerns but one type of situation where "contributory behaviour" on the part of the State involved precludes reference to necessity.

621. So far, this Tribunal has limited itself to examining the question of whether the above-mentioned precept is a rule of general international law, applicable between the Parties to the BIT and, hence, a rule which may be used to interpret Article XI of the latter. It has reached an affirmative conclusion on this point. One could also ask whether the rule exists as a "general principle of law recognised by civilised nations" in the sense of Article 38 (1) (c) of the Statute of the ICJ.

622. Volumes have been written on the subject of "general principles." Some authors consider that the latter must meet requirements similar to those applied to customary rules (general practice and *opinio juris*), which suggests that in reality this category is not an autonomous one.[562] The mainstream view seems to be, however, that "general principles" are rules largely applied *in foro domestico*, in private or public, substantive or procedural matters, provided that,

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[562] Thus, B. Conforti, *Diritto internazionale. Manuali per l'Università Napoli*, Editoriale Scientifica, 2006, writes on pp. 40-41: "A nostro avviso due condizioni o requisiti debbono sussistere perchè principi statali possano essere applicati a titolo di principi generali di diritto internazionale. Occorre anzitutto che essi esistano e siano uniformemente applicati nella ***più gran parte*** degli Stati; in secondo luogo, e questa è la condizione più caratterizzante, occorre che essi siano sentiti come obbligatori o necessari anche dal punto di vista del diritto internazionale, che essi cioè perseguano dei valori e impongano dei comportamenti che gli Stati considerino come perseguiti ed imposti o almeno necessari anche sul piano internazionale." Emphasis in the text. "There are two conditions for principles of domestic law to be applied as general principles of international law. It is first of all necessary that they exist and are uniformly applied in the ***great majority*** of States; secondly, and this is the most characterising condition, they must be perceived as obligatory or necessary also from the point of view of international law, *i.e.* as upholding values and prescribing behaviour that States consider as pursued or prescribed or at least as necessary also at the international level." (Translation by the Tribunal.)

after adaptation, they are suitable for application on the level of public international law.[563]

623. That there is a general principle on the preclusion of wrongfulness in certain situations can hardly be doubted, as is confirmed by the UNIDROIT Principles on International Commercial Contracts, a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems.[564] Article 6(2)(2) of these Principles, dealing with "hardship," provides that events causing hardship must be "beyond the control of the disadvantaged Party." Article 7(1)(6) on "exemption clauses" prescribes that a party may not claim exemption from liability "if it would be grossly unfair to [exempt it] having regard to the purpose of the contract." Finally, Article 7(1)(7), relating to "force majeure" (*vis maior)* excuses non-performance of a contract

> "… if that Party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences."[565]

Exemption from liability for non-performance or other forms of relief are therefore excluded under the UNIDROIT Principles if the Party claiming it was "in control" of the situation or if it would be "grossly unfair" to allow for such exemption.

624. It follows from the above that: (i) there is a rule of general international law which provides that necessity may not be invoked as a ground for precluding wrongfulness if the State concerned has significantly contributed to creating that necessity; (ii) there also seems to be a general principle of law recognised

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563 On this matter, and on the distinction between "general principles of law recognised by civilised nations" and "general principles of international law," see, *e.g.*, H. Mosler, "General Principles of Law," *in*: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. II (E-I), Amsterdam, 1995, North-Holland, pp. 511-527.

564 M. J. Bonell, An International Restatement of Contract Law - The UNIDROIT Principles of International Commercial Contracts, Transnational Publishers, Inc., Irvington, NY, 3rd ed. 2005.

565 International Institute for the Unification of Private Law (UNIDROIT), *UNIDROIT Principles of International Commercial Contract 2004*, available at:
http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf.

by civilised nations that necessity cannot be recognised if a Party to a contract has contributed to it. This means that the rule or principle in question may be used, under Article 31 (3) of the Vienna Convention, to ascertain the meaning of Article XI of the Argentina-US BIT. Accordingly, that Article may be taken to mean that necessity cannot be invoked by a Party having itself created such necessity or having substantially contributed to it.

625. Before examining whether Argentina has contributed to creating the situation on which it relies under Article XI, it is necessary to determine which Party bears the burden of proof in that regard. The Respondent appears to accept that it has to prove the defence it advances, namely, its entitlement to relying on "necessity", since in its view the events of 2001 required emergency measures.[566] The Claimant concurs but suggests that it is up to Argentina also "to demonstrate that the alleged economic situation was not self-inflicted."[567]

626. It is the Tribunal's view that the existence of the conditions for the application of Article XI, *i.e*. whether: (a) public order or essential security interests are at stake, and (b) whether the measures are necessary to maintain the former or protect the latter, is to be proved by the Respondent since it relies on such facts to preclude a finding that the measures breached the BIT.[568] Conversely, it is incumbent upon the Claimant to prove Respondent's contribution to bringing about the necessity of the measures since it relies on such a contribution as a defence against the application of Article XI.[569]

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[566] Counter-Memorial, §§ 106-139 (the issue of Argentina's contribution to the crisis is examined in §§ 755-761).
[567] Reply, §§ 687 and 707 (including footnote 1103).
[568] Bing Cheng, *General Principles of Law Applied by International Courts and Tribunals*, Cambridge, Cambridge University Press 2006, § 987, p. 334: "the burden of proof rests upon the party alleging the fact…."
[569] In *LG&E*, the tribunal held that the burden of proof was on the Claimants: "Claimants have not proved that Argentina has contributed to cause the severe crisis faced by the country." *LG&E, supra* note 51, § 256.

(iv) The Application of Article XI: The Parties' Positions on the State's Contribution to the Economic Crisis of 2001

(a) The Claimant's Position

627. The Claimant contends that "Argentina's economic 'emergency' of 2001 was almost entirely a result of the economic policy failures of the Argentine authorities."[570] In order to substantiate its position, the Claimant has produced a report by a macroeconomic expert, Professor Sebastian Edwards, dated 26 November 2006 and accompanied by many exhibits ("Edwards Report"). The Tribunal will therefore examine the Edwards Report as detailing the Claimant's position on the issue.

628. The Edwards Report asserts that "[t]he Argentine economic crisis of 2001-2002 was primarily self-induced"[571] and explains that a significant portion of Argentina's responsibility for its economic and currency crisis of 2001 is related to the failure to implement structural reforms that the currency board system (*i.e.* the currency system that pegged the Argentinian Peso to the US dollar) needed in order to succeed. For Argentina's currency board to work properly and remain viable over the medium or long term, there were at least four broad categories of supporting measures that Argentina needed to implement:

- Achieve and maintain fiscal discipline. In the absence of balanced fiscal accounts, a currency board would not be credible, and the public would end up withdrawing deposits from the banking sector. This would restrict liquidity and result in higher interest rates, which in turn would provoke a decline of investment and economic growth. Furthermore, during economic expansion, the public sector should run surpluses and build up

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[570] Reply, § 679. Claimant's Memorial addresses this issue by pointing to the requirement, under Article 25 of the ILC Draft Articles, that "… the GOA did not contribute to the situation of alleged necessity," Memorial, § 569, relying on the *Gabčikovo-Nagymaros* Judgment, *supra* note 559, Memorial, § 574.

[571] *Expert Report of Professor Sebastian Edwards* [hereinafter Edwards Report] of 26 November 2006, § 5 and § 41. Claimant's Exhibit No. 212.

fiscal reserves in order to provide a cushion during economic downturns and to enable the economy to face adverse international shocks.[572]

- Achieve and maintain labour market flexibility. In the absence of exchange rate flexibility, an economy needs labour market flexibility in order to accommodate external shocks. Competitiveness must therefore be achieved through a reduction in labour costs. However, if the labour market is heavily regulated and inflexible, labour costs will not decline and competitiveness will not improve; this will result in a higher rate of unemployment.[573]
- Open its economy by reducing barriers to foreign trade. If a currency board economy has a low degree of openness to international trade, even a modest external shock will result in a large decline in growth, since the GDP is forced to contract significantly in order to bring about a modest reduction in imports. However, in a currency board economy that is open to trade, even a large external shock will have a minor impact on economic activity.[574]
- Show firm governmental resolve to maintain the currency peg. If the credibility of the government's resolve to maintain the currency peg wanes, the public will begin to withdraw deposits. As deposits decline, bank liquidity diminishes, which leads to higher interest rates and a decline in economic activity. As the economy slumps, credibility and deposits are likely to decline further.[575]

629. Recommendations to that effect were made repeatedly by the IBRD, the IMF and others. In short, the GOA knew precisely what it needed to do to make the currency board work. It also fully understood that if it did not implement the required reforms, Argentina's economy would remain highly vulnerable, and a future currency crisis would be inevitable.[576] Despite this knowledge, Argentina's leaders never had the political will to implement the measures

[572] *Ibid.*, § 37.
[573] *Ibid.*
[574] *Ibid.*
[575] *Ibid.*
[576] *Ibid.*, §§ 38-39.

required. Fiscal responsibility, labour market flexibility and an open-trade policy each entailed a political price, and the Government simply never mustered the political will to pay that price. In the fiscal arena, Argentina ran large and increasing deficits throughout the 1992-2000 period. During many of the "good years," GDP growth was strong, and Argentina could have run surpluses to build up reserves as a cushion for a future economic downturn.[577]

630. Although the GOA could have implemented a variety of measures during the 90s to strengthen fiscal discipline, one of the most obvious and significant steps that it could have taken, according to the Claimant – but did not take – was to reduce provincial spending. Doing so would have required the Government fundamentally to reform Argentina's "Co-Participation Law" of 1988, which created strong incentives for fiscal indiscipline on the part of the country's provincial governments. The Co-Participation Law provided for large transfers of tax revenues from the Federal Government to the provincial governments, and these transfers accounted for a significant portion of Argentina's total public sector expenditure.[578]

631. By 2001, Argentina's economic condition had further declined, and the pressures on the currency board had grown. Nevertheless, Argentina still took no serious action to implement the structural reforms so desperately needed by its economy, such as the fundamental reform of the highly destabilising and perverse Co-Participation Law, the curtailment of aggressive public sector spending, the reform of the onerous and highly inefficient system of union-run social services ("*obras sociales*") and the elimination of protectionist trade practices.[579] Instead, the GOA embarked on a series of short-term manoeuvres such as the "Zero-Deficit" policy based on measures (such as the reduction in Government employees' salaries and pensions) that further reduced credibility, signalling a lack of commitment to the Convertibility Law.[580]

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577 *Ibid*., §§ 48-49.
578 *Ibid*., §§ 52-53.
579 *Ibid*., § 65.
580 *Ibid*., §§ 67 and 69.

632. One of the most important policy mistakes of 2001, according to the Claimant, was postponing fiscal and provincial adjustments until after the elections of October 2001. The Minister of the Economy, Domingo Cavallo, actively discussed the serious need to reform the Co-Participation Law and reduce provincial spending. That discussion, however, was put off until mid-October 2001. The governing coalition was concerned about the congressional elections of 14 October 2001, and provincial governors were spending heavily in support of their senatorial candidates. The day after the elections, Minister Cavallo proposed to reform the Co-Participation Law, to reduce the size of the public sector and to restructure provincial debts, but once again politics prevailed and the governors rejected the proposals. As a result of "quick-fix" measures taken in 2001, as well as the almost massive issuance of "*quasi-monies*" by the provinces and the refusal to reform the Co-Participation Law, confidence in the currency board and the stability of the banking system and of the currency board regime was increasingly at risk. The Argentinian public as well as the international financial community drew the obvious conclusion that Argentina's political leadership would not undertake the serious reforms required by the currency board. In November 2001, Standard & Poor lowered Argentina's long-term sovereign rating to "selective default."[581]

633. Contrary to what was suggested by the GOA and its expert, Professor Roubini, external shocks played a limited role in Argentina's economic crisis. However, misguided internal policies significantly *amplified* [582] the effects of external shocks on the Argentine economy. Many Latin-American countries experienced more severe external shocks than Argentina, yet did not suffer a major crisis. Moreover, most of the external shocks affecting Argentina (such as the decline in export prices, the increase of international interest rates and the growing strength of the U.S. dollar in international markets) were temporary phenomena that reversed in late 2001.[583]

[581] *Ibid.*, §§ 70-72.
[582] *Ibid.*, §§ 10 and 170.
[583] *Ibid.*, §§ 12 and 172.

(b) The Respondent's Position

634. In its Counter-Memorial, the Respondent, referring to Article 25 of the ILC Articles, denies having contributed to the occurrence of the state of necessity. Argentina relies on the requirement that any such contribution must be sufficiently substantial, not merely incidental or peripheral, to disregard the existence of a state of necessity.[584]

635. If the requirement of a lack of contribution were to be interpreted in such an extensive way, it would be impossible for a State to invoke the state of necessity as a circumstance precluding wrongfulness.[585] Quoting its experts, the Respondent suggests that "it strains credulity to think that Argentina intentionally sought to cause the financial collapse of 2000-2001."[586] Still relying on its experts, the GOA points to the considerable bearing that external factors, such as IMF policies and the state of the global economy, had on Argentinian economic policies.[587]

636. Regarding the defence of necessity, in the Rejoinder, Argentina deals separately with Article XI and Article 25 of the ILC Draft Articles. However, the Respondent refers essentially to Article 25 when dealing with the issue of "non-contribution."[588] It addresses issues raised by the Edwards Report by invoking essentially the Report by Professor Nouriel Roubini of 24 August 2006 presented with the Counter-Memorial (the "Roubini Report"), and the Report by Professors Robert Frenkel and Mario Damill, undated but appended to the Rejoinder (the "Frenkel-Damill Report"). The Roubini Report pre-dates the Edwards Report but deals with some of the issues considered by the latter. The Frenkel-Damill Report is in part a response to the Edwards Report, as evidenced by its title: "Diagnosis of the Crisis and Measures of the Argentine Government and Reply to Professor Sebastian Edwards' Report." These

584 Counter-Memorial, §§ 755-756.
585 Rejoinder, § 563.
586 Slaughter/Burke-White Report, *supra* note 523, § 102 (quoted in Counter-Memorial, § 757).
587 Counter-Memorial, §§ 758-760.
588 Rejoinder, §§ 559-565.

Reports will be analysed hereafter to the extent to which they deal with Argentina's contribution to the crisis.

637. According to Professor Roubini, Argentina's fixed-exchange-rate regime was not sustainable as it was inconsistent with economic and macroeconomic fundamentals, and was worsened by domestic and external shocks. When this regime became unsustainable, there was a run on the reserves of the Central Bank; and when these reserves were exhausted, there would be a currency collapse and a depreciation/devaluation of the currency. After this occurred in Argentina, the only economically sensible option was to abandon convertibility, to repeal the currency board and to move to a floating exchange rate, the experience of Argentina being the rule rather than an exception among emerging market economies.[589]

638. The following macroeconomic factors made it unavoidable for Argentina to abandon the currency board regime:

> "i) a series of shocks to the economy; ii) large fiscal imbalances and debt accumulation; iii) structural vulnerabilities; iv) currency overvaluation and large and eventually unsustainable external imbalances and loss of competitiveness."[590]

639. Several external shocks were identified by Professor Roubini, including (but not limited to): a "sudden stop" of capital inflows in 1998 and 1999, making the cost of borrowing in the international market higher and the quantity of funds more limited; the sharp devaluation of the Brazilian currency; the general strengthening of the US dollar against the euro and other major currencies between 1998 and 2001, causing Argentina to lose competitiveness in European and other markets since the peso was tied to the appreciated US dollar. The combination of these shocks slowed GDP growth in the second half of 1998 and produced an increasing recession until 2001.[591]

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[589] Roubini Report, *supra* note 252, §§ 12, 13 and 15.
[590] *Ibid.*, § 17.
[591] *Ibid.*, §§ 18-19.

640. Fiscal deficits and debt accumulation worsened after 1998 because of a fall in revenues, a cyclical increase in spending and the sharp increase in interest payments resulting from the sharp increase in the foreign debt sovereign spread and domestic interest rates. Fiscal deficit and debt accumulation were exacerbated by an increase in nominal and interest rates for Argentina after 1998, due partly to the worsening domestic fiscal position and the successive Governments' inability to achieve sufficient surpluses.[592]

641. Other structural vulnerabilities included: the reduced openness of the economy due to a long history of inward-oriented trade policies; labour market rigidities; a very large external debt-to-exports ratio; and an enormous currency mismatch due to the fact that almost the entire domestic and external Government debt was denominated in dollars.[593]

642. According to Professor Roubini, these factors made the fixed exchange rate regime inconsistent with economic fundamentals and led to a currency crisis. Argentina's macroeconomic hands were tied since it could not adjust its currency peg without bankrupting many firms while its high existing debt prevented it from running a counter-cyclical fiscal policy.[594]

643. In their rebuttal of the Edwards Report, Professors Frenkel and Damill contend, first, that since macroeconomics are not an experimental science, the views put forward by Professor Edwards are only his own.[595] They are of the opinion that external factors were the proximate cause of the crisis (the decline of export prices, the US dollar revaluation, the massive drop in the prices of emerging market bonds, the subsequent rise of country risk premium and interest rates after the Eastern Asia crisis, and the devaluation of the Brazilian currency). Regarding individual issues raised by the Edwards Report, the following is noted by Damill and Frenkel:

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[592] *Ibid*., §§ 21-22.
[593] *Ibid*., § 24.
[594] *Ibid*., §§ 30-31.
[595] Mario Damill and Roberto Frenkel, *Diagnosis of the Crisis and Measures of the Argentine government, and reply to Professor Sebastian Edwards Report* [hereinafter Damill and Frenkel Report], § 171. Annex to the Rejoinder.

(a) a high level of wages, reducing the competitiveness of the economy: reforms were implemented in the 1990's which, according to Professor Edwards, were not sufficient to solve the problem; to reach the required labour market flexibility, however, would have meant an increase in the unemployment rate, thus worsening the problem;[596]

(b) as to the measures which, according to Professor Edwards, should have been adopted in 2001 to avoid the devaluation, the default by the public debt and the pesification, they were: (i) exchanging bonds for bonds with longer maturity and, possibly, a lower interest rate: this took place in June 2001 through a voluntary debt swap (megaswap), but with no result;[597] (ii) "dollarisation": this was not feasible since the Central Bank would not have had available the amount of liquid US dollars needed to implement the measure; furthermore, it would have meant a dollarisation by the GOA of private contracts in order to change their currency from Argentine Pesos to US dollars, with the same effects that were complained of for the pesification, without the withdrawal of bank deposits being prevented.[598]

644. Regarding the fiscal evolution, Professor Edwards selectively quoted figures from secondary sources.[599] According to Professor Edwards' sources, Argentina's fiscal performance, improved during 1992-1996, declined in 1997 (2.1% of the GDP), climbed to 3.7% in 1998 and 6.6% in 1999. Professors Damill's and Frenkel's figures, based on more reliable sources, are different, showing a deficit of just 0.56% of the GDP in the 1991-1994 period. The difference is due to the fact that Edwards' secondary source considers debts incurred before the introduction of the currency board as expenditures. Between 1995 and 1997, the fiscal situation deteriorated because of the pension system reform implemented from 1994 onward.[600] Fiscal surplus in any case is

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596 *Ibid.*, §§ 179-181.
597 *Ibid.*, §§ 186-187.
598 *Ibid.*, §§ 188-191.
599 *Ibid.*, § 204.
600 *Ibid.*, §§ 207-210.

not synonymous with immunity to crisis. The fiscal situation significantly deteriorated from 1997 on, when the economy was affected by external shocks.[601]

645. As to the role of the Provinces in the deterioration of fiscal accounts during the development of the crisis, Professor Edwards, according to Frenkel and Damill, fails to consider that a reform in this area would have involved major institutional problems (Argentina being a federal State) and taken a lot of time. After all, the provincial deficit had a limited influence on the increase in the aggregate imbalance of public accounts during the crisis.[602]

646. As to external shocks being only "temporary," this fails to consider that even though temporary, they may have lasting effects. The Brazilian crisis caused extensive damage to the Argentine economy.[603]

647. As to Argentina's economy being "closed," Frenkel and Damill point out that Argentina initiated more open trade at the beginning of the 90s. However, the ratio between international and domestic trade flows depends not only on such governmental policies but also on the behaviour of individuals. The degree of openness rose until 1997, dropped in 1998-2001, to rise again thereafter. So, trade protectionism did not frustrate the design of Argentina's economic policy.[604]

648. During the hearing, Professors Damill and Frenkel mentioned that a financial system may collapse "if [the process is] not arrested in time and if measures are not taken to arrest it, if the State does not intervene to break those trends."[605] There was an improvement in Argentina's fiscal policy due to measures adopted during 1998-2001, but it was not sufficient to prevent contagion by the

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601 *Ibid.*, § 213.
602 *Ibid.*, § 214.
603 *Ibid.*, § 217.
604 *Ibid.*, Table 6 on p. 72 and § 224.
605 Hearing Transcript in English, *supra* note 67, Day 7, p. 1904.

Southeast Asia crisis which increased the risk premium and interest rate, thus increasing public indebtedness.[606]

(v) The Application of Article XI: The Tribunal's Analysis of the State's Contribution to the Economic Crisis of 2001

649. In addressing the question of whether Argentina contributed to the situation of necessity on which it relies to assert the lawfulness of the measures taken by it, the Tribunal will be guided essentially by two considerations. On the one hand, it acknowledges Argentina's right as a sovereign State to choose the economic policy best suited to the needs of the population. In that respect, the Tribunal is far from suggesting that actions by Argentina were specifically intended to hurt foreign investors or some of them, as Argentina appears to understand the Claimant's position.[607] On the other hand, it will take due account of the fact that the protection offered by the BIT to the Claimant's investment is suspended to the extent that Article XI is applicable, which makes it necessary to analyse carefully all the conditions for the application of that Article.

650. In conducting this analysis, the Tribunal shall not adopt a restrictive interpretation of necessity and its consequences under Article XI, as has been done by other tribunals in connection with the state-of-necessity defence under Article 25 of the ILC's Articles.[608] As mentioned in its Decision on Jurisdiction in the present dispute,

> "[t]his Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[609]

It will rely on the evidence made available by the Parties in these proceedings, with very limited consideration of prior decisions in other cases involving

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[606] *Ibid.*, p. 1914.
[607] See *supra*, § 635.
[608] United Nations, *Report of the International Law Commission, Fifth-Third (53th) Session*, Fifty-Sixth Session, Supplement No. 10 (A/56/10), 2001, § 20 (p. 205): "necessity needs to be more narrowly confined."
[609] Decision on Jurisdiction, *supra* note 58, § 70.

Argentina since the arguments and evidence placed before each tribunal are not the same in every case. Finally, the Tribunal will take account of the fact that, as already mentioned,[610] the Claimant bears the burden proving the facts regarding Argentina's contribution to the economic crisis of 2001.

651. The review of the experts' reports conducted by the Tribunal allows it to single out a few aspects on which there is some convergence of opinions.

652. Argentina's expert, Professor Roubini, acknowledges the significant role that Argentina's fiscal deficits and debt accumulation played in provoking the currency crisis of 2001. Although maintaining that the country's fiscal problems were partly aggravated by recession and external interest rates after 1998, his report suggests that the GOA's lack of fiscal control was already a problem by that time, as is shown by the following quotations:

> "Argentina's fiscal deficits and debt accumulation worsened after 1998";
>
> " … while for the first few years the currency board was viable based upon economic fundamentals, starting in 1998 it became increasingly vulnerable and eventually not viable because of: . . . large fiscal imbalances and debt accumulation …;"
>
> "Fiscal deficits and debt accumulation – partly worsened by recession and external interest rate shocks – made the pegged parity fragile and vulnerable to a speculative attack;"
>
> "In Argentina, persistent fiscal deficits … led to an accumulation of a growing stock of public debt, particularly as the economy began to shrink and interest rates rose after 1998."[611]

Professor Edwards also considers the absence of fiscal discipline as one of the causes of the economic and currency crisis of 2001.[612]

653. Professor Roubini equally concurs with Professor Edwards' view that Argentina's failure to liberalise labour markets and trade policies played a

[610] See *supra* § 626**.**
[611] Roubini Report, *supra* note 252, §§ 16-17 and 21-23.
[612] Compare with the Edwards Report, *supra* note 571, § 14.

significant role in bringing about the 2001 currency crisis. He concedes that Argentina's "inward-oriented trade policies" and "labour market rigidities" "made the fixed-rate regime fragile and vulnerable to shocks."[613]

654. The experts diverge in their analysis of responsibility for causing the Argentina economic and currency crisis. While the Edwards Report considers such crisis to have been primarily self-induced by Argentina,[614] Professor Roubini generally attributes the currency collapse to macroeconomic factors as including external shocks, although he concedes that "slippages of fiscal policy"[615] occurred, an expression suggesting a reduced level of attention or performance.[616]

655. Professors Frenkel and Damill's rebuttal of the Edwards Report is rather polemical and only in part based on data from external sources;[617] no evidence is provided by the two experts in support of their various contentions. This is striking, considering that the Frenkel-Damill Report was meant to rebut that of Professor Edwards, a comprehensive, very detailed and well-documented work.[618] The remark that Professor Edwards expressed only personal opinions therefore appears misguided.

656. It is clear from the evidence filed in the present proceedings that both internal and external factors were at the root of the economic crisis that occurred in Argentina at the end of 2001. Having fully considered the Parties' arguments and the evidence before it, a majority of the Tribunal has reached the conclusion that Argentina's failure to control several internal factors, in

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[613] Roubini Report, *supra* note 252, § 24; title of Section V.
[614] *See supra*, § 404.
[615] A lively debate took place at the hearing during the cross-examination of Professor Roubini regarding his use of the expression "slippages of fiscal policy." See Hearing Transcript in English, Day 2, pp. 344-346. The same expression was used by Professor Roubini during the hearing in the *Enron* case, see the relevant transcript shown by Mr. Schiffer (for the Claimant) to Professor Roubini during his cross-examination. Argentina objected to the document being shown at the hearing but the Chairman allowed the examination of Professor Roubini to continue. See Hearing Transcript in English, Day 2, pp. 342-343.
[616] The word "slippage" is given, among others, the meaning of "a decline in level, performance or achievement" by *The American Heritage Dictionary of the English Language*, 4th ed., 2006.
[617] Such as the rate of openness of Argentina's economy, Table 6 of Damill and Frenkel Report, *supra* note 595, p. 72.
[618] The Edwards Report, *supra* note 571, is accompanied by 166 exhibits.

particular the fiscal deficit debt accumulation and labour market rigidity, substantially contributed to the crisis. The progressive worsening of internal factors diminished Argentina's ability to respond adequately to external shocks, unlike what happened in other South American countries.

657. The Tribunal's conclusion finds support in independent and authoritative sources. Reference may be made to the IMF Independent Evaluation Office's (IEO) Evaluation Report of 2004: "The IMF and Argentina, 1991-2001."[619] That Report contains a comprehensive analysis of Argentina's situation in that period. The Report was examined and presumably approved by the Argentinian authorities and benefited from substantive contributions by Nouriel Roubini, Argentina's expert in the present proceedings.[620]

The following passages of the IEO Executive Summary are significant:

> "The crisis resulted from the failure of Argentina policymakers to take necessary corrective measures sufficiently early, particularly in the consistency of fiscal policy with their choice of exchange rate regime. The IMF on its part erred in the precrisis period by supporting the country's weak policies too long, even after it had become evident in the late 1990s that the political ability to deliver the necessary fiscal discipline and structural reform was lacking."

> "While fiscal policy improved substantially from previous decades, the initial gains were not sustained, and the election-driven increase in public spending led to a sharp deterioration in fiscal discipline in 1999. As a result, the stock of public debt steadily increased, diminishing the ability of the authorities to use countercyclical fiscal policy when the recession deepened."

> "Insufficient attention was paid to the provincial finances, the sustainable level of public debt for a country with Argentina's economic characteristics was overestimated, and debt sustainability issues received limited attention."

> "The IMF correctly identified structural fiscal reforms, social security reform, labour market reform, and financial sector reform as essential

[619] *Ibid.*, Claimant's Exhibit No. 34. IMF, Independent Evaluation Office, *The IMF and Argentina 1991-2001, 2004* [hereinafter IMF Evaluation Report].
[620] IMF Evaluation Report, p. vii.

> to enhancing the medium-term viability of the convertibility regime, by promoting fiscal discipline, flexibility and investment."
>
> "Some gains were made in the early years, but the long-standing political obstacles to deeper reforms proved formidable. Little progress was made in later years, and the earlier reforms were even reversed in some cases."[621]

658. A considerable number of statements made by Argentina in official documents, by its own witnesses and by qualified international experts have been placed in evidence in the present proceedings; they confirm the substance of the Edwards Report as well as the analysis and conclusions of the IEO Report. The following statement made in Argentina's SEC Filing (2004) may be quoted here:

> "The sustainability of Argentina's economic growth during the 1990s was *undermined by the Government's inability to maintain fiscal discipline*. Instead of capitalizing on periods of sustained growth and rising revenues to balance its budget and pay down its debt, the Government continued to incur overall fiscal deficits. This resulted primarily from inability to achieve political consensus about needed reforms, failure to reform revenue-sharing arrangements with the provinces, increasing debt service obligations and a widening gap between the Government's social security revenues and social security outlays attributable to the privatization of the social security system. The Government's inability to set its finance on a more sustainable course also undermined confidence in Argentina among foreign investors, increasing the Government's borrowing costs and threatening the capital inflows on which the country had come to depend."[622]

659. According to the former Argentine Minister of the Economy and Finance, Domingo Cavallo,

> "[t]he most important lesson to be learned from the Argentine experience relates to the importance of fiscal policy and, particularly, of fiscal discipline during good times. In my 1994 interview, I emphasized the role of fiscal balance as a precondition for stability. However, stability requires more than just that. During periods of

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[621] *Ibid*., p. 4.
[622] Amendment No. 3 to Registration Statement Under Schedule B of the Securities Act of 1933, The Republic of Argentina (registrant), as filed with the Securities and Exchange Commission on 28 September 2004, p. 14. Claimant's Exhibit No. 373. Emphasis added by the Tribunal.

> rapid growth and favorable external conditions, it is necessary to generate fiscal surplus as a cushion for the negative external shocks that may show up unexpectedly at any moment. Argentina should have done this between 1991 and 1994, and again between 1996 and 1998, but it did not. Therefore, at the time of external shocks, it depended on foreign financing precisely at a time when foreign expectations turned sour."[623]

660. Alieto Guadagni, a witness for Argentina and Secretary for Energy in 2002, stated, in an article published in April 2002, that:

> "Convertibility proved to be a simple and efficient regime. Yet it failed because it was not supported by a State that would observe the reasonable restrictions on progressive fiscal deficit accumulation, which worked to blow up the colourful balloon of public debt year after year. In January 2002, the balloon finally burst, and the two Ds' (devaluation and default) started walking the path of uncertainty."[624]

661. And, on 2 July 2004, Eduardo Duhalde, President of Argentina at the time of the crisis, wrote in the *Financial Times* that:

> "In the case of Argentina, no one bears more of the blame for the crisis than Argentina itself. We spent more than we earned; we failed to complete the full cycle of economic reforms; and we tied ourselves to the most productive economy in the world without building our own productivity. Of course, this was compounded by the global decline in commodity prices, by protectionism in key markets and by shifts in global capital flows. *Yet Argentina's crisis is largely home grown.*"[625]

662. In 2002, Professor Gary Becker, 1992 Nobel Economist of the University of Chicago, found that "[t]he current [2002] crisis again is mainly due to politicians who continued to borrow on the international capital market to finance large and growing budget deficits." [626]

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[623] Domingo Cavallo, "Eleven Years Later: What Went Wrong in Argentina, 2003 – 2006," Vol 27, *Harv. Int'l Rev*. 42, 45 (Fall 2005). Claimant's Exhibit No. 273, p. 4.

[624] Alieto Guadagni, "El fin de una ilusión: la crisis argentina de 2002" *Revista de Occidente* No. 251, Madrid, April 2002, p. 63. Exhibit 10 to Witness Statement of Alieto Aldo Guadagni.

[625] Eduardo Duhalde, *Argentina Regrets*, Financial Times (FT.com), 12 July 2004. Claimant's Exhibit No. 271. Emphasis added by the Tribunal.

[626] Gary S. Becker, *Deficit Spending Got Argentina Into This Mess*, Business Week 26, No. 3769, 11 February 2002, p. 1. Claimant's Exhibit No. 149.

663. The same Professor S. Becker concluded three years later that the GOA's lack of fiscal discipline led to the eventual crisis: "the Argentina problem arose because spending by the government, including the provinces, was very excessive and was not controlled." [627]

664. In an article published on 25 March 2002, Michael Moussa, Senior Fellow, Institute for International Economics in Washington, D.C., wrote:

> "Enumerating the many things that contributed to Argentina's tragedy, however, should not obscure the critical failure of *Argentina's economic policy* that was the fundamental cause of disaster – namely the chronic inability of the Argentinian authorities to run a responsible fiscal policy. This is an old and a sad story for Argentina."[628]

665. It is true, as has been said, that, "qualified observers remain in disagreement as to the exact causes of the crisis and the mix of measures that might have avoided it."[629] However, having found that Article XI is not "self-judging," the Tribunal has the power and duty to make sure that all conditions for its application are satisfied, including the absence of a substantial contribution by Argentina to the crisis of 2001. While accepting that "in economic matters, the analysis of causation … does not lend itself to the same scientific analysis as in the domain of the so-called exact sciences and of natural phenomenon,"[630] the evidence presented by the Claimant regarding the actions and omissions by Argentina until the end of 2001, and Argentina's own admission of its "inability to maintain a fiscal discipline," support the conclusion of a majority of the Tribunal that Argentina contributed to the crisis to a substantial extent, so that Article XI cannot come to its rescue.

666. Arbitrator Stern, while she agrees, as a matter of principle, with the theoretical analysis of the role played by the contribution by a State to a situation of

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[627] Gary S. Becker, *Falta mucho para la recuperación argentina dice Gary S. Becker: Reflexiones del Nobel de Economía 1992*, La Nación, 17 August 2005, p. 2: "El problema argentino surgió porque el gasto del gobierno, incluyendo a las provincias, fue muy excesivo y no fue controlado." Claimant's Exhibit No. 274

[628] Mussa, Michael, *Argentina and The Fund: From Triumph to Tragedy*, Institute for Intemational Economics, Washington, D.C., 25 March 2002, p.6, Annex 5 to the Edwards Report, *supra* note 571.

[629] *Continental*, *supra* note 150, § 224.

[630] *Ibid.*, footnote 357, pp. 105-106.

necessity as expressed in paragraphs 613-626, does not consider that, on the concrete level, the contribution of a State to an economic crisis should be lightly assumed – should the US be held responsible of the worldwide sub-prime crisis as it contributed to it, because the SEC did not monitor the banks closely enough? Moreover, she is of the view that, considering the facts of this case, the substantial contribution of the Argentine authorities to the crisis has not been sufficiently proven by strong and uncontroverted evidence presented by the Claimant.

667. Arbitrator Stern disagrees with the far-reaching conclusion by the majority, which is not based, in her view, on an in-depth understanding of the intricacies of economic development. It should not lightly be assumed that a State is responsible for an economic collapse in a liberal market economy, where the invisible hand of the market is more powerful than the hand of the State. The majority, after having presented the experts' evidence on both sides and concluded that the latter diverged on the analysis for the responsibilities of the economic crisis, the Claimant expert considering, not surprisingly, that the crisis was primarily self-induced and the Respondent's expert holding, unsurprisingly too, that the essential factors of the crisis were external shocks. The experts have presented contradictory analyses. The IMF itself recognised that it made mistakes in monitoring Argentina's problems, as can be seen in the citation of one of its reports in paragraph 657 of this Award, where it is recognised that "the IMF on its part erred in the precrisis period."

668. Economics is a complicated science or, better, a complicated art; the mere reading of the analyses of the experts of both Parties show that there is little certainty. In Arbitrator Stern's view, the conclusion reached by the majority is based essentially on a comparative analysis of the expert reports, the Edwards' Report being described as "comprehensive, very detailed and well documented," while the Frenkel/Damil report is said to be "rather polemical and only in part based on data from external sources." In her view, the situation of the Argentine economy was extremely serious and *out of control* by any definition. Many publicly well known events support this conclusion, and there is no reason to doubt the statement, made by Argentina, that it was "the worst

economic crisis (which later became a political and institutional crisis) ever experienced by the Argentine Republic as from its onset in 1810."[631] A serious clue to the gravity of the crisis was the decrease of Argentina's contribution to the United Nations:

> "In May 2002, the critical situation caused the United Nations Organization General Assembly to reduce Argentina's contribution to such organization. It was *the first time in history* that the organization decreased the contribution to be made by a member state and the decision was taken unanimously by its members."[632]

669. Moreover, according to Arbitrator Stern, the measures adopted were necessary to prevent the crisis from resulting in anarchy and social disintegration and they constituted a suitable means to overcome the chaos. It should also be recorded that the policies followed by Argentina before the crisis were generally supported by the World Bank and that the measures taken to address the crisis had the support and encouragement of the IMF. This has been stressed, for example, in *Continental*:

> "In its *Second Review* of January 2001, the IMF staff noted that "the external environment worsened in the subsequent months, with external financing to emerging markets nearly drying up. This was compounded by domestic political uncertainties, which raised doubts about the political governability of the country. (…) The authorities have responded to these adverse developments by strengthening the growth orientation of their economic program, through measures aimed at promoting a recovery of investment, and an accelerated implementation of structural reforms…. "*In view of the staff, this strategy is appropriate, and deserves the increased financial support of the international community … A recovery of confidence hinges*, in turn, not only on a relatively benign international environment, but perhaps more importantly, *on a demonstrated, unwavering commitment by the authorities to a rapid and full implementation of their announced policies.*"[633]

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[631] Counter-Memorial, § 108.

[632] Counter-Memorial, § 120 referring to Report of the Committee on Contributions, U.N. GAOR, 57th Session, Supplement No. 11, U.N. Document A/57/11 (2002) of 3 June 2002. Respondent's RA No. 112. Emphasis added.

[633] *Continental*, *supra* note 150, § 112. Emphasis by the *Continental* tribunal.

670. In other words, Argentina adopted mainstream policies, following the Washington consensus, and earned praise for its conduct from the international financial community. Therefore, Arbitrator Stern is inclined to adopt the same conclusion as in *Continental*, *i.e.* that the evidence is insufficient to conclude that the policies adopted by the GOA before the crisis were mainly responsible for the crisis. More could be said on the period during which a state of emergency existed, but this seems unnecessary, considering the decision of the majority. If needed, however, she would adopt dates essentially similar to those adopted by the *LG&E* tribunal, *i.e.* from 1 December 2001 to 26 April 2003.[634] As a result of such an approach, the consequences of the measures on the decision to sell taken between 6 January 2002 and 23 April 2003 should not have been considered. However, the minority Arbitrator, being in agreement with the other analyses of the Tribunal, did not consider it necessary to append a dissenting opinion, as the divergence on the application of Article XI does not have far-reaching consequences on the material aspects of the final disposal of the case.

VI. THE CLAIMANT'S DAMAGES

A. CAUSATION

671. The Tribunal has concluded (*supra*, § 492) that the Respondent breached the fair and equitable treatment standard under Article II(2)(a) of the BIT and that such breach cannot be excused by reference to Article IV(3) (*supra*, § 533) or – by majority – by reference to Article XI (*supra*, § 638). Prior to assessing the amount of damages owed the Claimant for breach of the BIT, the Tribunal will examine the issue of causation as discussed by the Parties.[635]

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[634] In *LG&E, supra* note 51, the Tribunal considered that a state of emergency existed from 1 December 2001 to 26 April 2003, stating: "These dates coincide, on the one hand, with the Government's announcement of the measure freezing funds, which prohibited bank account owners from withdrawing more than one thousand pesos monthly and, on the other hand, with the election of President Kirchner. The Tribunal marks these dates as the beginning and end of the period of extreme crisis in view of the notorious events that occurred during this period." § 230.

[635] Counter-Memorial, §§ 778-792; Reply, §§ 873-883; Rejoinder, §§ 601-618; RPHB, §§ 212-216.

1. The Parties' Positions

(i) The Claimant's Position

672. Argentina's argument that losses were due to macroeconomic conditions and that the Claimant "*bought high*" in 1997 and "*sold low*" in 2003, so that it cannot recover for the "business risk" inherent in such divestiture, is misplaced for a number of reasons.

673. El Paso sold its investment in Argentina not at the "worst possible" time but at a time when equity prices and certain rates also used by Macroconsulting coincided with the historic average of the period January 1992 – April 2006. The claim is not for losses due to a business risk or a perceived "bad investment" but rather for the loss of value of the investment due to the GOA measures violating the Claimant's legal and contractual rights.[636]

674. The discounted cash flow ("DCF") method adopted by the Claimant's expert, LECG, removes from the damages analysis losses due to macroeconomic conditions in Argentina by capturing only those that result directly from the GOA measures.[637]

675. The only reason for Macroconsulting's comparables approach showing damages different from LECG's method is that the actual equity value of CAPEX and Costanera was substantially higher than LECG's due to the arbitrary reduction by 35% of their debts as of 31 December 2001. This means that by simply correcting this aspect, the two valuations are very similar, thus showing the soundness of LEGC's work.[638]

676. Therefore, LECG's valuation methodology takes into account only the measures and not the macroeconomic situation, but nothing but the measures, considered to be the sole cause of the sale, the consequences of the crisis having been eliminated from the calculation.

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[636] Reply, §§ 877-879. Emphasis by the Claimant.
[637] *Ibid.*, §§ 874 and 880, referring to LECG's Damage Valuation Update of 23 November 2006 ("Updated Report"), §§ 144-147.
[638] Reply, § 883.

(ii) The Respondent's Position

677. Argentina contends that there is no causal connection between the alleged breach and the losses that El Paso alleges to have incurred. For such connection to exist, the internationally wrongful act must be the proximate cause of the loss, which is not denied by the Claimant.[639]

678. According to Argentina, two criteria have been applied by international courts to determine such proximate cause, one objective (the damage must by the natural and normal result of the wrongful act) and one subjective (the damage was a reasonably foreseeable consequence of that act or was so intended by the perpetrator).[640] Not only has the Claimant not proven the causality link; it has, rather, confirmed having caused the losses by its own acts.

679. None of the GOA measures constitutes the proximate cause of the damage alleged by the Claimant, regardless of whether the objective or the subjective criterion is applied, since they result from the macroeconomic, social and political situation suffered by Argentina as of late 2001. The damage allegedly suffered by El Paso were caused by the latter's decision to sell its assets in the worst time of the crisis in Argentina, as confirmed by the 2003 Report to the SEC and by Macroconsulting's comparables method.[641] Should it be held that there is a causal connection between the GOA measures and the Claimant's damage, the Claimant should bear part of such damage, having decided to sell at the time when the country's macroeconomic conditions had considerably reduced the value of its investment.[642]

680. Contrary to the comparables method used by Macroconsulting, the DCF method is a sophisticated device that requires much information and makes

[639] Counter-Memorial, § 781; Rejoinder, § 601.
[640] Counter-Memorial, §§ 782-784.
[641] Counter-Memorial, §§ 785-792; Rejoinder, §§ 602-607; RPHB, §§ 212-216.
[642] Rejoinder, §§ 619-621.

assumptions regarding several variables, so that this device can be easily manipulated by the party using it.[643]

681. Argentina's primary position is that its measures played no role at all in the decision of El Paso to sell its shares, its secondary position being that the decision to sell in 2003 resulted also from economic considerations by the Claimant, with the consequence that the latter's decision played a role in the damage suffered by it.

2. The Tribunal's Analysis

682. The Tribunal shares the view expressed by other investment treaty tribunals that the test of causation is whether there is a sufficient link between the damage and the treaty violation.[644]

683. In essence, the Respondent contends that there is no causal connection between the GOA measures and the damage allegedly suffered by the Claimant since the latter decided to sell at the worst possible time of the financial crisis, the country's macroeconomic conditions at that time being the cause of the reduced value of its investment.[645]

684. It cannot be denied that the general economic situation was taken into account by El Paso when deciding the sale in question.[646] However, contrary to what is mentioned by Argentina,[647] there is no contribution by the Claimant to a loss it suffered due to its own conduct, in the absence of wilful or negligent action by the Claimant.[648] The Tribunal does not view the sale by the Claimant of its

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[643] *Ibid.*, § 608.
[644] *S.D. Myers*, *supra* note 176, § 315 (referring to "harm that is proved to have sufficient causal link" with the specific breach); *LG&E v. Argentina*, *supra* note 51, § 50; *BG v. Argentina*, *supra* note 293, § 428. See also the Report of the International Law Commission to the UN General Assembly on the Articles on Responsibility of States for Internationally Wrongful Acts, 2001: "Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses attributable [to the wrongful act] as a proximate cause, or to damage which is too indirect, remote and uncertain to be appraised." (Commentary to Article 31, § 10, p. 227).
[645] Rejoinder, §§ 619-621.
[646] *Supra*, § 505.
[647] Rejoinder, §§ 619-621.
[648] Article 39 of ILC Articles on Responsibility of States for Internationally Wrongful Acts ("Contribution to the injury"): "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or

investment in the Argentinian companies as a wilful or negligent action, "*i.e.* an action which manifests a lack of due care on the part of the victim of the breach for his or her own property or right."[649] The Tribunal has examined the relationship between the sale of El Paso's shares in the Argentinian companies and the GOA measures in the context of determining whether such measures may be considered a violation of the FET standard, concluding that the measures were the prevailing cause of the sale.[650]

685. The Tribunal is satisfied that LECG has calculated the Claimant's damage under its DCF valuation method by considering only damage directly attributable to the GOA measures, to the exclusion of damage which might be attributable to the financial crisis. As explained by LECG:

> "In our DCF Approach (both the 2004 and the 2006 update we discuss below), the macroeconomic indicators, as well as all available ex-post company performance information are included in the building of cash flows from January 2002 onwards. Thus, the DCF analysis is based on actual sales volumes and costs that fully reflect all the *actual* macroeconomic conditions in which the companies have been operating in Argentina since January 2002 to date. This is true for both the *but for* and *actual* scenarios, so as to make the comparison between the two scenarios compatible and avoid attributing damages to factors other than the Government measures. In other words, volumes and costs reflect the impact of the 2002 recession, and of the dramatic economic recovery of 2003 onwards."[651]

686. The circumstance that the valuation of the Claimant's damage, based on LECG's DCF method, refers only to the impact of the measures on the value of its investment is confirmed by the Tribunal's Expert, Professor Geoffron, in his Report of 6 April 2010.[652] The Respondent has criticised the use of the DCF

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negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."

[649] To use the words of the International Law Commission Report to the UN General Assembly, 2002, § 5, p. 276.

[650] *Supra*, § 507.

[651] LECG's Updated Report, § 145. Emphasis in the original.

[652] The Report explains that it is to be "aimed at assessing whether and to what extent El Paso Energy International Company interests in Argentina have been damaged by the measures taken by the Government …" (§ 33).

method[653] but has not disputed the fact that LECG's has only considered the effect of the GOA measures on the value of the Claimant's investment when evaluating the latter's damage.

687. The Tribunal has held previously that the Respondent's measures were a contributory cause of the damage suffered by the Claimant for the loss of value of its investment in the Argentinian companies.[654] The Tribunal concludes that a causal connection exists between the GOA measures and the Claimant's damage.

B. COMPENSATION

1. *The Parties' Positions*

688. What follows is a summary of each Party's position regarding compensation due to the Claimant for breach of the BIT. More will be said on the subject when analysing the Tribunal's Expert's reports discussing the position of the Parties' accounting experts on the various issues relating to the damages assessment.

(i) The Claimant's Position

689. El Paso claims damages based on the loss of value of its investment due to GOA measures taken in violation of its legal and contractual rights and not, as alleged by the Respondent, because it sold in bad macroeconomic conditions.[655]

690. The amount claimed is estimated by LECG on the basis of two alternative valuation methodologies, the DCF and the transactions methods.[656] Both methods are reasonable and valid means to calculate the damage inflicted by the GOA measures on the Claimant.[657] LECG's Updated Report demonstrates that

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[653] As discussed later in this decision, the DCF method is accepted by the Tribunal as the most appropriate valuation method in this case, *infra*, § 705.
[654] *Supra*, § 509.
[655] Reply, §§ 873 and 875.
[656] A third method, unjust enrichment, proposed initially by the Claimant (LECG's 1st Report, Section V.10), is not mentioned in the Reply and in LECG's Updated Report.
[657] Reply, § 857.

as of 31 December 2006 the Claimant suffered damage amounting to US$ 147 million under the DCF method and US$ 210 million under the transactions method.[658] The amount under the DCF method is increased in LECG's Report of 22 March 2007 to US$ 228.2 million (including export withholding taxes up to February 2012).

691. The DCF model takes into account the conditions prevailing after the sales made in 2003 (such as current crude oil prices) since it assumes that El Paso would not have sold its investments in the absence of the GOA measures. The transactions method measures the Claimant's damage by comparing what a reasonable buyer would have paid for the assets in mid-2003 in the absence of the GOA measures to El Paso's actual sale proceeds in the light of the measures, therefore not using post-sale information.[659]

692. Contrary to Argentina's contention that the DCF method has "a high degree of uncertainty and includes an uncertain loss of profits",[660] that method is the most recognised and applied, as shown by other cases involving the Argentinian measures at issue in the present case.[661] El Paso is not claiming lost profits but rather the reduction of the market value of its Argentinian assets as a result of the GOA measures, even if a key component of the DCF method is future cash flows, which is analogous to accounting profits.[662]

(ii) The Respondent's Position

693. As already mentioned (*supra*, § 672), Argentina contends that even if it were found liable for breach of the BIT, the damage asserted by El Paso would not be the proximate consequence of that breach.[663] It asserts further that the sale by El

[658] *Ibid.*, § 876.
[659] Reply, § 875.
[660] Counter-Memorial, § 798.
[661] Reply, § 885.
[662] Reply, § 886.
[663] Rejoinder, § 601.

Paso took place at one of the worst moment of the Argentinian economy and that the sales were due to El Paso's own problems.[664]

694. Always according to Argentina, it is unreasonable to take into account post-sale conditions (such as current crude oil prices) in the damages assessment since, on the one side, El Paso cannot benefit from the increase in the price of the assets marketed following the sale of its investments[665] and, on the other side, this contradicts Article IV(1) of the BIT under which "compensation shall be equivalent to the fair market value of the expropriated investment *immediately before the expropriatory action was taken ….*"[666]

695. The DCF method embodies a wide range of inherently speculative elements, as stated by the International Law Commission ("ILC") and by arbitral awards.[667] The Claimant's statement that the damages claimed is not uncertain since it does not include any loss of profits is incorrect, considering that with the DCF method *lucrum cessans* becomes the sole element of compensation, as held by the *Amoco v. Iran* tribunal.[668]

696. According to the Claimant, the compensation standard should be the same as that applicable in cases of expropriation, namely fair market value. This is wrong, since the compensation applying in cases of expropriation cannot be obtained for the lower responsibility threshold of other Treaty violations.[669] Additionally, damage deriving from the export withholdings on hydrocarbons cannot be included in the calculation of damages.[670]

697. LECG's assessment of damages presents serious errors regarding its methodology and the assumptions made, as stated in the Counter-Memorial and the Macroconsulting's reports.[671] There are also doubts regarding the sum

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[664] *Ibid.*, §§ 603 and 605.
[665] *Ibid.*, § 609.
[666] *Ibid.*, § 611. Emphasis by the Respondent.
[667] Rejoinder, § 624.
[668] *Ibid.*, § 625.
[669] *Ibid.*, §§ 627-630.
[670] *Ibid.*, § 631.
[671] *Ibid.*, § 632.

obtained from the sale of El Paso's investment in CAPSA, so that LECG's use of that sum to assess the damages is also suspicious.[672]

2. *The Tribunal's Analysis*

698. The Tribunal has duly considered the reports and testimonies of the experts retained by each Party, Dr. Manuel Abdala and Dr. Pablo T. Spiller of LECG (for the Claimant), Dr. Martín Rodríguez Pardina of Macroconsulting (for the Respondent). In view of the number and complexity of the accounting issues relating to the damages assessment, as evidenced by the diverging views given on many relevant questions by the Parties' experts, the Tribunal, with the agreement of the Parties, has appointed its own expert in the person of Professor Patrice Geoffron, Professor of Economics at the University Paris-Dauphine (the "Expert").

699. The Report produced by the Expert on 6 April 2010 (the "April Report") was transmitted to the Parties on 14 April 2010. The Expert answered the observations made by the Parties on 21 May 2010 on the April Report, as directed by the Tribunal, by a "Complementary Note" of 10 July 2010 (the "July Report"), followed by a Final Revision of 12 October 2010 (the "October Report"). Both the July and October Reports were transmitted to the Parties on 22 November 2010 and comments thereon were filed by the Parties on 27 December 2010. The Expert's Reports and the Parties' comments shall be examined by the Tribunal in the context of determining the damages due to the Claimant. This will be done after establishing the principles that should govern the valuation of the damages in the present case.

(i) The Indemnification Standard

700. The BIT does not specify the standard for evaluating damages to which the investor is entitled in case of breach of a standard of treatment, such as that of fair and equitable treatment (as in the present case). Only in the event of lawful expropriation, which is not a treaty breach, Article IV (1) of the BIT refers to

[672] *Ibid.*, § 639.

the "fair market value" immediately before expropriation. In the absence of an agreed criterion, the appropriate standard of reparation under international law is compensation for the losses suffered by the party affected, as established by the Permanent Court of International Justice ("PCIJ") in the *Factory of Chorzów* case ("*Chorzów Factory*") in 1928:

> "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – 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."[673]

701. Many tribunals have applied this principle in deciding on damages due for breach of the standard of fair and equitable treatment.[674] As noted by the tribunal in *SD Myers v. Canada*, the silence of the treaty indicates the intention of the drafters "to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case,"[675] adding that "whatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation."[676]

702. In cases involving Argentina where, absent a finding of expropriation, a breach of the fair and equitable treatment standard under the BIT was found, other tribunals have held that damage should compensate for the difference in the "fair market value" of the investment resulting from the Treaty breach.[677] Fair market value has been so defined:

> "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open

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673 *Chorzów Factory*, Judgment No. 13 (Claim for Indemnity – The Merits) of 13 September 1928, ICJ Reports 1928, P.C.I.J., Series A, No. 17, p. 47.
674 *S.D. Myers, supra* note 176, §§ 311-315; *Metalclad supra* note 190, § 122; *MTD*, *supra* note 300, § 238; *CMS supra* note 48, § 400; *Azurix*, *supra* note 50, § 409; *Enron*, *supra* note 52, § 359; *Sempra*, *supra* note 53, § 400.
675 *S.D. Myers*, *supra* note 176, § 309.
676 *Ibid*., § 315.
677 *CMS* , *supra* note 48, § 410; *Azurix*, *supra* note 50, § 424; *Enron*, *supra* note 52, § 361.

> and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."[678]

703. The Tribunal shares this approach. The "fair market value" standard shall therefore be adopted to determine the value of the loss suffered by the Claimant by comparing the fair market value of El Paso's investment with and without the GOA measures (respectively, the *actual* and the *but for* scenarios).

704. Fair market value is the valuation standard adopted by the BIT to calculate compensation due in case of lawful expropriation under Article IV(1). However, in the present case; the Tribunal is not confronted with a lawful expropriation but with a breach of the BIT. The majority of the Tribunal takes account of the difference between the two situations and of the fact that, as established by the *dictum* in the *Chorzów Factory* case, "reparation must, as far as possible, wipe out all the consequences of the illegal act." The fair market value in the *but for* scenario shall be calculated considering also data and information which became known after 1 January 2002, including after El Paso's sales in 2003, to the extent they are representative of financially assessable damages.[679] Arbitrator Stern considers that a fair market value evaluation of damage resulting from a violation of FET should only take into account what a willing buyer and a willing seller could foresee at the time of the interference with the investor's rights. However, as, for reasons explained in paragraph 736, the Tribunal finally relies on a valuation taking into account the prices of oil as foreseen in 2003, at the time of the sale, she does not expand on the theoretical aspects of the question of the indemnification standard and the time of valuation.

705. These valuation criteria are in keeping with principles of public international law. It is worth reproducing the relevant passage of the Judgment in the *Chorzów Factory* case:

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[678] *International Glossary of Business Valuation Terms*, American Society of Appraisers, ASA website, 6 June 2001, p. 4.
[679] To use the words of Article 36 of ILC Articles on Responsibility of States for Internationally Wrongful Acts, *infra*, § 703.

> "Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law … The dispossession of an industrial undertaking … then involves the obligation to restore the undertaking and, if this be not possible, *to pay its value at the time of the indemnification*, which value is designed to take the place of restitution which has become impossible."[680]

(ii) The Valuation Date

706. To pay the value of the property "*at the time of indemnification*", as stated by the above *dictum*, means that the property (in our case, El Paso's participation in the Argentinian companies) is to be evaluated by reference not to the time of the dispossession, as in the case of a lawful expropriation, but to the time when compensation is paid. Compensation is in fact in lieu of restitution that "has become impossible", so that it should correspond "to the value which a restitution in kind would bear" (as stated by the *Chorzóow Factory* Judgment in the passage cited).

707. In the *Amco Asia v. Indonesia* Resubmitted Case, the respondent State was found by the ICSID tribunal responsible for an unlawful interference with the Claimant's rights to develop and operate a hotel complex in Indonesia. The tribunal emphasised the difference of the standard of damages after an unlawful act, which should be based on the principle of full reparation, and the standard of compensation after a lawful expropriation:

> "It may, on one view, be the case that in a lawful taking, Amco would have been entitled to the fair market value of the contract at the moment of dispossession. In making such a valuation, a Tribunal in 1990 would necessarily exclude factors subsequent to 1980. But if Amco is to be placed as if the contract had remained in effect, then

[680] *Chorzów Factory, supra* note 673, pp. 47-48. Emphasis added by the Tribunal.

> subsequent known factors bearing on that performance are to be reflected in the valuation technique …"[681]

708. The tribunal emphasised the reasons why developments up to the time of the award had to be taken into account:

> "Foreseeability not only bears on causation rather than on quantum, but it would anyway be an inappropriate test for damages that approximate to restitution in integrum. The only subsequent factors relevant to value which are not be relied on are those attributable to the illegality itself."[682]

709. In making its assessment of damages, the tribunal further stated:

> "But as to valuation techniques for 1980-1989 the tribunal will not use the perspective of what the reasonable businessman in 1980 could foresee, because for this period it can use known data for relevant factors."[683]

710. Article 36 ("Compensation") of the ILC Articles on Responsibility of States for Internationally Wrongful Acts provides the following:

> "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage, including loss of profits insofar as it is established."

After considering the above *dictum* in the *Chorzów Factory* case, the ILC's Commentary of this Article concludes that "the function of compensation is to address *the actual losses* incurred as a result of the internationally wrongful act."[684] The reference to "*loss of profits*" in Article 36(2) confirms that the

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[681] Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Award of 5 June 1990, § 186.
[682] *Ibid*.
[683] *Ibid.*, § 196. Other tribunals have adopted the same approach to assess damages caused by the GOA measures. The tribunal in *CMS* relied on actual post-2001 events, such as the peso-dollar exchange rate, cost of equity, natural gas demand and other factors, *supra* note 48, §§ 442-463). In *Siemens* , it was held that "under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that the enterprise has gained up to the date of this Award, plus any consequential damages.", *supra* note 133, Award of 6 February 2007, § 352.
[684] ILC Commentary, Article 36, page 245. Emphasis added by the Tribunal.

value of the property should be determined with reference to a date subsequent to that of the internationally wrongful act, provided the damage is "*financially assessable*", therefore not speculative. The Tribunal shares this position.

(iii) The Valuation Method

711. The Expert's opinion is that "the Transaction approach presents uncertain reliability for assessing economic damages in the context of the Argentine crisis,"[685] while the Comparable method, proposed by Macroconsulting, is not favored by financial practitioners "due to the restricted reliability of sounds sets of comparables in the local market."[686] The DCF method is preferred, as being "by far the most widely used as a primary valuation tool."[687]

712. The Tribunal endorses the choice of the DCF method as being the most appropriate in the circumstances, considering also its consistency with the Expert's chosen valuation standard. The method has been used widely, including by numerous arbitral tribunals in similar circumstances.[688] It makes it possible to assess the loss of value of El Paso's investment due solely to the GOA measures, including the Argentinian companies' capacity, as going concerns, to generate returns.

(iv) The Tribunal's Findings

713. Having established the valuation standard to be applied and the methodology to be used, the Tribunal shall now examine the Expert's Reports insofar as they also respond to the Parties' comments. This will allow the Tribunal to establish to what extent the Expert's findings and conclusions may be shared as to individual issues bearing on the quantum determination. The Tribunal's analysis shall be concluded by the assessment of the amount of compensation

[685] April Report, § 65.
[686] *Ibid.*, § 77.
[687] *Ibid.*
[688] The DCF method has been adopted by other awards in cases involving Argentina in relation to the measures taken as of January 2002: *CMS*, *supra* note 48 § 416; *Enron, supra* note 52, § 385; *Sempra, supra* note 53, § 416.

due to the Claimant for the breach of the fair and equitable treatment standard under the BIT.

714. The DCF method having been chosen, it is correct to take LECG's DCF model as the basis for damages assessment, as was done by the Expert. Macroconsulting having chosen another method, LECG's model is the only DCF model available.

715. The Tribunal has analysed LECG's DCF model with the Expert's assistance and is satisfied that it conforms to the principles that are to be applied to assess El Paso's damages in the frame of the chosen valuation standard. Reference is made in particular to LECG's explanations of the chosen methodology and to how cash flows have been built.[689]

716. The Tribunal has initially submitted to the Expert a number of questions under the "Terms of Reference for the Independent Expert Appointed by the Tribunal".[690] Six issues have been examined by the Expert's Reports in answer to the Tribunal's questions[691]:

(a) the WAAC

[689] LECG's Updated Report, §§ 145-147, footnotes omitted. "In our DCF Approach (both the 2004 and the 2006 update we discuss below), the macroeconomic indicators, as well as all available ex-post company performance information is included in the building of cash flows from January 2002 onwards. Thus, the DCF analysis is based on actual sales volumes and costs that fully reflect all the actual macroeconomic conditions in which the companies have been operating in Argentina since January 2002 to date. This is true for both the but for and actual scenarios, so as to make the comparison between the two scenarios compatible and avoid attributing damages to factors other than the Government measures. In other words, volumes and costs reflect the impact of the 2002 recession, and of the dramatic economic recovery of 2003 onwards.
Consider, for example, the calculation of the companies' operating costs. All cost components such as labor, as well as other costs that are not linked to revenue or output levels are the same in the but for and actual scenarios and are invariant to the Government measures.
The only cost component that is attributable to the Government measures (the cost of natural gas for Central Costanera) is modelled differently between the but for and the actual. In this way, we strictly capture damages that are solely attributable to the measures, and not due to any other differences between scenarios.
Furthermore, in our DCF analysis we assumed domestic sales were affected by the economic crisis. Indeed, in both the actual and but for scenarios, E1 Paso's electricity generation companies' output declined in 2002, immediately after the crisis. The reduction in output reflects the impact of the recession on electricity sales, which affected Capex (a reduction of 10% as compared to 2001 output) and Central Costanera (a 36% reduction). Our damage analysis fully takes this impact into account, by subjecting both the but for and the actual scenario to the same macroeconomic shock. Thus, all effects from the devaluation of 2002 as well as the macroeconomic factors surrounding it are fully taken into account in our damage analysis in a way that is consistent with the computation of damages attributable to the Government measures only."
[690] April Report, Appendix 8.1.
[691] *Ibid.*, § 83.

(b) the debt discount

(c) the withholding tax

(d) the oil prices

(e) the benefits accruing to El Paso from the pesification and other measures

(f) the value collected by El Paso for the sale of the Argentinian companies.

717. The Tribunal is satisfied that, by dealing with these issues, the Expert's Reports answer adequately the questions submitted to him.

(a) The WAAC

718. The Parties' experts have proposed widely divergent discount rates regarding the WAAC. Macroconsulting's rate averages 35%, while LECG's rate averages 12-13%. The April Report criticises both rates, the former as not reflecting a fair market value since it attributes "all the value variation to the economic crisis" while the latter is "too low to reflect the increasing risk to private investors in December 31st, 2001", so as to be "strangely 'immune' from the economic crisis."[692]

719. In discussing what should be the appropriate discount rate for 31 December 2001, the April Report underlines that, contrary to LECG's analysis, private investors are not immune from the consequences of a sovereign default, being indirectly exposed to Argentina's sovereign credit risk.[693] This leads the Expert to "upgrade" the discount rate proposed by LECG, the latter being consistent with a risk assessment in November 2001 but not reflecting the increasing threat to private investors in December 2001.

720. This consideration leads the Expert to re-evaluate the discount rate proposed by LECG according to the change in the country risk between November and December 2001. Following the Claimant's expert's remark, the final WAAC's

[692] April Report, §§ 5 and 88.
[693] *Ibid.*,§ 93.

values retained by the Expert are 15.45% for electricity and 15.43% for hydrocarbons.[694]

721. The Tribunal shares the Expert's view that the discount rate, in a situation such as that confronting Argentina at the end of 2001, must consider the increase in the country risk between November and December 2001. The Expert's measure of LECG's WAACs is reasonable, as is confirmed by the result of the calculation which, while accounting for the increased country risk, does not make the new WAACs incompatible with fair market value. The re-evaluated WAACs are therefore accepted.

(b) The Debt Discount

722. Here again the Parties' experts have expressed widely divergent views. LECG states that no discount should be applied to the debts of Costanera (US$ 383 million) and CAPEX (US$ 285 million) since the book value of the two companies' debts before and after the GOA measures were similar due to the implementation of debt restructuring agreements with the lenders. Applying a discount to such value would therefore, according to LECG, not make sense economically. Macroconsulting, on the contrary, stresses that the completion of the debt restructuring in 2005 is not relevant to the debt values in December 2001 and that account should be taken of the economic crisis of the period.

723. The Expert opines that keeping unchanged the book value of the debts in a turbulent period such as that characterising Argentina's economy in December 2001 would not be in line with the dominant view in the literature. He proposes to apply a debt discount that is not to be ascribed entirely to the economic crisis, as proposed by Macrocosulting, but that reflects the negative and continued impacts of both the GOA measures and the crisis in the *actual* scenario and only the impact of the crisis in the *but for* scenario.[695]

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[694] July Report, § 55.
[695] April Report, § 146.

724. By following an approach inspired by the reasoning adopted to re-evaluate the WAACs, the Expert proposes a debt discount of 35% in the *actual* scenario and of 26.25% in the *but for* scenario.[696] This assessment was subsequently confirmed by the Expert.[697]

725. The Tribunal agrees with the Expert that keeping the value of Costanera's and CAPEX' debts unchanged in the turbulent period experienced by Argentina's economy in December 2001 would not reflect the real value of the debts. A discount should therefore be applied to reconcile their value with the market value. The Tribunal also agrees that a debt discount should be separately calculated for the *but for* scenario and for the *actual* scenario, as proposed by the Expert and accepts the two figures proposed by the Expert.

(c) The Withholding Tax

726. The April Report distinguishes between a direct effect of the withholding tax (external effect) and an indirect effect (internal effect).[698] The direct effect of the withholding tax is the normal operation and effect of a tax, in this case the direct appropriation by the State of revenues accruing to CAPSA and CAPEX from the export of crude oil and LPG; while the indirect effect consists in artificially depressing domestic crude oil and LPG price. [699]

727. The Tribunal has already excluded its jurisdiction regarding the withholding tax, holding that the tax imposed by Argentina on the export of crude oil and LPG in 2002 and thereafter is a tax measure under Article XII (2) of the BIT.[700] The Expert has correctly removed from LECG's DCF model the direct effect of the withholding tax by excluding from the damages calculation the lost

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[696] *Ibid.*, § 157.
[697] July Report, § 58.
[698] April Report, §§ 167 and 169.
[699] The distinction between direct and indirect effect of the withholding tax is made by the Claimant: "Export Withholding on crude oil constitute (i) a direct taking of export revenues of CAPSA and CAPEX and (ii) an indirect taking from by artificially depressing domestic crude oil and LPG prices" (Memorial, § 474).
[700] *Supra*, §§ 281-298.

revenues for CAPSA (on crude oil exports) and CAPEX (on crude oil and LPG exports) due to the withholding tax.[701]

728. The indirect effect of the withholding tax requires more developments by the Tribunal. The starting point is the precise identification of this effect. This is described as follows by the Claimant:

> ”On the other hand, Export Withholdings have the effect of artificially depressing domestic prices for those products that are subject to these levies. This is because the Export Withholdings produce what is known as the “export parity.” Buyers in the domestic market will predictably refrain from paying a price to the producer that is higher than the net price the producer would receive (after deducting export costs, including any Export Withholdings) if the product is exported. Consequently, due to the Export Withholdings, CAPSA and CAPEX were forced to accept prices for their domestic sales of crude oil and LPG that were significantly lower than those prices that would have prevailed in the domestic market in the absence of the Export Withholdings.”[702]

729. May the indirect effect of the withholding tax be deemed to fall within the scope of Article XII(2) of the BIT, so that the Tribunal’s lack of jurisdiction extend to any consideration or ruling regarding this effect? The Tribunal believes this to be the case, for the following reasons.

730. Article XII(2) of the BIT, when interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”,[703] is meant to preserve the State’s sovereign power in “matters of taxation”, the latter being clearly an attribute of sovereignty. Contracting States agreed therefore to exclude matters of taxation from the system of guarantees and protections of foreign investments established by the BIT in order to preserve their full sovereignty in that regard. This being the

[701] April Report, § 183 and Figure 20 (compared to Figure 19).
[702] Memorial, § 339. Footnotes omitted.
[703] Vienna Convention on the Law of Treaties, Article 31(1).

object and purpose of Article XII(2), it is for this reason that the Tribunal has declined jurisdiction regarding the withholding tax.[704]

731. Is the export parity effect described by the Claimant a "*matter of taxation*" within the meaning of Article XII(2), interpreted as mentioned above? The answer is in the affirmative. In its ordinary meaning, the expression "*matters of taxation*" is not limited to the levy and collection by the State of the specific tax but includes all effects of the tax on the taxpayer. The Tribunal shares the Respondent's view that not only the withholding tax as such falls within the scope of Article XII(2) of the BIT but also its indirect effects.[705]

732. The export parity effect (the indirect effect of the withholding tax) should therefore be excluded from the damages calculation. Having been so directed by the Tribunal, the Expert, in the October Report, has excluded any withholding tax effects, both local and external.[706]

(d) The Oil Prices

733. The Tribunal has decided that the valuation standard to be applied for the calculation of El Paso's damages enables it to consider data and information which became known subsequent to the date of the first GOA measures, 1 January 2002.[707] Crude oil prices have been taken into consideration by LECG in the DCF model submitted by the Claimant in support of the claim for damages by using crude oil futures as of 2004[708] and as of 2006.[709]

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[704] *Supra*, § 289: "The tax policy of a country is a matter relating to the sovereign power of the State and the State's power to impose taxes within its territory. The Tribunal must emphasise the sovereign right of a State to enact tax measures it deems appropriate in any particular time."

[705] Observations of the Republic of Argentina on Prof. Geoffron's Report of 1 June 2010, § 74.

[706] October Report, Section 4.2 on p. 12 and § 28. The external effect of the export withholding tax had already been excluded in the April Report.

[707] *Supra*, § 704.

[708] LECG's Report, note 373 and § 191. "Crude oil prices from August 2004 onwards are forecasted using NYMEX future prices for WTI adjusted by a differential for quality and transportation" (*ibid.*, § 194(a)). NYMEX (New York Mercantile Exchange) is the main world market for petroleum futures.

[709] LECG's Updated Report, § 210: "We updated crude oil prices up to September 2006 and from then onwards we use a WTI Future prices that converge to US $ 50 per barrel in 2012." Historical price data for WTI (West Texas Intermediate, a type of crude oil) are publicly available.

734. LECG's damages assessment based on said crude oil futures is consistent with the valuation standard adopted by the Tribunal to determine the fair market value of El Paso's investment in the *but for* scenario. Crude oil prices during the period are reported internationally so that a loss of profits based on such prices is financially assessable and not speculative.[710]

735. Consistent with the above, the Expert's reduction of the LECG's damages assessment by considering only information available in 2002[711] was not accepted by the Tribunal. The Expert was directed to prepare two alternative solutions, one applying the 2003 oil prices, the other integrating oil prices to include future prices. The October 2010 Report accordingly presents two different valuations, the first (Valuation 1) applying the "2003 futures / oil prices" and the other (Valuation 2) applying oil prices up to 2020, both valuations excluding the withholding tax effects.[712]

736. In the Tribunal's view, Valuation 2 is more problematic since it is based on oil prices that, by projecting the calculation up to 2020, make the result financially not assessable on safe grounds, thus providing to be speculative. The Tribunal's choice is therefore for the more reliable results of Valuation 1.

(e) The Benefits Accruing to El Paso from the Pesification and Other Measures

737. The Expert confirms that the positive impact of the pesification has been integrated by LECG in its DCF model,[713] adding that this specific issue is not mentioned by Macroconsulting in its Second Report.[714] No benefits from other measures are mentioned.

738. The Tribunal is satisfied that benefits accruing to El Paso as a result of the GOA measures have been duly considered by the Claimant's expert reports.

[710] *Supra*, § 704.
[711] April Report, § 209. Figure 26 of the April Report shows the amount of reduction in El Paso's total damages by considering oil prices in 2003 only.
[712] October Report, Sections 3.1 and 4.1.
[713] April Report, § 218.
[714] *Ibid.*, § 221.

(f) The Value Collected by El Paso for the Sale of the Argentinian Companies

739. Based on LECG's reports, the total price collected by El Paso for the sale of its interest in Argentina in 2003 is equal to US$ 32.7 million.[715] Contrary to the Claimant's contention,[716] the Respondent asserts that there are serious doubts on the price actually received by El Paso and that there is no trace of the 2003 transactions in the DCF damages assessment under LECG's DCF model.[717]

740. Having initially considered that the price so collected by El Paso should be deducted from the DCF damages,[718] following further analysis the Expert has concluded that the price collected by El Paso for the sale of its participation in the Argentinian companies in 2003 should not be deducted to determine the damages amount since the DCF damages calculation assumes that the Claimant continues to keep its shareholding in said companies.[719]

741. Following the Parties' observations of 27 December 2010, the Tribunal has requested the Expert to express his final opinion regarding the damages assessment based on Valuation 1. This has led the Expert to recommend to the Tribunal the following modifications to the October Report:

(a) the increase of the damages for CAPSA by US$ 14.2 million by accepting LECG's suggested correction to withdraw CAPSA's negative damages;[720]

(b) the deduction of US$ 2.15 million regarding CAPEX and US$ 0.69 million regarding Costanera, for a total of US$ 2.84 million, suggested by MacroConsulting as correction on the electricity spot prices.[721]

The Expert's recommendations are accepted by the Tribunal.

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[715] LECG's Report, Exhibit 12 to the Memorial, §§ 176-177.
[716] CPHB, § 183.
[717] RPHB, § 222.
[718] April Report, § 232.
[719] July Report, § 48.
[720] LECG's Comments on Prof. Geoffron's Reports of July and October 2010, Annex A to the Claimant's letter of 27 December 2010, § 33 and Table II.
[721] MacroConsulting's Analysis of the Complementary Note and the Final Revisions of Prof. Geoffron's Valuation of Damages on the Value of El Paso's Investments in Argentina of 23 December 2010 attached to Argentina's Observations on Prof. Geoffron's Supplementary Report of 27 December 2010, § 51.

742. As a result of all modifications of the initial damages assessment under the April Report accepted by the Tribunal, El Paso's total damages amount to US$ 43.03 million. The compensation due by Argentina to El Paso is therefore fixed by the Tribunal to the amount of US$ 43.03 million.

C. INTEREST

1. *The Parties' Positions*

743. The Claimant has requested interest "at commercially reasonable rate from the date of expropriation", as provided by Article IV of the BIT, to be compounded quarterly through the date of the award.[722] In reply to the Respondent's contention that only simple interest should be awarded, the Claimant, referring to LECG, notes that compound interest "merely reflects the economic reality that a dollar foregone could otherwise have been invested and that income on that investment could have been reinvested so that funds grow at a compound rate."[723] In its last written submission, the Claimant, relying on the *Enron* award, has requested that interest be awarded at the LIBOR plus 2% rate until the date of payment.[724]

744. Relying on the alleged general position of international courts and tribunals as well as of most authors, Argentina has asserted that simple interest should be granted.[725]

2. *The Tribunal's Analysis*

745. The Tribunal notes that LIBOR plus 2% is the rate of interest used by other awards involving Argentina regarding the same economic crisis as that considered in the present.[726] Such a rate appears less speculative than other rates of interest granted by other awards involving Argentina. This rate is, therefore, accepted by this Tribunal.

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[722] Memorial, §§ 629-633.
[723] Reply, §§ 903-904.
[724] CPHB, § 184.
[725] Counter-Memorial, § 820; Rejoinder, § 640.
[726] *Enron, supra* note 52, § 452; *Continental, supra* note 150, §§ 313-314.

746. Compound interest is generally recognised by arbitral tribunals in the field of investment protection, including all awards in the Argentine cases.[727] The Tribunal shares the view expressed by these awards that compound interest reflects economic reality and will therefore better ensure full reparation of the Claimant's damage. Interest shall be compounded semi-annually, for the same reason.

747. Interest shall run from 1 January 2002, being the date to which the amount of compensation is discounted back in the Expert's Report, until full payment of the amount due.

VII. COSTS OF THE PROCEEDING

748. According to Article 61(2) of the ICSID Convention and Rule 47(1)(j) of the Arbitration Rules, the Tribunal has to decide, as part of the award, the apportionment of the expenses incurred by the Parties in connection with the proceedings as well as of the fees and expenses of the members of the Tribunal and the charges for the use of the facilities and services of the Centre.

749. Each Party has asked the Tribunal that its costs in connection with these proceedings, including the advances made to ICSID for the Centre's charges and the expenses and fees of the arbitrators, be reimbursed to it by the other Party.[728] The Claimant has quantified its costs in the amount of US$ 7,950,823 besides ICSID fees and expenses.[729] The Respondent has quantified its costs, net of ICSID fees and expenses, in the amount of US$ 546,456.71.[730]

750. The Convention and the Arbitration Rules give ICSID tribunals broad discretion in awarding costs. The practice in apportioning costs has sometimes followed the principle "the loser pays" while in many other cases the decision has been that the Parties were to bear their own costs and share equally the fees

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[727] *CMS*, *supra* note 48, § 471; *Azurix*, *supra* note 50, § 440; *Enron*, *supra* note 52, § 452; *LG&E*, *supra* note 51, § 103; *BG*, *supra* note 293, § 455; *Continental*, *supra* note 150, § 309.
[728] CPHB, § 186(3); RPHB, § 232.
[729] El Paso's letter of 16 June 2011.
[730] Argentina's letter of 15 June 2011.

and expenses of the arbitrators as well as the charges for the use of the Centre's facilities and services.

751. Regarding the present case, the Tribunal notes that the Claimant has been successful on the jurisdictional issue but only in part as to the merits of the case and the damages claimed. There are therefore good reasons to decide, as is hereby decided, that each Party shall bear its own costs connected with the proceedings as well as half of the fees and expenses of the arbitrators and the charges for the use of the Centre's facilities and services.

VIII. DECISION OF THE TRIBUNAL

752. For the foregoing reasons, the Tribunal decides as follows:

A) Argentina breached Article II(2)(a) of the BIT by failing to accord fair and equitable treatment to El Paso's investment.

B) Argentina's defence of necessity to El Paso's claims is rejected.

C) Within 30 (thirty) days of the date of dispatch to the Parties of this Award, Argentina shall pay to El Paso compensation in the sum of US $ 43.03 million, increased by semi-annually compounded interest on that amount at the rate of LIBOR plus 2% from January 1, 2002 until the date of payment in full of this Award.

D) The Parties shall bear all their own legal costs and expenses, without recourse to each other.

E) The Parties shall bear equally the costs and expenses of the Tribunal and ICSID.

All other claims by either Party are rejected

Professor Lucius Caflisch
President

Date: 27 October 2011

Professor Brigitte Stern
Arbitrator

Date: 3 October 2011

Professor Piero Bernardini
Arbitrator

Date: 25 October 2011