No. _____

# In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,
*Petitioner*,

v.

BG GROUP PLC,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Following this Court's decision in *Hall Street Associates v. Mattel, Inc*., 552 U.S. 576 (2008), the lower courts have been in disagreement about whether "manifest disregard of the law" is grounds to vacate an arbitral award, causing confusion which the Court declined to resolve in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 672 n.3 (2010).

The question presented, therefore, is whether a federal court with jurisdiction to vacate an arbitral award under the Federal Arbitration Act may do so on the grounds that the arbitrators acted with manifest disregard of the law – that is, that the arbitrators correctly stated the applicable law, but proceeded to disregard it.

## PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner the Republic of Argentina ("Argentina") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a) is reported at 555 F. App'x 2. The court of appeals' order denying Petitioner's petition for rehearing (Pet. App. 358a) is not reported.

This Court's prior opinion reversing the court of appeals (Pet. App. 3a) is reported at 134 S. Ct. 1198. The opinion of the court of appeals vacating the arbitral award (Pet. App. 51a) is reported at 665 F.3d 1363. The opinions of the district court recognizing and enforcing the award (Pet. App. 71a) and denying the petition to vacate the award (Pet. App. 109a) are reported at 764 F. Supp. 2d 21 and 715 F. Supp. 2d 108, respectively. The arbitral award (Pet. App. 143a) is not reported.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 15, 2014. Pet. App. 1a. A timely petition for panel rehearing was denied on May 21, 2014. *See* Pet. App. 358a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 10(a) of the Federal Arbitration Act, 9 U.S.C. § 10(a), provides:

Section 10: Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration - (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

## STATEMENT OF THE CASE

This petition presents the Court the opportunity to clarify whether and in what circumstances "manifest disregard of the law" is a basis to vacate an arbitral award. Prior to this Court's decision in *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008), the lower courts were unanimous that an arbitral award could be vacated for manifest disregard of the law, a doctrine that derived from this Court's own jurisprudence. Since *Hall Street*, a circuit split has emerged concerning manifest disregard, which the Court acknowledged but declined to resolve in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 672 n.3 (2010). In the four years since *Stolt-*

*Nielsen*, the split has become more widespread and entrenched. This split has resulted in considerable uncertainty as to an important and recurring function of the federal courts – review of arbitral awards under the Federal Arbitration Act ("FAA"). The question presented thus warrants this Court's attention to resolve the confusion in the lower courts, and this case presents an appropriate vehicle for the Court to do so: the district court and court of appeals' decisions recite their uncertainty about manifest disregard, which in turn led them to condone a glaring excess of power by the arbitrators in the award under review.

## I. FACTUAL BACKGROUND

At the end of the 20th century, global events sparked an economic crisis in Argentina of historic proportions – one that rivaled the Great Depression in the United States. Starting in 1998, following the Asian financial crisis and the Russian default of 1998, capital stopped flowing to emerging markets like Argentina; demand for Argentine exports weakened in Brazil, one of Argentina's major trading partners; the price of Argentina's exports relative to its imports decreased considerably; Argentina lost competitiveness abroad as a result of the devaluation and ultimate collapse of the Brazilian currency and the appreciation of the U.S. dollar; and the U.S. Federal Reserve in 1999 and 2000 tightened monetary policy (which led to contraction in Argentina because Argentina's currency was directly linked to the U.S. dollar). Pet. App. 169a.

As a result of these external shocks, the Argentine economy collapsed: during the last quarter of 2001, the Argentine Central Bank lost US$ 11 billion of reserves, 25% of funds on deposit disappeared from the financial

system, and the International Monetary Fund ("IMF") withheld a loan installment of more than one billion dollars. *Id.* at 55a, 170a–171a. By May 2002, unemployment peaked at 21.5% and average wages for those still employed had decreased by almost 70% in seven months. *Id.* at 171a. Demand for public services shrunk by 20%. *Id.* Riots and upheavals dominated Argentina, and five Presidents took office within a period of twelve days. *Id.* at 171a, 177a. Argentina faced inflation of over 70%.

In the face of these unprecedented and catastrophic events that devastated Argentina's economic system, Argentina enacted Emergency Law 25,561 ("Emergency Law") on January 6, 2002. *Id.* at 178a. The Emergency Law sought to alleviate some of the pressure on Argentina's economy, which was necessary to protect the essential interests of the State. In particular, Argentina terminated the currency board that had maintained equivalence between the Argentine peso and the U.S. dollar, and, in respect of public services contracts, terminated indexation clauses tied to international price indices and the calculation of tariffs in U.S. dollars. *Id.* at 178a–179a.

## II. THE ARBITRATION

In 2003, and in the midst of Argentina's dire economic crisis, Respondent BG Group Plc ("BG") sought arbitration under the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments. *Id.* at 5a; *see also* U.K.-Arg., Dec. 11, 1990, 1765 U.N.T.S. 33 (the "Treaty"). BG alleged that because of the Emergency Law's impact on the tariffs

collected by MetroGAS, a gas distribution company that Argentina had privatized in 1992, Argentina violated the Treaty by effecting an expropriation of BG's 54.67% investment in Gas Argentino, S.A., which owned MetroGAS. Pet. App. 155a, 184a. BG further claimed that Argentina had denied "fair and equitable treatment" to BG's investment by "failing to observe obligations entered into with regard to" it. *Id.* at 184a. Argentina raised a number of defenses, including that even if the arbitral tribunal (the "Tribunal") found that it had jurisdiction and that the measures complained of could be deemed to violate the Treaty in the abstract, both of which Argentina disputed, the measures were excused by the state of necessity doctrine under customary international law as codified in Article 25 of the International Law Commission's Draft Articles on State Responsibility (the "ILC Draft Articles"). *Id.* at 312a–313a, 323a.

A state of necessity exists when the State is compelled to depart from an international obligation with another State in order to preserve an essential state interest in a situation of grave or imminent danger. *Id.* at 323a–324a. The impact on Argentina of the financial crises in Asia and Russia, the devaluation in Brazil, the run on Argentina's banks, the loss of over a billion dollars in expected assistance from the IMF, the country's resultant political instability, and the impoverishment of its population that resulted in unprecedented social unrest, presented, in combination, a situation of grave and imminent danger that necessitated immediate and decisive action. The Argentine government was compelled to act not only for the survival of Argentina's economy and the preservation of the ability of its financial sector to

operate, but also for social and institutional stability, and it had limited tools to combat this crisis. *Id.* at 325a–327a. In other words, the events that unfolded in Argentina were precisely of the type contemplated by the state of necessity doctrine.

On December 24, 2007, the Tribunal issued a decision rejecting BG's claim of expropriation, but finding that Argentina had breached its obligation under the Treaty to provide BG's investment with fair and equitable treatment in relation to its adoption of the Emergency Law. *Id.* at 272a, 282a–283a, 297a, 304a–305a, 310a–311a. Although the Tribunal concluded that "[t]here is no question that Argentina is entitled to adopt such measures as it deems appropriate *to emerge from the state of emergency*," *id.* at 332a–333a (emphasis added), the Tribunal summarily rejected the state of necessity defense raised by Argentina, *id.* at 335a. After considering the hypothetical arguments that the defense might only apply to inter-State obligations and that "[i]t can be argued" that the text of the Treaty "implies" that the defense of necessity is excluded from application to investments protected under that Treaty, *id.* at 332a–333a, the Tribunal found that, "even if [it] were to apply Article 25," Argentina had failed to show that it was entitled to invoke the state of necessity doctrine, *id.* at 333a–335a. But in rejecting the defense set forth by the ILC Draft Articles, the Tribunal instead considered factors outside of those set by the ILC Draft Articles, such as its belief that Argentina allegedly misled investors or threatened those that sought arbitration, without relating those factors to the specific criteria for a state of necessity defense as outlined by ILC Draft Article 25. *Id.* at 334a-335a.

The Tribunal awarded BG US$ 185,285,485.85, plus interest, costs of arbitration, and attorneys' fees. *Id.* at 348a, 356a-357a. In order to calculate this amount, the Tribunal compared a valuation of MetroGAS based on a 1998 transactional value (the "Without Measures" value) with a post-Emergency Law transactional value (the "With Measures" value), the amount of damages being simply the difference between the Without Measures and the With Measures values. *Id.* at 346a-348a. In doing so, moreover, the Tribunal did not make any adjustments to take into account that 1998 was the peak year of Argentina's economy during the 1990s, just before a recession started that caused a "cumulative loss of GDP [of] about 25% and [a] real per capita GDP [decline] from $8,302 in 1998 to $2,595 in 2002." *Id.* at 170a. In fact, the only adjustment the Tribunal made to its valuation was on the basis of BG's percentage ownership of MetroGAS. *Id.* at 348a.

## III. FEDERAL PROCEEDINGS

Argentina timely petitioned to vacate the award under the Federal Arbitration Act, 9 U.S.C. §§ 10-11, in the U.S. District Court for the District of Columbia, as Washington, D.C. was the legal seat of the arbitration. Argentina raised several grounds for vacatur, including that: (1) the Tribunal acted in manifest disregard of the law when it rejected Argentina's state of necessity defense; and (2) the Tribunal lacked jurisdiction under the dispute resolution provision of the Treaty. *Id.* at 115a, 128a. The district court denied Argentina's petition to vacate or modify the award, *id.* at 109a–110a, and granted BG's cross-petition for recognition and enforcement of the Award, *id*. at 71a-72a.

In addressing Argentina's challenge to the Tribunal's rejection of Argentina's state of necessity defense, the district court noted its uncertainty whether manifest disregard of the law remains a basis for vacating an arbitral award after this Court's decision in *Hall Street*. *Id.* at 117a–118a n.7. Then, without resolving that question, the district court rejected Argentina's claim of manifest disregard, finding that Argentina failed to demonstrate that: "(1) the [Tribunal] knew of a governing legal principle[,] yet refused to apply it or ignored it altogether[;] and (2) the law ignored by the [Tribunal] was well[-]defined, explicit, and clearly applicable to the case." *Id.* at 134a (quotation omitted). The district court characterized Argentina's position as "nothing more than a mere assertion of error," *id.* at 135a, and concluded that it was not clear that the doctrine applies to this case for the reasons set forth by the Tribunal, *id.* at 136a.

On Argentina's appeal, the court of appeals reversed, finding that the Tribunal lacked jurisdiction over the dispute, *id.* at 52a, and therefore declined to address Argentina's other grounds for vacatur, including that the Tribunal acted in manifest disregard of the law.

This Court subsequently granted BG's petition for a writ of certiorari and reversed the court of appeals' jurisdictional ruling. *Id.* at 4a, 25a.

Just one week after this Court's certified judgment and mandate was docketed in the court of appeals, the panel summarily entered a judgment ordering that "the District Court's orders denying the motion to vacate and granting the cross-motion to confirm be affirmed."

*Id.* at 2a. Argentina timely petitioned for panel rehearing on a number of grounds that had not been previously taken up by the court of appeals, including manifest disregard.

On May 21, 2014, the court of appeals denied Argentina's request for panel rehearing in a one-page order. Argentina's argument that the Tribunal acted in manifest disregard of the law was rejected in a single sentence. *See id.* at 359a ("Assuming the manifest-disregard-of-law standard applies, Argentina failed to show either that the 'state of necessity' doctrine clearly applied or that the arbitral panel refused to apply it or ignored it.") (citing *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001)).

## REASONS FOR GRANTING THE PETITION

This case presents a question that has sharply divided the lower courts in the six years since *Hall Street*: whether an arbitration award may be vacated if an arbitral tribunal manifestly disregards the law, that is, if the tribunal states the law correctly but deliberately declines to apply it. The Court expressly declined to resolve this question in *Stolt-Nielsen*, and the split has only intensified since then. It warrants this Court's resolution so that the judiciary may fulfill a necessary control function to sustain the legitimacy of both domestic and international arbitration. This case presents an appropriate vehicle to resolve the

conflict because, if properly applied here, the manifest disregard standard would require reversal.[1]

## I. THERE IS A DEEP AND SIGNIFICANT CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE AVAILABILITY OF MANIFEST DISREGARD AS A BASIS FOR VACATING ARBITRAL AWARDS

The "manifest disregard" formulation derives from this Court's decision more than sixty years ago in *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). *Wilko* noted that "*interpretations* of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. at 436–37 (emphases added). The Court continued to point thereafter to the *Wilko* formulation, including in one of its seminal arbitration decisions of the modern era, to describe the "unusual circumstances" in which a court will set aside an arbitral award. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citing *Wilko* for the proposition that the "parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law").

By the time the Court discussed the issue in *Hall Street*, 552 U.S. at 584–85, "every federal appellate

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[1] In presenting these arguments, Argentina does not waive any and expressly preserves all rights with respect to the defenses it included in its petition to vacate or modify the Award, as regards any forum in which enforcement of the Award may be sought.

court … allowed for the vacatur of an award based on an arbitrator's manifest disregard of the law." *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008) (citing pre-*Hall Street* vacatur decisions from the 1st – 11th Circuits). The manifest disregard standard therefore had significant stability nationwide prior to *Hall Street*.

*Hall Street* itself did not concern a claim of manifest disregard, but rather addressed a split among the circuits about whether parties may contract in their arbitration agreements for judicial review and vacatur based on simple legal error, in addition to the grounds provided under the FAA. *See* 552 U.S. at 583-84. The Court held they may not. *See id.* at 586, 592. In doing so, it rejected an argument that *Wilko* supported allowing contractual expansion of the grounds beyond those provided in the FAA. *Id.* at 584-85. The precise context in *Hall Street* was thus a rejection of the proposed "leap from a supposed judicial expansion by interpretation to a private expansion by contract." *Id.* at 585. However, the Court's further comment that "maybe . . . 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them," *id.*, has spawned a raging conflict among the circuits as to whether the opinion was intended to bury manifest disregard as a basis for vacating an award. The Court's elusive statement in *Stolt-Nielsen* – "We do not decide whether 'manifest disregard' survives [*Hall Street*] as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10," 559 U.S. at 672 n.3 – has led to a deepening of the divisions among the lower courts in the years since then.

The Fifth, Eighth, and Eleventh Circuits have taken *Hall Street* to hold that courts should no longer invalidate arbitral awards on the basis of manifest disregard. *See S. Mills, Inc. v. Nunes*, No. 13-11921, 2014 WL 2777279, at *1 n.2, (11th Cir. Mar. 27, 2014) (per curiam) ("[M]anifest disregard of the law is no longer a valid basis for vacating an arbitration award."); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010) (holding that manifest disregard is unavailable as a ground for vacatur because "the categorical language of *Hall Street* compels such a conclusion"); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (reading *Hall Street* as a definitive rejection of manifest disregard as a ground to vacate an arbitration award); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding that manifest disregard is "not cognizable" as a ground for vacatur after *Hall Street*); *see also Air Line Pilots Ass'n Int'l v. Trans State Airlines, LLC*, 638 F.3d 572, 579 (8th Cir. 2011) (characterizing manifest disregard as a "defunct vacatur standard").

In contrast, the Second, Fourth, Sixth, Seventh, and Ninth Circuits have concluded that manifest disregard survives, although their rationales for, and scope of application of, the doctrine differ somewhat. The Second and Ninth Circuits have held that manifest disregard survives *Hall Street* as a "judicial gloss" on the FAA. *See Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451 (2d Cir. 2011) ("[A]s 'judicial gloss on these specific grounds for vacatur of arbitration awards' . . . we have held that the court may set aside an arbitration award if it was rendered in 'manifest disregard of the law.'") (citation omitted); *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 414 (9th

Cir. 2011) ("Although the words 'manifest disregard for law' do not appear in the FAA, they have come to serve as a judicial gloss on the standard for vacatur set forth in FAA § 10(a)(4)."). The Fourth and Sixth Circuits have held that manifest disregard survives without precisely resolving whether it is statutory or extra-statutory. *See Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) ("Although we find that manifest disregard continues to exist as either an independent ground for review or as a judicial gloss, we need not decide which of the two it is . . . ."); *Coffee Beanery*, 300 F. App'x. at 418 (citing the statutory grounds to vacate an arbitration award and noting "[t]his Court's ability to vacate an arbitration award is almost exclusively limited to these grounds, although it may also vacate an award found to be in manifest disregard of the law"). The Seventh Circuit has held that a court may vacate an arbitral award based on manifest disregard only when the award directs a party to violate the law. *See Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281, 284–85 (7th Cir. 2011).[2]

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[2] Among the circuits that continue to apply the standard, there is a further divergence in the courts' wording of the standard for determining what constitutes manifest disregard. *See, e.g.*, *Affymax*, 660 F.3d at 284 (finding that manifest disregard may only be invoked for "an award that directs the parties to violate the legal rights of third persons who did not consent to the arbitration"); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 n.1 (2d Cir. 2011) (requiring that (1) "the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable" and (2) "the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it") (quotations omitted); *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 620 (10th Cir. 2011) (stating

Finally, the remaining circuits have noted the debate about whether manifest disregard survives *Hall Street* but have contributed to the uncertainty by declining to resolve the issue definitively for themselves. *See Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010) ("We have referred to the issue in dicta . . . but have not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*.") (citation omitted); *Bellantuono v. ICAP Sec. USA, LLC*, 557 F. App'x 168, 174 (3d Cir. 2014) (noting the split over manifest disregard and stating that the Third Circuit had "not yet ruled on the issue"); *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 620 (10th Cir. 2011) (noting history of recognizing manifest disregard, and declining to eliminate the standard without more explicit guidance from the Supreme Court). The D.C. Circuit – from which this case arises – has not issued a published decision analyzing manifest disregard since *Hall Street* and declined to resolve the question in the judgment below. *See* Pet. App. 359a.

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that manifest disregard "requires a party to establish the arbitrator's willful inattentiveness to the governing law") (quotations omitted) (citing *Stolt-Nielsen*, 559 U.S. at 671). In essence, however, these tests all return to the fundamental question of whether "the arbitrator understands and correctly states the law, but proceeds to disregard the same." *Dewan v. Walia*, 544 F. App'x 240, 246 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1788 (2014) (quotation omitted) (vacating an arbitral award for manifest disregard).

## II. ONLY THIS COURT CAN RESOLVE THE DISAGREEMENT ITS DECISIONS HAVE SPAWNED AMONG THE CIRCUITS ABOUT MANIFEST DISREGARD

Because the circuit split concerning the status of manifest disregard is a reaction to this Court's statements in *Hall Street* and has only deepened following the Court's reservation of the issue in *Stolt-Nielsen*, only this Court has the ability to resolve it. It is important that the Court do so. Because the FAA provides for judicial review of arbitral awards, this is an issue that will not go away. The current uncertainty spawns unnecessary litigation concerning collateral issues – the existence and scope of the standard of review – that both prolongs the review process and gets in the way of meaningful and appropriate review of arbitral awards. It also results in arbitral awards receiving scrutiny under different standards in different circuits, contrary to the expectation that the FAA would provide a uniform national standard of review. *See Bakoss v. Certain Underwriters at Lloyds of London*, 707 F.3d 140, 143 (2d Cir. 2013) (guided by "congressional intent to create a uniform national arbitration policy"); *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) ("[Congress] sought a uniform federal policy favoring agreements to arbitrate."); *see also Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and HR. 646 Before the Subcomms. of the Judiciary*, 68th Cong. 28 (1924) (testimony of Alexander Rose) ("There is a good deal of confusion in the law on this subject. . . . [T]he enactment of [the FAA], extending its effect all over the United States, will have an effect upon the cause of

that much-desired thing—uniform legislation on a subject of this character."). This case provides the Court an appropriate vehicle to bring certainty to this important area of federal court jurisdiction.

### A. Manifest Disregard Is a Proper and Important Basis for Vacatur

Manifest disregard of the law falls comfortably within the grounds for vacatur explicitly stated in FAA § 10(a)(3)-(4), which include arbitrator misconduct and excess of power. *See, e.g.*, *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("[T]he manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4), which states that the court may vacate 'where the arbitrators exceeded their powers.'") (citations omitted); *see also Hall Street*, 552 U.S. at 585 (observing that "some courts have thought [that] 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers'") (citation omitted); James M. Gaitis, *Clearing the Air on 'Manifest Disregard' and Choice of Law in Commercial Arbitration: A Reconciliation of Wilko, Hall Street, and Stolt-Nielsen*, 22 Am. Rev. Int'l Arb. 21, 30 (2011) ("[T]he vacatur provisions of the FAA were meant to subsume common-law vacatur grounds, such as the manifest disregard concept, based on acts in excess of arbitral powers.").

Manifest disregard does not call for courts to vacate arbitral awards because of simple legal error or disagreement with the arbitrators' resolution of disputed legal issues. Rather, it concerns willful

refusal to apply the law the arbitrators are required by the arbitration agreement to apply. The predicate, under virtually all formulations of the rule, is that the arbitrators properly articulated the governing standard and then flouted it. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 672 n.3 (referring to the argument that the arbitrators "'willfully flouted the governing law by refusing to apply it'") (citation omitted).

A willful failure to apply the law the parties agreed would govern their conduct is readily recognized as amounting to "misconduct" or an excess of power, as the arbitrators have no power to choose to apply a different law than that which the parties agreed must apply. Parties who agree to arbitration do so with the understanding that the arbitrator will resolve the dispute on the basis of applicable law. Failure by the arbitrator to do so means that the resulting award "fails to draw its essence from the contract." *Dewan v. Walia*, 544 F. App'x 240, 245 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1788 (2014); *see Stolt-Nielsen*, 559 U.S. at 677 (vacating award because tribunal "imposed its own policy choice and thus exceeded its powers").

Manifest disregard is thus an embodiment of the FAA's standard for judicial oversight that permits vacating an award in exceptional circumstances. *See Hall Street*, 552 U.S. at 586 (the FAA tasks courts with vacating arbitral awards in circumstances where necessary to catch "egregious departures from the parties' agreed upon arbitration"). Parties may be less inclined to agree to arbitrate if they cannot be assured that "arbitrators do not intentionally disregard their legal rights." Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law"*

*Standard*, 52 B.C. L. Rev. 137, 183 (2011); *cf.* Gaitis, *supra*, at 43 ("Just as the parties may agree to the application of a particular procedural law, so may they agree to the application of a particular substantive law. And if arbitrators manifestly ignore that directive, courts are duty bound to 'honor' that directive by vacating the ensuing award as being founded on arbitral acts in excess of authority."). Review in this case is warranted not only to resolve the conflict among the circuits, but to reaffirm necessary judicial oversight to preserve party consent, on which arbitration rests.

### B. This Case Provides an Appropriate Vehicle for Resolving Confusion Among the Circuits as to the Legal Basis for the Manifest Disregard Standard

This case is a proper one for the Court to use to reaffirm the standing of manifest disregard. The D.C. Circuit is among those that have shied away from manifest disregard because of the uncertainty spawned by *Hall Street*, which can only have contributed to the perfunctory review it afforded in this case. Had the court of appeals applied the manifest disregard standard in earnest, it would have found that the Tribunal correctly stated the law regarding the state of necessity defense but failed to apply it, which justifies vacating the Award.

Argentina invoked the state of necessity doctrine under customary international law, which the Treaty makes applicable,[3] as embodied in Article 25 of the ILC

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[3] *See* Treaty Art. 8(4) ("The arbitral tribunal shall decide the dispute in accordance with . . . the applicable principles of international law.").

Draft Articles. Pet. App. 312a-313a, 323a. Referring to Argentina's statement of the law, the Tribunal correctly noted that a state of necessity exists under customary international law when the State is compelled to depart from an international obligation with another State in order to preserve an essential state interest in a situation of grave or imminent danger. *Id.* at 324a–325a.[4] Yet the Tribunal's conclusory analysis – a mere six paragraphs in a 467-paragraph award – relied on factors altogether foreign to the ILC Draft Articles.

The circumstances of Argentina's economic crisis presented the necessary predicate to invoke the state of necessity. It faced the worst economic crisis in its history, combined with "unprecedented social unrest." *Id.* at 169a–172a, 325a–326a. The government was

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[4] Article 25 of the ILC Draft Articles provides in full:

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

compelled to act for the survival of Argentina's economy and the operation of its financial system and to restore social and institutional stability. *Id.* at 325a–326a. Argentina's monetary reforms, including those BG challenged, were a "proportionate and reasonable solution within the context of the very serious emergency in Argentina." *Id.* at 326a. They thus satisfied Article 25's requirement that the act "[i]s the only way for the State to safeguard an essential interest" – continued social and economic functions – "against a grave and imminent peril" – total and imminent collapse. *See* ILC Draft Article 25(1)(a).

Despite setting forth the relevant standard and acknowledging "Argentina is entitled to adopt such measures as it deems fit to emerge from the state of emergency," Pet. App. 332a–333a, the Tribunal rejected Argentina's state of necessity defense. In doing so, the Tribunal invoked factors wholly extraneous to, and in manifest disregard of, the law it had identified – ILC Draft Article 25. The Tribunal stated that Argentina was not entitled to claim a state of necessity as a defense:

> given that measures adopted by Argentina included: (i) luring BG and other investors to accept a temporary suspension of the dollar denominated tariff and the adjustment mechanism by indicating that the measures would be temporary; (ii) threatening companies that resorted to arbitration; (iii) attempting to force investors which commenced arbitration to withdraw these proceedings as a condition to negotiations; and (iv) setting up a mechanism for the revision of the concessions that was never

> intended to restore the conditions of Argentina's initial representations.

*Id.* at 334a–335a. But all of these assertions are not only disputed but, more importantly, are unrelated to the state of necessity standards under the ILC Draft Articles – the Tribunal rejected Argentina's defense by referring to criteria that simply do not exist under Article 25.[5]

At the same time, the Tribunal failed to expressly consider whether the standards actually established by Article 25(1) – including whether the measures adopted were the "only way" to respond to the state of necessity – had been satisfied, and likewise did not consider the factors under Article 25(2) that would render the defense unavailable, including whether Argentina "ha[d] contributed to the state of necessity." By identifying ILC Draft Article 25 as applicable, but then failing to apply that law and instead substituting other irrelevant factors, the Tribunal disregarded the applicable law. Had the Tribunal applied, rather than disregarded, the terms of Article 25, it would have been required to rule for Argentina.

Accordingly, a proper application of the manifest disregard standard in this case would call for vacating

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[5] The Tribunal's speculation that the defense might not apply to obligations to private investors, Pet. App. 332a, makes no sense since BG can only invoke rights based on "obligations between sovereign States" arising from the Treaty, *id.* Its suggestion of an exception to the doctrine not based on the text of the Treaty, *id.* at 332a–333a, is contradicted by Article 25(2)(a)'s requirement that any such exception be stated in the source of the obligation itself, which here is the Treaty.

the Award. The court of appeals' failure to reach this conclusion is both wrong and a reflection that it is awaiting further guidance from this Court regarding the validity and scope of the manifest disregard grounds in light of *Hall Street*. The petition should therefore be granted.

The grave economic crisis that underlies Argentina's state of necessity defense adds urgency to the need for this Court's review to provide a remedy for the Tribunal's manifest disregard of the law. The Tribunal's approach to the calculation of damages compounds the fundamental unfairness of allowing such an unlawful Award to stand. As discussed *supra* p. 7, the Tribunal measured damages as the difference between a value of MetroGAS in 1998, at the height of the economy, and a supposed value at a later date. The Tribunal thus failed altogether to adopt a method that could assess the alleged harm – damages – caused by the measures of which BG complained. And, by failing even to take any steps to account for the impact of the general economic decline in Argentina between the two dates, it effectively ordered Argentina to pay BG for losses that resulted from the decline faced by the economy as a whole, rather than to compensate BG for any harm actually caused by the measures undertaken to combat the crisis on which liability was founded.[6]

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[6] The Tribunal's failure to account for the effect of Argentina's severe economic decline on BG's alleged losses has been confirmed by independent observers. *See, e.g.*, Sergey Ripinsky with Kevin Williams, *Damages in International Investment Law* 94 (2008) (stating in reference to the Award that "[t]he Tribunal did not consider, however, whether the diminution in value could in part be attributed to the general economic crisis in Argentina, for which

The Tribunal's manifest disregard of the law is thus not some academic matter, but resulted in a windfall, and a proper application of the FAA demands that the Award be set aside.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

August 2014

Respectfully submitted,

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the country must not be held responsible under international law").

# APPENDIX

# APPENDIX

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 11-7021**
**September Term, 2013**

**[Filed April 15, 2014]**

| | |
|---|---|
| REPUBLIC OF ARGENTINA, | ) |
| APPELLANT | ) |
| | ) |
| v. | ) |
| | ) |
| BG GROUP PLC, | ) |
| APPELLEE | ) |
| | ) |

On Remand from the Supreme Court of the United States

Before: HENDERSON and ROGERS, *Circuit Judges*; SENTELLE, *Senior Circuit Judge*

**J U D G M E N T**

This cause came to be heard on remand from the Supreme Court of the United States, reversing this court's judgment. *See BG Group plc v. Republic of Argentina*, 134 S. Ct. 1198 (2014). On consideration thereof, it is

**ORDERED** that this court's judgment filed January 17, 2012, be vacated. It is

**FURTHER ORDERED and ADJUDGED** that the District Court's orders denying the motion to vacate and granting the cross-motion to confirm be affirmed.

The Clerk is directed to issue the mandate forthwith.

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

Dated: April 15, 2014

## APPENDIX B

## SUPREME COURT OF THE UNITED STATES

**No. 12–138**

**[Filed March 5, 2014]**

BG GROUP PLC, PETITIONER
*v.*
REPUBLIC OF ARGENTINA

Opinion of the Court

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUSTICE BREYER delivered the opinion of the Court.

Article 8 of an investment treaty between the United Kingdom and Argentina contains a dispute-resolution provision, applicable to disputes between one of those nations and an investor from the other. See Agreement for the Promotion and Protection of Investments, Art. 8(2), Dec. 11, 1990, 1765 U. N. T. S. 38 (hereinafter Treaty). The provision authorizes either party to submit a dispute "to the decision of the competent tribunal of the Contracting Party in whose

territory the investment was made," *i.e.*, a local court. Art. 8(1). And it provides for arbitration

> "(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal . . . , the said tribunal has not given its final decision; [or]
> "(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute." Art. 8(2)(a).

The Treaty also entitles the parties to agree to proceed directly to arbitration. Art. 8(2)(b).

This case concerns the Treaty's arbitration clause, and specifically the local court litigation requirement set forth in Article 8(2)(a). The question before us is whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions. That is to say, who—court or arbitrator—bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy? In our view, the matter is for the arbitrators, and courts must review their determinations with deference.

## I

### A

In the early 1990's, the petitioner, BG Group plc, a British firm, belonged to a consortium that bought a majority interest in an Argentine entity called

MetroGAS. MetroGAS was a gas distribution company created by Argentine law in 1992, as a result of the government's privatization of its state-owned gas utility. Argentina distributed the utility's assets to new, private companies, one of which was MetroGAS. It awarded MetroGAS a 35-year exclusive license to distribute natural gas in Buenos Aires, and it submitted a controlling interest in the company to international public tender. BG Group's consortium was the successful bidder.

At about the same time, Argentina enacted statutes providing that its regulators would calculate gas "tariffs" in U. S. dollars, and that those tariffs would be set at levels sufficient to assure gas distribution firms, such as MetroGAS, a reasonable return.

In 2001 and 2002, Argentina, faced with an economic crisis, enacted new laws. Those laws changed the basis for calculating gas tariffs from dollars to pesos, at a rate of one peso per dollar. The exchange rate at the time was roughly three pesos to the dollar. The result was that MetroGAS' profits were quickly transformed into losses. BG Group believed that these changes (and several others) violated the Treaty; Argentina believed the contrary.

B

In 2003, BG Group, invoking Article 8 of the Treaty, sought arbitration. The parties appointed arbitrators; they agreed to site the arbitration in Washington, D. C.; and between 2004 and 2006, the arbitrators decided motions, received evidence, and conducted hearings. BG Group essentially claimed that

Argentina's new laws and regulatory practices violated provisions in the Treaty forbidding the "expropriation" of investments and requiring that each nation give "fair and equitable treatment" to investors from the other. Argentina denied these claims, while also arguing that the arbitration tribunal lacked "jurisdiction" to hear the dispute. App. to Pet. for Cert. 143a–144a, 214a–218a, 224a–232a. According to Argentina, the arbitrators lacked jurisdiction because: (1) BG Group was not a Treaty-protected "investor"; (2) BG Group's interest in MetroGAS was not a Treaty-protected "investment"; and (3) BG Group initiated arbitration without first litigating its claims in Argentina's courts, despite Article 8's requirement. *Id.*, at 143a–171a. In Argentina's view, "failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible." *Id.*, at 162a.

In late December 2007, the arbitration panel reached a final decision. It began by determining that it had "jurisdiction" to consider the merits of the dispute. In support of that determination, the tribunal concluded that BG Group was an "investor," that its interest in MetroGAS amounted to a Treaty-protected "investment," and that Argentina's own conduct had waived, or excused, BG Group's failure to comply with Article 8's local litigation requirement. *Id.,* at 99a, 145a, 161a, 171a. The panel pointed out that in 2002, the President of Argentina had issued a decree staying for 180 days the execution of its courts' final judgments (and injunctions) in suits claiming harm as a result of the new economic measures. *Id.*, at 166a–167a. In addition, Argentina had established a "renegotiation

process" for public service contracts, such as its contract with MetroGAS, to alleviate the negative impact of the new economic measures. *Id.*, at 129a, 131a. But Argentina had simultaneously barred from participation in that "process" firms that were litigating against Argentina in court or in arbitration. *Id.*, at 168a–171a. These measures, while not making litigation in Argentina's courts literally impossible, nonetheless "hindered" recourse "to the domestic judiciary" to the point where the Treaty implicitly excused compliance with the local litigation requirement. *Id.,* at 165. Requiring a private party in such circumstances to seek relief in Argentina's courts for 18 months, the panel concluded, would lead to "absurd and unreasonable result[s]." *Id.*, at 166a.

On the merits, the arbitration panel agreed with Argentina that it had not "expropriate[d]" BG Group's investment, but also found that Argentina had denied BG Group "fair and equitable treatment." *Id.*, at 222a–223a, 240a–242a. It awarded BG Group $185 million in damages. *Id.*, at 297a.

C

In March 2008, both sides filed petitions for review in the District Court for the District of Columbia. BG Group sought to confirm the award under the New York Convention and the Federal Arbitration Act. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. IV, June 10, 1958, 21 U. S. T. 2519, T. I. A. S. No. 6997 (New York Convention) (providing that a party may apply "for recognition and enforcement" of an arbitral award

subject to the Convention); 9 U. S. C. §§204, 207 (providing that a party may move "for an order confirming [an arbitral] award" in a federal court of the "place designated in the agreement as the place of arbitration if such place is within the United States"). Argentina sought to vacate the award in part on the ground that the arbitrators lacked jurisdiction. See §10(a)(4) (a federal court may vacate an arbitral award "where the arbitrators exceeded their powers").

The District Court denied Argentina's claims and confirmed the award. 764 F. Supp. 2d 21 (DC 2011); 715 F. Supp. 2d 108 (DC 2010). But the Court of Appeals for the District of Columbia Circuit reversed. 665 F. 3d 1363 (2012). In the appeals court's view, the interpretation and application of Article 8's local litigation requirement was a matter for courts to decide *de novo*, *i.e.*, without deference to the views of the arbitrators. The Court of Appeals then went on to hold that the circumstances did not excuse BG Group's failure to comply with the requirement. Rather, BG Group must "commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration." *Id.*, at 1373. Because BG Group had not done so, the arbitrators lacked authority to decide the dispute. And the appeals court ordered the award vacated. *Ibid.*

BG Group filed a petition for certiorari. Given the importance of the matter for international commercial arbitration, we granted the petition. See, *e.g.*, K. Vandevelde, Bilateral Investment Treaties: History, Policy & Interpretation 430–432 (2010) (explaining that dispute-resolution mechanisms allowing for arbitration are a "critical element" of modern day

bilateral investment treaties); C. Dugan, D. Wallace, N. Rubins, & B. Sabahi, Investor-State Arbitration 51–52, 117–120 (2008) (referring to the large number of investment treaties that provide for arbitration, and explaining that some also impose prearbitration requirements such as waiting periods, amicable negotiations, or exhaustion of local remedies).

II

As we have said, the question before us is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision. Put in terms of standards of judicial review, should a United States court review the arbitrators' interpretation and application of the provision *de novo*, or with the deference that courts ordinarily show arbitral decisions on matters the parties have committed to arbitration? Compare, *e.g., First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 942 (1995) (example where a "court makes up its mind about [an issue] independently" because the parties did not agree it should be arbitrated), with *Oxford Health Plans LLC* v. *Sutter*, 569 U. S. ___, ___ (2013) (slip op., at 4) (example where a court defers to arbitrators because the parties "'bargained for'" arbitral resolution of the question (quoting *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000))). See also *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 588 (2008) (on matters committed to arbitration, the Federal Arbitration Act provides for "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway" and to prevent it from becoming "merely a prelude to a

more cumbersome and time-consuming judicial review process" (internal quotation marks omitted)); *Eastern Associated Coal Corp.*, *supra*, at 62 (where parties send a matter to arbitration, a court will set aside the "arbitrator's interpretation of what their agreement means only in rare instances").

In answering the question, we shall initially treat the document before us as if it were an ordinary contract between private parties. Were that so, we conclude, the matter would be for the arbitrators. We then ask whether the fact that the document in question is a treaty makes a critical difference. We conclude that it does not.

III

Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. See, *e.g., Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"). If the contract is silent on the matter of who primarily is to decide "threshold" questions about arbitration, courts determine the parties' intent with the help of presumptions.

On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about "arbitrability." These include questions such as "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a

particular type of controversy." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84 (2002); accord, *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299–300 (2010) (disputes over "formation of the parties' arbitration agreement" and "its enforceability or applicability to the dispute" at issue are "matters . . . the court must resolve" (internal quotation marks omitted)). See *First Options*, *supra*, at 941, 943–947 (court should decide whether an arbitration clause applied to a party who "had not personally signed" the document containing it); *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 651 (1986) (court should decide whether a particular labor-management layoff dispute fell within the arbitration clause of a collective-bargaining contract); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 546–548 (1964) (court should decide whether an arbitration provision survived a corporate merger). See generally *AT&T Technologies*, *supra*, at 649 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator").

On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. See *Howsam*, *supra*, at 86 (courts assume parties "normally expect a forum-based decisionmaker to decide forum-specific *procedural* gateway matters" (emphasis added)). These procedural matters include claims of "waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S.

1, 25 (1983). And they include the satisfaction of "'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.'" *Howsam*, *supra*, at 85 (quoting the Revised Uniform Arbitration Act of 2000 §6, Comment 2, 7 U. L. A. 13 (Supp. 2002); emphasis deleted). See also §6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled"); §6, Comment 2 (explaining that this rule reflects "the holdings of the vast majority of state courts" and collecting cases).

The provision before us is of the latter, procedural, variety. The text and structure of the provision make clear that it operates as a procedural condition precedent to arbitration. It says that a dispute "shall be submitted to international arbitration" if "one of the Parties so requests," as long as "a period of eighteen months has elapsed" since the dispute was "submitted" to a local tribunal and the tribunal "has not given its final decision." Art. 8(2). It determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all. Cf. 13 R. Lord, Williston on Contracts §38:7, pp. 435, 437; §38:4, p. 422 (4th ed. 2013) (a "condition precedent" determines what must happen before "a contractual duty arises" but does not "make the *validity* of the contract depend on its happening" (emphasis added)). Neither does this language or other language in Article 8 give substantive weight to the local court's determinations on the matters at issue between the parties. To the contrary, Article 8 provides that *only* the "arbitration decision shall be final and binding on both Parties."

Art. 8(4). The litigation provision is consequently a purely procedural requirement—a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute.

Moreover, the local litigation requirement is highly analogous to procedural provisions that both this Court and others have found are for arbitrators, not courts, primarily to interpret and to apply. See *Howsam*, *supra*, at 85 (whether a party filed a notice of arbitration within the time limit provided by the rules of the chosen arbitral forum "is a matter presumptively for the arbitrator, not for the judge"); *John Wiley*, *supra*, at 555–557 (same, in respect to a mandatory prearbitration grievance procedure that involved holding two conferences). See also *Dialysis Access Center, LLC* v. *RMS Lifeline, Inc.*, 638 F. 3d 367, 383 (CA1 2011) (same, in respect to a prearbitration "good faith negotiations" requirement); *Lumbermens Mut. Cas. Co*. v. *Broadspire Management Servs., Inc*., 623 F. 3d 476, 481 (CA7 2010) (same, in respect to a prearbitration filing of a "Disagreement Notice").

Finally, as we later discuss in more detail, see *infra*, at 13–14, we can find nothing in Article 8 or elsewhere in the Treaty that might overcome the ordinary assumption. It nowhere demonstrates a contrary intent as to the delegation of decisional authority between judges and arbitrators. Thus, were the document an ordinary contract, it would call for arbitrators primarily to interpret and to apply the local litigation provision.

*Appendix B*

IV

A

We now relax our ordinary contract assumption and ask whether the fact that the document before us is a treaty makes a critical difference to our analysis. The Solicitor General argues that it should. He says that the local litigation provision may be "a condition on the State's consent to enter into an arbitration agreement." Brief for United States as *Amicus Curiae* 25. He adds that courts should "review de novo the arbitral tribunal's resolution of objections based on an investor's non-compliance" with such a condition. *Ibid.* And he recommends that we remand this case to the Court of Appeals to determine whether the court-exhaustion provision is such a condition. *Id.*, at 31–33.

1

We do not accept the Solicitor General's view as applied to the treaty before us. As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent. *Air France* v. *Saks*, 470 U. S. 392, 399 (1985) (courts must give "the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"); *Sullivan* v. *Kidd*, 254 U. S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties"); *Wright* v. *Henkel*, 190 U. S. 40, 57 (1903) ("Treaties

must receive a fair interpretation, according to the intention of the contracting parties"). And where, as here, a federal court is asked to interpret that intent pursuant to a motion to vacate or confirm an award made in the United States under the Federal Arbitration Act, it should normally apply the presumptions supplied by American law. See New York Convention, Art. V(1)(e) (award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"); Vandevelde, Bilateral Investment Treaties, at 446 (arbitral awards pursuant to treaties are "subject to review under the arbitration law of the state where the arbitration takes place"); Dugan, Investor-State Arbitration, at 636 ("[T]he national courts and the law of the legal situs of arbitration control a losing party's attempt to set aside [an] award").

The Solicitor General does not deny that the presumption discussed in Part III, *supra* (namely, the presumption that parties intend procedural preconditions to arbitration to be resolved primarily by arbitrators), applies both to ordinary contracts and to similar provisions in treaties when those provisions are not also "conditions of consent." Brief for United States as *Amicus Curiae* 25–27. And, while we respect the Government's views about the proper interpretation of treaties, *e.g.*, *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010), we have been unable to find any other authority or precedent suggesting that the use of the "consent" label in a treaty should make a critical difference in discerning the parties' intent about whether courts or

arbitrators should interpret and apply the relevant provision.

We are willing to assume with the Solicitor General that the appearance of this label in a treaty can show that the parties, or one of them, thought the designated matter quite important. But that is unlikely to be conclusive. For parties often submit important matters to arbitration. And the word "consent" could be attached to a highly procedural precondition to arbitration, such as a waiting period of several months, which the parties are unlikely to have intended that courts apply without saying so. See, *e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments, Art. 9, Netherlands-Slovenia, Sept. 24, 1996, Netherlands T. S. No. 296 ("Each Contracting Party hereby consents to submit any dispute . . . which they can not [*sic*] solve amicably within three months . . . to the International Center for Settlement of Disputes for settlement by conciliation or arbitration"), online at www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2006/10/17/slovenia.html (all Internet materials as visited on Feb. 28, 2014, and available in Clerk of Court's case file); Agreement for the Promotion and Protection of Investments, Art. 8(1), United Kingdom-Egypt, June 11, 1975, 14 I. L. M. 1472 ("Each Contracting Party hereby consents to submit" a dispute to arbitration if "agreement cannot be reached within three months between the parties"). While we leave the matter open for future argument, we do not now see why the presence of the term "consent" in a treaty warrants abandoning, or increasing the complexity of, our ordinary intent-determining

framework. See *Howsam*, 537 U. S., at 83–85; *First Options*, 514 U. S., at 942–945; *John Wiley*, 376 U. S., at 546–549, 555–559.

2

In any event, the treaty before us does *not* state that the local litigation requirement is a "condition of consent" to arbitration. Thus, we need not, and do not, go beyond holding that, in the absence of explicit language in a treaty demonstrating that the parties intended a different delegation of authority, our ordinary interpretive framework applies. We leave for another day the question of interpreting treaties that refer to "conditions of consent" explicitly. See, *e.g.*, United States-Korea Free Trade Agreement, Art. 11.18, Feb. 10, 2011 (provision entitled "Conditions and Limitations on Consent of Each Party" and providing that "[n]o claim may be submitted to arbitration under this Section" unless the claimant waives in writing "any right" to press his claim before an "administrative tribunal or court"), online at www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text; North American Free Trade Agreement, Arts. 1121–1122, Dec. 17, 1992, 32 I. L. M. 643–644 (providing that each party's "[c]onsent to [a]rbitration" is conditioned on fulfillment of certain "procedures," one of which is a waiver by an investor of his right to litigate the claim being arbitrated). See also 2012 U. S. Model Bilateral Investment Treaty, Art. 26 (entitled "Conditions and limitations on Consent of Each Party"), online at www.ustr.gov / sites / default / files /BIT%20text%20for%20ACIEP%20Meeting.pdf. And we apply our ordinary presumption that the interpretation

and application of procedural provisions such as the provision before us are primarily for the arbitrators.

B

A treaty may contain evidence that shows the parties had an intent contrary to our ordinary presumptions about who should decide threshold issues related to arbitration. But the treaty before us does not sho w any such contrary intention. We concede that the local litigation requirement appears in ¶(1) of Article 8, while the Article does not mention arbitration until the subsequent paragraph, ¶(2). Moreover, a requirement that a party exhaust its remedies in a country's domestic courts before seeking to arbitrate may seem particularly important to a country offering protections to foreign investors. And the placing of an important matter prior to any mention of arbitration at least arguably suggests an intent by Argentina, the United Kingdom, or both, to have courts rather than arbitrators apply the litigation requirement.

These considerations, however, are outweighed by others. As discussed *supra*, at 8–9, the text and structure of the litigation requirement set forth in Article 8 make clear that it is a procedural condition precedent to arbitration—a sequential step that a party must follow before giving notice of arbitration. The Treaty nowhere says that the provision is to operate as a substantive condition on the formation of the arbitration contract, or that it is a matter of such elevated importance that it is to be decided by courts. International arbitrators are likely more familiar than are judges with the expectations of foreign investors

and recipient nations regarding the operation of the provision. See *Howsam*, *supra*, at 85 (comparative institutional expertise a factor in determining parties' likely intent). And the Treaty itself authorizes the use of international arbitration associations, the rules of which provide that arbitrators shall have the authority to interpret provisions of this kind. Art. 8(3) (providing that the parties may refer a dispute to the International Centre for the Settlement of Investment Disputes (ICSID) or to arbitrators appointed pursuant to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL)); accord, UNCITRAL Arbitration Rules, Art. 23(1) (rev. 2010 ed.) ("[A]rbitral tribunal shall have the power to rule on its own jurisdiction"); ICSID Convention, Regulations and Rules, Art. 41(1) (2006 ed.) ("Tribunal shall be the judge of its own competence"). Cf. *Howsam*, *supra*, at 85 (giving weight to the parties' incorporation of the National Association of Securities Dealers' Code of Arbitration into their contract, which provided for similar arbitral authority, as evidence that they intended arbitrators to "interpret and apply the NASD time limit rule").

The upshot is that our ordinary presumption applies and it is not overcome. The interpretation and application of the local litigation provision is primarily for the arbitrators. Reviewing courts cannot review their decision *de novo*. Rather, they must do so with considerable deference.

*Appendix B*

C

The dissent interprets Article 8's local litigation provision differently. In its view, the provision sets forth not a condition precedent to arbitration in an already-binding arbitration contract (normally a matter for arbitrators to interpret), but a substantive condition on Argentina's consent to arbitration and thus on the contract's formation in the first place (normally something for courts to interpret). It reads the whole of Article 8 as a "unilateral standing offer" to arbitrate that Argentina and the United Kingdom each extends to investors of the other country. *Post*, at 9 (opinion of ROBERTS, C. J.). And it says that the local litigation requirement is one of the essential "'terms in which the offer was made.'" *Post*, at 6 (quoting *Eliason* v. *Henshaw*, 4 Wheat. 225, 228 (1819); emphasis deleted).

While it is possible to read the provision in this way, doing so is not consistent with our case law interpreting similar provisions appearing in ordinary arbitration contracts. See Part III, *supra*. Consequently, interpreting the provision in such a manner would require us to treat treaties as warranting a different kind of analysis. And the dissent does so without supplying any different set of general principles that might guide that analysis. That is a matter of some concern in a world where foreign investment and related arbitration treaties increasingly matter.

Even were we to ignore our ordinary contract principles, however, we would not take the dissent's view. As we have explained, the local litigation

provision on its face concerns arbitration's timing, not the Treaty's effective date; or whom its arbitration clause binds; or whether that arbitration clause covers a certain kind of dispute. Cf. *Granite Rock*, 561 U. S., at 296–303 (ratification date); *First Options*, 514 U. S., at 941, 943–947 (parties); *AT&T Technologies,* 475 U. S., at 651 (kind of dispute). The dissent points out that Article 8(2)(a) "does not simply require the parties to wait for 18 months before proceeding to arbitration," but instructs them to *do* something—to "submit their claims for adjudication." *Post*, at 8. That is correct. But the something they must do has no direct impact on the resolution of their dispute, for as we previously pointed out, Article 8 provides that only the decision of the arbitrators (who need not give weight to the local court's decision) will be "final and binding." Art. 8(4). The provision, at base, is a claims-processing rule. And the dissent's efforts to imbue it with greater significance fall short.

The treatises to which the dissent refers also fail to support its position. *Post*, at 3, 6. Those authorities primarily describe how an offer to arbitrate in an investment treaty can be accepted, such as through an investor's filing of a notice of arbitration. See J. Salacuse, The Law of Investment Treaties 381 (2010); Schreuer, Consent to Arbitration, in The Oxford Handbook of International Investment Law 830, 836–837 (P. Muchlinski, F. Ortino, & C. Schreuer eds. 2008); Dugan, Investor-State Arbitration, at 221–222. They do not endorse the dissent's reading of the local litigation provision or of provisions like it.

To the contrary, the bulk of international authority supports our view that the provision functions as a purely procedural precondition to arbitrate. See 1 G. Born, International Commercial Arbitration 842 (2009) ("A substantial body of arbitral authority from investor-state disputes concludes that compliance with procedural mechanisms in an arbitration agreement (or bilateral investment treaty) is not ordinarily a jurisdictional prerequisite"); Brief for Professors and Practitioners of Arbitration Law as *Amici Curiae* 12–16 (to assume the parties intended *de novo* review of the provision by a court "is likely to set United States courts on a collision course with the international regime embodied in thousands of [bilateral investment treaties]"). See also Schreuer, Consent to Arbitration, *supra*, at 846–848 ("clauses of this kind . . . creat[e] a considerable burden to the party seeking arbitration with little chance of advancing the settlement of the dispute," and "the most likely effect of a clause of this kind is delay and additional cost").

In sum, we agree with the dissent that a sovereign's consent to arbitration is important. We also agree that sovereigns can condition their consent to arbitrate by writing various terms into their bilateral investment treaties. *Post*, at 9–10. But that is not the issue. The question is whether the parties intended to give courts or arbitrators primary authority to interpret and apply a threshold provision in an arbitration contract—when the contract is silent as to the delegation of authority. We have already explained why we believe that where, as here, the provision resembles a claims-processing requirement and is not a requirement that affects the

arbitration contract's validity or scope, we presume that the parties (even if they are sovereigns) intended to give that authority to the arbitrators. See Parts III, IV–A and IV–B, *supra*.

V

Argentina correctly argues that it is nonetheless entitled to court review of the arbitrators' decision to excuse BG Group's noncompliance with the litigation requirement, and to take jurisdiction over the dispute. It asks us to provide that review, and it argues that even if the proper standard is "a [h]ighly [d]eferential" one, it should still prevail. Brief for Respondent 50. Having the relevant materials before us, we shall provide that review. But we cannot agree with Argentina that the arbitrators "'exceeded their powers'" in concluding they had jurisdiction. *Ibid.* (quoting 9 U. S. C. §10(a)(4)).

The arbitration panel made three relevant determinations:

(1) "As a matter of treaty interpretation," the local litigation provision "cannot be construed as an absolute impediment to arbitration," App. to Pet. for Cert. 165a;

(2) Argentina enacted laws that "hindered" "recourse to the domestic judiciary" by those "whose rights were allegedly affected by the emergency measures," *id.*, at 165a–166a; that sought "to prevent any judicial interference with the emergency legislation," *id.*, at 169a; and that "excluded from the renegotiation process" for public service contracts "any licensee seeking judicial redress," *ibid.*;

(3) under these circumstances, it would be "absurd and unreasonable" to read Article 8 as requiring an investor to bring its grievance to a domestic court before arbitrating. *Id.*, at 166a.

The first determination lies well within the arbitrators' interpretive authority. Construing the local litigation provision as an "absolute" requirement would mean Argentina could avoid arbitration by, say, passing a law that closed down its court system indefinitely or that prohibited investors from using its courts. Such an interpretation runs contrary to a basic objective of the investment treaty. Nor does Argentina argue for an absolute interpretation.

As to the second determination, Argentina does not argue that the facts set forth by the arbitrators are incorrect. Thus, we accept them as valid.

The third determination is more controversial. Argentina argues that neither the 180-day suspension of courts' issuances of final judgments nor its refusal to allow litigants (and those in arbitration) to use its contract renegotiation process, taken separately or together, warrants suspending or waiving the local litigation requirement. We would not necessarily characterize these actions as rendering a domestic court-exhaustion requirement "absurd and unreasonable," but at the same time we cannot say that the arbitrators' conclusions are barred by the Treaty. The arbitrators did not "'stra[y] from interpretation and application of the agreement'" or otherwise "'effectively "dispens[e]"'" their "'own brand of . . . justice.'" *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*,

559 U. S. 662, 671 (2010) (providing that it is only when an arbitrator engages in such activity that "'his decision may be unenforceable'" (quoting *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 509 (2001) (*per curiam*)).

Consequently, we conclude that the arbitrators' jurisdictional determinations are lawful. The judgment of the Court of Appeals to the contrary is reversed.

*It is so ordered.*

*Appendix B*

JUSTICE SOTOMAYOR, concurring in part.

I agree with the Court that the local litigation requirement at issue in this case is a procedural precondition to arbitration (which the arbitrators are to interpret), not a condition on Argentina's consent to arbitrate (which a court would review *de novo*). *Ante,* at 8, 14. Importantly, in reaching this conclusion, the Court acknowledges that "the treaty before us does *not* state that the local litigation requirement is a 'condition of consent' to arbitration." *Ante,* at 12. The Court thus wisely "leave[s] for another day the question of interpreting treaties that refer to 'conditions of consent' explicitly." *Ibid.* I join the Court's opinion on the understanding that it does not, in fact, decide this issue.

I write separately because, in the absence of this express reservation, the opinion might be construed otherwise. The Court appears to suggest in dictum that a decision by treaty parties to describe a condition as one on their consent to arbitrate "is unlikely to be conclusive" in deciding whether the parties intended for the condition to be resolved by a court. *Ante,* at 11. Because this suggestion is unnecessary to decide the case and is in tension with the Court's explicit reservation of the issue, I join the opinion of the Court with the exception of Part IV–A–1.

The Court's dictum on this point is not only unnecessary; it may also be incorrect. It is far from clear that a treaty's express use of the term "consent" to describe a precondition to arbitration should not be conclusive in the analysis. We have held, for instance,

that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84 (2002). And a party plainly cannot be bound by an arbitration clause to which it does not consent. See *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) ("Arbitration is strictly 'a matter of consent' " (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)).

Consent is especially salient in the context of a bilateral investment treaty, where the treaty is not an already agreed-upon arbitration provision between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors. In this setting, a nation-state might reasonably wish to condition its consent to arbitrate with a previously unspecified investor counterparty on the investor's compliance with a requirement that might be deemed "purely procedural" in the ordinary commercial context, *ante,* at 9. Moreover, as THE CHIEF JUSTICE notes, "[i]t is no trifling matter" for a sovereign nation to "subject itself to international arbitration" proceedings, so we should "not presume that any country . . . takes that step lightly." *Post,* at 9 (dissenting opinion).

Consider, for example, the United States-Korea Free Trade Agreement, which as the Court recognizes, *ante,* at 12–13, includes a provision explicitly entitled "Conditions and Limitations on Consent of Each Party." Art. 11.18, Feb. 10, 2011. That provision declares that "[n]o claim may be submitted to

arbitration" unless a claimant first waives its "right to initiate or continue before any administrative tribunal or court . . . any proceeding with respect to any measure alleged to constitute a breach" under another provision of the treaty. *Ibid.* If this waiver condition were to appear without the "consent" label in a binding arbitration agreement between two commercial parties, one might characterize it as the kind of procedural "'condition precedent to arbitrability'" that we presume parties intend for arbitrators to decide. *Howsam*, 537 U. S., at 85. But where the waiver requirement is expressly denominated a "condition on consent" in an international investment treaty, the label could well be critical in determining whether the states party to the treaty intended the condition to be reviewed by a court. After all, a dispute as to consent is "the starkest form of the question whether the parties have agreed to arbitrate." *Post*, at 13. And we ordinarily presume that parties intend for courts to decide such questions because otherwise arbitrators might "force unwilling parties to arbitrate a matter they reasonably would have thought a judge . . . would decide." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 945 (1995).

Accordingly, if the local litigation requirement at issue here were labeled a condition on the treaty parties' "consent" to arbitrate, that would in my view change the analysis as to whether the parties intended the requirement to be interpreted by a court or an arbitrator. As it is, however, all parties agree that the local litigation requirement is not so denominated. See Agreement for the Promotion and Protection of Investments, Art. 8(2), Dec. 11, 1990, 1765 U. N. T. S.

38. Nor is there compelling reason to suppose the parties silently intended to make it a condition on their consent to arbitrate, given that a local court's decision is of no legal significance under the treaty, *ante,* at 8–9, and given that the entire purpose of bilateral investment agreements is to "reliev[e] investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a foreigner and their own government," Brief for Professors and Practitioners of Arbitration Law as *Amici Curiae* 6. Moreover, Argentina's conduct confirms that the local litigation requirement is not a condition on consent, for rather than objecting to arbitration on the ground that there was no binding arbitration agreement to begin with, Argentina actively participated in the constitution of the arbitral panel and in the proceedings that followed. See *Eastern Airlines, Inc.* v. *Floyd*, 499 U. S. 530, 546 (1991) (treaty interpretation can be informed by parties' postenactment conduct).[*]

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[*] The dissent discounts the significance of Argentina's conduct on the ground that Argentina "object[ed] to the [arbitral] tribunal's jurisdiction to hear the dispute." *Post,* at 16, n. 2. But there is a difference between arguing that a party has failed to comply with a procedural condition in a binding arbitration agreement and arguing that noncompliance with the condition negates the existence of consent to arbitrate in the first place. Argentina points to no evidence that its objection was of the consent variety. This omission is notable because Argentina knew how to phrase its arguments before the arbitrators in terms of consent; it argued separately that it had not consented to arbitration with BG Group on the ground that BG was not a party to the license underlying the dispute. See App. to Pet. for Cert. 182a–186a. *First Options of*

In light of these many indicators that Argentina and the United Kingdom did not intend the local litigation requirement to be a condition on their consent to arbitrate, and on the understanding that the Court does not pass on the weight courts should attach to a treaty's use of the term "consent," I concur in the Court's opinion.

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*Chicago, Inc.* v. *Kaplan*, 514 U. S. 938 (1995), is not to the contrary, as that case held that "arguing the arbitrability issue to an arbitrator" did not constitute "clea[r] and unmistakabl[e]" evidence sufficient to override an indisputably applicable presumption that a court was to decide whether the parties had agreed to arbitration. *Id.*, at 944, 946. The question here, by contrast, is whether that presumption attaches to begin with—that is, whether the local litigation requirement was a condition on Argentina's consent to arbitrate (which would trigger the presumption) or a procedural condition in an already binding arbitration agreement (which would not). That Argentina apparently took the latter position in arbitration is surely relevant evidence that the condition was, in fact, not one on its consent.

*Appendix B*

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, dissenting.

The Court begins by deciding a different case, "initially treat[ing] the document before us as if it were an ordinary contract between private parties." *Ante*, at 6. The "document before us," of course, is nothing of the sort. It is instead a treaty between two sovereign nations: the United Kingdom and Argentina. No investor is a party to the agreement. Having elided this rather important fact for much of its analysis, the majority finally "relax[es] [its] ordinary contract assumption and ask[s] whether the fact that the document before us is a treaty makes a critical difference to [its] analysis." *Ante*, at 10. It should come as no surprise that, after starting down the wrong road, the majority ends up at the wrong place.

I would start with the document that *is* before us and take it on its own terms. That document is a bilateral investment treaty between the United Kingdom and Argentina, in which Argentina agreed to take steps to encourage U. K. investors to invest within its borders (and the United Kingdom agreed to do the same with respect to Argentine investors). Agreement for the Promotion and Protection of Investments, Dec. 11, 1990, 1765 U. N. T. S. 33 (Treaty). The Treaty does indeed contain a completed agreement for arbitration—between the signatory countries. Art. 9. The Treaty also includes, in Article 8, certain provisions for resolving any disputes that might arise between a signatory country and an investor, who is not a party to the agreement.

One such provision—completely ignored by the Court in its analysis—specifies that disputes may be resolved by arbitration when the host country and an investor "have so agreed." Art. 8(2)(b), 1765 U. N. T. S. 38. No one doubts that, as is the normal rule, whether there was such an agreement is for a court, not an arbitrator, to decide. See *First Options of Chicago*, *Inc.* v. *Kaplan*, 514 U. S. 938, 943–945 (1995).

When there is no express agreement between the host country and an investor, they must form an agreement in another way, before an obligation to arbitrate arises. The Treaty by itself cannot constitute an agreement to arbitrate with an investor. How could it? No investor is a party to that Treaty. Something else must happen to *create* an agreement where there was none before. Article 8(2)(a) makes clear what that something is: An investor must submit his dispute to the courts of the host country. After 18 months, or an unsatisfactory decision, the investor may then request arbitration.

Submitting the dispute to the courts is thus a condition to the formation of an agreement, not simply a matter of performing an existing agreement. Article 8(2)(a) constitutes in effect a unilateral *offer* to arbitrate, which an investor may accept by complying with its terms. To be sure, the local litigation requirement might not be absolute. In particular, an investor might argue that it was an implicit aspect of the unilateral offer that he be afforded a reasonable opportunity to submit his dispute to the local courts. Even then, however, the question would remain whether the investor has managed to form an

arbitration agreement with the host country pursuant to Article 8(2)(a). That question under Article 8(2)(a) is—like the same question under Article 8(2)(b)—for a court, not an arbitrator, to decide. I respectfully dissent from the Court's contrary conclusion.

I

The majority acknowledges—but fails to heed—"the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent.'" *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)); see *ante,* at 7. We have accordingly held that arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc.*, *supra*, at 943. The same "first principle" underlies arbitration pursuant to bilateral investment treaties. See C. Dugan, D. Wallace, N. Rubins, & B. Sabahi, Investor-State Arbitration 219 (2008) (Dugan); J. Salacuse, The Law of Investment Treaties 385 (2010); K. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 433 (2010). So only if Argentina agreed with BG Group to have an arbitrator resolve their dispute did the arbitrator in this case have any authority over the parties.

The majority opinion nowhere explains when and how Argentina agreed *with BG Group* to submit to arbitration. Instead, the majority seems to assume that, in agreeing with the United Kingdom to adopt Article 8 along with the rest of the Treaty, Argentina

thereby formed an agreement with all potential U. K. investors (including BG Group) to submit all investment-related disputes to arbitration. That misunderstands Article 8 and trivializes the significance to a sovereign nation of subjecting itself to arbitration anywhere in the world, solely at the option of private parties.

A

The majority focuses throughout its opinion on what it calls the Treaty's "arbitration clause," *ante*, at 1, but that provision does not stand alone. Rather, it is only part—and a subordinate part at that—of a broader dispute resolution provision. Article 8 is thus entitled "Settlement of Disputes Between an Investor and the Host State," and it opens without so much as mentioning arbitration. 1765 U. N. T. S. 37. Instead it initially directs any disputing investor and signatory country (what the Treaty calls a "Contracting Party") to court. When "an investor of one Contracting Party and the other Contracting Party" have an investment-related dispute that has "not been amicably settled," the Treaty commands that the dispute "*shall be submitted*, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made." Art. 8(1), *id.*, at 37–38. (emphasis added). This provision could not be clearer: Before taking any other steps, an aggrieved investor must submit its dispute with a Contracting Party to that Contracting Party's own courts.

*Appendix B*

There are two routes to arbitration in Article 8(2)(a), and each passes through a Contracting Party's domestic courts. That is, the Treaty's arbitration provisions in Article 8(2)(a) presuppose that the parties have complied with the local litigation provision in Article 8(1). Specifically, a party may request arbitration only (1) "after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made" and "the said tribunal has not given its final decision," Art. 8(2)(a)(i), *id.*, at 38, or (2) "where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute," Art. 8(2)(a)(ii), *ibid.* Either way, the obligation to arbitrate does not arise until the Contracting Party's courts have had a first crack at the dispute.

Article 8 provides a third route to arbitration in paragraph 8(2)(b)—namely, "where the Contracting Party and the investor of the other Contracting Party have so agreed." *Ibid.* In contrast to the two routes in Article 8(2)(a), this one does not refer to the local litigation provision. That omission is significant. It makes clear that an investor can bypass local litigation only by obtaining the Contracting Party's explicit agreement to proceed directly to arbitration. Short of that, an investor has no choice but to litigate in the Contracting Party's courts for at least some period.

The structure of Article 8 confirms that the routes to arbitration in paragraph (2)(a) are just as much about eliciting a Contracting Party's consent to arbitrate as the route in paragraph 8(2)(b). Under

Article 8(2)(b), the requisite consent is demonstrated by a specific agreement. Under Article 8(2)(a), the requisite consent is demonstrated by compliance with the requirement to resort to a country's local courts.

Whereas Article 8(2)(a) is part of a completed *agreement* between Argentina and the United Kingdom, it constitutes only a unilateral standing *offer* by Argentina with respect to U. K. investors—an offer to submit to arbitration where certain conditions are met. That is how scholars understand arbitration provisions in bilateral investment treaties in general. See Dugan 221; Salacuse 381; Brief for Practitioners and Professors of International Arbitration Law as *Amici Curiae* 4. And it is how BG Group itself describes this investment treaty in particular. See Brief for Petitioner 43 (the Treaty is a "standing offer" by Argentina "to arbitrate"); Reply Brief 9 (same).

An offer must be accepted for a legally binding contract to be formed. And it is an "undeniable principle of the law of contracts, that an offer . . . by one person to another, imposes no obligation upon the former, until it is accepted by the latter, *according to the terms in which the offer was made*. Any qualification of, or departure from, those terms, invalidates the offer." *Eliason* v. *Henshaw*, 4 Wheat. 225, 228 (1819) (emphasis added). This principle applies to international arbitration agreements just as it does to domestic commercial contracts. See Dugan 221–222; Salacuse 381; Schreuer, Consent to Arbitration, in The Oxford Handbook of International Investment Law 830, 836–837 (P. Muchlinski, F. Ortino, & C. Schreuer eds. 2008).

*Appendix B*

By incorporating the local litigation provision in Article 8(1), paragraph 8(2)(a) establishes that provision as a term of Argentina's unilateral offer to arbitrate. To accept Argentina's offer, an investor must therefore first litigate its dispute in Argentina's courts—either to a "final decision" or for 18 months, whichever comes first. Unless the investor does so (or, perhaps, establishes a valid excuse for failing to do so, as discussed below, see *infra*, at 17), it has not accepted the terms of Argentina's offer to arbitrate, and thus has not formed an arbitration agreement with Argentina.[1]

Although the majority suggests that the local litigation requirement would not be a "condition of consent" even if the Treaty explicitly called it one, the Court's holding is limited to treaties that contain no such clear statement. See *ante*, at 11–13. But there is no reason to think that such a clear statement should be required, for we generally do not require "talismanic words" in treaties. *Medellín* v. *Texas*, 552 U. S. 491, 521 (2008). Indeed, another arbitral tribunal concluded that the local litigation requirement was a condition on Argentina's consent to arbitrate despite the absence of the sort of clear statement apparently contemplated by the majority. See *ICS Inspection & Control Servs. Ltd.* v. *Argentine Republic*, PCA Case No. 2010–9, Award on Jurisdiction, ¶262 (Feb. 10, 2012). Still other tribunals have reached the same conclusion with regard to

[1] To be clear, the only question is whether BG Group formed an *arbitration* agreement with Argentina. To say that BG Group never formed such an agreement is not to call into question the validity of its various commercial agreements with Argentina.

similar litigation requirements in other Argentine bilateral investment treaties. See *Daimler Financial Servs. AG* v. *Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶¶193, 194 (Aug. 22, 2012); *Wintershall Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶116 (Dec. 8, 2008).

In the face of this authority, the majority quotes a treatise for the proposition that "'[a] substantial body of arbitral authority from investor-state disputes concludes that compliance with procedural mechanisms in an arbitration agreement (or bilateral investment treaty) is not ordinarily a jurisdictional prerequisite.'" *Ante,* at 16 (quoting 1 G. Born, International Commercial Arbitration 842 (2009)). But that simply restates the question. The whole issue is whether the local litigation requirement is a mere "procedural mechanism" or instead a condition on Argentina's consent to arbitrate.

BG Group concedes that other terms of Article 8(1) constitute conditions on Argentina's consent to arbitrate, even though they are not expressly labeled as such. See Tr. of Oral Arg. 57 ("You have to be a U. K. investor, you have to have a treaty claim, you have to be suing another party to the treaty. And if those aren't true, *then there is no arbitration agreement*" (emphasis added)). The Court does not explain why the *only other term*—the litigation requirement—should be viewed differently.

Nor does the majority's reading accord with ordinary contract law, which treats language such as

the word "after" in Article 8(2)(a)(i) as creating conditions, even though such language may not constitute a "clear statement." See 13 R. Lord, Williston on Contracts §38:16 (4th ed. 2013). The majority seems to regard the local litigation requirement as a condition precedent to *performance* of the contract, rather than a condition precedent to *formation* of the contract. *Ante,* at 8–9; see 13 Lord §§38:4, 38:7. But that cannot be. Prior to the fulfillment of the local litigation requirement, there was no contract between Argentina *and BG Group* to be performed. The Treaty is not such an agreement, since BG Group is of course not a party to the Treaty. Neither the majority nor BG Group contends that the agreement is under Article 8(2)(b), the provision that applies "where the Contracting Party and the investor of the other Contracting Party have so agreed." An arbitration agreement must be *formed*, and Article 8(2)(a) spells out how an investor may do that: by submitting the dispute to local courts for 18 months or until a decision is rendered.

Moreover, the Treaty's local litigation requirement certainly does not resemble "time limits, notice, laches, estoppel," or the other kinds of provisions that are typically treated as conditions on the performance of an arbitration agreement, rather than prerequisites to formation. Revised Uniform Arbitration Act of 2000 §6(c), Comment 2, 7 U. L. A. 26 (2009). Unlike a time limit for submitting a claim to arbitration, see *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 85 (2002), the litigation requirement does not simply regulate the timing of arbitration. As the majority recognizes, *ante*,

at 15–16, the provision does not simply require the parties to wait for 18 months before proceeding to arbitration, but instead requires them to submit their claims for adjudication during that period. And unlike a mandatory pre-arbitration grievance procedure, see *John Wiley & Sons*, *Inc.* v. *Livingston*, 376 U. S. 543, 556–559 (1964), the litigation requirement sends the parties to court—and not just any court, but a court of the host country.

The law of international arbitration and domestic contract law lead to the same conclusion: Because paragraph (2)(a) of Article 8 constitutes only a unilateral standing offer by the Contracting Parties to each other's investors to submit to arbitration under certain conditions, an investor cannot form an arbitration agreement with a Contracting Party under the Treaty until the investor accepts the actual terms of the Contracting Party's offer. Absent a valid excuse, that means litigating its dispute in the Contracting Party's courts to a "final decision" or, barring that, for at least 18 months.

B

The nature of the obligations a sovereign incurs in agreeing to arbitrate with a private party confirms that the local litigation requirement is a condition on a signatory country's consent to arbitrate, and not merely a condition on performance of a pre-existing arbitration agreement. There are good reasons for any sovereign to condition its consent to arbitrate disputes on investors' first litigating their claims in the country's own courts for a specified period. It is no trifling matter for a

sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly. Cf. *United States* v. *Bormes*, 568 U. S. ___, ___ (2012) (slip op., at 4) (Congress must "unequivocally express[ ]" its intent to waive the sovereign immunity of the United States (quoting *United States* v. *Nordic Village*, *Inc.*, 503 U. S. 30, 33 (1992); internal quotation marks omitted)). But even where a sovereign nation has subjected itself to suit in its own courts, it is quite another thing for it to subject itself to international arbitration. Indeed, "[g]ranting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation" whose "uniqueness and power should not be over-looked." Salacuse 137. That is so because of both the procedure and substance of investor-state arbitration.

Procedurally, paragraph (3) of Article 8 designates the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) as the default rules governing the arbitration. Those rules authorize the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an "appointing authority" who—absent agreement by the parties—can select the sole arbitrator (or, in the case of a three-member tribunal, the presiding arbitrator, where the arbitrators nominated by each of the parties cannot agree on a presiding arbitrator). UNCITRAL Arbitration Rules, Arts. 6, 8–9 (rev. 2010 ed.). The arbitrators, in turn, select the site of the arbitration (again, absent an

agreement by the parties) and enjoy broad discretion in conducting the proceedings. Arts. 18, 17(1).

Substantively, by acquiescing to arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary. See Salacuse 355; G. Van Harten, Investment Treaty Arbitration and Public Law 65–67 (2007). Consider the dispute that gave rise to this case: Before the arbitral tribunal, BG Group challenged multiple sovereign acts of the Argentine Government taken after the Argentine economy collapsed in 2001—in particular, Emergency Law 25,561, which converted dollar-denominated tariffs into peso-denominated tariffs at a rate of one Argentine peso to one U. S. dollar; Resolution 308/02 and Decree 1090/02, which established a renegotiation process for public service contracts; and Decree 214/02, which stayed for 180 days injunctions and the execution of final judgments in lawsuits challenging the effects of the Emergency Law. Indeed, in awarding damages to BG Group, the tribunal held that the first three of these enactments violated Article 2 of the Treaty. See App. to Pet. for Cert. 241a–242a, 305a.

Perhaps they did, but that is not the issue. Under Article 8, a Contracting Party grants to private adjudicators not necessarily of its own choosing, who can meet literally anywhere in the world, a power it typically reserves to its own courts, if it grants it at all: the power to sit in judgment on its sovereign acts. Given these stakes, one would expect the United Kingdom and Argentina to have taken particular care in specifying the limited circumstances in which

foreign investors can trigger the Treaty's arbitration process. And that is precisely what they did in Article 8(2)(a), requiring investors to afford a country's own courts an initial opportunity to review the country's enactments and assess the country's compliance with its international obligations. Contrast this with Article 9, which provides for arbitration between the signatory countries of disputes under the Treaty without any preconditions. Argentina and the United Kingdom considered arbitration with particular foreign investors to be different in kind and to require special limitations on its use.

The majority regards the local litigation requirement as toothless simply because the Treaty does not require an arbitrator to "give substantive weight to the local court's determinations on the matters at issue between the parties," *ante*, at 9; see also *ante*, at 15–16, but instead provides that "[t]he arbitration decision shall be final and binding on both Parties," Art. 8(4), 1765 U. N. T. S. 38. While it is true that an arbitrator need not defer to an Argentine court's judgment in an investor dispute, that does not deprive the litigation requirement of practical import. Most significant, the Treaty provides that an "arbitral tribunal shall decide the dispute in accordance with . . . the laws of the Contracting Party involved in the dispute." Art. 8(4), *ibid.* I doubt that a tribunal would give no weight to an Argentine court's authoritative construction of Argentine law, rendered in the same dispute, just because it might not be formally bound to adopt that interpretation.

The local litigation requirement can also help to narrow the range of issues that remain in controversy by the time a dispute reaches arbitration. It might even induce the parties to settle along the way. And of course the investor might prevail, which could likewise obviate the need for arbitration. Cf. *McKart* v. *United States*, 395 U. S. 185, 195 (1969).

None of this should be interpreted as defending Argentina's history when it comes to international investment. That history may prompt doubt that requiring an investor to resort to that country's courts in the first instance will be of any use. But that is not the question. Argentina and the United Kingdom reached agreement on the term at issue. The question can therefore be rephrased as whether it makes sense for either Contracting Party to insist on resort to its courts before being compelled to arbitrate anywhere in the world before arbitrators not of its choosing. The foregoing reasons may seem more compelling when viewed apart from the particular episode before us.

II

Given that the Treaty's local litigation requirement is a condition on consent to arbitrate, it follows that whether an investor has complied with that requirement is a question a court must decide *de novo*, rather than an issue for the arbitrator to decide subject only to the most deferential judicial review. See, *e.g.*, *Adams* v. *Suozzi*, 433 F. 3d 220, 226–228 (CA2 2005) (holding that compliance with a condition on formation of an arbitration agreement is for a court, rather than an arbitrator, to determine). The logic is simple:

Because an arbitrator's authority depends on the consent of the parties, the arbitrator should not as a rule be able to decide for himself whether the parties have in fact consented. Where the consent of the parties is in question, "reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U. S., at 83–84.

This principle is at the core of our arbitration precedents. See *Granite Rock Co.*, 561 U. S., at 299 (questions concerning "the formation of the parties' arbitration agreement" are for a court to decide *de novo*). The same principle is also embedded in the law of international commercial arbitration. 2 Born 2792 ("[W]here one party denies ever having made an arbitration agreement or challenges the validity of any such agreement, . . . the possibility of de novo judicial review of any jurisdictional award in an annulment action is logically necessary"). See also Restatement (Third) of U. S. Law of International Commercial Arbitration §4–12(d)(1) (Tent. Draft No. 2, Apr. 16, 2012) ("a court determines de novo . . . the existence of the arbitration agreement").

Indeed, the question in this case—whether BG Group accepted the terms of Argentina's offer to arbitrate—presents an issue of contract formation, which is the starkest form of the question whether the parties have agreed to arbitrate. In *Howsam* v. *Dean Witter Reynolds*, *Inc.*, we gave two examples of questions going to consent, which are for courts to decide: "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause

in a concededly binding contract applies to a particular type of controversy." 537 U. S., at 84. In both examples, there is at least a putative arbitration agreement between *the parties to the dispute*. The only question is whether the agreement is truly binding or whether it covers the specific dispute. Here, by contrast, the question is whether the arbitration clause in the Treaty between the United Kingdom and Argentina gives rise to an arbitration agreement between Argentina *and BG Group* at all. Cf. *ante*, at 2 (SOTOMAYOR, J., concurring in part) ("Consent is especially salient in the context of a bilateral investment treaty, where the treaty is not an already agreed-upon arbitration provision between known parties").

The majority never even starts down this path. Instead, it preempts the whole inquiry by concluding that the local litigation requirement is the kind of "procedural precondition" that parties typically expect an arbitrator to enforce. *Ante*, at 8–9. But as explained, the local litigation requirement does not resemble the requirements we have previously deemed presumptively procedural. See *supra,* at 8. It does not merely regulate the timing of arbitration. Nor does it send the parties to non-judicial forms of dispute resolution.

More importantly, all of the cases cited by the majority as examples of procedural provisions involve commercial contracts between two private parties. See *ante*, at 9. None of them—not a single one—involves an agreement between sovereigns or an agreement to which the person seeking to compel arbitration is not

even a party. The Treaty, of course, is both of those things.

The majority suggests that I am applying "a different kind of analysis" from that governing private commercial contracts, just because what is at issue is a treaty. *Ante*, at 15. That is not so: The key point, which the majority never addresses, is that there is no completed agreement whatsoever between Argentina and BG Group. An agreement must be formed, and whether that has happened is—as it is in the private commercial contract context—an issue for a court to decide. See *supra*, at 12–13.

The distinction between questions concerning consent to arbitrate and mere procedural requirements under an existing arbitration agreement can at times seem elusive. Even the most mundane procedural requirement can be recast as a condition on consent as a matter of technical logic. But it should be clear by now that the Treaty's local litigation requirement is not a mere formality—not in Buenos Aires, not in London. And while it is true that "parties often submit important matters to arbitration," *ante*, at 11, our precedents presume that parties do not submit to arbitration the most important matter of all: whether they are subject to an agreement to arbitrate in the first place.

Nor has the majority pointed to evidence that would rebut this presumption by showing that Argentina "'clearly and unmistakably'" intended to have an arbitrator enforce the litigation requirement. *Howsam*, *supra*, at 83 (quoting *AT&T Technologies*, *Inc.* v.

*Communications Workers*, 475 U. S. 643, 649 (1986)). As the majority notes, *ante*, at 14, the Treaty incorporates certain arbitration rules that, in turn, authorize arbitrators to determine their own jurisdiction over a dispute. See Art. 8(3). But those rules do not operate until a dispute is properly before an arbitral tribunal, and of course the whole question in this case is whether the dispute between BG Group and Argentina was before the arbitrators, given BG Group's failure to comply with the 18-month local litigation requirement. As a leading treatise has explained, "[i]f the parties have not validly agreed to any arbitration agreement at all, then they also have necessarily not agreed to institutional arbitration rules." 1 Born 870. "In these circumstances, provisions in institutional rules cannot confer any [such] authority upon an arbitral tribunal." *Ibid.*

I also see no reason to think that arbitrators enjoy comparative expertise in construing the local litigation requirement. *Ante*, at 14. It would be one thing if that provision involved the application of the arbitrators' own rules, cf. *Howsam*, *supra*, at 85, or if it were "intertwined" with the merits of the underlying dispute, *John Wiley & Sons*, 376 U. S., at 557. Neither is true of the litigation requirement. A court can assess compliance with the requirement at least as well as an arbitrator can. Given the structure of Article 8 and the important interests that the litigation requirement

protects, it seems clear that the United Kingdom and Argentina thought the same.[2]

III

Although the Court of Appeals got there by a slightly different route, it correctly concluded that a court must decide questions concerning the interpretation and application of the local litigation requirement *de novo*. 665 F. 3d 1363, 1371–1373 (CADC 2012). At the same time, however, the court seems to have simply taken it for granted that, because BG Group did not submit its dispute to the local courts, the arbitral award in BG Group's favor was invalid. Indeed, the court addressed the issue in a perfunctory

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[2] JUSTICE SOTOMAYOR contends that "Argentina's conduct confirms that the local litigation requirement is not a condition on consent, for rather than objecting to arbitration on the ground that there was no binding arbitration agreement to begin with, Argentina actively participated in the constitution of the arbitral panel and in the proceedings that followed." *Ante,* at 4 (opinion concurring in part). But as the arbitral tribunal itself recognized, Argentina *did* object to the tribunal's jurisdiction to hear the dispute. App. to Pet. for Cert. 99a, 134a, 143a, 161a–163a. And we have held that "merely arguing the arbitrability issue to an arbitrator"—say, by "filing with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction"—"does not indicate a clear willingness to arbitrate that issue, *i.e.,* a willingness to be effectively bound by the arbitrator's decision on that point." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 946 (1995). The concurrence contends that Argentina "apparently" argued its jurisdictional objection in terms of procedure rather than consent, *ante,* at 4, n., but the one piece of evidence cited—a negative inference from the *arbitrator's* characterization of Argentina's argument on a subsidiary issue—hardly suffices to distinguish *First Options*.

paragraph at the end of its opinion and saw "'only one possible outcome'": "that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration." *Id.*, at 1373 (quoting *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 677 (2010)).

That conclusion is not obvious. A leading treatise has indicated that "[i]t is a necessary implication from [a unilateral] offer that the offeror, in addition, makes a subsidiary offer by which he or she promises to accept a tender of performance." 1 Lord §5:14, at 1005. On this understanding, an offeree's failure to comply with an essential condition of the unilateral offer "will not bar an action, if failure to comply with the condition is due to the offeror's own fault." *Id.,* at 1005–1006.

It would be open to BG Group to argue before the Court of Appeals that this principle was incorporated into Article 8(2)(a) as an implicit aspect of Argentina's unilateral offer to arbitrate. Such an argument would find some support in the background principle of customary international law that a foreign individual injured by a host country must ordinarily exhaust local remedies—unless doing so would be "futile." See Dugan 347–357. In any event, the issue would be analyzed as one of contract formation, and therefore would be for the court to decide. I would accordingly vacate the decision of the Court of Appeals and remand the case for such an inquiry.

I respectfully dissent.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 11-7021**

**[Filed January 17, 2012]**

REPUBLIC OF ARGENTINA, APPELLANT

v.

BG GROUP PLC, APPELLEE

Appeal from the United States District Court for the District of Columbia (No. 1:08-cv-00485)

Argued November 10, 2011
Decided January 17, 2012

Before: SENTELLE, *Chief Judge*, HENDERSON and ROGERS, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The Republic of Argentina appeals the denial of its motion to vacate an arbitral award on the principal ground that the arbitral panel exceeded its authority by ignoring the terms of the

parties' agreement. That agreement, in the form of a Bilateral Investment Treaty between the United Kingdom of Great Britain and Northern Ireland, and Argentina ("the Treaty"), provides that disputes between an investor and the host State will be resolved in the host State's courts. If, however, no final court ruling is forthcoming within eighteen months or the dispute is unresolved after a court ruling, the Treaty provides that resort may then be had to arbitration. BG Group, PLC, a British corporation and investor in Argentina gas companies pursuant to the Treaty, invoked the arbitration clause without first filing a claim in the Argentine courts. The arbitral panel nonetheless ruled it had jurisdiction, found Argentina had violated the Treaty, and awarded BG Group damages.

Although the scope of judicial review of the substance of arbitral awards is exceedingly narrow, it is well settled that an arbitrator cannot ignore the intent of the contracting parties. Where, as here, the result of the arbitral award was to ignore the terms of the Treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months pursuant to Article 8(2) of the Treaty, the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration. Accordingly, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm, and we vacate the Final Award.

*Appendix C*

## I.

The Bilateral Investment Treaty between the United Kingdom and Argentina was signed December 11, 1990, and became effective on February 19, 1993. It aimed to promote a favorable investment environment between the contracting parties following Argentina's economic reformation to reduce inflation and the public debt. As relevant, Article 8(1) of the Treaty provides that disputes between an investor under the Treaty and the host State that "have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made." Article 8(2) sets the conditions by which such a dispute may be submitted to international arbitration:

> (a) if one of the Parties so requests, in any of the following circumstances:
>
> > (i) where, *after a period of eighteen months has elapsed* from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
> >
> > (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute; [or]
>
> (b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

Art. 8(2) (emphasis added). Article 8(3) provides that if, after three months from written notification of the claim, the parties to the dispute are unable to agree on one of the described arbitration procedures, then "the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law ["UNCITRAL Rules"]," although they can modify these rules. Article 8(4) instructs that "[t]he arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement [i.e., the Treaty], the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law."

Around the time the Treaty took effect, as part of its economic reformation, Argentina privatized the state-owned gas transportation and distribution company, *Gas del Estado,* and established a 1:1 fixed parity between the Argentine peso and the U.S. dollar. *Gas del Estado* was split into two transportation companies and eight distribution companies, one of which was MetroGAS. MetroGAS was granted a thirty-five year exclusive license to distribute gas in the city of Buenos Aires and portions of the surrounding metropolitan area, and the license provided that tariffs would be calculated in U.S. dollars and expressed in pesos. One provision of MetroGAS's license provided that adjustments to tariffs would be made every six months for inflation, in accordance with the United States Product Price Index ("PPI"). MetroGAS was entitled to

review of its tariffs every five years to ensure reasonable returns. BG Group eventually acquired a 54.67 percent interest in Gas Argentino, S.A. ("GASA"), which in turn owned seventy percent of MetroGAS. In addition, BG Group invested directly in MetroGAS, and by 1998 held a 45.11 percent interest in MetroGAS.

The Argentine economy collapsed in late 2001 and early 2002 following, Argentina explained, the collapse of the Brazilian currency, a run on Argentine banks, and the withholding of a billion dollar loan installment by the International Monetary Fund. In response, Argentina enacted Emergency Law 25,561 on January 6, 2002, to terminate the currency board that had pegged the peso to the U.S. dollar, to convert U.S. dollar based adjustment clauses in agreements to peso-based adjustment clauses, to prohibit inflation adjustments based on foreign price indices (e.g., the PPI), and to convert dollar-based tariffs into peso-based tariffs at a rate of one peso to one U.S. dollar. Argentina also established, by Resolution 308/02 and Decree 1090/02, a renegotiation process for public service contracts (excluding any licensee who sought redress in court or arbitration). And on March 2, 2002, Argentina adopted Decree 214/02, Article 12 of which stayed for 180 days the compliance with injunctions and execution of final judgments in lawsuits brought on account of the Emergency Law's effect on the financial system.

Eight months after the stay under Article 12 of Decree 214/02 had expired, BG Group filed a Notice of Arbitration, on April 25, 2003, pursuant to Article 8(3) of the Treaty. When it was unable to reach agreement

with Argentina on an alternate forum, BG Group submitted to arbitration under the UNCITRAL Rules. As characterized by the Arbitral Panel, a ministerial opinion (appearing in an article by the former Argentina Attorney General and Minister of Justice) submitted by BG Group estimated that it would take six years to resolve BG Group's claim in the Argentine courts, and BG Group therefore viewed the requirement in Article 8(2) of the Treaty as "senseless," Final Award ¶ 142, and saw no reason to wait eighteen months before requesting arbitration. Alternatively, BG Group argued that customary international law did not require exhaustion of local remedies, and that Article 3 of the Treaty, the Most Favored Nation Clause, obviated the requirement that it seek recourse in Argentine courts given that Argentina's investment treaty with the United States lacked such a requirement.

The Arbitral Panel issued a Final Award on December 24, 2007, in Washington, D.C. The Panel determined it had jurisdiction. It rejected BG Group's arguments that the dispute was arbitrable because an Argentine court would not resolve the dispute within eighteen months and that international law did not require exhaustion of local remedies. Instead, the Panel concluded that although BG Group did not seek recourse in Argentine courts for the eighteen month period required by Article 8(2) of the Treaty, that provision could not, "[a]s a matter of Treaty interpretation . . . be construed as an absolute impediment to arbitration." Final Award ¶ 147. Citing

Article 32 of the Vienna Convention,[1] the Panel concluded that because Argentina by emergency decrees had restricted access to its courts and had excluded from the renegotiation process any licensee that sought redress, a literal reading of the Treaty would produce an "absurd and unreasonable result." *Id.* The Panel thus found it unnecessary to decide whether Article 3 of the Treaty made Article 8(1) and (2) inoperative.

On the merits, the Arbitral Panel ruled BG Group had standing to bring its claim because, under the terms of the Treaty, it was an "investor" with an "investment"[2] (in GASA and MetroGAS), which

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[1] Article 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"), provides that in interpreting a treaty:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."

Article 31 sets forth the "General rule of interpretation," stating in paragraph 1 that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[2] Article 1(a)(ii) of the Treaty defines an "investment" to include "shares in and stock and debentures of a company and any other

suffered a decrease in the value as a result of the Emergency Law. It rejected BG Group's claim that Argentina had breached Article 5 of the Treaty or expropriated its investment in MetroGAS, because the decrease in the value of BG Group's investment was not permanent. It found, however, that Argentina had violated Article 2 of the Treaty by failing to provide fair and equitable treatment to investments,[3] in that its actions in the early 1990s led to BG Group's investment and by dismantling the regulatory scheme that induced the investment, "Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment." *Id*. ¶ 307. The violation was exacerbated, it found, by the exclusion of licensees seeking relief in an arbitral or other forum from the renegotiation process. The Panel rejected Argentina's state-of-necessity defense under customary international law, on the ground the defense was limited to exceptional circumstances, such as where there is a "serious and imminent threat and no means to avoid it." *Id*. ¶ 410 (internal quotation marks and citation omitted). Finally, the Panel awarded

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form of participation in a company, established in the territory of either of the Contracting Parties."

[3] Article 2(2) of the Treaty provides that "[i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment . . . . Neither Contracting Party shall in any way impair by unreasonable . . . measures the management, maintenance, use, enjoyment or disposal of investments in its territory. . . . Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."

damages based on a comparison of two trades of BG Group's shares — one in 1998 (three and a half years before enactment of the Emergency Law) and one in 2002 (shortly after enactment of the Emergency Law) — extrapolating the value of BG Group's total investment and assessing the difference as the damages caused by the Emergency Law: $185,285,485.85 in U.S. dollars (excluding interest, costs, and attorneys' fees).

Argentina petitioned to vacate or modify the Final Award pursuant to the FAA, 9 U.S.C. §§ 10(a) & 11.[4] BG Group filed an opposition and a cross-motion for recognition and enforcement of the Final Award, and for a prejudgment bond. Following further filings in opposition or reply, the district court denied vacatur and granted enforcement. *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108 (D.D.C. 2010); *Republic of Argentina v. BG Group PLC*, 764 F. Supp.

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[4] Section 10(a) of the FAA, 9 U.S.C. § 10(a), provides that an arbitration award may be vacated

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

2d 21 (D.D.C. 2011). Argentina appeals; our review of the district court's findings of fact is for clear error and our review of questions of law is *de novo*. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48 (1995); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007).

**II.**

The "gateway" question in this appeal is arbitrability: when the United Kingdom and Argentina executed the Treaty, did they, as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made? That question raises the antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator.

The Supreme Court has held that the intent of the contracting parties controls whether the answer to the question of arbitrability is to be provided by a court or an arbitrator. *See, e.g.*, *First Options*, 514 U.S. at 943. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id*. at 944 (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) (alterations in original). This comports with the "basic objective" of arbitration, which the Court explained "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are

enforced according to their terms." *Id.* at 947 (internal quotation marks and citations omitted). Thus, in "construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1773–74 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

In *Howsam v. Dean Witter*, 537 U.S. 79 (2002), the Court provided guidance on the circumstances in which a court, rather than the arbitrator, is to decide a "question of arbitrability," *id*. at 83. A court will decide the question

> in the kind of narrow circumstances where the contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

*Id.* at 83–84. In such circumstances, where "the parties did *not* agree to submit the arbitrability question itself to arbitration, then the district court should decide that question . . . independently." *First Options*, 514 U.S. at 943 (emphasis in original). If, on the other hand, there is clear and unmistakable evidence that the parties intended for the arbitrator to decide the question of arbitrability, a district court's review of the arbitrator's

decision on that matter "should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *Id.* (internal citations omitted).

The district court viewed Argentina as having conceded that the Treaty provided that the arbitrator would decide the question of arbitrability. It cited counsel's statement at the motions hearing that Argentina "'acknowledge[s] that the Arbitral Tribunal has the principal power to rule upon its jurisdiction.'" *Republic of Argentina*, 764 F. Supp. 2d at 33 & n.8 (quoting Tr., Sept. 28, 2010, at 4) (alteration in original). The context in which counsel made this statement, and the subsequent colloquy with the district court, however, indicate that Argentina was conceding an altogether different point: once the Treaty's arbitration provision was properly triggered, after eighteen months' recourse to an Argentine court, any question of arbitrability *then* would be decided by the arbitrator. *See* Tr., Sept. 28, 2010, at 5. Indeed, in the sentence immediately following the one cited by the district court, Argentina's counsel stated: "However, we also understand that this Court has the right to and the duty to under the New York Convention to assess whether . . . Argentina's consent to arbitration [was] respected." *Id.* at 4. The transcript indicates this statement qualifies the previous sentence about arbitrability, rather than presents a new argument, because counsel next stated that the consent was "also"

relevant to "whether the award is contrary or not to U.S. [public] policy," *id.*, a separate argument under the New York Convention.

Any concession by Argentina was thus limited to stating that the parties agreed the issue of arbitrability would be decided by an arbitrator if the aggrieved party had first sought relief in an Argentine court, pursuant to Article 8(1) and (2) of the Treaty. Indeed, its counsel made the point explicit in responding to the district court's next inquiry about whether the Treaty provided that the UNCITRAL Rules would apply if there were no agreement on an arbitral forum. *See id.* at 4–5. Argentina's counsel stated: "The fundamental issue[] here and that's our first objection is that [under the terms of the Treaty] Argentina's consent to arbitration had a very important condition. And that condition was that the dispute had to be submitted for 18 months to local courts to an Argentine judge." *Id.* at 5. The transcript thus demonstrates, when the statement by Argentina's counsel on which the district court relied is viewed in context, that the district court clearly erred in finding that Argentina had conceded that the arbitrator had the power to determine arbitrability under the circumstances.

A temporal analysis of the Treaty confirms this conclusion. Article 8(3) of the Treaty provides for the procedure to be followed once the possibility of arbitration is triggered, but only after an Argentine court first has an opportunity to resolve the dispute. Under Article 8(3), if the parties do not agree on an arbitration forum or procedure, the UNCITRAL Rules will govern resolution of the dispute; the UNCITRAL

Rules grant the arbitrator the power to determine issues of arbitrability.[5] Thus, once Article 8(3) of the Treaty is triggered, the Treaty's incorporation of the UNCITRAL Rules provides "clear[] and unmistakabl[e] evidence," *AT & T Techs.*, 475 U.S. at 649; *see First Options*, 514 U.S. at 944, that the parties intended for the arbitrator to decide questions of arbitrability. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011). But the Treaty's incorporation of the UNCITRAL Rules has a temporal limitation: the Rules are not triggered until after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made.

The Treaty does not directly answer whether the contracting parties intended a court or the arbitrator to determine questions of arbitrability where the precondition of resort to a contracting party's court pursuant to Article 8(1) and (2) is disregarded by an investor. By comparison, the Treaty states in Article 9(2) that should a dispute arise between the contracting parties themselves, the United Kingdom and Argentina, and it is not resolved through diplomatic channels, the dispute will go directly to arbitration. Article 9(5) provides that "[t]he [arbitral] tribunal shall determine its own procedure." This provision indicates that the contracting parties were

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[5] Article 21(1) of the UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 21, para. 1, U.N. Doc. A/RES/31/98 (Dec. 15, 1976), provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction" to hear the arbitration.

aware of how to provide an arbitrator with the authority to determine a "question of arbitrability," *cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994), and suggests that the absence of such language in Article 8(1) and (2) was intentional, *cf. First Options*, 514 U.S. at 945. It also underscores the importance the contracting parties ascribed to Article 8(1) and (2), counseling against a reading that would render its requirements inoperative.

Furthermore, the contracting parties likely never conceived of the need to specify that a *court* should decide whether Article 8(1) and (2)'s requirement that disputes first be brought to a *court* should be respected. The Treaty provides a prime example of a situation where the "parties would likely have expected a court" to decide arbitrability. *Howsam*, 537 U.S. at 83. It would be odd to assume that where the gateway provision *itself* is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed. At the very least, there is no clear and unmistakable evidence, *see First Options*, 514 U.S. at 944, that the contracting parties intended an arbitrator to decide the gateway question.

Because the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide. *See id.* The district court therefore erred as a matter of law by failing to determine whether there

was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where BG Group disregarded the requirements of Article 8(1) and (2) of the Treaty to initially seek resolution of its dispute with Argentina in an Argentine court.

The Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), does not require the opposite conclusion. In *John Wiley*, the Court drew a distinction between "substantive" questions of arbitrability and "procedural" questions of arbitrability, assigning the former to courts and the latter to arbitrators. *Id.* at 557. It did so in the context of an industrial labor dispute under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The premise underlying section 301 is a congressional policy favoring speedy arbitral resolution of labor disputes as an ongoing part of the collective bargaining process, to avoid the industrial strife that had historically led to labor strikes. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). "[A]rbitration of labor disputes . . . is part and parcel of the collective bargaining process itself," *id.*, and thus "[t]he processing of disputes through [arbitration] is actually a vehicle by which meaning and content are given to the collective bargaining agreement," *id.* at 581. In the context of labor disputes, "judicial inquiry under [§] 301 must be strictly confined . . . . Doubts should be resolved in favor of [arbitration]." *Id.* at 582–83. Given this context, the *John Wiley* Court was concerned with "the delay attendant upon judicial proceedings

preliminary to arbitration. . . . [S]uch delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, . . . contrary to the aims of national labor policy." *John Wiley*, 376 U.S. at 558.

The dispute between Argentina and BG Group arises in an entirely different context: an international investment treaty between two sovereigns. The provision at issue in the United Kingdom–Argentina Treaty, Article 8(1) and (2), illustrates why the reasoning in *John Wiley* is inapposite. The Treaty explicitly *requires* judicial proceedings prior to arbitration. That is, the contracting parties specifically desired "the delay attendant upon judicial proceedings preliminary to arbitation," *John Wiley*, 376 U.S. at 558, and the procedural/substantive arbitrability distinction drawn to accord with "the policy behind federal labor law," *id.* at 559, cannot be applied to a dispute over the operation of an international treaty provision that *requires* that which the Court in *John Wiley* sought to avoid. Furthermore, in *John Wiley*, the Court found it significant that the Union, not the arbitrator, questioned the operative relevance of the preconditions to arbitration in the collective bargaining agreement, because as a result the facts underlying the question of arbitrability "gr[e]w out of the dispute and b[ore] on its final disposition. *Id.* at 557. By contrast, as characterized by the Arbitral Panel, BG Group did not question its ability to commence a lawsuit in an Argentine court based on any of the decrees discussed by the Panel, but instead argued that a decision would not be rendered within eighteen months and thus it was "senseless" to adhere to the Treaty provision, Final

Award ¶ 142. Unlike in *John Wiley*, here the facts underlying the question of arbitrability did not "grow out of the dispute" between BG Group and Argentina, but instead were raised *sua sponte* by the Panel. The question of arbitrabilty here precedes rather than grows out of the dispute.[6]

Because the Treaty provision at issue is explicit, the usual "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), cannot function to override the intent of the contracting parties. It may be that parties generally negotiate arbitration clauses to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628. A court interpreting such a clause in the international trade context is informed by "a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely

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[6] *Howsam*, 537 U.S. at 82, 85, is also distinguishable because the question of arbitrability arose from a rule, promulgated by the National Association of Securities Dealers ("NASD"), that functioned as a six year statute of limitations. *Id.* at 82. The question of arbitrability thus was intertwined with the facts underlying the substantive dispute. The Supreme Court reasoned that the NASD arbitrators were "comparatively more expert about the meaning of their own rule, . . . [and thus] better able to interpret and to apply it." *Id.* at 85. Here, the question of arbitrability is separate from the underlying dispute, and the Treaty requirement to seek relief first in court was required by the contracting parties, not promulgated by the Arbitral Panel.

negotiated choice-of-forum clauses." *Id.* at 631. In a case such as *Mitsubishi Motors*, this results in enforcing an agreement to arbitrate, which historically required "national courts . . . to shake off the old judicial hostility to arbitration." *Id.* at 638 (internal quotation marks and citation omitted). But where, as here, the contracting parties provided that an Argentine court would have eighteen months to resolve a dispute prior to resort to arbitration, a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties. "'[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.'" *Id*. at 630 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972)). Therefore, "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes requires that we enforce the parties' agreement." *Id.* at 629. Where the contracting parties agree to require dispute resolution in a court prior to arbitration, and the aggrieved party initiating the dispute disregards the requirement, a fundamentally different question of arbitrability arises than that of the ignored informal resolution steps in *John Wiley*. In keeping with the foundational principles expressed above, *see, e.g., Stolt-Nielsen*, 130 S. Ct. at 1774–75; *Howsam*, 537 U.S. at 83, a *John Wiley* assumption that the arbitrator is to determine the question of arbitrability cannot sensibly apply here.

Accordingly, "[b]ecause we conclude that there can be only one possible outcome on the [arbitrability question] before us," *Stolt-Nielsen*, 130 S. Ct. at 1770, namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm the Final Award, and we vacate the Final Award.

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**Civil Action No. 08-485 (RBW)**

**[Filed January 21, 2011]**

REPUBLIC OF ARGENTINA, )
)
Plaintiff, )
)
v. )
)
BG GROUP PLC, )
)
Defendant. )
)

## MEMORANDUM OPINION

Currently before the Court is a cross-motion filed by respondent BG Group PLC ("BG Group") to confirm an arbitral award (the "Award") rendered in its favor and against petitioner Republic of Argentina ("Argentina") under the Federal Arbitration Act, 9 U.S.C. § 207 (2000) (the "FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at 1970 WL 104417 (the "New York Convention" or the "Convention"), which was ratified by Congress and codified at 9 U.S.C. §§ 201-08 (2000). Cross-Motion for Recognition and Enforcement of

Arbitral Award (the "Resp't's Cross-Mot.") at 1. Argentina previously moved to vacate the Award under the FAA and the New York Convention, but the Court denied that relief in a memorandum opinion and order issued on June 7, 2010. Republic of Argentina v. BG Group, 715 F. Supp. 2d 108, 126 (D.D.C. 2010) (Walton, J.). The Court held a hearing on September 28, 2010, as to the merits of the motion currently before the Court, at which time the Court issued an oral ruling granting the cross-motion and informed the parties that it would memorialize its rationale and ruling thereafter. Hearing Transcript ("Tr.") 48:17-21, Sept. 28, 2010. This memorandum opinion represents the Court's adherence to that promise.

## I. Background

Many of the facts germane to the issues confronting the Court in this case have already been set forth in the June 7, 2010 memorandum opinion, but in the interest of providing the factual background necessary to understanding the Court's legal analysis below, those facts will be revisited here.[1] On December 11,

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[1] The Court considered the following documents in reaching its decision: (1) Argentina's Petition to Vacate or Modify Arbitration Award (the "Pet'r's Pet."); (2) the Memorandum of Points and Authorities of BG Group PLC in Opposition to Motion to Vacate and in Support of Cross Motion for Recognition and Enforcement and for a Pre-Judgment Bond (the "Resp't's Cross-Mot."); (3) Argentina's Memorandum of Points and Authorities in Reply to Respondent's Opposition to the Motion to Vacate or Modify Arbitration Award and in Opposition to Respondent's Cross-Motions for Confirmation of the Award and For a Pre-Judgment Bond (the "Pet'r's Reply"); (4) BG Group's Memorandum of Points

1990, Argentina and the United Kingdom entered into the Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33 ("Investment Treaty"), the purpose of which was to promote foreign investment between these two nations. Resp't's Cross-Mot. at 1; Pet'r's Pet. ¶ 13. Similar to other bilateral investment treaties entered into around the same period, the Investment Treaty was designed to ensure foreign investors that they would be treated fairly and equitably, to provide them with "full protection and security," and to restrict the host country "from expropriating the assets of such investors without just compensation." Respt't's Cross-

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and Authorities in Reply to Petitioner's Opposition to Respondent's Cross-Motion for Recognition and Enforcement and for a Pre-Judgment Bond (the "Resp't's Reply"); (5) BG Group's Supplemental Memorandum of Law in Support of Respondent's Motion for Pre-Judgment Bond (the "Resp't's Supp. Mem."); (6) Argentina's Supplemental Memorandum of Points with Regard to Posting a Bond (the "Pet'r's Supp. Mem."); (7) Argentina's Second Supplemental Memorandum of Points with Regard to Posting of Bond (the "Pet'r's 2d Supp. Mem."); (8) BG Group's Supplemental Memorandum of Law on the Applicability of the New York Convention (the "Resp't's 2d Supp. Mem."); (9) Argentina's Supplemental Memorandum Refusing Respondent's Request for a Pre-Judgment Bond (the "Pet'r's 3d Supp. Mem."); (10) BG Group's Supplemental Memorandum in Support of Respondent's Motion for a Pre-Judgment Bond (the "Resp't's 3d Supp. Mem."); (11) Argentina's June 30, 2010 Supplemental Memorandum (the "Pet'r's 4th Supp. Mem."); (12) BG Group's Reply Supplemental Memorandum of Points and Authorities of Petitioner (the "Resp't's 4th Supp. Mem."); and (13) the Reply Supplemental Memorandum of Points and Authorities of Petitioner.

Mot. at 1. To address any disputes arising from these investments, Argentina and the United Kingdom agreed to a two-tiered system of dispute resolution in which the dispute could be submitted to a "competent tribunal" of the country "in whose territory the investment was made," after which the matter could be referred to arbitration under certain conditions, or the dispute could be submitted directly to international arbitration.[2] Investment Treaty, art. 8(2).

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[2] Article 8(2) of the Investment Treaty provides for recourse to arbitration under the following circumstances:

> (a) if one of the Parties so requests . . .:
>
> > (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [a] competent tribunal of the [country] in whose territory the investment was made;
> >
> > (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;
>
> (b) where the [Parties] have so agreed.

Furthermore, the Investment Treaty provides that "where the dispute is referred to international arbitration," the parties "may agree to refer the dispute either to: (a) the International Centre for the Settlement of Investment Disputes [(the "ICSID")] . . . or (b) an international arbitrator or ad hoc arbitration tribunal . . . under the Arbitration Rules of the United Nations Commission on International Trade Law [(the "UNCITRAL Rules")]. Award at 6 (citing Article 8(3)(a)-(b) of the Treaty). Here, "[b]ecause the [p]arties failed to agree on submission of the dispute to [the ICSID], [BG Group] submitted the arbitration under [the UNCITRAL Rules]." Id. at 7.

Also as part of its economic reforms, Argentina enacted several measures in an effort "to reduce inflation and the public deficit," including "privatization of certain state[-]owned companies in many sectors[,] including the gas transportation and distribution industry." Pet'r's Pet. ¶ 15. As part of these efforts, Argentina divided its gas transportation and distribution industry, Gas del Estado, Sociedad del Estado, into two transportation companies and eight distribution companies. Id. ¶ 18. BG Group, a United Kingdom company, invested in one of the eight gas distribution companies, MetroGAS, through a consortium of investors known as Gas Argentino, S.A. Id. ¶ 20. Eventually, BG Group acquired a 54.67% interest in Gas Argentino, S.A., which in turn owned 70% of MetroGAS. Id. ¶¶ 20-21.

In 2001, after a period of exceptional economic growth, Argentina began to suffer an economic crisis. Pet'r's Pet. at 6-7. In its efforts to respond to this predicament, Argentina enacted an emergency law that took effect on January 6, 2002, which consisted of several measures that, according to BG Group, negatively impacted its investment in MetroGAS. Id.; Respt't's Cross-Mot. at 2. As a result, BG Group initiated international arbitration proceedings on April 25, 2003, under Article 8 of the Investment Treaty,[3] Respt't's Cross-Mot. at 2; Pet'r's Pet. ¶ 6, arguing that Argentina's promulgation of these emergency measures

[3] Over 25 foreign investors initiated arbitration against Argentina claiming violation of bilateral investment treaties as a result of the emergency law's impact. Respt't's Opp'n at 2.

violated Article 5 of the Investment Treaty "by expropriating BG[ Group's] . . . shareholding in GASA and MetroGas and, alternatively, . . . [its] rights under or related to the MetroGAS License," Award ¶ 85(a), as well as Article 2(2) of Investment Treaty "by failing to provide BG[ Group] fair and equitable treatment and protection and security, . . . by taking unreasonable and discriminatory measures, [and] by failing to observe obligations entered into with regard to BG[ Group's] Investments," id. ¶ 85(b).

An arbitral panel commenced proceedings in New York and Washington, D.C. beginning in July of 2006. Pet'r's Pet. ¶ 4. On December 24, 2007, the arbitral panel issued a decision in which it rejected BG Group's contention that Argentina breached Section 5 of the Investment Treaty, Award ¶ 269, concluding that there had been no expropriation of BG Group's investment in MetroGAS because "the impact of Argentina's measures [was] not . . . permanent on the value of BG[ Group's] shareholding in MetroGAS," and that "MetroGAS'[s] business never halted, continues to operate, and has an asset base which is recovering," id. ¶ 270. The panel concluded, however, that Argentina breached Article 2(2) of the Investment Treaty by "fundamentally modif[ying] the investment [r]egulatory [f]ramework," id. ¶ 310, and "unilaterally withdr[a]w[ing] commitments which induced BG [Group] to make its investment in Argentina," id. ¶ 343.

With regards to assessing the amount of damages owed by Argentina for its breach of Article 2(2), the arbitral panel applied the standard for reparations set

forth in Case Concerning the Factory at Charzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, see Award ¶ 429, which held that a party injured by a "breach of engagement" was entitled to "reparation [that], as far as possible, [would] wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed," id. ¶ 425. Applied to this case, the arbitral panel concluded that BG Group was entitled to damages equivalent to the fair market value of its "investment in MetroGAS immediately before and after promulgation of the [emergency measures]," id. ¶ 438; see also id. ¶ 443 (calculating damages based on the difference between the fair market value of BG Group's investment prior to enactment of the emergency measures and the value of the investment while the measures were in place). On this point, BG Group presented an expert witness, John Wood-Collins, who concluded that the value of BG Group's investment prior to the enactment of the emergency measures was $239,400,000, while the value of the investment after the measures were implemented was $1,300,000. Id. ¶ 438. Mr. Wood-Collins's position, therefore, was that BG Group was entitled to $238,100,000 in damages. Id.

The arbitral panel rejected Mr. Wood-Collin's figures, concluding that his findings led "to a result [that] is uncertain and speculative." Id. ¶ 439. The panel then calculated the damages in this case by relying on two transactions involving the sale of shares in MetroGAS and Gas Argentino, S.A. Id. ¶ 443. First, the panel reviewed a transaction that took place after the promulgation of the emergency measures, in which

BG Group relinquished part of its interest in MetroGAS (through Gas Argentino, S.A.) in exchange for a debt write-off, and concluded that the value of BG Group's investment at that time was $91,825.244.15. Id. ¶ 440. Second, the panel analyzed a transaction in which the sale of a minority stake in Gas Argentino, S.A., reflected a value of $277,110,730 for BG Group's shares in MetroGAS. Id. ¶¶ 441-42. Considering the difference between these two values, the arbitral panel concluded that the damage to BG Group's investment as a result of Argentina's breach of Article 2(2) was $185,285,485.85. Id. ¶ 443. The arbitral panel also concluded that BG Group was entitled to interest, id. ¶ 467(5), costs for the arbitration, id. ¶ 467(6), and attorneys' fees, id. ¶ 467(7).

On March 21, 2008, Argentina filed in this Court its petition to vacate or modify the Award under 9 U.S.C. §§ 10-11 and Article V(1)(e) of the New York Convention, see Pet'r's Pet. ¶¶ 3-5 (relying on the FAA and New York Convention to vacate or modify the Award), to which BG Group responded with its own motion to have the Award confirmed pursuant to 9 U.S.C. § 9 and Article IV of the Convention, Resp't's Cross-Mot. at 36. On June 7, 2010, this Court issued a memorandum opinion and order denying Argentina's petition to vacate the Award. Republic of Argentina, 715 F. Supp. 2d at 126-27. Specifically, the Court rejected Argentina's arguments that "the arbitral panel exceeded its authority under the Investment Treaty," that "the arbitral panel acted 'in manifest disregard of the law,'" that "there was 'evident partiality or corruption' on the part of one of the arbitrators on the

panel," that "the Award was procured through corruption, fraud, or undue means," and that "the Award is disproportionate, unfair, and irrational." Id. at 121. As to BG Group's cross-motion to confirm the Award, the Court noted that Argentina did not set forth its reasons as to why confirmation should be denied; rather, Argentina expressly reserved weighing in on the matter pending further briefing on the issue "'considering the serious violations of public policy' allegedly committed by the arbitral panel." Id. at 126 (quoting Pet'r's Reply at 22). Despite the fact "that Argentina could have (and should have) set forth . . . the basis for [denying confirmation] on public policy grounds," the Court granted Argentina leave to file a supplemental memorandum on the issue of whether the Court should deny confirmation of the Award under Article V(2)(b) of the New York Convention.[4] Id.

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[4] In its prior opinion, the Court imprecisely framed the present issue as "whether vacatur is appropriate under Article V(b)(2) of the New York Convention," Republic of Argentina, 715 F. Supp. 2d at 126, rather than whether the Court should confirm the Award. A proceeding to vacate or modify an arbitral award is distinguishable from one to confirm an award; in point of fact, the purpose of a proceeding to vacate an arbitral award, which can only be held in "the country in which, or under the [arbitration] law of which, [an] award is made," is to render the award unenforceable in any other nation that is a party to the New York Convention, see TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 935-36 (D.C. Cir. 2007) (quoting New York Convention, art. V(1)(e)) (concluding that a "principal precept of the New York Convention" is that "an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in [the country in] which the award was made"), while a proceeding to confirm an award, which

Argentina then filed its supplemental memorandum in support of denying confirmation of the Award on June 30, 2010, relying on Article V(1)(c) of the New York Convention, which states that the Court may deny recognition of an arbitral award "when the award deals with a difference . . . not falling within the terms of the submission to arbitration," in addition to Article V(2)(b). Specifically, Argentina asserts that (1) "[t]he [a]rbitral [t]ribunal exceeded its powers in permitting BG [Group] to arbitrate its claims in blatant disregard of the [p]arties' agreement to arbitrate," Pet'r's 3d Supp. Mem. at 12; (2) the arbitral panel's decision to allow BG Group to bring a claim for "alleged damages suffered . . . by . . . MetroGAS [] in which BG [Group] held . . . shares," id. at 13, "is contrary to the public policy of the United States," id. at 16; and (3) the arbitral panel's reliance on a 1998 transaction in determining the fair market value of MetroGAS in 2001, see id. at 18, is an excessive use of its powers and, moreover, contravenes settled United States public policy because the calculation of actual damages must take into account the injury "suffered as of the time of the wrongful act or the taking []of property[]," id. at 22. Additionally, Argentina argued at the

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can be held in any other signatory state to the New York Convention, concerns whether an arbitral award—even one that has not been 'set aside' by a competent authority—should nonetheless be enforced in that particular state, see Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004) (observing that the issue confronting countries "where recognition and enforcement are sought" is "whether that state should enforce the arbitral award").

September 28, 2010 hearing that the arbitral panel's decision to arbitrate BG Group's claims also violated the public policy of the United States. See Tr. 8:20-21:15, Sept. 28, 2010.

Not surprisingly, BG Group urges the Court to reject all of these arguments. BG Group asserts that Argentina's attack on the Award as having been made in excess of the arbitral panel's authority "have already been dismissed by the Court," Resp't's 4th Supp. Mem. at 3. As for Argentina's public policy arguments, BG Group contends that Argentina's position is unmeritorious because it has failed to identify any fundamental public policy that implicates "this country's 'most basic notions of morality and justice.'" Id. at 7.

## II. Standard of Review

Pursuant to 9 U.S.C. § 207, the Court is required to "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." Those specified grounds can be found under Article V of the Convention. Specifically, Article V(1) authorizes the Court to deny confirmation of the arbitral award under the following circumstances:

> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Furthermore, Article V(2) of the Convention provides the Court with two additional grounds for denying recognition of an arbitral award:

> (a) The subject matter of the difference is not capable of settlement by arbitration under [United States] law . . . ; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of [the United States].

As one federal circuit court has observed, "[t]here is now considerable case[]law holding that . . . the grounds for relief enumerated in Article V of the Convention are the only grounds available for [denying recognition or enforcement] of a [foreign] arbitral award." Yusef Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997) (emphasis added) (citing M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 851 (6th Cir. 1996); Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial, 745 F. Supp. 172, 181-82 (S.D.N.Y. 1990); Brandeis Intsel Ltd. v. Calabrian Chems Corp., 656 F. Supp. 160, 167 (S.D.N.Y. 1987); and Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 265 (1981)); see also TermoRio, 487 F.3d at 935 (D.C. Cir. 2007) (quoting Yusuf, 126 F.3d at 23) (concluding that where an enforcement action is brought in a jurisdiction outside of where the arbitral award was rendered, "the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention"). Given that the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature. See, e.g., Zeiler v. Deitsch, 500 F.3d 157, 169

(2d Cir. 2007) ("Confirmation under the Convention is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm."). "[T]he showing required to avoid summary confirmation is high," Ottley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir. 1987), and the burden of establishing the requisite factual predicate to deny confirmation of an arbitral award rests with the party resisting confirmation, Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 336 (5th Cir. 1976); see also New York Convention, art. V ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes [proof] to the competent authority where the recognition and enforcement is sought . . . .").

The Court also must remain mindful of the principle that "judicial review of arbitral awards is extremely limited," and that this Court "do[es] not sit to hear claims of factual or legal error by an arbitrator" in the same manner that an appeals court would review the decision of a lower court. Teamsters Local Union No. 61 v. United Parcel Serv., Inc., 272 F.3d 600, 604 (D.C. Cir. 2001) (quoting Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178 (D.C. Cir. 1991)). In fact, careful scrutiny of an arbitrator's decision would frustrate the FAA's "emphatic federal policy in favor of arbitral dispute resolution," Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (internal citation omitted)—a policy that "applies with special force in the field of international commerce,"

id.—by "undermining the goals of arbitration, namely, settling disputes efficiently and avoiding lengthy and expensive litigation," LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2, 4-5 (D.D.C. 2000) (Sullivan, J.), aff'd 246 F.3d 702 (D.C. Cir. 2001). Instead, "a court must confirm an arbitration award where some colorable support for the award can be gleaned from the record." Id.

## III. Legal Analysis

As the Court noted in its prior memorandum opinion, "[t]he remaining question in this matter . . . is whether the Court should grant BG Group's cross-motion to confirm the Award." Republic of Argentina, 715 F. Supp. 2d at 126. Argentina argues that the Award should not be confirmed by the Court because (1) the arbitral panel "completely disregard[ed] the terms of the parties' agreement to submit to arbitration," Pet'r's 3d Supp. Mem. at 6; (2) the arbitral panel improperly allowed BG Group to present a "derivative" claim in contravention of United States and international law, see id. at 13-14; and (3) the arbitral panel improperly held Argentina "liable to pay compensation for the consequences of an economic crisis," id. at 17. As to the first and third issues, Argentina argues that the arbitral panel exceeded its powers in reaching the conclusions that it did, see id. at 12, 22, and that as to all three issues, Argentina contends that recognition of the Award, given these alleged errors, would be contrary to the well-settled public policy of the United States, see id. at 16, 18; Tr. 8:20-21:15, Sept. 28, 2010.

As an initial matter, the Court has serious doubts about whether Article V(1)(c) of the New York Convention authorizes this Court to deny confirmation of the Award on the ground that the arbitral panel exceeded its powers. Unlike Section 10(a)(4) of the FAA, which states that an award may be vacated "where the arbitrators exceeded their powers," Article V(1)(c) is not so broad; rather, Article V(1)(c) authorizes the Court to deny confirmation of an award if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." See also Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 976 (2d Cir. 1974) (recognizing that Article V(1)(c) "tracks in more detailed form [Section] 10(d) of the Federal Arbitration Act . . . which authorizes vacating an award 'where the arbitrators exceeded their powers'" (emphasis added));[5] Mgmt. & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp., 820 F.2d 1531, 1534 (9th Cir. 1987) ("[I]t is generally recognized that the [New York] Convention tracks the Federal Arbitration Act." (internal citation omitted)). Put differently, a situation where an arbitrator "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," New York Convention, art. V(1)(c), is just one "detailed" example of a broader category of acts that can be considered an excessive use of power by an arbitrator under Section 10(a)(4) of the

[5] Section 10(d) of the FAA was re-designated as Section 10(a)(4) in 1990. See e.g., S. Rep. No. 101-543, at 24 (1990).

FAA. But arguably, it is only that specific scenario, not other actions that would be encompassed under Section 10(a)(4), that is covered under the New York Convention. Indeed, where an arbitral award is issued by an arbitrator who exceeds his powers by acting in "manifest disregard of the law," see Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1281 (9th Cir. 2009) ("[A]n arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under [Section] 10(a)(4) of the [FAA]."),[6] at least one other court has found that such an award cannot be denied confirmation under Article V of the Convention,[7] see M & C Corp., 87 F.3d at 851

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[6] In Hall Street Associates LLC v Mattel Inc., 552 U.S. 576 (2008), the Supreme Court called into question the continuing viability of the "manifest disregard of the law" standard as a non-statutory basis for vacatur of an arbitral award. See id. at 584 (concluding that Sections 10(a) and 11 of the FAA "provide the . . . exclusive grounds for expedited vacatur and modification" of an arbitral award); Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., ___ U.S. ___, ___, 130 S. Ct. 1758, 1768 n.3 (2010) (declining to decide whether the "manifest disregard of the law" standard survived Hall Street Associates). While the Ninth Circuit has continued to recognize the "manifest disregard of the law" standard after Hall Street Associates, see Comedy Club, 553 F.3d at 1281, the District of Columbia Circuit has yet to address this issue, see Regnery Pub. Inc. v. Miniter, No. 09-7039, 2010 WL 1169843, at *1 (D.C. Cir. Mar. 17, 2010) (assuming, without deciding, that the "manifest disregard of the law" standard survived Hall Street Associates).

[7] In fact, this appears to be the exact argument that Argentina is pursuing here—not that the arbitrator resolved a dispute falling outside the scope of the arbitration, but that the panel deliberately

(concluding that "Article V of the [New York] Convention lists the exclusive grounds justifying refusal to recognize an arbitral award," and that "[t]hose grounds . . . do not include . . . manifest disregard of the law"). Thus, the plain language of Article V(1)(c) does not appear to have the far reach that Argentina desires.

Nonetheless, the Court need not conclusively decide whether Article V(1)(c) allows the Court to deny recognition of an arbitral award in every instance where an arbitration panel (or an individual arbitrator) exceeds its powers, because even assuming that Article V(1)(c) can be interpreted so broadly, the Court already concluded in its earlier memorandum opinion in this case that the arbitral panel did not exceed its powers during the course of the arbitration that is the subject of this case. See Republic of Argentina, 715 F. Supp. 2d at 121. While the Court previously examined the arbitral panel's exercise of power in the context of whether the Award should be vacated under Section 10(a)(4) of the FAA, see, e.g., id. at 121 ("Argentina asserts that the Court must vacate the Award under Section 10(a)(4) because, inter alia, the arbitral panel improperly 'permit[ed] BG [Group] to arbitrate its claims' before seeking recourse in the Argentine courts[,] . . . and . . . that the arbitral panel wrongfully rejected 'the discounted cash flow method' in calculating the amount of the Award" (internal citations omitted)), the fact that Argentina now relies

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ignored the terms of the Investment Treaty and applicable principles of international law.

on Article V(1)(c) of the New York Convention makes no difference. The upshot of the Court's earlier opinion is that the arbitral panel did not exceed its powers, and that conclusion has the same legal effect whether Argentina relies on Section 10(a) of the FAA, or Article V(1)(c) of the New York Convention. And, because Argentina fails to provide any reason why the Court should revisit its prior ruling, Argentina's attempt to deny confirmation of the Award under Article V(1)(c) must be rejected. See Lemmons v. Georgetown Univ. Hosp., 241 F.R.D. 15, 22 (D.D.C. 2007) (Walton, J.) (quoting Judicial Watch v. Dep't of Army, 466 F. Supp. 2d 112, 123 (D.D.C. 2006) (Urbina, J.)) ("[W]here litigants have once battled for the Court's decision, they should neither be required, nor without good reason permitted, to battle for it again.").

Turning to the issue of whether recognition of the Award would be contrary to the public policy of the United States, the Court finds it helpful to review some foundational and relevant legal principles in this regard. "The public policy defense" under the New York Convention "is to be construed narrowly [and] applied only where enforcement would violate the forum state's most basic notions of morality and justice." TermoRio, 487 F.3d at 938 (quoting Karaha Bodas Co., 364 F.3d at 305-06). More specifically, the Court's authority to deny recognition of an arbitral award under the New York Convention "is limited to situations where the contract as interpreted [by the arbitrators] would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of

supposed public interests." Banco de Seguros Del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 264 (2d Cir. 2003) (emphasis added and alteration in original) (quoting United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987)). This does not mean, however, that an arbitral award may be denied confirmation simply because it violates some statute in existence in the United States. As one court noted:

> All laws, be they procedural or substantive, are founded on strong policy considerations. Yet not all laws represent this country's "most basic notions of morality and justice." Were it otherwise, the Convention's public policy exception would eviscerate the very goal of the Convention as a whole—to encourage the recognition and enforcement of commercial arbitration agreements.

A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd., Civil Action No. 88-4500 (MJL), 1989 WL 115941, at *2 (S.D.N.Y. Sept. 27, 1989). Given the public policy defense's narrow application, the burden of establishing that an arbitral award is contrary to public policy "is high, and infrequently met," Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986); and "[o]nly in clear[]cases" should the party seeking to deny confirmation of an arbitral award prevail, Tahan v. Hodgson, 662 F.2d 862, 866 n.17 (D.C. Cir. 1981); see also Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan, 190 F. Supp. 2d 936, 955 (S.D. Tex. 2001) ("Application of the public policy exception will succeed in only the narrowest of circumstances . . . ."). With these principles serving as the Court's touchstone, the

Court turns to each of the contentions raised by Argentina in both its supplemental memorandum and at the September 28, 2010 hearing.

A. The Arbitrability of the Dispute

Argentina argues that the Court should deny confirmation of the arbitral award under Article V(b)(2) because it did not consent to arbitrate this dispute. From Argentina's perspective, the Court must first "second guess" the arbitral panel's conclusion that this dispute was arbitrable, see Tr. 4:11-15, Sept. 28, 2010 ("THE COURT: But why should I question the [a]rbitration [p]anel's decision as to its authority to issue the arbitration award? You're not suggesting I should second[-]guess that, are you? MR. BOTTINI: Yes, Your Honor, we are saying that."), and instead adopt its interpretation that Argentina's consent to arbitrate this dispute rested on the condition that "the dispute had to be submitted for [eighteen] months to . . . an Argentine judge," id. at 5:5-7, id. at 7:15-18. Then, Argentina urges the Court to find that because this condition was not met, it therefore did not consent to arbitrate this dispute, and thus enforcement of the Award would contravene the principle that "arbitration of a particular dispute" is to occur only when "the parties agreed to arbitrate that dispute." Granite Rock Co. v. Int'l Brotherhood of Teamsters, ___ U.S. ___, ___, 130 S. Ct. 2847, 2856 (2010); see also Stolt-Nielsen, ___ U.S. at ___, 130 S. Ct. at 1773 (recognizing "the basic precept that arbitration 'is a matter of consent, not coercion'" (quoting Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

Argentina's analytical approach is flawed, however. As the authorities cited above command, the Court is without authority to deviate from the arbitral panel's interpretation of the Investment Treaty in determining whether enforcement of the Award would contravene the public policy of the United States. Rather, the Court must accept as correct the arbitral panel's construction of the Investment Treaty in determining whether the agreement violates public policy. See Banco de Seguros Del Estado, 344 F.3d at 264 (quoting United Paperworks Int'l Union, 484 U.S. at 43) (holding that the question to be resolved on a challenge under Article V(2)(b) is whether "the contract as interpreted would violate some explicit public policy" (emphasis added)); cf. Nat'l R.R. Passenger Corp. v. Consol. Rail Corp., 892 F.2d 1066, 1070 (D.C. Cir. 1990) (quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757, 766 (1983)) (concluding in the context of the FAA that it is the duty of the courts to resolve "question[s] of public policy [that are] implicated under the contract as interpreted" (emphasis added)). Besides, in a case such as this one, in which Argentina "acknowledge[s] that the [a]rbitral [panel] has the principal power to rule upon its jurisdiction,"[8] Tr. 4:2-3, Sept. 28, 2010, any extensive

[8] To be sure, the issue of whether the parties in a dispute "have agreed to submit a particular dispute to arbitration" is one that is "typically an issue for judicial determination." Granite Rock, ___ U.S. at ___, 130 S. Ct. at 2855 (internal quotation marks omitted). Only where the record reflects a "clear and unmistakable" intention by the parties to arbitrate arbitrability would that issue

judicial review of the panel's interpretation of the Investment Treaty would be contrary to the Supreme Court's ruling in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). There, the Supreme Court observed that where

> the parties agree[d] to submit the arbitrability question . . . to arbitration . . . . then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that [the] parties have agreed to arbitrate . . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances[, e.g., Section 10 of the Federal Arbitration Act].

Id. at 943 (citing 9 U.S.C. § 10). In other words, where the parties have conferred upon the arbitrator the authority to determine whether the dispute is arbitrable, then judicial review of that decision "is extremely limited," and this Court is without authority "to hear claims of factual or legal error by an arbitrator." Teamsters Local Union No. 61, 272 F.3d at 604 (quoting Kanuth, 949 F.2d at 1178). Thus, it is the arbitral panel's interpretation of the Investment

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fall outside the reach of the courts. First Options of Chicago Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Given Argentina's concession that the arbitral panel had the authority to rule on its own jurisdiction, however, the Court need not decide whether "clear and unmistakable evidence" exists in this case.

Treaty, and not Argentina's (or this Court's), that controls the Court's analysis.

Accepting, as it must, the arbitral panel's construction of the Investment Treaty, it is evident to the Court that Argentina was not compelled to arbitrate this dispute without its consent, and thus there was no violation of the principle set forth in Granite Rock.[9] Here, the arbitral panel concluded that Article 8(2)(a)(i) of the Investment Treaty, as agreed to by both the United Kingdom and Argentina, allowed BG Group to submit its claim to arbitration without first seeking recourse before the Argentine courts. See Award ¶ 157 ("The Tribunal . . . finds admissible the claims brought by BG [Group] in this arbitration . . . ."). Although the arbitral panel acknowledged that Article 8(2)(a)(i) requires claimants, as a general matter, to "litigate in the [Argentine] courts for [eighteen] months before they can bring their claims to arbitration," id. ¶ 146, it found that "[a]s a matter of treaty interpretation, . . . Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration," id. ¶ 147. This, the arbitral panel concluded, is because it must apply both the terms of the "treaty itself, [as well as] the applicable principles of international law," id. ¶ 90, and if Article 8(2)(a)(i) were read to require BG Group to seek relief before the Argentine courts even where

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[9] Consequently, the Court finds it unnecessary to decide whether the issuance of an arbitral award, despite a finding by an arbitral panel (or individual arbitrator) that one or both of the parties did not consent to the arbitration, is one that contravenes this country's "most basic notions of morality and justice." TermoRio, 487 F.3d at 928 (quoting Karaha Bodas Co., 364 F.3d at 305-06).

Argentina passed measures that were essentially meant "to bar recourse to the courts," id. ¶ 148, that "interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention," id. ¶ 147 (emphasis added).[10] Thus, the arbitral panel concluded that Article 8(2)(a)(i), when viewed in light of Article 32's directive to interpret treaty provisions to avoid an "absurd and unreasonable result," did not require recourse to the Argentine Courts for eighteen months as Argentina had made attempts "to unilaterally elude arbitration." Id. Based on that interpretation, therefore, it cannot be said that Argentina's participation in the arbitration was without its consent; to the contrary, the arbitral panel concluded that Article 8(2)(a)(i), as agreed to by Argentina, allows for direct recourse to arbitration. Accordingly, enforcement of the Award does not offend the notion that "[a]rbitration is strictly a matter of

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[10] As the Court noted in Republic of Argentina, 715 F. Supp. 2d at 122:

> Article 32 of the Vienna Convention on the Law of Treaties, to which Argentina is a signatory, provides that "[r]ecourse may be had to supplementary means of interpretation" when standard means of treaty interpretation would "leave[ ] the meaning [of the provision] ambiguous or obscure[,] or ... lead[ ] to a result which is manifestly absurd or unreasonable." The arbitral panel was authorized, if not compelled, to resort to sources of international law in construing Article 8(2)(a)(i) of the Investment Treaty. See Investment Treaty, art. 8(4) (requiring "[t]he arbitral tribunal [to] decide the dispute in accordance with the provisions of [the Investment Treaty] and the applicable principles of international law").

consent," Granite Rock, ___ U.S. at ___, 130 S. Ct. 2847, 2857, and thus the Court rejects Argentina's efforts to prevent confirmation of the Award on this basis.

B. BG Group's "Derivative" Claims

Next, Argentina argues that the arbitral panel's decision to allow BG Group to directly proceed against Argentina on a "derivative claim[] . . . is contrary to the public policy of the United States of America." Pet'r's Supp. Mem. at 16. Specifically, Argentina asserts that it was MetroGAS that directly suffered harm as a result of the various measures enacted in 2002, id. at 13, and that any damages suffered by BG Group were limited to the decrease in the value of its shares in Gas Argentino, S.A. and MetroGAS, id. at 12. Argentina further contends that it is well-established in both international and United States jurisprudence that "a shareholder does not have an individual cause of action against third parties for wrongs or injuries to the corporation in which he or she holds stock," id. at 14, and that the adjudication of this claim by the arbitral panel, therefore, violates this principle, id. at 16.

The Court agrees with Argentina that, as a general matter, a shareholder cannot "maintain a direct action when the alleged injury is inflicted on the corporation and the only injury to the shareholder is the indirect harm which consists of the diminution in the value of his or her shares." Lapidus v. Hecht, 232 F.3d 679, 683 (9th Cir. 2000); see also Labovitz v. Washington Times Corp., 172 F.3d 897, 902 (D.C. Cir. 1999) (recognizing the "general principle[] of corporate law" that a

shareholder "cannot recover on account of injury done to the corporation" (internal quotation marks omitted)). But what Argentina fails to recognize is that there are numerous exceptions to this rule, including where "a special contractual duty exists." Nocula v. UGS Corp., 520 F.3d 719, 726 (7th Cir. 2008); see also Oliver v. Sealaska Corp., 192 F.3d 1220, 1226 (9th Cir. 1999) (recognizing that a direct action can be maintained by a shareholder where, inter alia, "there is a special duty, such as a contractual duty"). Moreover, such a duty can be owed to a third-party beneficiary to a contract, so long as "the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly."[11] Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001).

These principles, when applied to the facts of this case, refute Argentina's argument that BG Group could not bring a direct action against it under the Investment Treaty. There is no question that Argentina, as a "contracting party," directly owed BG Group, an "investor," the duty under the Investment Treaty to refrain from enacting "unreasonable or discriminatory measures" that would "impair . . . the management, maintenance, use, enjoyment, or disposal

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[11] The principles detailed in these cases are applicable in the present case because the Investment Treaty is at its very essence a contractual agreement between Argentina and the United Kingdom. See e.g., Trans World Airlines Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations").

of investments in its territory."[12] Investment Treaty, art. 2(2). BG Group is, therefore, a third-party

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[12] In fact, Argentina owed BG Group a litany of other duties under the Investment Treaty. See Investment Treaty, art. 2(1) ("Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory, and . . . shall admit such capital."); id., art. 3(1) ("Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than which it accords to investments or returns of its own investors or to investments or returns of investors of any third State."); id., art. 3(2) ("Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment[,] or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."); id., art. 4 ("Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to . . . a state of national emergency . . . shall be accorded by the latter Contracting Party treatment . . . no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State."); id., art. 5(1) ("Investments of investors of either Contracting Party shall not be nationalised, expropriated[,] or subjected to measures having [the same] effect . . . in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis," and in such cases the investor "shall have a right . . . to prompt review[] by a judicial or other independent authority of that Contracting Party."); id., art. 6(1) ("Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted transfer of their investments and returns to the country where they reside.").

beneficiary under the Investment Treaty,[13] and the arbitral panel's decision to entertain BG Group's direct action against Argentina for enacting "unreasonable [and] discriminatory measures" that "impair[ed]" BG Group's investment, Investment Treaty, art. 2(2); Award ¶ 413, is consistent with, rather than contrary to, well-settled principles of American jurisprudence.[14] As a consequence, the Court rejects Argentina's "derivative claim" argument.

C. The Arbitral Panel's Damages Assessment

Finally, Argentina asserts that the arbitral panel's assessment of damages in this case is contrary to the public policy of the United States. Pet'r's 3d Supp. Mem. at 17. It is important to note here that, as far as the Court can tell, Argentina does not dispute the general rule applied by the arbitral panel in assessing

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[13] Although BG Group was not explicitly identified in the Investment Treaty as a beneficiary of the agreement, that is of no moment here. See e.g., Synovus Bank of Tampa Bay v. Valley Nat'l Bank, 487 F. Supp. 2d 360, 368 (S.D.N.Y. 2007) ("While the third-party beneficiary does not have to establish that it is explicitly mentioned in the contract, New York law requires that the parties' intent to benefit a third-party be shown on the face of the contract.").

[14] Because the Court concludes that enforcement of the Award would not violate any general principle of corporate law recognized by the courts of this country, it need not resolve the question of whether enforcement of an arbitral award that would contravene this principle would be contrary to this country's "most basic notions of morality and justice." TermoRio, 487 F.3d at 928 (quoting Karaha Bodas Co., 364 F.3d at 305-06).

the award of damages in this case, to wit, the difference in the value of BG Group's "investment in MetroGAS immediately before and after promulgation of the [emergency measures]," Award ¶ 438; see also id. ¶ 443 (calculating damages based on the difference between the value of BG Group's investment prior to enactment of the emergency measures and the value of the investment after Argentina's measures were in place). What Argentina does take issue with is what it believes to be the arbitral panel's failure to assess the fair market value of BG Group's shares in MetroGAS as of the date when the emergency measures went into effect, Pet'r's 3d Supp. Mem. at 22, which was January 6, 2002, Pet'r's Pet. at 6-7; Respt't's Cross-Mot. at 2. Specifically, Argentina argues that the arbitral panel should have appraised the value of BG Group's investment on "the day before the [emergency] measures" were taken, Tr. 17:7, Sept. 28, 2010, when the Argentine economy had already collapsed, Pet'r's 3d Supp. Mem. at 18, instead of assessing "the value of BG[ Group's] stake in MetroGAS in 1998 . . . . when the Argentine economy was at its peak," id. at 18, by relying on the July 12, 1998 transaction involving the sale of Gas Argentino, S.A. shares, Award ¶ 441. Argentina asserts that the arbitral panel's valuation of BG Group's investment resulted in Argentina being "held responsible . . . for the effects of the economic crisis it suffered between 1998 and 2001," and thus the arbitral panel's ruling conflicts with both the principle that "[a]ctual pecuniary loss sustained as a direct result of the wrong is the measure to be applied in fixing damages," Pet'r's 3d Supp. at 22 (citing Ainger v. Michigan General Corp., 476 F. Supp. 1209, 1233

(S.D.N.Y. 1979)),[15] as well as the Fifth Amendment's guarantee of entitlement to only "just compensation" for the taking of property, see Tr. 15:21-25, Sept, 28, 2010 (asserting that "the guiding principle of just compensation and the [T]akings [C]lause of the Fifth Amendment is that the owner of the condemned property must be made whole[,] but is entitled to no more").

These arguments are without merit. For starters, Argentina distorts the arbitral panel's reliance on the 1998 transaction. At the onset of its analysis regarding Mr. Wood-Collins's damages assessment, the arbitral panel observed that he

> a) assessed the loss in the fair market value of BG[ Group's] investment in MetroGAS as [of] January 2002; [and]
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> b) adjusted the result of (a) above to account for the part of the loss which might be borne by the creditors of [Gas Argentino, S.A.] and calculated

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[15] Argentina also cites American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951), as standing for the proposition that "[a]ctual pecuniary loss sustained as a direct result of the wrong is the measure to be applied in fixing damages." Pet'r's 3d Supp. at 22. The case, however, has little, if anything, to do with the appropriate standard to be applied in calculating damages. Rather, the issue confronting the Supreme Court in Finn was to determine what is "the proper federal rule to be followed on a motion by a defendant to vacate a United States District Court judgment, obtained by a plaintiff after removal from a state court by [a] defendant, and to remand the suit to state court." Finn, 341 U.S. at 7.

> BG[ Group's] "historical loss" for the period of January 2002 to December 2005.

Award ¶ 430. At no point in its analysis, however, did the arbitral panel take issue with Mr. Wood-Collins's conclusion that January 1, 2002, should be the starting point for measuring the loss in BG Group's investment. Award ¶ 438. Rather, the only concern expressed by the arbitral panel regarding Mr. Wood-Collin's assessment of the fair market value of BG Group's investment was that his figures were "uncertain and speculative." Id. ¶ 439. The panel concluded that the more "objective indication of the value of BG[ Group's] investment," id. ¶ 440, were actual transactions that reflected MetroGAS's fair market value, id. ¶ 443 (noting that the arbitral panel's calculation of damages was "based on actual transactions") (emphasis added)); specifically, the cancellation of debt totaling $38,200,000 "in exchange for an 18.8% interest in MetroGAS that took place after the enactment of Argentina's emergency measures, see id. (concluding that the "Ashmore/ Marathon transaction . . . . provides an objective indication of the value of BG[ Group's] investment after the Emergency Law"), and the sale of a 25% interest in Gas Argentino, S.A. for $75,000,000, id. ¶ 442 (concluding that a 1998 transaction involving an interest in MetroGAS "is also a better proxy of the value of BG[ Group's] investment before promulgation of the Emergency Law"). It is not the case, therefore, that the arbitral panel found that July 12, 1998, was the appropriate date from which to measure the damages suffered by BG Group; instead, the panel agreed (albeit implicitly) with Mr. Wood-Collins that

January 1, 2002, was the starting point for calculating the damages in this case, but in reaching this conclusion, it found that the value of MetroGAS's shares, as reflected by the July 12, 1998 transaction, was a "better proxy of the value of BG[ Group's] investment before promulgation of the [e]mergnecy [l]aw." Award ¶ 442.

As a practical matter, this analytical distinction makes little difference because under the arbitral panel's calculus, its exclusive reliance on the July 12, 1998 transaction has the result of equating the value of BG Group's investment in MetroGAS in 1998 with the value of that investment on January 1, 2002. As a legal matter, however, this distinction is significant. Had the arbitral panel concluded that July 12, 1998, was the correct starting point to measure the damages suffered by BG Group, even though the act that caused the injury—the promulgation of the emergency law—occurred on January 1, 2002, then Argentina would have a colorable argument that it is being held accountable for something more than just "the actual pecuniary loss sustained as a direct result of the wrong." Ainger, 476 F. Supp. at 1233. But, because the arbitral panel measured the fair market value of BG Group's investment in MetroGAS as of January 1, 2002, Argentina's challenge must not be directed at the date at which the panel measured the damages, but rather at the fact that the arbitral panel relied on the 1998 transaction to appraise the fair market value of BG Group's investment in MetroGAS in 2001. Given that the employment of the "fair market value" standard "as a measuring device in the workaday world

of business" does not include resorting to "the equivalent of a precise scientific formula," McDonald v. Comm'r, 764 F.2d 322, 330 (5th Cir. 1985); see also BMW of North America v. United States, 39 F. Supp. 2d 445, 447 (D.N.J. 1998) (observing that "the determination of 'fair market value' is not an exact science, and that reasonable persons . . . could reach different conclusions with respect to . . . 'fair market value'"); In re Air Vermont, Inc., 41 B.R. 486, 491 (Bankr. D. Vt. 1984) ("It is generally known that determination of the fair market value . . . by appraisal is not an exact science."), this value assessment "is necessarily one of fact to be determined by the evidence," Crawford v. Helvering, 70 F.2d 744, 745 (D.C. Cir. 1934) (per curiam). And, in considering whether enforcement of the Award is contrary to public policy, the Court is without authority to conduct "an exercise in factfinding," United Paperworkers Int'l Union, 484 U.S. at 44, as "[t]he parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them," id. at 45. The Court, therefore, cannot second-guess the arbitral panel's reliance on the 1998 transaction in determining the fair market value of BG Group's investment in MetroGAS on January 1, 2002, and because the panel appraised the value of the investment as of the date that Argentina enacted the emergency measures that ultimately caused monetary harm to BG Group, the Court cannot conclude that enforcement of the Award would contravene any principle in Ainger.[16]

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[16] Finding no inconsistency between the arbitral panel's ruling and the principles set forth in Ainger, the Court need not resolve the

Neither does the Award contravene the principle of "just compensation" as set forth in the Fifth Amendment. The Takings Clause of the Fifth Amendment "prohibits the government from taking private property for public use without just compensation." Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (emphasis added). For the Court to find that enforcement of the Award would offend the policy of the "just compensation" mandate of the Fifth Amendment, the Court would have to conclude (1) that there was a government taking; (2) that the taking was of private property for public use; and (3) that the taking occurred without providing "just compensation." U.S. Const., amend. V. It had been Argentina's position during the arbitration proceeding, however, that no government expropriation occurred in this case. See Award ¶ 252 ("Argentina denied that any expropriation under Article 5 of the [Investment Treaty] has occurred."). Indeed, the arbitral panel sided with Argentina on this point, reasoning that "the impact of Argentina's measures has not been permanent on the value of BG[ Group's] shareholding in MetroGAS," as the "business never halted, continues to operate, and has an asset base which is recovering." Award ¶ 270. Thus, enforcement of the Award cannot be said to be contrary to the Takings Clause when, as Argentina successfully demonstrated in the arbitration, there had

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question of whether an arbitral award that imposes damages in excess of actual pecuniary loss would be contrary to this country's "most basic notions of morality and justice." TermoRio, 487 F.3d at 928 (quoting Karaha Bodas Co., 364 F.3d at 305-06).

been no improper government expropriation of BG Group's investment.[17]

To the extent Argentina is asserting that the arbitral panel's issuance of the Award itself violates the Takings Clause and contravenes the public policy of the United States, that position is also without merit. Of course, the arbitral panel is not an arm of any government, and thus any decision rendered by it could not constitute a "government taking." But even assuming that the arbitral panel, as a quasi-judicial body, see, e.g., Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Assoc., 218 F.3d 1085, 1090 (9th Cir. 2000) (observing that an "arbitrator plays a quasi-judicial role" in conducting an arbitration), could be viewed as a governmental entity, the Supreme Court noted in Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, ___ U.S. ___, ___, 130 S. Ct. 2592, 2604 (2010), that no clear standard exists for what constitutes a "judicial taking, or indeed whether such a thing as a judicial taking even exists." It cannot be said, therefore, that the arbitral panel's issuance of the Award was an act that "violate[d] some explicit public policy that is well defined and dominant." Banco de Seguros Del Estado, 344 F.3d at 264 (quoting United Paperworkers Int'l Union, 484 U.S. at 43) (emphasis added). Accordingly, if Argentina's position is that the

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[17] The Court takes no position on whether enforcement of an arbitral award that fails to comport with the Takings Clause would contravene this country's "most basic notions of morality and justice." TermoRio, 487 F.3d at 928 (quoting Karaha Bodas Co., 364 F.3d at 305-06).

issuance of the Award itself offends the Takings Clause and precludes confirmation of the Award, that argument also fails.

## IV. Conclusion

"A judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.'" Ackermann, 788 F.2d at 841 (quoting Tahan, 662 F.2d at 864). Argentina's attempts to convince the Court to deny confirmation of the Award fall exceedingly short of this standard. Indeed, Argentina failed to establish that the arbitral panel's interpretations of the Investment Treaty contravened any well-settled law or case precedent, let alone that its rulings were contrary to a principle so inextricably woven into the fabric of American jurisprudence to warrant this Court's intervention. Having failed to meet "the showing required to avoid summary confirmation," Ottley, 819 F.2d at 376, the Court concludes that the Award must be confirmed, and that BG Group is entitled to damages of $185,285,485.85, along with interest, costs for the arbitration, and attorneys' fees.[18]

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[18] According to BG Group's calculation, the total award including interest and attorneys' fees as of July 2010, was $233,344,409.91. Resp't's 4th Supp. Mem., Ex. 1 (July 21, 2010 Declaration of Elliot Friedman) Ex. A. Presumably, BG Group will seek an award of interest that will include the time period between July 2010, and the date of the final order confirming the Award. The parties, therefore, shall appear before the Court for a hearing at 2:00 p.m. on February 3, 2011, for the purpose of determining the

**SO ORDERED** on this 21st day of January, 2011.[19]

REGGIE B. WALTON
United States District Judge

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appropriate amount of interest payments owed by Argentina to BG Group as of the date of the hearing. An order to this effect will be issued contemporaneously with the issuance of this memorandum opinion.

[19] A final order will be issued at the conclusion of the February 3, 2011 hearing (1) granting BG Group's cross-motion to confirm the Award; (2) entering final judgment in favor of BG Group and against the Republic of Argentina in the amount of $185,285,485.85, plus an amount of interest to be determined at the February 3, 2011 hearing.

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**Civil Action No. 08-485 (RBW)**

**[Filed June 7, 2010]**

| | |
|---|---|
| REPUBLIC OF ARGENTINA, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| BG GROUP PLC, | ) |
| | ) |
| Defendant. | ) |
| | ) |

**MEMORANDUM OPINION**

The Republic of Argentina ("Argentina"), the petitioner in this case, seeks to vacate or modify an arbitral award (the "Award") rendered against it and in favor of respondent BG Group PLC ("BG Group") under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2006) (the "FAA"). Petition to Vacate or Modify Arbitration Award (the "Petition" or "Pet'r's Pet.") ¶ 3. In response, BG Group filed a cross-motion to confirm the Award under the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at 1970 WL 104417 (the "New York Convention" or the

"Convention"), which was ratified by Congress and codified at 9 U.S.C. §§ 201-08 (2006). Cross-Motion for Recognition and Enforcement of Arbitral Award (the "Resp't's Cross-Mot.") at 1. After carefully considering Argentina's petition to vacate or modify the Award, BG Group's cross-motion to confirm the Award, and all relevant documents and exhibits attached to those submissions,[1] the Court concludes for the reasons below that it must deny Argentina's petition to vacate or modify the Award.

## I. Background

During the late 1980s and early 1990s, Argentina undertook a "wide [economic] reformation process,"

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[1] In addition to Argentina's petition and BG Group's cross-motion, the Court considered the following documents in reaching its decision: (1) Argentina's Memorandum of Points and Authorities in Reply to Respondent's Opposition to the Motion to Vacate or Modify Arbitration Award and in Opposition to Respondent's Cross-Motions for Confirmation of the Award and For a Pre-Judgment Bond (the "Pet'r's Reply"); (2) BG Group's Memorandum of Points and Authorities in Reply to Petitioner's Opposition to Respondent's Cross-Motion for Recognition and Enforcement and for a Pre-Judgment Bond (the "Resp't's Reply"); (3) BG Group's Supplemental Memorandum of Law in Support of Respondent's Motion for Pre-Judgment Bond (the "Resp't's Supp. Mem."); (4) Argentina's Supplemental Memorandum of Points with Regard to Posting a Bond (the "Pet'r's Supp. Mem."); (5) Argentina's Second Supplemental Memorandum of Points with Regard to Posting of Bond (the "Pet'r's 2d Supp. Mem."); (6) BG Group's Supplemental Memorandum of Law on the Applicability of the New York Convention (the "Resp't's 2d Supp. Mem."); and (7) BG Group's Supplemental Memorandum in Support of Respondent's Motion for a Pre-Judgment Bond (the "Resp't's 3d Supp. Mem.").

which included entering into numerous bilateral investment treaties with various foreign nations in the hopes of attracting foreign investors. Resp't's Cross-Mot. at 1; Pet'r's Pet. ¶ 13. One of the treaties entered into during this period was the Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33 (the "Investment Treaty"), between Argentina and the United Kingdom. Resp't's Cross-Mot. at 1; Pet'r's Pet. ¶ 13. Similar to other bilateral investment treaties, the Investment Treaty was designed to ensure foreign investors that they would be treated fairly and equitably, to provide them with "full protection and security," and to restrict the host country "from expropriating the assets of such investors without just compensation." Resp't's Cross-Mot. at 1. To address any disputes arising from these investments, Argentina and the United Kingdom agreed to a two-tiered system of dispute resolution in which the dispute could be submitted to a "competent tribunal" of the country "in whose territory the investment was made," after which the matter could be referred to arbitration under certain conditions, or the dispute could be submitted directly to international arbitration. Investment Treaty, art. 8(2).[2]

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[2] Article 8(2) of the Investment Treaty provides for recourse to arbitration under the following circumstances:

> (a) if one of the Parties so requests . . .:
>
> > (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [a] competent tribunal of the [country] in whose territory the investment was made . . . ;

Also as part of its economic reforms, Argentina enacted several measures in an effort "to reduce inflation and the public deficit," including "privatization of certain state[-]owned companies in many sectors[,] including the gas transportation and distribution industry." Pet'r's Pet. ¶ 15. As part of these efforts, Argentina divided its gas transportation and distribution industry, Gas del Estado, Sociedad del Estado, into two transportation companies and eight distribution companies. Id. ¶ 18. BG Group, a United Kingdom company, invested in one of the eight distribution companies, MetroGAS, through a consortium of investors known as Gas Argentino, S.A. Id. ¶ 20. Eventually, BG Group acquired a 54.67% interest in Gas Argentino, S.A., which in turn owned 70% of MetroGAS. Id. ¶ 21.

In 2001, after a period of exceptional economic growth, Argentina began to experience an economic

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> (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;
>
> (b) where the [Parties] have so agreed.

Furthermore, the Investment Treaty provides that "where the dispute is referred to international arbitration," the parties "may agree to refer the dispute either to: (a) the International Centre for the Settlement of Investment Disputes [(the "ICSID")] . . . or (b) an international arbitrator or ad hoc arbitration tribunal . . . under the Arbitration Rules of the United Nations Commission on International Trade Law [(the "UNCITRAL Rules")]. Award at 6 (citing Article 8(3)(a)-(b) of the Treaty). Here, "[b]ecause the [p]arties failed to agree on submission of the dispute to the . . . []ICSID[], BG [Group] submitted to arbitration under . . . []the UNCITRAL Rules[]." Id. at 7.

crisis. Pet'r's Pet. at 6-7. In its efforts to respond to this predicament, Argentina enacted an emergency law in 2002, implementing regulatory measures that negatively impacted BG Group's investment in MetroGAS. Id.; Resp't's Cross-Mot. at 2. Pursuant to the Investment Treaty, BG Group initiated international arbitration proceedings on April 25, 2003.[3] Resp't's Cross-Mot. at 2; Pet'r's Pet. ¶ 6. An arbitral panel commenced proceedings in New York and Washington, D.C. beginning in July of 2006. Pet'r's Pet. ¶ 4.

Argentina raised a number of objections at the outset of the arbitration. First, Argentina objected to the arbitral panel's jurisdiction to entertain BG Group's claims, arguing, inter alia, that the Investment Treaty authorizes recourse to arbitration "only where disputes have been submitted for 18 months to the competent tribunal of the State which hosts the decision," i.e., a competent tribunal in Argentina. Award ¶ 140. Second, Argentina challenged the arbitral panel's jurisdiction on the grounds that BG Group's claims were derivative in nature, and such claims "are proscribed by international law and by [Argentine] corporate law." Id. ¶ 191. Third, Argentina challenged the appointment of Albert Jan van den Berg to the arbitral panel, id. ¶ 8, alleging that Jan van den Berg had issued arbitrary and capricious rulings in previous arbitrations involving Argentina, Pet'r's Pet.

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[3] Over 25 foreign investors initiated arbitration against Argentina claiming violations of bilateral investment treaties caused by the emergency law's enactment. Resp't's Opp'n at 2.

¶ 75-76. Each of these objections was rejected. Award ¶ 157 (finding that BG Group's claims were arbitrable); id. ¶ 205 (concluding that the arbitral panel "has jurisdiction to hear BG[ Group's] claims as they relate to its indirect shareholding in MetroGAS"); id. ¶ 11 (noting that the International Chamber of Commerce International Court of Arbitration (the "ICC Court") "had decided to reject [Argentina's] challenge [to] Professor Albert Jan van den Berg" to the arbitral panel).[4] Both parties then proceeded with the arbitration, and, on December 24, 2007, the arbitral panel unanimously ruled in favor of BG Group and issued an award in the amount of $185,285,485.85 plus costs, attorneys' fees, and interest. Pet'r's Pet. at 3. In its decision, the arbitral panel rejected numerous arguments raised by Argentina, one of which was its reliance on the "state of necessity" doctrine to exonerate it from liability.[5] Award ¶ 391. The arbitral panel then concluded that Argentina breached the Investment Treaty and awarded damages to BG Group

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[4] Under Article 12(1)(b) of the UNCITRAL Rules, which governed the arbitration at issue in this case, a challenge to the seating of an arbitrator on an arbitral panel must be brought before an "appointing authority" that has been previously designated by the parties. In this case, the ICC Court had been designated as the "appointing authority" by the parties. Award ¶ 9.

[5] Argentina argued that it could invoke the "state of necessity" doctrine because it was purportedly "compelled to depart from [its] obligations with [the United Kingdom] in order to preserve an essential state interest in a situation of grave or imminent danger." Award ¶ 391.

based on the fair market value of its investment in MetroGAS. Id. ¶ 422.

Clearly unsatisfied with the outcome of the arbitration decision, Argentina filed its petition to vacate or modify the Award on March 21, 2008. In support of its prayer for relief, Argentina asserts the following arguments: (1) "[t]he [a]rbitrators exceeded their authority by disregarding [the] terms of [the] parties' agreement," Pet'r's Pet. ¶ 41; (2) "[t]he [a]rbitral [t]ribunal misunderstood applicable law . . . and failed to correctly apply [such law]," id. ¶ 61; (3) "[t]he International Court of Arbitration exceeded its authority by failing to disqualify [Jan van den] Berg from serving as [an] arbitrator," id. ¶ 69; (4) the award was procured by "corruption, fraud, or undue means," id. ¶¶ 79-80; and (5) the arbitral tribunal imposed a disproportionate and unfair award, id. ¶ 107. BG Group, in turn, argues that Argentina's claims are "without merit and must be dismissed." Resp't's Cross-Mot. at 16.[6] BG Group also moves to have the Award confirmed pursuant to 9 U.S.C. § 9 and Article IV of the New York Convention. Id. at 36.

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[6] BG Group also seeks an order from the Court requiring Argentina to post a pre-judgment bond before having its petition considered by the Court. On March 31, 2010, the Court issued an order requiring Argentina to post a pre-judgment bond. Upon further reflection, however, the Court concludes that the posting of a bond is unnecessary, in light of the Court's conclusion here that Argentina's petition to vacate or modify the Award is entirely without merit. Accordingly, the March 31, 2010 Order is vacated, and BG Group's cross-motion for a pre-judgment bond is denied as moot.

## II. Standard of Review

The Court's authority to vacate an arbitral award is governed by 9 U.S.C. § 10(a), which provides the following:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Additionally, the Court may modify or correct an arbitral award if (1) the movant can demonstrate that there "was an evident material miscalculation of

figures[,] or an evident material mistake in the description of any person, thing, or property referred to in the award," (2) the arbitrator has rendered a decision "upon a matter not submitted to [him], unless it is a matter not affecting the merits of the decision upon the matter submitted," or (3) "the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11. The Supreme Court has held that the grounds enumerated in Sections 10(a) and 11 of the FAA are the exclusive means for vacating, modifying, or correcting an arbitral award.[7]

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[7] In addition to Sections 10(a) and 11 of the FAA, Argentina relies on the non-statutory ground that an arbitral award may be vacated where the award was issued in "manifest disregard of the law." Lessin v. Merrill Lynch Pierce Fenner & Smith Inc., 481 F.3d 813, 816 (D.C. Cir. 2007). A question remains, however, as to whether this basis for vacating an arbitral award survived the Supreme Court's recent decision in Hall Street Associates LLC v Mattel Inc., 552 U.S. 576 (2008). There, the Supreme Court concluded that Sections 10(a) and 11 of the FAA "provide the . . . exclusive grounds for expedited vacatur and modification," 552 U.S. at 584 (emphasis added), but acknowledged that its "vague phrasing" of the "manifest disregard of the law" standard in prior precedents has caused confusion amongst the various circuit courts of appeals, with some circuits viewing that standard as being encompassed within the grounds explicitly listed under the FAA (specifically Sections 10(a)(3) and (4)), id. at 585, while others, including the District of Columbia Circuit, have viewed the standard as independent of the grounds explicitly enumerated under Section 10(a), see Lessin, 481 F.3d at 816 ("In addition to the grounds under the [FAA] . . . on which an arbitration award may be vacated, an award may be vacated only if it is 'in manifest disregard of the law.'"). The Supreme Court remained silent, however, as to which approach is correct, and neither the Supreme Court nor the District of Columbia Circuit have yet to weigh in on

Hall St. Assoc., LLC v. Mattel, Inc., 552 U.S. 576, 581 (2008).

In relying on these standards to determine whether vacatur or modification of the Award is warranted, the Court must remain mindful of the principle that "judicial review of arbitral awards is extremely limited," and that this Court "do[es] not sit to hear claims of factual or legal error by an arbitrator" in the same manner that an appeals court would review the decision of a lower court. Teamsters Local Union No. 61 v. United Parcel Serv., Inc., 272 F.3d 600, 604 (D.C. Cir. 2001) (quoting Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178 (D.C. Cir. 1991)). In fact, careful scrutiny of an arbitrator's decision would frustrate the FAA's "emphatic federal policy in favor of arbitral dispute resolution," Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (internal citation omitted)—a policy that "applies with special force in the field of international commerce," id.—by "undermining the goals of arbitration, namely,

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whether Hall Street Associates affects any of their respective precedents. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., _ U.S. __, __, __ S. Ct. __, __ , 2010 WL 1655826, at *7 n.3 (Apr. 27, 2010) (declining to decide whether the "manifest disregard of the law" standard survived Hall Street Associates); Regnery Pub. Inc. v. Miniter, No. 09-7039, 2010 WL 1169843, at *1 (D.C. Cir. Mar. 17, 2010) (assuming, without deciding, that the "manifest disregard of the law" standard survived Hall Street Associates). Regardless, the Court need not conclusively determine whether precedent regarding the "manifest disregard of the law" standard has continued viability in light of Hall Street Associates, for Argentina's claims nonetheless fail under that standard for the reasons discussed below.

settling disputes efficiently and avoiding lengthy and expensive litigation," LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2, 4-5 (D.D.C. 2000) (Sullivan, J.), aff'd 246 F.3d 702 (D.C. Cir. 2001). Instead, "a court must confirm an arbitration award where some colorable support for the award can be gleaned from the record." Id. Thus, "[t]he showing required to avoid summary confirmation of an arbitration award is high, and a party moving to vacate the award has the burden of proof." Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (citations omitted).

## III. Legal Analysis

Before addressing the merits of the Petition, the Court must first assess whether it has subject-matter jurisdiction under the FAA to entertain this dispute. In the Petition, Argentina cites 9 U.S.C. § 203 as the basis for the Court's jurisdiction over this matter, see Pet'r's Pet. at 2 ("This court has jurisdiction over . . . this Petition pursuant to 9 U.S.C. §§ 201 et seq."), which confers jurisdiction on this Court to entertain "action[s] or proceeding[s] falling under the [New York] Convention," 9 U.S.C. § 203 (2006). Although Argentina seemingly took the position in its jurisdictional statement that the Award falls within the ambit of the New York Convention, it has actually taken the opposite position in this litigation with regards to whether the Court has the authority to grant BG Group's cross-motion for a pre-judgment bond pursuant to Article VI of the New York Convention. See, e.g., Pet'r's 2d Supp. Mem. at 2. The Court suspects that Argentina merely intended to argue against the

applicability of the Convention for the sole purpose of defeating BG Group's efforts at securing a pre-judgment bond, but in so doing, Argentina has also potentially undermined its own invocation of this Court's subject-matter jurisdiction. This is because without recourse to Section 203, the Court is likely without any other basis to find that it has subject-matter jurisdiction, as the FAA does "not itself bestow[] jurisdiction on the federal district courts" under 28 U.S.C. § 1331, Karsner v. Lothian, 532 F.3d 876, 882 (D.C. Cir. 2008) (quoting Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1245-46 (D.C. Cir. 1999)), jurisdiction is not available under 28 U.S.C. § 1332 because diversity jurisdiction is not available where "a lawsuit [is] brought by one alien against another alien, without a citizen of a state on either side of the litigation," see, e.g., Saadeh v. Farouki, 107 F.3d 52, 58 (D.C. Cir. 1997); see also Pet'r's Pet. ¶¶1-2 (noting that the petitioner is the Argentinean government, while the respondent is a British corporation), and there is no other independent ground for federal court jurisdiction that the Court is aware of that would allow it to entertain this matter. Given that Argentina has called into question the applicability of the New York Convention, and that the resolution of this issue may have a material effect on the Court's jurisdiction, the Court has no choice but to first resolve the issue of whether the exercise of jurisdiction over this matter is proper under Section 203 before addressing the merits of Argentina's petition and BG Group's cross-motion. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) (concluding that all courts "are obliged to inquire sua

sponte whenever a doubt arises as to the existence of federal jurisdiction"); Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430-31 (2007) (citing Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 93-102 (1998)) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of a claim in suit . . . .").

A. The Jurisdiction of the Court to Entertain the Petition and Cross-Motion

As noted above, whether the Court has subject-matter jurisdiction over this dispute hinges on whether the Award is one that is covered under the New York Convention. Article I(1) of the New York Convention provides the following:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

New York Convention, art. I(1). Put differently, the first sentence applies to arbitral awards that are issued outside the territorial boundaries of the nation where enforcement is being sought, while the second sentence refers to awards that are issued within the borders of the nation where enforcement is sought, yet are

sufficiently foreign in character as to not be considered "domestic awards" in that country.[8] The parties agree that the Award was issued in the District of Columbia and it therefore falls outside the bounds of the "extraterritorial" provision of Article I(1). See Bergensen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983) (concluding that an arbitral award issued in New York "does not meet the territorial criterion"). The parties do not agree, however, whether the United States recognizes the "non-domestic" provision at all, and even if it does, whether this Award falls within the meaning of a "non-domestic" award under Article I(1) of the New York Convention.

In support of its argument that the United States does not recognize the "non-domestic" provision of the New York Convention, Argentina relies on the United States's invocation of a reservation contained in Article I(3) of the Convention, Pet'r's 2d Supp. Mem. at 2, which was aptly described by one of the Convention's drafters as the "reciprocity clause," see, e.g., United Nations Conference on International Commercial Arbitration, May 20-June 10, 1958, Adoption and Signature of the Final Act and Convention, at 9, U.N. Doc. E/CONF.26/SR.23 – E/CONF.26/L.60 (June 9, 1958). The clause maintains, in part, that "[t]he United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another

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[8] For ease of reference, the Court will refer to the first provision of Article I(1) as the "extraterritorial" provision, and the second provision as the "non-domestic" provision.

Contracting State."[9] New York Convention, Note by the Department of State, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at 1970 WL 104417, at *1. Argentina argues that a plain reading of this declaration compels "a district court to recognize and enforce only . . . arbitral award[s] rendered in a foreign state." Pet'r's 2d Supp. Mem. at 4.

Argentina's reading of the reservation fails to comport with the well-known canon of statutory construction that a court must "give effect, if possible, to every word . . . used," Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979), because its interpretation renders superfluous the phrase "on the basis of reciprocity" as it is used in the declaration. Indeed, Argentina's proffered interpretation of the "reciprocity clause" has nothing to do with the concept of reciprocity whatsoever. By taking into account the reciprocity language, it is evident that Article I(1) of the New York Convention is not concerned with the applicability of the "non-domestic" provision, but rather, as noted by BG Group, the clause addresses "the inapplicability of

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[9] Article I(3) of the New York Convention states the following:

> When signing, ratifying[,] or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

the New York Convention to [arbitral] awards rendered in States that are not a party to the . . . Convention." Resp't's 2d Supp. Mem. at 2-3. It is BG Group's interpretation of Article I(1), not Argentina's, that accounts for each and every word comprising the "reciprocity clause."

Another defect present in Argentina's interpretation of the "reciprocity clause" is that it directly conflicts with Congress's understanding of the New York Convention's extensive reach to arbitral awards issued in the United States, as reflected in the language of 9 U.S.C. § 202 (2006), which provides that:

> [a]n agreement or award arising out of [a commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

While it is clear that arbitral awards "between citizens of the United States" that maintain "some . . . reasonable relation[ship] with one or more foreign states" are covered by the New York Convention pursuant to Section 202, Congress did not explicitly state whether Section 202 applies to arbitral awards rendered abroad, awards issued domestically, or both. But in reading Section 202 in pari materia with the New York Convention, it is evident that Congress did not intend for this provision to relate to arbitral awards issued outside of the territorial jurisdiction of the

United States, as an award rendered under that circumstance falls within the explicit language of the "extraterritorial" provision of Article I(1) of the Convention. See New York Convention, art. I(1); Albert Jan van den Berg, When Is an Arbitral Award Nondomestic Under the New York Convention of 1958, 6 Pace L. Rev. 25, 39 (1985) ("[T]he New York Convention always applies to the recognition and enforcement of an arbitral award made in another state."). Thus, Congress must have intended for Section 202, and the provisions of the New York Convention, to apply to arbitral awards issued within the territorial boundaries of the United States, i.e., awards covered under the "non-domestic" provision of the Convention. Accordingly, Section 202 debunks any argument that Congress, in ratifying the New York Convention, understood the "reciprocity clause" to limit the reach of that treaty to only those arbitral awards issued extraterritorially.

As for whether the Award constitutes a "non-domestic" award under the New York Convention, the starting point in resolving that question is the Convention itself. As the plain text of Article I(1) states, each individual signatory to the Convention determines what constitutes a "non-domestic" award. See New York Convention, art. I(1) (applying the Convention to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought"). And, as noted above, Congress intended to "spell[] out its definition of" a "non-domestic" award in Section 202 of the FAA, and that in doing so, it did not exclude from its definition

arbitral awards involving two foreign parties. Bergensen, 710 F.2d at 933. In fact, Section 202 extends the coverage of the New York Convention to arbitral awards "between citizens of the United States" that maintain some "reasonable relation[ship] with one or more foreign states." 9 U.S.C. § 202. Given that Congress plainly intended for the New York Convention to cover certain arbitral awards issued in matters involving two domestic parties, it would be nonsensical for this Court to conclude that the Award—which was issued in a dispute involving two foreign parties, a foreign treaty, and a foreign investment —falls outside the reach of a treaty that was ratified for the purpose of recognizing and enforcing foreign arbitral awards. Therefore, the Award plainly falls within the "non-domestic" provision of Article I(1) of the New York Convention and, consequently, this Court has subject-matter jurisdiction to entertain this matter under 9 U.S.C. § 203.[10]

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[10] BG Group contends that the Court should not entertain the Petition because Argentina failed to comply with 9 U.S.C. § 12, which requires a party moving to vacate, modify, or correct an arbitral award to serve "[n]otice of [the] motion . . . upon the adverse party or his attorney within three months after the award is filed or delivered." Specifically, BG Group alleges that the Award was delivered to the parties on December 24, 2007, and that Argentina did not serve notice of the Petition until April 8, 2008, approximately two weeks after the limitations period expired on March 24, 2008. Resp't's Cross-Mot. at 14. On the other hand, Argentina asserts that it had sent an e-mail, with the Petition attached, to both BG Group and its counsel on March 20, 2008. Pet'r's Reply at 5; see also Pet'r's Pet., Ex. 3 (Affidavit of Fernando

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Koatz) ¶ 6-7 (declaring under oath that the Petition was served on BG Group and its counsel on March 20, 2008).

While Section 12 of the FAA is unquestionably applicable to the Petition now before the Court, see 9 U.S.C. § 208 (providing that 9 U.S.C. §§ 1-12 are applicable to matters covered under the New York Convention "to the extent that [they] are not in conflict with [9 U.S.C. §§ 201-208] or the Convention as ratified by the United States"), the problem with construing Section 12 in the context of international arbitration awards is that this provision "is an anachronism [that does not] account for the internationalization of arbitration law subsequent to its enactment." Matter of Arbitration Between InterCarbon Bermuda Ltd. and Caltex Trading and Transp. Corp., 146 F.R.D. 64, 67 n.3 (S.D.N.Y. 1993). This is because Section 12 prescribes the appropriate manner of service for parties located in a district within the United States, but does not "give any direction for service on a foreign party." Id. at 67. Further complicating the analysis is that the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "Hague Convention"), Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, presumably governs the method for serving process on an adverse party abroad, at least in the absence of any mandate to the contrary. But under the Hague Convention, a petitioner's compliance with Section 12 of the FAA would be virtually impossible because the Convention requires that a "central authority" located within the receiving country be solely responsible for serving the documents within that country, id. art. 5, and these "central authorities can and do take significantly longer than 90 days to arrange for service of process," Broad v. Mannesmann Anlagenbau AG, 196 F.3d 1075, 1077 (9th Cir. 1999). And because various courts have observed that "[t]here is no statutory or common law exception to" the three-month time limitation set forth under Section 12, strict enforcement of the limitations period set forth under Section 12 would effectively bar any petition to vacate an arbitral award where foreign parties stand on both sides of the aisle. Dalal v. Goldman Sachs & Co., 541

B. The Merits of the Petition and Cross-Motion

Turning to the merits of the Petition, Argentina relies on several provisions under 9 U.S.C. §§ 10(a) and 11 in support of its request for vacatur or modification of the Award. Specifically, Argentina argues that the Award should be vacated for the following reasons: (1) the arbitral panel exceeded its authority under the Investment Treaty, 9 U.S.C. § 10(a)(4); (2) the arbitral panel acted "in manifest disregard of the law," LaPrade, 246 F.3d at 706 (citation omitted); (3) there was "evident partiality or corruption" on the part of one of the arbitrators on the panel, 9 U.S.C. § 10(a)(2);

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F. Supp. 2d 72, 76 (D.D.C. 2008 ) (Sullivan, J.), aff'd 575 F.3d 725 (D.C. Cir. 2009); see also Webster v. A.T. Kearney, Inc., 507 F.3d 568, 574 (7th Cir. 2007) (denying the petition to vacate because it was filed one day late); Sanders-Midwest, Inc. v. Midwest Pipe Fabricators, Inc., 857 F.2d 1235, 1238 (8th Cir. 1988) (finding no exceptions to the time for service of notice as prescribed under Section 12).

Fortunately for the Court, the quandary of applying Section 12 in the international arbitration context is a perplexing problem whose resolution will be left for another day, as this issue does not involve a question of jurisdiction, Dalal, 541 F. Supp. 2d at 76 (construing the three-month time limitation under Section 12 as a statute of limitations, rather than a jurisdictional bar), that the Court must resolve first before addressing the merits, Sinochem, 549 U.S. at 430-31 (citing Steel Co., 523 U.S. at 93-102). Furthermore, the Court need not resolve this issue because even assuming that Argentina timely served notice of the Petition, the Court nonetheless concludes that the Petition is without merit. The Court will, therefore, pass on the question of whether Argentina is time-barred under Section 12 from asserting the claims at issue here.

(4) the Award was procured through "corruption, fraud, or undue means," 9 U.S.C. § 10(a)(1); and (5) the Award is disproportionate, unfair, and irrational, and therefore should be modified pursuant to 9 U.S.C. § 11. The Court will address each issue in turn.

1. Whether the Arbitral Panel and ICC Court Exceeded Their Authority

Argentina proffers several arguments in support of its position that the Court should vacate the Award pursuant to Section 10(a)(4) of the FAA. First, Argentina contends that the ICC Court exceeded its authority by failing to disqualify Jan van den Berg from serving on the panel. Pet'r's Pet. ¶ 69. Second, Argentina asserts that the Court must vacate the Award under Section 10(a)(4) because the arbitral panel improperly "permit[ed] BG [Group] to arbitrate its claims" before seeking recourse in the Argentine courts. Id. ¶ 60. Third, Argentina contends that the arbitral panel acted outside the bounds of its authority by allowing BG Group to "bring[] a derivative claim on behalf of MetroGAS." Id. And fourth, Argentina argues that the arbitral panel wrongfully rejected "the discounted cash flow method" in calculating the amount of the Award. Id. ¶ 105.

In order for Argentina to prevail in its efforts to vacate the Award under Section 10(a)(4), it must demonstrate that the "arbitrator stray[ed] from interpretation and application of the agreement and effectively dispense[d] his own brand of industrial justice." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., __ U.S. __, __, __ S. Ct. __, __, 2010 WL 1655826, at *7

(Apr. 27, 2010) (citations and internal quotation marks omitted). But, "if an arbitrator was arguably construing or applying the contract, a court must defer to the arbitrator's judgment." Madison Hotel v. Hotel & Rest. Employees, Local 25, 144 F.3d 855, 859 (D.C. Cir. 1998) (citation and internal quotation marks omitted). In conducting its review, the Court "may review the substance of an arbitration award, [but] only the narrowest circumstances will justify setting the award aside." Id. at 858-59 Applying these standards here, it is evident that Argentina has failed demonstrate that vacatur is appropriate under Section 10(a)(4).

On the question of whether the ICC Court exceeded its authority by failing to unseat Jan van den Berg from the arbitral panel, the claim is without merit. Nowhere in its Petition does Argentina dispute the ICC Court's authority under the Investment Treaty or the UNICTRAL arbitration rules to entertain its objection to Jan van den Berg's appointment to the arbitral panel. And, to the extent that Argentina argues that the ICC Court exceeded its authority by allowing a partial and biased arbiter to sit on the panel, that argument must be rejected because Argentina has failed to provide any evidence establishing partiality on the part of Jan van den Berg. See infra p. 20-21. Argentina has simply provided no basis from which the Court could vacate the Award based on the ICC Court's exercise of authority.

Likewise, Argentina has not met its burden of showing that the arbitral panel exceeded its authority by entertaining BG Group's claims without requiring that recourse first be sought in the Argentine court

system. The panel concluded that BG Group need not seek recourse in the Argentine court system before arbitrating this dispute because "[a]s a matter of treaty interpretation, . . . Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration" where "any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention [on the Law of Treaties]."[11] Award ¶ 147. And, the arbitral panel concluded that a strict textual interpretation of Article 8(2)(a)(i) would result in an "absurd and unreasonable result" because Argentina had promulgated "emergency legislation . . . whose purpose was to bar recourse to the courts by those whose rights were felt to be violated." Id. ¶ 148; see also id. ¶ 149 (concluding that Argentina had also implemented a decree which "provided for a stay of all suits brought by those whose rights were allegedly affected by the [government's] emergency measures"). As the cited language illustrates, the panel correctly turned to the text of Article 8(2)(a)(i) of the Investment Treaty and relevant international law sources in

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[11] Article 32 of the Vienna Convention on the Law of Treaties, to which Argentina is a signatory, provides that "[r]ecourse may be had to supplementary means of interpretation" when standard means of treaty interpretation would "leave[] the meaning [of the provision] ambiguous or obscure[,] or . . . lead[] to a result which is manifestly absurd or unreasonable." The arbitral panel was authorized, if not compelled, to resort to sources of international law in construing Article 8(2)(a)(i) of the Investment Treaty. See Investment Treaty, art. 8(4) (requiring "[t]he arbitral tribunal [to] decide the dispute in accordance with the provisions of [the Investment Treaty] and the applicable principles of international law").

attempting to discern its jurisdiction to hear BG Group's claims, and it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable. Under Section 10(a)(4) and controlling case law, the Court is without authority to disturb the panel's conclusions.

Argentina's remaining efforts to vacate the Award under Section 10(a)(4) must also be rejected. In determining whether international law authorized BG Group to bring "a derivative claim on behalf of MetroGAS," Pet'r's Pet. ¶ 60, the panel reviewed several arbitration decisions and ultimately concluded that those cases supported the proposition that derivative claims are allowable under international law. In fact, the two cases cited by Argentina to support its argument that the panel could not hear derivative claims were actually found by the arbitral panel to stand for the opposite proposition. See Award ¶ 192 ("In support for its position [that derivative claims are not allowable] under international law, [Argentina] initially relied on Barcelona Traction, Light and Power Co. [(Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5)], and it later invoked . . . [GAMI Investments, Inc. v. United Mexican States, UNCITRAL/NAFTA, Final Award (Nov. 15, 2004)]"), id. ¶ 197 (concluding that international law "does not require a claimant shareholder to be a majority or controlling owner for his investment to qualify for protection"); id. ¶ 193 ("The Tribunal finds the GAMI decision apposite and compelling as it relates generally to derivative claims, and specifically to the significance of Barcelona Traction."). Similarly, when the panel concluded that

Section 2.2 of the Investment Treaty was silent on the standard for calculating damages, the arbitral panel properly turned to sources of international law to "identify the rule of law that governs in that situation." Stolt-Nielsen S.A., __ U.S. at __, __ S. Ct. at __, 2010 WL 1655826, at *7; see also Award ¶ 423-24 (relying "on the principle established in 1928 by the Permanent Court of International Justice in the Case Concerning the Factory at Charzów [(F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at ¶ 330 (Sept. 13)]" that "reparation is due for failure to apply a convention even where the convention itself is silent on the issue"); id. ¶ 428 (construing customary international law to require that the wrongful act be the proximate cause of the damages, and that the damages must not be speculative in nature). And, the panel determined that under customary international law, BG Group was entitled to the difference in value of BG's investment before the enactment of Argentina's emergency laws and the value of the investment after the legislation was adopted. Id. ¶ 440 (referring to BG Group's relinquishment of "an 18.8% indirect interest in MetroGAS in exchange for a US$38.2 million write-off," resulting "in a post-Emergency Law value of BG's 45.11% interest in MetroGAS of US$91,825,244.15"); id. ¶ 441 (relying on BG Group's expert witness in determining that the company's share in MetroGAS prior to the enactment of the emergency laws was US$277.0 million); id. ¶ 443 (concluding that BG Group is entitled to approximately US$185 million in damages). Whether the arbitral panel's reached the correct result in resolving these issues is not a matter fit for resolution by the Court; rather, it is merely

enough that the arbitral panel reached conclusions that could arguably be justified by a colorable construction of the Investment Treaty's provisions and any applicable concepts derived from international law. And here, the Court is satisfied that the panel's conclusions meet that threshold. The arbitral panel having provided sustainable constructions of the Investment Treaty, the Court must rebuff Argentina's efforts to vacate the Award under Section 10(a)(4).

2. Whether the Arbitral Panel Acted In Manifest Disregard of the Law

To prevail under the "manifest disregard of the law" standard, Argentina must demonstrate "more than error or misunderstanding with respect to the law." LaPrade, 246 F.3d at 706. Rather, it must show that "(1) the arbitrators knew of a governing legal principle[,] yet refused to apply it or ignored it altogether[,] and (2) the law ignored by the arbitrators was well[-]defined, explicit, and clearly applicable to the case." Id. Here, Argentina argues that the arbitral panel's exercise of jurisdiction over BG Group's claims, as well as the panel's rejection of the "state of necessity" doctrine relied upon by Argentina in the arbitration, were made in "manifest disregard of the law." Pet'r's Reply at 10, 12. These arguments are simply without merit.

In resolving the jurisdictional question, the arbitral panel did not "ignore[] the plain language of the [Investment] Treaty," as Argentina suggests. Pet'r's Reply at 10 (emphasis added). Rather, as noted above, the arbitral panel construed Article 8(2)(a)(i) of the

Investment Treaty together with Article 32 of the Vienna Convention and determined that the former was not applicable under the particular circumstances of this case. Given that the arbitral panel provided a colorable justification for its interpretation of the Investment Treaty, it can hardly be said that the panel disregarded the applicable law.

Similarly, Argentina's argument that the arbitral panel "misunderstood . . . and failed to correctly apply the ['state of necessity'] doctrine" is nothing more than a mere assertion of error, and not that the panel manifestly disregarded the law. Pet'r's Pet. ¶ 61. Indeed, Argentina even admits that the panel addressed the "state of necessity" doctrine in issuing the Award. See id. ¶ 64 (contending that "[i]n a mere[] short seven paragraphs of the Award . . . the [panel] arbitrarily dismissed [the ']state of necessity[']' defense"). But putting aside the fact that the arbitral panel considered, rather than ignored, Argentina's invocation of the "state of necessity" doctrine, it is far from certain that the doctrine is "clearly applicable" in this case. As the arbitral panel explained in issuing the Award, a country cannot invoke the "state of necessity" doctrine without being subject to "very restrictive conditions" to ensure that the country does not abuse the doctrine and "violate . . . international law with impunity." Award ¶ 410; see also International Court of Justice, Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7 (Sept. 25) (concluding that the "state of necessity" doctrine, as codified in Article 25 of the International Law Commission's Articles on State Responsibility, is

limited to circumstances in which there is "grave and imminent peril"). And, the panel found that Argentina could not invoke this doctrine because, inter alia, it had lured BG Group and other investors to accept measures that Argentina described as temporary, but later "set[] up a mechanism . . . that was never intended to restore the conditions of Argentina's initial representations." Award ¶ 411. Thus, the "state of necessity" doctrine is by no means "clearly applicable" to this case; if anything, the arbitral panel explained why this doctrine has no application to the facts of this case whatsoever. The Court, therefore, rejects Argentina's challenges to the arbitral panel's decision based on the "manifest disregard of the law" standard.

3. Whether There was Evident Partiality or Corruption With the Arbitrators

To have the award vacated under Section 10(a)(2), Argentina must present evidence of partiality or corruption that is "direct, definite, and capable of demonstration[,] rather than remote, uncertain, or speculative." Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996) (citation omitted). Indeed, Argentina has the "heavy" burden to "establish specific facts that indicate improper motives on the part of an arbitrator." Id. (emphasis added and citation omitted). As grounds for its position, Argentina contends that arbitrator Albert Jan van den Berg presided over four arbitral matters arising out of the Investment Treaty, and that in the first matter (involving a company named LG&E), he held that Argentina could rely on the "state of necessity" doctrine, while in the three other arbitrations (including the one now being

disputed before the Court), Jan van den Berg concluded, without elaboration, that the doctrine could not be invoked. Pet'r's Pet. ¶ 71. Argentina argues that Jan van den Berg's inconsistent decisions, as well as his failure to explain the reasoning behind his decisions, is evidence of bias and that the Award must be vacated for those reasons. Id. ¶ 76. The argument lacks merit.

Jan van den Berg's failure to provide an explanation for his decision is hardly evidence of nefarious intent on his part, especially given the well-settled principle that arbitrators have no obligation to disclose the basis upon which their awards are made. Wilko v. Swan, 346 U.S. 427, 436 (1953). Furthermore, there could be a number of innocuous reasons to explain why Jan van den Berg reached a different conclusion in the first case. For example, there may be a material factual distinction between this case and the LG&E case. See, e.g., Resp't's Reply at 2 n.3 (asserting that the LG&E tribunal accepted Argentina's defense of necessity based on a provision which is contained in the bilateral investment treaty between the United States and Argentina, but does not exist in the Investment Treaty at issue here). Or, it may be that LG&E failed to articulate a persuasive argument in opposition to Argentina's invocation of the state of necessity doctrine, while BG Group and the other litigants have since raised convincing challenges. The upshot is that there is no basis for the Court to conclude that Jan van den Berg was a biased arbiter without engaging in rank speculation. Accordingly, Argentina has failed to provide the Court with "direct" and "definite" evidence

of arbiter bias which is necessary to prevail under Section 10(a)(2) of the FAA. Al-Harbi, 85 F.3d at 683.

4. Whether the Award was Procured by Corrupt, Fraudulent, or Undue Means

Argentina asserts that the Award was procured by "corrupt, fraud, or undue means" because witness statements presented in this case contain "passages that are identical or substantially identical to a witness statement presented in [another unrelated] case." Pet'r's Pet. ¶ 82. Specifically, Argentina observes that the "witness statements presented in this case have many passages that are identical or substantially identical to a witness statement presented in [an earlier] case," and that because counsel for BG Group represented the plaintiff involved in the earlier case, the statements must "reflect what [c]ounsel would have [the] witness[es] declare," rather than "what the witness[es] saw, thought[,] or believed at the time" the statements were made. Id. ¶ 82.

But Argentina assumes too much. At best, the similarities between the witness statements establish that counsel drafted the declarations in both cases. Assuming that counsel did in fact have a heavy hand in drafting the declarations at issue in these cases, their actions do not rise to the level of wrongdoing unless Argentina can prove that the witness signed the statement without subscribing to the facts stated therein. See Resolution Trust Corp. v. Bright, 6 F.3d 336, 342 (5th Cir. 1993) (finding no ethics violation where attorneys drafted an affidavit but "made sure that [the witness] signed [it] only if she agreed with its

contents"). Argentina has provided no evidence to that effect, and thus there is nothing in the record before the Court that allows for vacatur of the Award pursuant to Section 10(a)(1).

5. Whether a "Disproportionate," "Unfair," and "Irrational" Award Can Be Modified Under 9 U.S.C. § 11

Finally, Argentina argues that the Court should modify the Award because the arbitral panel's rejection of the "discounted cash flow basis" standard resulted in a disproportionate, unfair, and irrational Award. Pet'r's Reply at 17. Unfortunately for Argentina, Section 11 of the FAA does not authorize the Court to modify the Award on these grounds. Rather, the Court can modify the Award under Section 11 only if it finds that the Award contains a "material miscalculation of figures," 9 U.S.C. § 11(a), i.e., a "mathematical error appear[ing] on [its] face," Grain v. Trinity Health, Mercy Health Servs., Inc., 551 F.3d 374, 378 (6th Cir. 2008) (quoting Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 194 (4th Cir. 1998)), the arbitrators had decided a matter that was "not submitted to them," 9 U.S.C. § 11(b), or that the Award "is imperfect in matter of form not affecting the merits of the controversy," id. § 11(c). Argentina does not rely on any of these as grounds for modifying the Award under Section 11 and therefore relief under this provision is not available to it. The request for such relief must therefore be denied.

## IV. Conclusion

"A federal court cannot vacate [or modify] an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." Howard Univ. v. Metro. Campus Police Officer's Union, 519 F. Supp. 2d 27, 37 (D.D.C. 2007) (Walton, J.) (quoting Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004)). Yet Argentina's attack on the validity of the Award is premised on nothing more than numerous assertions of error on the part of the arbitral panel. To be sure, under a more searching, appellate-style review, the arguments presented by Argentina in its Petition could very well carry the day. But, because the Court in this circumstance does not sit like "an appellate court does in reviewing the decisions of lower courts," Kanuth, 949 F.2d at 1178, the Court has no choice but to deny the relief sought by Argentina in its Petition.

The remaining question in this matter, therefore, is whether the Court should grant BG Group's cross-motion to confirm the Award. Argentina argues that it "should be given [a] full opportunity to respond to [BG Group's cross-motion] once the Court has [rendered] a decision" regarding its Petition, "considering the serious violations of public policy" allegedly committed by the arbitral panel,[12] Pet'r's Reply at 22, while BG Group responds that Argentina has had more than a

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[12] Article V(2)(b) of the New York Convention provides a court with the authority to refuse recognition of an arbitral award if confirmation of the award "would be contrary to the public policy of that country."

month to oppose the cross-motion, but that in any event, "Argentina's challenge to the Award on public policy grounds is entirely without foundation," Resp't's Reply at 4 n.4. The Court shares a level of empathy with BG Group's position (i.e., that Argentina could have (and should have) set forth in its memorandum in opposition to BG Group's cross-motion the basis for vacatur on public policy grounds), and that given the nature of the Award, the Court is highly skeptical that the Award violates this country's "most basic notions of morality and justice." TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 939 (D.C. Cir. 2007) (quoting Karahas Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 305-06 (5th Cir. 2004)).

Nonetheless, in light of Argentina's express reservation for further briefing on the issue of whether vacatur is appropriate under Article V(2)(b) of the New York Convention, the Court concludes that Argentina should be given the opportunity to submit a supplemental memorandum. Thus, any supplemental memorandum that Argentina desires to submit on this issue shall be filed on or before June 30, 2010, BG Group shall file its memorandum in opposition to Argentina's supplemental memorandum on or before July 21, 2010, and Argentina shall file its brief in reply to BG Group's opposition memorandum on July 30, 2010. And, to ensure the prompt resolution of this matter, the parties shall then appear before the Court at 9:30 a.m. on August 13, 2010, for a hearing on the merits of BG Group's motion to confirm the Award. The Court expects strict adherence to this schedule, given

the inconvenience and additional delay that BG Group will have to endure as a result of additional briefing. Accordingly, the Court will not grant Argentina any extensions of time to file its submissions absent the most compelling circumstances, and the failure of Argentina to timely file a supplemental memorandum will result in the Court treating BG Group's cross-motion as conceded.

**SO ORDERED** on this 7th day of June, 2010.[13]

REGGIE B. WALTON
United States District Judge

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[13] The Court issued an order on March 31, 2010, granting BG Group's motion for a pre-judgment bond and, inter alia, staying further action in this case until otherwise ordered by the Court. In light of the foregoing analysis, the Court will issue an order accompanying this memorandum opinion (1) vacating the March 31, 2010 order; (2) lifting the stay and administratively reopening the case; (3) denying Argentina's Petition to Vacate or Modify an Award; (4) denying as moot BG Group's Motion for a Pre-Judgment Bond; (5) directing Argentina to file a supplemental memorandum explaining its reasons why the Court should refrain from confirming the Award pursuant to Article V(1)(c) of the New York Convention, if any it intends to file, on or before June 30, 2010; (6) directing BG Group to file its memorandum in opposition to Argentina's supplemental memorandum, if any it intends to file, on or before July 21, 2010; (7) directing Argentina to file its brief in reply to BG Group's opposition memorandum, if any it intends to file, on or before July 30, 2010; and (8) directing the parties to appear before the Court at 9:30 a.m. on August 13, 2010, for a hearing on the merits of BG Group's motion to confirm the Award.

## APPENDIX F

**In proceedings pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, entered into on 11 December 1990 and the UNCITRAL Arbitration Rules:**

**[Dated December 24, 2007]**

| | |
|---|---|
| BG Group Plc. | ) |
| | ) |
| Claimant | ) |
| | ) |
| and | ) |
| | ) |
| The Republic of Argentina | ) |
| | ) |
| Respondent | ) |
| | ) |

**Final Award**

**Before the Tribunal comprising:**

Alejandro M. Garro, Arbitrator

Albert Jan van den Berg, Arbitrator

Guillermo Aguilar Alvarez C., President

*Appendix F*

| Representing the Claimant: | Representing the Respondent: |
|---|---|
| **Freshfields Bruckhaus Deringer** | **Procuración del Tesoro de la Nación** |
| Nigel Blackaby | Osvaldo César |
| Lluis Paradell | Guglielmino |
| Sylvia Noury | Cintia Yaryura |
| Andrea Saldarriaga | Jorge Barraguirre |
| **Marval, O'Farrell & Mairal** | Florencio Travieso |
| Francisco Macías | |

**Administrative Secretary of the Arbitral Tribunal**

Lucía Ojeda

Formal seat of the arbitration: Washington, D.C.

* * *

[*Index Omitted in the Printing of this Appendix*]

## I. The Parties

1. The Claimant in this arbitration is BG Group Plc. (BG), a British corporation located at 100 Thames Valley Park Drive, Reading Berkshire, RG6 1PT, in the United Kingdom. BG has a direct and an indirect ownership interest in MetroGAS S.A. (MetroGAS). MetroGAS is a natural gas distribution company incorporated in Argentina. BG was represented by Nigel Blackaby, Lluis Paradell, Andrea Saldarriaga,

and Sylvia Noury of Freshfields Bruckhaus Deringer, and Francisco Macías of Marval, O'Farrell & Mairal.

2. The Respondent in this arbitration is The Republic of Argentina (Argentina), acting through the *Procuración del Tesoro de la Nación*, located at Posadas 1641, Buenos Aires, Argentina. Argentina was represented by Osvaldo César Guglielmino, Cintia Yaryura, Jorge Barraguirre and Florencio Travieso of the *Procuración del Tesoro de la Nación*. At the hearing, however, the following individuals also appeared for Argentina: Adolfo Gustavo Scrinzi (*Subprocurador de la Nación*), Felix Helou, Tomás Braceras, Rodrigo Ruiz-Esquide, Nicolas Stern, Ariel Martins, Ignacio Torterola, Charles Massano, Carlos Winograd, Alicia Federico and Mauricio Longín D'Alessandro.

## II. The Tribunal and the Procedure

3. BG filed its Notice of Arbitration of 25 April 2003 pursuant to the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments* of 11 December 1990 (the Argentina-U.K. BIT or the BIT).[1] Article 8 of the Argentina-U.K. BIT provides that:[2]

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[1] Exhibit J-69.

[2] Where available, official English text of quotes shall be used.

*Appendix F*

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the

Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 (footnote omitted) (provided that both Contracting Parties are Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules.

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

> conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law. The arbitration decision shall be final and binding on both Parties.
>
> (5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree to consult together as soon as possible so that they can reach a mutually acceptable solution.

4. Because the Parties failed to agree on submission of the dispute to the International Centre for the Settlement of Investment Disputes (ICSID), BG submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Rules).

5. The Parties designated arbitrators in accordance with Article 7(1) of the UNCITRAL Rules. BG appointed Professor Albert Jan van den Berg and the Republic of Argentina appointed Professor Alejandro M. Garro. Messrs. van den Berg and Garro designated Guillermo Aguilar Alvarez as President of the Arbitral Tribunal. The Tribunal was constituted on 22 June

2004. The Arbitral Tribunal appointed Mrs. Lucia Ojeda as its Administrative Secretary.

6. On 29 October 2004 a Preliminary Conference was held in New York City to address issues related with the conduct of the proceedings.

7. The Tribunal sees no need to burden the text of this Award with a recital of correspondence with counsel. Nor is it necessary to set out the content of the procedural orders issued by the Tribunal,[3] which are all part of the written record of the proceedings. No unresolved procedural issues were extant as of the end of the hearing.

8. On 6 June 2007 Argentina challenged Professor Albert Jan van den Berg pursuant to Article 11 of the UNCITRAL Rules. BG rejected the challenge by letter of 11 June 2007. Professor van den Berg stated his position by letter of 12 June 2007, declining to withdraw from office.

9. Argentina initially refused to submit the challenge to the ICC International Court of Arbitration (ICC Court), the appointing authority under Article 12(1)(b) of the UNCITRAL Rules. Following failure by the

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[3] The Arbitral Tribunal issued procedural orders on 30 June 2004 (Procedural Order No. 1), 8 November 2004 (Procedural Order No. 2, amended on 24 June 2005, 5 July 2005, 13 July 2005, and 12 August 2005), 3 December 2004 (Procedural Order No. 3), 9 June 2005 (Procedural Orders Nos. 4 and 5), 1 July 2005 (Procedural Order No. 6), 10 February 2006 (Procedural Order No. 7), 14 June 2006 (Procedural Order No. 8) , and 23 May 2007 (Procedural Order No. 9).

Parties to agree on a new authority that would be willing to make a decision on the challenge, Respondent sought the designation of a new appointing authority by the Permanent Court of Arbitration. By letter of 15 August 2007, the Secretary-General of the Permanent Court of Arbitration informed the Parties that it had no power to replace the ICC Court as appointing authority.

10. On 17 September 2007 BG informed the Tribunal of the Parties' joint request for the suspension of the preparation of the award until 1 October 2007. By letter of 3 October 2007 BG informed the Tribunal that the suspension period had expired without the Parties having agreed to an extension and, therefore, that the Tribunal should resume the preparation of the award.

11. On 10 October 2007 Respondent submitted the challenge to the ICC Court. On 21 December 2007 the Secretariat of the ICC Court informed the Parties that, at its session of that same day, the ICC Court had decided to reject the challenge of Professor Albert Jan van den Berg.

12. Respondent filed its *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral* with objections to jurisdiction and admissibility on 24 March 2005. Claimant filed its Counter-Memorial on Jurisdiction on 9 May 2005. On 9 June 2005 the Arbitral Tribunal decided not to bifurcate the proceedings (Procedural Order No. 5). Hence, this award affirms the jurisdiction of the Tribunal and it also adjudicates the merits of the dispute.

13. The hearing was held on 5, 6, 7, 10, 11, 12, 13 and 14 July 2006 (the Hearing). The following witnesses appeared before the Arbitral Tribunal:

a) Designated by Claimant

- William Adamson
- Richard Souchard
- Jose Luis Fernández
- John Wood-Collins (expert witness)

b) Designated by Respondent

- Eduardo Ratti
- Gustavo Simeonoff
- Cristian Folgar
- Diego Petrecolla and Federico Molina (expert witnesses)
- Alejandro Gallino and Alejandro Sruoga (expert witnesses)
- Benedict Kingsbury (expert witness)

14. All of the witnesses designated by the Parties filed written statements. The following witnesses, however, did not appear at the Hearing:

a) Designated by Claimant

- Patricio Carlos Perkins

b) Designated by Respondent

- Nouriel Roubini (expert witness)

15. In addition to the submissions referred to in paragraph 12, the Parties filed the following written submissions:

| Submission | Date |
|---|---|
| **Claimant** | |
| Statement of Claim | 7 February 2005 |
| Reply | 6 February 2006 |
| Post-Hearing Brief | 28 August 2006 |
| Cost Submission | 4 June 2007 |
| **Respondent** | |
| *Memorial de Contestación* | 7 November 2005 |
| *Dúplica* | 8 May 2006 |
| *Alegato Final* | 28 August 2006 |
| Reply to Claimant's Cost Submission | 11 June 2007 |

## III. Findings of Fact

16. The findings of fact set out in this Chapter of the award are based on the documentary evidence and on the written and oral testimony on the record.

### A. BG's Investment in Argentina

#### 1. The Privatization of the Gas Industry

17. In 1989 Argentina took economic measures to reduce inflation and the public deficit. Law 23.696 of 17

August 1989 provided, *inter alia*, for the privatization of certain state-owned companies, including the gas transportation and distribution monopoly *Gas del Estado, Sociedad del Estado* (*Gas del Estado*). Almost two years later, Law 23.928 of 27 March 1991 (the Convertibility Law) established a 1 to 1 fixed parity between the Argentine peso and the US dollar.

18. The gas industry was restructured for the purpose of its privatization as set out in Decree 48/91, Decree 633/91, Law 24.076 (the Gas Law) and Decree 1738/92 (the Gas Decree). The assets of *Gas del Estado* were divided into two transportation companies and eight distribution companies. One of the gas distribution companies was *Distribuidora de Gas Metropolitana S.A.* This entity's corporate name subsequently changed to MetroGAS.

19. Article 50 of the Gas Law created the *Ente Nacional Regulador del Gas* (ENARGAS), at the time under the responsibility of the *Ministerio de Economía y Obras y Servicios Públicos* (Ministry of Economy, Public Works and Services). ENARGAS was, and remains at the time of the rendering of this award, the regulatory agency charged with the implementation and application of the new legal framework for the privatization of the gas industry in Argentina.

20. The transportation and distribution companies were incorporated by Decree 1189/92 and the privatization process was launched with the publication on 21 July 1992 of Resolution 874/92 of 12 July 1992, which called for an international public tender to sell a controlling interest in the

transportation and distribution companies. The terms, conditions and rules governing the public bid were set out in the Bidding Rules issued by the *Ministerio de Economía y Obras y Servicios Públicos* (the Bidding Rules).[4] Resolution 874/92 also provided for the sale of a 70% interest in MetroGAS.

21. The Republic of Argentina promoted the international public tender among foreign investors by means of an English language memorandum dated "September 1992" (the Information Memorandum).[5]

22. On 2 December 1992, Decree 2255/92 approved model licenses for the provision of gas transportation and distribution services by the companies to be privatized.

23. Finally, on 21 December 1992, the President of Argentina issued Decree 2459/92, which granted the predecessor of MetroGAS an exclusive license to distribute natural gas in an area comprising the City of Buenos Aires and the southern and eastern greater metropolitan Buenos Aires (the MetroGAS License).[6] Decree 2459/92 was also signed by Dr. Domingo F. Cavallo, then Minister of *Economía y Obras y Servicios Públicos*.

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[4] Exhibit J-100.

[5] Exhibit J-101.

[6] Exhibit J-113.

### 2. BG's Participation in the Privatization Process

24. Gas Argentino, S.A. (GASA) was the successful bidder for the 70% ownership interest of MetroGAS that was tendered for sale by Respondent in 1992. GASA was formed by BG, *Compañía Naviera Pérez Companc S.A. Comercial, Financiera, Inmobiliaria, Minera, Forestal y Agropecuaria* (Pérez Companc), *Astra Compañía Argentina de Petróleo S.A.* (Astra) and Invertrad S.A.[7] (the Initial Shareholders) for the sole purpose of holding this ownership interest. BG initially owned 41% of GASA. On 11 August 1998 BG acquired an additional 13.67% interest from Pérez Companc through British Gas International BV, its wholly owned subsidiary (BG International).[8]

25. On 28 December 1992, GASA, the Initial Shareholders, MetroGAS, the *Estado Nacional* and *Gas*

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[7] On 20 January 1993, Invertrad S.A. assigned its 14% interest in GASA to Argentina Private Development Trust Company Limited (APDT). APDT subsequently changed its corporate name to Argentina Private Development Company Limited and assigned all its shares in GASA to YPF.

[8] BG International is a wholly owned subsidiary of BG Gas Netherlands Holding BV (BGNH, also a wholly owned subsidiary of BG. On 12 November 1993, BG transferred to BGNH all of its shares in GASA. Subsequently, BGNH's GASA shares were transferred to BG International.

*del Estado* entered into a Share Transfer Agreement.[9] The *Estado Nacional* and *Gas del Estado* were represented by the *Ministerio de Economía y Obras y Servicios Públicos*.

26. After the Share Transfer Agreement, Argentina continued to own 30% of MetroGAS, but it immediately transferred 10% to an employee share program. In 1994, Argentina offered the remaining 20% for sale in 1994 on the Argentine stock market and on the New York Stock Exchange. Between 1994 and 1998, BG increased its investment in MetroGAS from 28.7% (held through GASA) to 45.11% (held through GASA and BG International).[10]

**B. The Regulatory Framework**

27. The Regulatory Framework allegedly relied upon by BG at the time of its investment in Argentina included:

a) Law 24.076 of 20 May 1992 (the Gas Law);

b) The Gas Decree 1738 of 18 September 1992 (the Gas Decree); and

c) The MetroGAS License dated 21 December 1992 (the MetroGAS License).

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[9] Exhibit J-115. MetroGAS and BG also entered into a Technical Assistance Agreement dated 28 December 1992 and renewed on 28 December 2002.

[10] BG, through BG International, purchased additional shares in MetroGAS in 1994 (5.5%) and 1998 (1.34%).

28. The Tribunal will examine these legal texts *seriatim*.

### 1. The Gas Law (20 May 1992)

29. One of the stated objectives of the Gas Law was to guarantee that the tariffs to be collected for the regulated services were to be ". . . *justas y razonables de acuerdo a lo normado en la presente ley*".[11]

30. Pursuant to the Bidding Rules and the Information Memorandum, the foundations for the tariff regime are to be found in Title IX of the Gas Law. Thus, the following principles of the Gas Law are relevant to ascertain the expectations of the Parties at the time:

a) gas distributors operating efficiently and prudently were to be given the opportunity to collect ". . . *ingresos suficientes para satisfacer todos los costos operativos razonables . . . impuestos, amortizaciones y una rentabilidad razonable . . .*";[12]

b) to achieve "*rentabilidad razonable*", tariffs would provide for a return commensurate to the return of other activities of equal or comparable risk, and they must be a function of the efficient and satisfactory delivery of service;[13]

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[11] Article 2(d).

[12] Article 38(a).

[13] Article 39.

c) tariffs would be adjusted by applying a methodology based on international market indicators ". . . *que reflejen los cambios de valor de bienes y servicios representativos de las actividades de los prestadores . . .*";[14] and

d) tariffs would be subject to review every five years,[15] or on an extraordinary basis.[16]

31. The Gas Law does not expressly address the currency in which the tariffs were to be calculated or expressed. The transportation and distribution tariffs are the object of regulation in the Gas Decree and in the MetroGAS License, to which this award now turns.

**2. The Gas Decree (18 September 1992)**

32. Article 41(1) of the Gas Decree introduces the US dollar as the currency in which to assess and calculate the value of transportation and distribution tariffs.

> *En la adecuación normal y periódica de la tarifas que autorice,* [ENARGAS] *se ajustará a los siguientes lineamientos:*

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[14] Article 41.

[15] Article 42.

[16] Upon the request of the service provider (Article 46), or *ex officio* by ENARGAS (Article 47).

> *(1) Las tarifas de Transporte y Distribución se calcularán en Dólares.*[17] *El Cuadro Tarifario resultante será expresado en pesos convertibles según la Ley No. 23.928,*[18] *teniendo en cuenta para su reconversión a pesos la paridad establecida en el Artículo 3 del Decreto No. 2.128/91.*[19]

33. Paragraph 3 of Article 41 of the Gas Decree builds on Article 41 of the Gas Law by requiring incorporation in the respective licenses[20] of a mandatory tariff adjustment methodology based on international market indicators.

34. Moreover, Article 42 of the Gas Decree fixes a time limit for ENARGAS to issue rules relating to the methodology for the review of tariffs every five years, as provided in Article 42 of the Gas Law. The Gas Decree offers some guidance to the regulator:

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[17] Article 1(1) of the Gas Decree defines "*Dólar*" as ". . . *la moneda de curso legal en los Estados Unidos de América*".

[18] The Convertibility Law (Exhibit J-79).

[19] Article 3 of the *Decreto No. 2.128/91* (Exhibit J-86) establishes a 1 to 1 parity between the Argentine peso and the US dollar ("*El PESO será convertible con el Dólar de los ESTADOS UNIDOS DE AMERICA, a una relación de UN PESO . . . por cada Dólar, para la venta, en las condiciones establecidas por la Ley 23.928*").

[20] Though Article 41 of the Gas Decree uses the Spanish term *habilitaciones,* Article 4.5 of the Decree provides that such *habilitaciones* take the form of a license.

> (. . . .) *La revisión global del método empleado para el cálculo de las tarifas . . . se mantendrá por un nuevo período de Cinco (5) años contados a partir de su vigencia, procurando observar los principios de estabilidad, coherencia y previsibilidad tanto para los Consumidores como para los Prestadores.*
>
> *[ENARGAS] establecerá las normas de procedimiento para la revisión del método empleado en el cálculo de las tarifas que asegure la participación de los sujetos de la Ley* (. . . .)

35. Article 46 of the Gas Decree provides in turn for a set of guidelines to proceed with the extraordinary review of tariffs:

> *[ENARGAS] deberá establecer los requisitos que deberán cumplir los Transportistas, Distribuidores o consumidores en sus solicitudes de modificación de Tarifas o del Reglamento del Servicio a fin de acreditar la necesidad de tales modificaciones.*
>
> *Las modificaciones contempladas en el Artículo 46 de la Ley deberán basarse en circunstancias específicas no previstas con anterioridad, y no podrán ser recurrentes. Las mismas no incluyen el reajuste que contempla el Artículo 42 de la Ley.*

36. This analysis of the Gas Decree concludes by restating one of its opening provisions. Article 4.5 gives reassurance to licensees that their license may not be modified without their consent:

> (. . . .) *Las licencias otorgadas no . . . serán modificadas durante su vigencia sin el consentimiento de los licenciatarios. No se considerarán modificaciones a la licencia (i) las modificaciones que [ENARGAS] introduzca en el Reglamento del Servicio, sin perjuicio del derecho de [ENARGAS] o del licenciatario a requerir el correspondiente ajuste de las tarifas si el efecto neto de tal modificación alterase en sentido favorable o desfavorable, respectivamente, el equilibrio económico - financiero existente antes de tal modificación; y (ii) los reajustes de la Tarifa que conste[n] como anexo de la licencia y que se practiquen de acuerdo con la Ley, esta Reglamentación y los términos de la respectiva licencia. Al convocar a licitación en caso de extinción de una licencia, [ENARGAS] podrá modificar los términos de la licencia vigente hasta ese momento.*

37. The interpretation of the Gas Law and the Gas Decree was the object of considerable disagreement between the Parties. The Tribunal will address that controversy later in this award. In so doing, the Tribunal will turn to the Bidding Rules and to the Information Memorandum in order to ascertain the understanding of the parties at the time of the conclusion of their agreement.

### 3. The MetroGAS License (21 December 1992)

38. On 21 December 1992 the President of Argentina issued Decree 2459/92 which granted the predecessor

of MetroGAS a 35 year exclusive license to distribute natural gas in the City of Buenos Aires and the southern and eastern greater metropolitan Buenos Aires.[21] As indicated above, Decree 2459/92 was also signed by Dr. Domingo F. Cavallo, then Minister of *Economía y Obras y Servicios Públicos*.

39. The text of Decree 2459/92 is itself brief. It comprises eight Articles over six pages, plus three Annexes setting out in detail the terms of the MetroGAS License: (i) the *Reglas Básicas* (Annex I); (ii) the *Reglamento de Servicio* (Annex II); and (iii) the Tariffs (Annex III). The provisions of the MetroGAS License relevant to the dispute between the Parties are primarily located in Annex I (*Reglas Básicas*).

40. Before an examination of the rules set out in Annex I, the Tribunal records that Article 1 of this Presidential Decree provides that the MetroGAS License is granted under the terms and conditions set out, *inter alia*, in the Gas Law, the Gas Decree, Annex I (*Reglas Básicas*) and Annex III (Tariffs).

41. Section 9.2 of the MetroGAS License[22] confirms the application of the US dollar as the currency of reference for the calculation and adjustment of tariffs:

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[21] Exhibit J-113 (the MetroGAS License was subject to a 10 year extension).

[22] Unless otherwise specified, all references in the award to Sections of the MetroGAS License are to Sections in Annex I (*Reglas Básicas*).

*Appendix F*

> *El Anexo III del Decreto que aprueba estas Reglas Básicas contiene la tarifa que puede percibir la Licenciataria.*
>
> *La tarifa se ha calculado en dólares estadounidenses. Los ajustes a que se refiere el punto 9.3. serán calculados en dólares estadounidenses.*
>
> *El Cuadro Tarifario resultante o recalculado se expresará en el momento de su aplicación a la facturación en pesos ($) a la relación para la convertibilidad establecida en el art. 3° del Dto. 2128/91, reglamentario de la [Ley de Convertibilidad] y sus eventuales modificatorios.*
>
> *Dicha tarifa sólo será modificada de conformidad con lo establecido en la Ley [24,076],*[23] *el Decreto Reglamentario,*[24] *estas Reglas Básicas y las disposiciones de la misma Tarifa.*

42. The tables of Annex III (*Tarifas*) setting out the different tariffs indicate in the upper right hand corner that they are expressed "*en $ convertibles ley 23,928*".[25]

43. Section 9.3 of the MetroGAS License sets out a useful recapitulation of the tariff adjustment regime:

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[23] The Gas Law.

[24] The Gas Decree.

[25] Law 23,928 is the Convertibility Law.

*Appendix F*

*De acuerdo con los términos de la Ley y su Decreto Reglamentario, se prevén las siguientes clases de ajustes de tarifas:*

*a) Periódicos y de tratamiento preestablecido*

- *Ajuste por variaciones en los indicadores de mercado internacional (artículo 41 de la Ley)*
- *Ajuste por variaciones en el precio del Gas comprado*
- *Ajuste por variaciones en el costo del Transporte*

*b) Periódicos y de tratamiento a preestablecer por la Autoridad Regulatoria*

- *Ajuste por la revisión quinquenal de tarifas (artículo 42 de la Ley)*

*c) No recurrentes*

- *Ajuste basado en circunstancias objetivas y justificadas (artículo 46 de la Ley)*
- *Ajuste por cambios en los impuestos (artículo 41 de la Ley)*

44. To summarize further the adjustment provisions of the MetroGAS License:

a) tariffs would be adjusted every six months in accordance with the US PPI (the US PPI Adjustment);[26]

b) MetroGAS was entitled to a review every five years to maintain tariffs at a level sufficient to provide a reasonable rate of return after covering costs, taking into account the licensees efficiencies and investments (the Five Year Review);[27] and

c) outside the Five Year Review, MetroGAS could also request an "extraordinary review" based on "objective and justified" grounds (the Extraordinary Review).[28]

45. It is a matter of record that only one Five Year Review was completed with respect to MetroGAS (RQT I in 1997), and that a second Five Year Review (RQT II) was in progress in January 2002, but was never concluded. On 8 February 2002, ENARGAS notified MetroGAS that the RQT II process was suspended pending completion of the renegotiation process

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[26] Section 9.4.1.1 of the MetroGAS License. The License defines "PPI" as " . . . *el 'Indice de Precios del Productor – Bienes Industriales (1967 = 100) publicado por la Oficina de Estadísticas Laborales del Departamento de Trabajo de los Estados Unidos* . . .".

[27] Sections 9.4.1.2, 9.4.1.3 and 9.4.1.4 of the License.

[28] Section 9.6.1 of the License.

mandated by Law 25.561 adopted on 6 January 2002 (the Emergency Law).[29]

46. The MetroGAS License also provides for the stability of the Regulatory Framework and its tariff regime.

47. First, Section 9.1 of the MetroGAS License requires that modifications to the *Reglamento de Servicio* be responsive to the evolution and need to improve service, and it calls for consultations with the licensee and a tariff adjustment if the economic and financial equilibrium is disturbed:

> *El Reglamento del Servicio podrá ser modificado periódicamente, después de la fecha de vigencia, por la Autoridad Regulatoria, para adecuarlo a la evolución y mejora del Servicio Licenciado. Cuando tales modificaciones no se deban a la iniciativa de la Licenciataria, corresponderá la previa consulta a la misma. Dichas modificaciones no podrán alterar las presentes Reglas Básicas y, si alteraran el equilibrio económico-financiero de la Licencia, darán lugar [a la] revisión de la Tarifa según lo determine la Autoridad Regulatoria.*

48. Section 18.2 of the MetroGAS License further elaborates on the principles of stability and compensation:

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[29] Exhibit J-295.

> *El Otorgante no modificará estas Reglas Básicas, en todo o en parte[,] salvo mediante consentimiento escrito de la Licenciataria y previa recomendación de la Autoridad Regulatoria.*
>
> *Las disposiciones que modifiquen el Reglamento del Servicio y la Tarifa que adopte la Autoridad Regulatoria no se considerarán modificaciones a la Licencia en ejercicio de sus facultades, sin perjuicio del derecho de la Licenciataria de requerir el correspondiente reajuste de la Tarifa si el efecto neto de tal modificación alterase en sentido favorable o desfavorable, respectivamente, el equilibrio económico-financiero existente antes de tal modificación.*

49. Second, Section 9.8 of the License provides as follows with respect to price controls:

> *No se aplicarán al régimen de tarifas de la Licenciataria congelamientos, administraciones y/o controles de precios. Si a pesar de esta estipulación se obligara a la Licenciataria a adecuarse a un régimen de control de precios que estableciere un nivel menor al que resulte de la Tarifa, la Licenciataria tendrá derecho a una compensación equivalente pagadera por el Otorgante.*

50. Upon expiration of the license term, MetroGAS would be entitled to receive compensation in cash to the lower of:[30]

a) the net book value of the assets;[31] and

b) the net proceeds of a new competitive bid.

51. Finally, the MetroGAS License is governed by the laws of Argentina and it includes the following jurisdictional clause in Section 16.2:

> *Para todos los efectos derivados de la presente Licencia en su relación con el Otorgante,*[32] *la Licenciataria se somete a la competencia de los tribunales en lo Contencioso Administrativo Federal de la Capital Federal. En las*

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[30] Section 11.3.1 of the MetroGAS License.

[31] *I.e*, the book value net of cumulative amortization of the essential assets, including historical cost (also net of cumulative amortization) of the investments made by the Licensee during the term of the License not challenged by ENARGAS. For purposes of this calculation, (a) investments are to be determined on the basis of the price paid for the essential assets by MetroGAS in 1992, plus the original cost of subsequent investments, converted into dollars and adjusted by US PPI, and (b) amortization shall be calculated in US dollars applying normal rules of useful life of the assets, regardless of the historic cost in Argentine currency or accelerated amortization for fiscal purposes (Section 11.3.1 of the MetroGAS License).

[32] Section 1.1 of the License defines *Otorgante* to mean "the National Executive Branch" (*el Poder Ejecutivo Nacional*).

*controversias con otras partes relativas a la Licencia, será competente la justicia federal.*

52. The Tribunal will now turn to the crisis which precipitated the dispute between the Parties.

**C. The Crisis**

53. Starting in 1998, external developments contributed to the demise of the currency regime implemented by, *inter alia*, the Convertibility Law:[33]

a) capitals stopped flowing to emerging markets following the Asian crisis and the Russian default of 1998;

b) demand weakened in Brazil, one of Argentina's major trading partners;

c) the price of Argentina's exports relative to its imports decreased considerably;

d) Argentina lost competitiveness abroad as a result of the devaluation of the Brazilian currency and the appreciation of the dollar; and

e) monetary policy was tightened by the U.S. Federal Reserve in 1999 and 2000.

54. Given the Convertibility Law, Argentina could not apply exchange rate adjustments and it lacked a monetary policy to address the combined effect of these

[33] Roubini Witness Statement, pp. 7 and 8.

external developments.[34] This led to a slowdown of the economy in 1998 and Argentina eventually plunged into a profound recession.[35] The recession worsened in 2001, precipitating an acute economic, social and political crisis.

55. Between 1999 and 2002, cumulative loss of GDP was about 25% and real *per capita* GDP fell from $8,302 in 1998 to $2,595 in 2002.[36] Public debt and the fiscal deficit increased.[37]

56. On 1 December 2001, Decree 1570/01 imposed exchange controls and severe restrictions on the withdrawal of funds from the banking system (the *corralito*).[38] Argentina subsequently declared a default on its foreign debt and the IMF withheld funds scheduled to be delivered to Argentina by the end of

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[34] Roubini Witness Statement, pp. 7 and 8.

[35] Roubini Witness Statement, p. 8.

[36] Roubini Witness Statement, p. 9.

[37] Fiscal debt increased to 8% of GDP and the Balance of Payments Current Account showed deficits every year between 1999 and 2001 (Folgar Witness Statement, p. 6).

[38] Exhibit J-282. *Corralito* was the informal name for these measures taken in order to stop a bank run. The *corralito* almost completely froze bank accounts and forbade withdrawals from U.S. dollar-denominated accounts. The Spanish word *corralito* is the diminutive form of *corral*, which means "corral, animal pen, enclosure". The term alludes to the restrictions imposed by the measure.

that year. The IMF also publicly withdrew its support of Argentina's economic program.[39]

57. The attack on the peso intensified. In the first days of December 2001 on average 500 million dollars were being withdrawn from the banking system every day. During the last quarter of that year the Central Bank lost 11 billion dollars of reserves and 25% of funds on deposit vanished from the financial system.[40]

58. The crisis had social and political repercussions.

59. In May of 2002 unemployment peaked at 21.5% from 18.3% in October of 2001.[41] Average wages decreased almost 70% in 7 months, from US $569.90 in October of 2001 to US $190.00 in May of 2002.[42] By the first quarter of 2002, domestic consumption, including demand for public services, had shrunk 20%.[43]

60. Five Presidents took office within a period of 12 days. On 1 January 2002, Eduardo Duhalde became President and on 6 January 2002 Argentina enacted the Emergency Law, declaring a state of emergency

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[39] *Memorial de Contestación*, paragraphs 46 and 48.

[40] *Memorial de Contestación*, pp. 10 and 11.

[41] Folgar Witness Statement, p. 6.

[42] *Memorial de Contestación*, paragraph 116.

[43] *Memorial de Contestación*, paragraph 65.

throughout the country.[44] The Parties disagree as to whether the state of emergency has been overcome.[45] The state of emergency is currently set to expire on 31 December 2007.[46]

61. The next Section of the award describes the *corralito*, the Emergency Law and other measures taken by the government of Argentina to address the crisis.

### D. The Measures

62. Starting in 1999, Argentina adopted a series of measures to address macroeconomic pressures, social unrest and political instability. These measures had an effect on BG's investment in MetroGAS and their examination is critical to the adjudication of this dispute.

#### 1. Suspension of the Application of the US PPI

63. At the invitation of the Secretary of Energy, on 6 January 2000 all licensees, including MetroGAS, agreed to a six month suspension (until 1 July 2000) of the US PPI adjustments pursuant to the Gas Law (Article 41), the Gas Decree (Article 41) and the MetroGAS License (Section 9.4.1.1 of the *Reglas*

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[44] Exhibit J-287.

[45] *Dúplica*, paragraph 87. Reply, paragraph 482.

[46] See paragraph 73 of this award.

*Básicas)* until 1 July 2000. The *Acta Acuerdo*[47] which formalizes this agreement stated that:

a) the suspension was exceptional ". . . *y por única vez*";[48]

b) the suspension was without prejudice to the integrity of the Regulatory Framework, the licenses and the ". . . *compromisos y contratos celebrados como resultado de la privatización de Gas del Estado*";[49]

c) the licensees would not be indemnified in case of damage suffered as a result of the suspension;[50] and

d) the suspension should not be deemed as a precedent, or as an amendment to the existing legal framework.[51]

64. Argentina did not implement the adjustment upon expiry of the suspension on 1 July 2000. Instead, the government once again invited the licensees to

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[47] Exhibit J-214.

[48] Exhibit J-214, paragraph 1.

[49] Exhibit J-214, paragraph 2 of the Preamble.

[50] Exhibit J-214, paragraph 5 of the Preamble.

[51] Exhibit J-214, paragraph 5 of the Preamble.

accept a two-year deferral of the adjustment.[52] Pursuant to the new agreement, dated 17 July 2000:

a) tariffs payable as from July 2000 could be increased by the US PPI uplift due in January 2000; and

b) the US PPI adjustments applicable from July 2000 to January 2002 were to be deferred until 30 June 2002.

65. This agreement was formalized by Decree 669/00, signed by the President of Argentina. Decree 669/00 recognized that the licensees had a "*derecho legítimamente adquirido*" to US PPI tariff adjustments.[53] The Presidential Decree also acknowledges that bilateral investment treaties are a part of the legal framework relevant to investments in Argentina.[54]

66. Decree 669/00 and the agreement concluded on 17 July 2000 were challenged before local courts by the Argentine Ombudsman (*Defensor del Pueblo de la Nación*) on grounds that the US PPI adjustment mechanism was unconstitutional and in breach of the amended Convertibility Law. On 18 August 2000, a federal administrative court (the *Juzgado Nacional de Primera Instancia en lo Contencioso Administrativo Federal No. 8*) issued an injunction staying the

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[52] Exhibit J-226.

[53] Exhibit J-226, p. 2.

[54] Ibidem, p.1.

application of Decree 669/00 and the agreement of 17 July 2000.[55]

67. The injunction was appealed by both MetroGAS and the Argentine authorities. The appeal memorial filed by the Ministry of Economy and ENARGAS sheds light on the purpose of the Regulatory Framework:

> *Cuando en los años noventa se encaró en la Argentina el amplio proceso privatizador, la inflación no había sido derrotada. Para atraer inversores, en ese contexto se decidió ofrecer un marco contractual que asegurara la estabilidad de la ecuación económica inicial, evitando que las tarifas fueran licuadas por el incesante aumento de precios, al punto de hacer inviable la explotación rentable de la actividad.*
>
> *El instrumento elegido, en la mayoría de los casos, fue fijar tarifas en dólares con la cláusula de ajuste según la inflación estadounidense, que históricamente había seguido un curso mucho más estable que la argentina.*
>
> [Exhibit J-233, p. 71]
>
> [*D*]*ebe tenerse en cuenta cuál es el sentido que, en momento del procedimiento licitatorio, se le dio al ajuste en cuestión. . . . Tal sentido está dado en que, en primer lugar, las ofertas económicas de los Consorcios que participaron en la Licitación – teniendo en cuenta las condiciones*

[55] Exhibit J-229.

> *del Pliego de Bases y Condiciones-, preveían la aplicación del ajuste mencionado durante la vigencia de la habilitación.*
>
> [Exhibit J-233, p. 95]
>
> [Emphasis added]

68. Pending the decision on appeal, in August of 2000 and every 6 months thereafter, ENARGAS ordered MetroGAS to maintain its tariffs at the approved rate for May of 2000.[56]

69. On 5 October 2001, the Federal Court of Appeals upheld the injunction against the application of the US PPI adjustment mechanism.[57] In reaching its decision, the appellate court noted that "dollarized" tariffs protected the licensees against exchange rate fluctuations.[58] An appeal to the Supreme Court was soon to be overtaken by other measures adopted by Argentina in January of 2002. The MetroGAS tariffs have therefore not been adjusted for inflation since July of 1999.[59]

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[56] Exhibits J-238, J-252 and J-285.

[57] Exhibit J-253.

[58] Exhibit J-253, p. 10 (". . . *si se tiene en cuenta la dolarización de las tarifas y el seguro de cambios que ello implica . . .*")

[59] Decree 2437/02 (Exhibit J-371) authorized 5 to 10% increases in the tariffs of MetroGAS. However, the application of this decree was suspended by judicial injunction. Further attempts to increase tariffs were also blocked by injunctive measures adopted by Argentine courts (Exhibits J-398 and J-401).

### 2. The *Corralito*

70. By the end of 2001 Argentina was heavily indebted and with an economy in stagnation. Pegging the exchange rate at one U. S. dollar per Argentine peso further made its exports uncompetitive and it also effectively deprived the state of an independent monetary policy. Fearing an economic crash and a devaluation, many Argentines, especially companies, were transforming pesos to dollars and withdrawing them from the banks in large amounts, usually transferring them to foreign accounts.

71. On 1 December 2001, the government enacted Decree 1570/01 in order to stop this process from further threatening the banking system.[60] This Decree froze all bank accounts, initially for 90 days. Only a small amount of cash was allowed for withdrawal on a weekly basis, initially 250 pesos.

72. The *corralito* had a paradoxical effect. Attempts to withdraw funds from the banks intensified and the cash restrictions exacerbated the recession and angered the public. President Fernando de la Rúa resigned on 21 December 2001 after violent riots, but the restrictions of the *corralito* were not lifted at the time.

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[60] Exhibit J-282.

**3. The Emergency Law and Ancillary Regulations**

73. On 6 January 2002, Argentina enacted the Emergency Law.[61] This Law declared a state of "emergency" for a limited period of time originally due to expire on 10 December 2003,[62] but subsequently extended until 31 December 2004,[63] 31 December 2005,[64] 31 December 2006[65] and 31 December 2007.[66]

74. Among other measures, the Emergency Law:

a) abolished the currency board established by the Convertibility Law which had pegged the peso to the dollar;[67]

b) set aside dollar denominated adjustment clauses;[68]

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[61] Exhibit J-287.

[62] This is the date which appears in Article 1 of the Emergency Law as submitted by Argentina in its Exhibit A RA-131.

[63] Exhibit J-448.

[64] Exhibit J-505.

[65] Exhibit J-643.

[66] Exhibit J-740.

[67] Article 3.

[68] Article 8.

c) eliminated the US PPI adjustment mechanism by prohibiting indexation clauses tied to international price indices;[69]

d) converted dollar denominated tariffs into pesos at the rate of one peso to one US dollar;[70]

e) prohibited licensees from suspending or altering the performance of their obligations;[71] and

f) prescribed that the law would be applicable irrespective of any "vested rights".[72]

75. The Emergency Law also authorized the Executive Branch of government to "renegotiate" its agreements with public service providers.[73] Originally

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[69] Article 8.

[70] Article 8. Thus, while the exchange rate eventually stabilized at 3 Argentine pesos to the US dollar, the devaluation was not transferred to the licensees' tariffs.

[71] Article 10. This rule is also included in Article 5 of Law 25.790 of 1 October 2003.

[72] Article 19 ("*La presente ley es de orden público. Ninguna persona puede alegar en su contra derechos irrevocablemente adquiridos*".) This provision is in contrast with Decree 669/00 (Exhibit J-226) which had earlier recognized that the licensees had a "*derecho legítimamente adquirido*" to US PPI tariff adjustments.

[73] Article 9 ("*Autorízase al Poder Ejecutivo nacional a renegociar los contratos comprendidos en lo dispuesto en el Artículo 8º de la presente ley. En el caso de los contratos que tengan por objeto la prestación de servicios públicos, deberán tomarse en consideración los siguientes criterios: 1) el impacto de las tarifas en la*

conducted under the auspices of the *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* which operated from February of 2002 until July of 2003,[74] the renegotiation process was subsequently taken over by the *Unidad de Renegociación de Contratos de Obras y Servicios Públicos* or UNIREN.[75]

76. Article 11 of the Emergency Law and Decree 214/02[76] further (i) ordered that private dollar denominated obligations be converted into pesos at a rate of one peso to one dollar, and (ii) abolished indexation by reference to international indicators. Decree 214/02 also established that "pesified" obligations were to be adjusted by application of a *Coeficiente de Estabilización de Referencia* or CER. Pursuant to Decree 410/02, however, the "pesification" would not apply to obligations governed by foreign law.[77]

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*competitividad de la economía y en la distribución de los ingresos; 2) la calidad de los servicios y los planes de inversión, cuando ellos estuviesen previstos contractualmente; 3) el interés de los usuarios y la accesibilidad de los servicios; 4) la seguridad de los sistemas comprendidos; y 5) la rentabilidad de las empresas.*")

[74] Exhibit J-297.

[75] Exhibit J-424.

[76] Exhibit J-292.

[77] Exhibit J-300.

77. During the arbitration, BG argued that these and other measures adopted by Argentina after January of 2002 had a discriminatory effect which adversely impacted its investment in Argentina. Chapter VIII of this award shall address the measures in question and their effect in the renegotiation process.

### 4. The Renegotiation Process

78. The *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* was created by Decree 293/02 of 14 February 2002 to assume responsibility over the renegotiation of public service contracts.[78] Although this Renegotiation Commission was unable to conclude its task within the statutory term of 120 days, it did produce a report dated 24 January 2003 which notes a sharp decline in the economics of the MetroGAS operations:[79]

| **Net Margin over Sales** | | **Rate of Return** | |
|---|---|---|---|
| **2001** | **2002** | **2001** | **2002** |
| 14% | -121% | 8% | -142% |

79. On 3 July 2003, the administration of President Kirchner replaced the *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* with UNIREN.[80] On 21 October 2003, Congress enacted Law

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[78] Exhibit J-297.

[79] Exhibit J-400, p. 44.

[80] Decree 311/03 (Exhibit J-424).

25.790 governing the renegotiation process.[81] Article 2 of this Law 25,790 expressly authorized UNIREN to depart from the existing Regulatory Framework and licenses:

> *Las decisiones que adopte el Poder Ejecutivo nacional en el desarrollo del proceso de renegociación no se hallarán limitadas o condicionadas por las estipulaciones contenidas en los marcos regulatorios que rigen los contratos de concesión o licencia de los respectivos servicios públicos.*
>
> [. . .]
>
> [Emphasis added]

80. There is no dispute between the Parties that the stated objective of the Emergency Law and the purpose of subsequent legislation, including Law 25.790, was to establish a new deal with the licensees. Return to the original legal framework as presented by the Information Memorandum and the Bidding Rules was accordingly not an alternative.[82] This was confirmed at the hearing by the Executive Secretary of UNIREN, who testified that a return to dollar denominated tariffs was not possible.[83]

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[81] Exhibit J-432.

[82] Exhibit J-297.

[83] Tr. Simeonoff, 10 July 2006, 1048:13-1050:3. Respondent's counsel also confirmed this (Tr. Scrinzi, 6 July 2006, 408:8-409:20).

81. Further, Article 11 of Resolution 308/02[84] and Article 1 of Decree 1090/02[85] expressly exclude from the renegotiation process any licensee that sought redress in an arbitral or other forum.

82. In the circumstances, five years[86] failed to yield a successful settlement of the dispute between the Parties.

## IV. Summary of the Contentions of the Parties and Relief Sought

83. The prayer for relief below is presented *verbatim* as submitted by the Parties in their Post–Hearing Brief. Their contentions are summarized here and subsequently analyzed in more detail.

### A. BG's Position

84. Claimant argued that Argentina's measures described in Section III.D above have damaged MetroGAS:[87]

> In short, as a result of Argentina's Measures, MetroGAS's business is no longer viable. MetroGAS's tariff revenue is no longer sufficient to cover its costs and provide a reasonable rate of return, as promised in the Regulatory

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[84] Exhibit J-347.

[85] Exhibit J-334.

[86] The time elapsed since promulgation of the Emergency Law.

[87] Statement of Claim, paragraph 350.

> Framework. Some three years after the January 2002 Law was enacted, the absence of a renegotiated Licence or material tariff increase means that MetroGAS remains in a critical financial condition and at the mercy of its creditors.

85. BG's case on the merits is that Argentina has breached the following provisions of the Argentina-U.K. BIT:[88]

a) Article 5, by expropriating BG's (i) shareholding in GASA and MetroGAS and, alternatively, (ii) rights under or related to the MetroGAS License; and

b) Article 2.2 (i) by failing to provide BG fair and equitable treatment and protection and security, (ii) by taking unreasonable and discriminatory measures, (iii) by failing to observe obligations entered into with regard to BG's Investments, and (iv) for acts of its judiciary.

86. BG requests that the Tribunal:

a) declare that the dispute is within the jurisdiction of the Tribunal and that all of Argentina's objections to the jurisdiction and competence of the Tribunal and the admissibility of BG's claims be dismissed;

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[88] Post-Hearing Brief, Chapters V and VI.

b) declare that Argentina breached Article 5(1) of the [Argentina-U.K. BIT] by expropriating BG's investment without compensation;

c) declare that Argentina breached Article 2(2) of the [Argentina-U.K. BIT] by mistreating BG's investment in violation of the standards of treatment provided therein;

d) order that Argentina compensate BG in an amount of US $238.1 million plus interest at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually;

e) award BG any such additional relief as the Tribunal considers appropriate; and

f) order that Argentina pay the costs of these proceedings, including the Tribunal's fees and expenses, and the cost of BG's legal representation, subject to interest.

**B. Argentina's Position**

87. Argentina requests the following from the Tribunal:

a) *Se declare la falta de competencia del Tribunal respecto de la controversia planteada por la Demandante, con costas a cargo de BG, incluyendo todos los gastos del Tribunal y los gastos incurridos por la República Argentina en relación con el presente arbitraje;*

b) *Subsidiariamente, se solicita se rechace en forma total la demanda de BG Group plc, con costas.*

88. Argentina's defense on the merits is based on its allegation that it has not breached the Argentina-U.K. BIT and on the doctrine of state of necessity.

## V. Applicable Law

89. Both Parties agree that the issue of the law applicable to the dispute is addressed in Article 8(4) of the Argentina-U.K. BIT.[89] Article 8(4) of the BIT provides that:

> The arbitral tribunal shall decide this dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in this dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law.

90. This provision points to the application of the treaty itself, Argentine law (including its rules on conflict of laws) and "*the applicable principles of international law*". The Parties do not disagree that these are the relevant sources of law under the Argentina-U.K. BIT.[90]

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[89] *Alegato Final de la República Argentina ("*Alegato Final*")*, paragraph 107; Post-Hearing Brief, paragraph 137.

[90] See *Alegato Final,* paragraphs 117-21, in particular paragraph 117 ("*...[E]s claro que el Tribunal no podría dejar de aplicar el*

91. It is undisputed that treaty law determines, for example, who qualifies as an "Investor"[91] as well as the various types of property rights that constitute an "Investment".[92] Equally clear and not subject to dispute by the Parties is that the substantive standards for treatment of investors are matters governed by the treaty, without any need for reference to Argentine law.[93] Indeed, the preeminence of the BIT as *lex*

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*derecho interno argentino así como tampoco podría dejar de aplicar el TBI o los principios de derecho internacional que resulten aplicables."*). See also, Post-Hearing Brief, paragraphs 137-40.

[91] Argentina-U.K. BIT, Article 1(c)(i)(bb).

[92] Argentina-U.K. BIT, Article 1(a).

[93] Respondent does not question that breach of the substantive obligations set out in Articles 2.2 and 5 of the Argentina-U.K. BIT is governed by the BIT. See, *e.g.*, *Alegato Final*, paragraph 132 *("*[l]*a Argentina sólo podrá ser responsable internacionalmente si el Tribunal, partiendo del análisis de todas las fuentes de derecho aplicables, comprueba que la conducta de la Argentina es incompatible con alguna disposición del TBI").* See also *ibidem*, paragraph 137. After pointing to the prominent role played by Argentine law in defining the type of property rights making up an "investment", referring to *El Paso Energy International Co. v. República Argentina* (CIADI ARB.03/15/, *Decisión sobre Jurisdicción* 27 April 2006), Argentina highlights the relevance of ascertaining whether the investor's rights may have been illegally restricted and whether such restriction may be imputed to Argentina for having violated "the high standards" set forth in the BIT *("[e]n conclusión: la República Argentina considera que para determinar qué derechos posee la Demandante, su existencia y extensión, debe aplicarse:*

- *el derecho argentino, a efectos de determinar qué derechos*

*specialis* governing this dispute, on matters expressly covered by this bilateral treaty, is expressly acknowledged by both Parties.[94]

92. It is also beyond dispute that the contours of the concept of "asset" included in the definition of "investment" in Article 1(a) of the Argentina-U.K. BIT, is governed by Argentine law.[95] Article 1(a) of the BIT

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*fueron adquiridos mediante la inversión;*

- *una vez determinado esto, debe verse si ese derecho ha sido ilegalmente restringido; y*
- *por último, si tal restricción constituye además una violación a los altos estándares del TBI atribuible al Estado Argentino."*

[94] See *Alegato Final*, paragraph 118 ("[*l*]*a primera fuente de derecho contenida en el artículo 8.4 del TBI es el mismo tratado. Es claro que las cuestiones reguladas por el Tratado son ley especial (lex specialis) respecto del derecho internacional general . . .*"; subsequently making the point that the BIT is not a self-contained, stand-alone legal framework but must be "integrated" with underlying principles of international law. BG's Post-Hearing Brief, paragraph 140 (also contending that ". . . *the conduct of the host state [must be] examined on the basis of the substantive standards of treatment set out in the treaty. Thus, the treaty as supplemented by general international law is the applicable law in this phase.*").

[95] See *Alegato Final*, paragraph 124 (*"Es decir, el derecho argentino es el que determina cuáles son los derechos adquiridos por la inversión (en otras palabras: cuál es el contenido de la propiedad del inversor*"); Post-Hearing Brief, paragraph140 ("[a]t *the first stage, the tribunal must decide, if it is a matter of contention, whether particular assets or rights constituting the alleged investment exist, their scope and in whom they vest. The law of the host state and/or the investment constitute an investment as*

provides that:

> "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made . . .
>
> [Emphasis added]

93. Where Claimant and Respondent disagree is on: (i) whether the Argentina-U.K. BIT requires the Tribunal to follow an order of priority in applying the sources of law set out in Article 8(4) of the BIT; and (ii) whether Argentina's alleged liability is exclusively a function of domestic law, as argued by Respondent, or whether this issue falls squarely under the terms of the BIT and underlying principles of international law, as argued by the Claimant.

94. The Tribunal shall deal first, and only to the extent that it is relevant to settle this dispute, with the interplay between international and Argentine internal law under Article 8(4) of the Argentina-U.K. BIT. Second, assuming that the terms of the treaty and underlying principles of international law are silent regarding the protection to foreign investors in a situation of emergency, as propounded by Respondent, the Tribunal shall discuss whether Argentine internal law may be applied to fill the alleged gap.

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*defined by the treaty*"). Although Argentine private international law is included within the bodies or sources of law mentioned in Article 8(4) of the BIT, neither Party relied upon it, so the matter under discussion here is the role played by Argentine substantive municipal rules of law.

95. It must be borne in mind that there is no contract concluded between BG and the Republic of Argentina, and that the dispute between the two focuses on the scope of protection to which BG's investment is entitled. Because this is precisely the purpose of the Argentina-U.K. BIT, in adjudicating its jurisdiction and, if need be, the substance of this dispute, the Tribunal must rely on the terms of this bilateral treaty as the primary source of law.

96. Regarding the remission in Article 8(4) of the BIT to national and international law, the Parties seem to make much of the issue whether international law and Argentine law are to be deemed of equal rank, as proposed by Respondent, or whether the latter ought to yield to the former, as contended by Claimant.[96] In the opinion of the Tribunal this focus is misplaced. In the first place, the doctrinal and jurisprudential authorities brought to the attention of the Tribunal fail to yield any collision or contradiction between the protection to which Claimant's property rights are entitled under Argentine constitutional and administrative law and the protection it receives under international law. If anything, the constitutional jurisprudence developed by the Supreme Court of Argentina around Articles 14 and

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[96] See *Alegato Final*, paragraph 111, referring to Respondent's expert on this issue, Professor Benedict Kingsbury, for the proposition that when the treaty itself refers to the application of domestic law, such domestic law holds equal rank with international law. See also Claimant's Post-Hearing Brief, paragraphs 138 et seq., to the effect that under fundamental principles of international law, the latter prevails over domestic law.

17 of the Constitution points to the protection of property rights *lato sensu,*[97] giving rise to a duty to provide full compensation in cases where the State deems it fit for reasons of public policy and regardless of whether an emergency is invoked or not, to unilaterally terminate or modify the terms of a deal concluded with a private party.[98] Thus, the question of the hierarchy that one source of law bears with regard to the other fades in relevance in this case, where property rights would be fully protected under Argentine domestic law in any event.

97. More importantly, the interplay between international law and municipal law under Article 8(4) of the BIT should not overlook that the former may be deemed incorporated into the latter, depending on the status conferred to international treaties and international law in general by a particular constitutional system. This is particularly relevant to the case of Argentina, whose constitutional framework

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[97] See, *e.g.*, Exhibit JL-30 (*Gregorio Guitiérrez v. Compañía Hispano Americana de Electricidad, 158 Fallos 268 (1930)*), holding that the right of property protected by Articles 14 and 17 of the Argentine Constitution refers to all types of interest, tangible or intangible.

[98] See, *e.g.*, Exhibit J-14 (*Compañía de Tranvías Anglo Argentina v. Nación Argentina, 262 Fallos 555 (1965)*), where the Supreme Court, making clear that it was not passing judgment on the government's sovereign power to adopt any economic policies it deems appropriate, yet held the State liable for the unilateral modification of the terms of a concession contract insofar as it infringed on the concessionaire's right to raise tariffs in order to secure a reasonable right of return.

and doctrine have traditionally admitted the direct application of international law whenever feasible and, at least since the constitutional reform undertaken in 1994, expressly providing for the principle that international treaties preempt provincial and federal law.[99] Accordingly, the challenge of discerning the role that international law ought to play in the settlement of this dispute, vis-à-vis domestic law, disappears if one were to take into account that the BIT and underlying principles of international law, as "the supreme law of the land", are incorporated into Argentine domestic law, superseding conflicting domestic statutes.[100]

98. In its *Alegato Final*, Respondent relied on the unquestionable gravity of the crisis that exploded in December 2001 to introduce the argument that the measures allegedly affecting BG's investment, which found support in the Emergency Law adopted in January 2002,[101] must be regarded as a suitable response to the "extraordinary and unforeseeable" magnitude of the crisis, fully justified under the doctrine of "unforeseeable changed circumstances"

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[99] Argentine Constitution (as adopted in 1994), Article 75(22).

[100] Article 75(22) of the Argentine Constitution.

[101] See supra, paragraphs 53 to 62, where this award discusses and acknowledges the extraordinary gravity of the Argentine crisis leading to the adoption of the Emergency Law and ancillary measures.

(*teoría de la imprevisión*) of Article 1198 of the Argentine Civil Code.[102]

99. The Tribunal notes that Article 1198 relates to the law of contracts and that the dispute between the Parties does not arise out of contract. More specifically, Article 1198 of the Argentine Civil Code does not apply in the context of an international investment dispute governed by Article 8(4) of the Argentina-U.K. BIT.

100. Although the Tribunal finds that the BIT is the primary source of rules to assess Respondent's liability, the bilateral investment treaty is not a self-contained

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[102] Article 1198, in its current version, was enacted in 1968, incorporating for the first time the "*teoría de la imprevisión*" (or doctrine of unforeseen changed circumstances). Article 1198 provides that:

> "*Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe y de acuerdo con lo que verosímilmente las partes entendieron o pudieron entender, obrando con cuidado y previsión.*
>
> *En los contratos bilaterales conmutativos y en los unilaterales onerosos y conmutativos de ejecución diferida o continuada, si la prestación a cargo de una de las partes se tornara excesivamente onerosa, por acontecimientos extraordinarios e imprevisibles, la parte perjudicada podrá demandar la resolución del contrato. El mismo principio se aplicará a los contratos aleatorios cuando la excesiva onerosidad se produzca por causas extrañas al riesgo propio del contrato.*
>
> *En los contratos de ejecución continuada la resolución no alcanzará a los efectos ya cumplidos.*
>
> *No procederá la resolución, si el perjudicado hubiese obrado con culpa o estuviese en mora.*
>
> *La otra parte podrá impedir la resolución ofreciendo mejorar equitativamente los efectos del contrato*."

legal framework, isolated from international and domestic law. Yet, the domestic law defense of unforeseen changed circumstances is of little assistance to Respondent here. The process for the privatization of *Gas del Estado* and the resulting Regulatory Framework clearly demonstrate a concern for economic and currency instability, a systemic and hardly unpredictable occurrence in Argentina's modern history.

101. The rejection of the concept of *rebus sic stantibus* under the Argentine Civil Code is not a dismissal of Argentina's defense under the international law doctrine of state of necessity. The Tribunal will address this question in Chapter IX of the award.

102. In brief, the Tribunal shall apply:

a) the Argentina-U.K. BIT with respect to the jurisdictional objections raised by Argentina under the treaty itself;

b) to the extent that jurisdiction is affirmed, Argentine law to the determination of the concept of "asset" in Article 1(a) of the Argentina-U.K. BIT;

c) to the extent that jurisdiction is affirmed, the Argentina-U.K. BIT and such other relevant principles of international law as may have been relied upon by the Parties.

103. In addition, the Tribunal will be mindful of the Argentine Regulatory Framework for the transportation and distribution of natural gas, as it

was presented to foreign investors at the time of the privatization of *Gas del Estado* and as subsequently modified by Argentina.

## VI. Jurisdiction and Admissibility

104. Argentina raised objections to the jurisdiction of this Tribunal and to the admissibility of BG's claims.

105. The Tribunal will address Argentina's objections in the following order:

a) Is BG an "Investor"?

b) Has BG made an "Investment" in Argentina?

c) Are BG's claims admissible?

d) Is the dispute contractual?

e) May BG bring "derivative claims"?

f) Are measures of general application actionable under the Argentina-U.K. BIT?

g) Is the renegotiation process an obstacle to this Tribunal's jurisdiction?

106. Respondent's allegation that Argentine courts have exclusive jurisdiction over this dispute is related with questions (d) and (e) above, and it will be adjudicated in Section E below.

### A. Is BG an "Investor"?

107. BG relies on Section 1(c)(i)(bb) of the definition of "Investor" in the Argentina-U.K. BIT:

"investor" means:

(i) in respect of the United Kingdom:

. . .

(bb) companies, corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12.

108. It is not disputed that BG is a company incorporated and constituted under the laws in force in the United Kingdom. A copy of BG's Certificate of Incorporation, Memorandum and Articles of Association are on the record.[103]

109. BG therefore qualifies as an "Investor" under the Argentina-U.K. BIT.

110. The Tribunal now turns to the question of whether BG made an "Investment" in Argentina within the terms of the Argentina-U.K. BIT.

**B. Has BG Made an "Investment" in Argentina?**

111. Article 1 of the Argentina-U.K. BIT includes the following definition of "Investment":

(a) "investment" means every kind of asset defined in accordance with the laws and

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[103] Exhibit J-188.

regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties;

(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments. The term "investment" includes all investments, whether made before or after the

> date of entry into force of this Agreement, but the provisions of this Agreement shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force;
>
> (b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.

112. BG contends that it holds the following "Investments" in Argentina:

a) an indirect participation in the Argentine companies MetroGAS (45.11%)[104] and GASA (54.67%);[105]

[Article 1(a)(ii) of the BIT]

b) the following rights over the economic value of the License,[106]

(i) claims to money and performance under contracts entered into by MetroGAS, and

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[104] Held by BG International (i) directly (6.84%), and (ii) through its 54.67% interest in GASA (*i.e.,* 38.27%).

[105] Held by BG International. Statement of Claim (paragraph 48) and Post-Hearing Brief (paragraph 169(a)).

[106] Statement of Claim (paragraph 50) and Post-Hearing Brief (paragraph 169(b)).

(ii) benefits from the License granted to MetroGAS to carry out gas distribution services in Argentina;

[Article 1(a)(iii) and (v) of the BIT]

c) rights that the MetroGAS License be respected.[107]

[Article 1(a)(v) of the BIT]

113. Initially, Argentina argued that BG had not provided sufficient evidence of its ownership interest in GASA and MetroGAS.[108] In response, BG provided additional explanation and evidence of this participation.[109] Testimony at the hearing further established that BG's interest in GASA and MetroGAS is no longer contested.[110] Additionally, Argentina has not subsequently denied that BG's ownership interest in GASA and MetroGAS are an "Investment" within the meaning of Article 1(a)(ii) of the Argentina-U.K. BIT. On the contrary, Argentina's *Alegato Final*

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[107] Statement of Claim (paragraph 50) and Post-Hearing Brief (paragraph 169(c)).

[108] *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral,* pp. 45-52.

[109] Counter-Memorial on Jurisdiction, paragraphs 42-58.

[110] Testimony of Messrs. Petrecolla and Molina (Tr. Molina, 12 July 2006, 1587:5-1587:18).

acknowledged that ". . . *BG tiene una única inversión: sus acciones*."[111]

114. Argentina does, however, argue that shareholders may only bring claims with respect to measures taken by Argentina that directly interfere with their corporate rights. The thread of this argument runs across a number of Argentina's jurisdictional objections and the Tribunal believes that it is best addressed when it turns to the issue of "derivative claims" in Section E.

115. For now, the Tribunal will focus on whether the rights identified in Paragraphs 112(b) and (c) above constitute an "Investment" for purposes of the Argentina-U.K. BIT. A determination on this point requires consideration of Argentina's contentions that:

a) the definition of "Investment" in the BIT requires that the term "asset" be defined by reference to ". . . *the laws and regulations of the Contracting Party in whose territory the investment is made*"; and

b) the Spanish version of the BIT (*títulos de crédito*) prevails with respect to the meaning of the term "claims to money" in Article 1(a) (iii).[112]

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[111] Paragraph 185.

[112] The term used in the Spanish version of the BIT is "*títulos de crédito*".

*Appendix F*

**1. "Asset" or "*Activo*"**

116. Argentina relied heavily on the reference in Article 1(a) of the BIT to ". . . *the laws and regulations of the Contracting Party in whose territory the investment is made*". More specifically, Argentina asserts that:

a) the term "asset" in Article 1(a) of the BIT should be defined by reference to the laws of Argentina;

b) the Spanish version of the treaty (". . . *el término 'inversión' designa todo elemento del activo* . . .") requires construing the term "*activo*" as it is understood in generally accepted accounting principles; and

c) because MetroGAS has not included the MetroGAS License as an "*activo*" in its accounting, rights under the License are not an asset under the definition of "Investment" of the BIT.

117. As to the first point, BG conceded that Argentine law governs the issue of ". . . *whether a particular asset exists and in whom it vests*."[113] The Tribunal agrees with both Parties: the *renvoi* of Article 1(a) of the treaty requires this Tribunal to apply the laws of Argentina to the interpretation of this part of the definition of "Investment" in the Argentina-U.K. BIT. As a matter of conventional international law, this *demarche* is necessary to determine whether rights

[113] "Responses to the Questions of the Arbitral Tribunal of 10 July 2006", p. 3.

associated with the MetroGAS License are protected under the BIT.

118. A first conclusion emerges from Argentine law. The existence of the MetroGAS License and certain rights associated with it is unquestionable. The Regulatory Framework presented to international investors in order to promote interest in the privatization of *Gas del Estado* is determinative of this issue. This is not a finding as to the precise content of those rights, or as to BG's *ius standi* to exercise them – the award will deal with this issue later - but merely as to whether those assets were in existence as a matter of Argentine law. Argentina has taken a position with respect to the content, ownership and survival of those rights, but it has not denied their existence.[114]

119. The next question is whether Claimant's rights under the Regulatory Framework described in Chapter III.B of this award, including the MetroGAS License, constitute an "*activo*" pursuant to the definition of "Investment" in the Spanish version of the BIT, or an "asset" as set out in Article 1(a) of the English language version of the treaty.

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[114] For this reason alone, Respondent's reliance on Exhibit JL-490 (*Encana Corporation v. The Republic of Ecuador*, Award of 3 February 2006) is misplaced . This matter is inapposite to this case.

120. Neither Party offered a definition of "*activo*"[115] under any Argentine law of general application. In the absence of a statutory definition, the Tribunal must turn to the interpretive work of the courts.

121. In *Industria Mecánica S.A. v. Gas del Estado* (*Industria Mecánica*) the court took an ample patrimonial view of the constitutional protection of property rights:[116]

> [S]*egún la jurisprudencia de esta Corte, el término propiedad empleado en los artículos 14 y 17 de la Constitución Nacional ampara todo el patrimonio incluyendo derechos reales y personales, bienes materiales e inmateriales, [. . .] y en general todos los intereses apreciables que un hombre pueda poseer fuera de sí mismo, su vida y libertad, entre ellos los derechos emergentes de los contratos.*
>
> [Emphasis added]

122. Almost 20 years earlier, in *Compañía de Tranvías Anglo Argentina v. Nación Argentina* (*Compañía de Tranvías*), in a situation where certain measures had disturbed the economics of a concession,

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[115] At the hearing, BG asserted that "*activo*" under Argentine law means ". . . *todo derecho, sea de carácter real o personal susceptible de valor patrimonial*." It did not, however, provide any legal cite as the source of this definition and it is thus of limited assistance to the Tribunal's investigation of Argentine law ("Responses to the Questions of the Arbitral Tribunal of 10 July 2006", p. 3).

[116] Exhibit JL-154, pp. 859-860.

the Supreme Court focused on damage to the investor's patrimony as a whole:[117]

> [*las*] *normas tuvieron por consecuencia determinar mayores erogaciones para el concesionario; lo cual justificaba indemnización o aumento de tarifas. No debe olvidarse . . . que quien así legislaba era a su vez poder concedente y como tal, tenía la obligación de respetar la economía general del contrato, es decir su ecuación económico financiera.*

123. The property rights protected by the courts in Argentina are not limited to assets registered for accounting purposes, as the Spanish term "*activo*" might suggest. This conclusion is not altered by Argentina's reliance on the contractual definition of "*Activos Afectados al Servicio*" and "*Activos Esenciales*" set out in Section 1.1 of the Share Transfer Agreement.[118] First, this contract does not trump the broader notion of property embraced by *Compañía de Tranvías* and *Industria Mecánica S.A.* Second, the Share Transfer Agreement itself acknowledges that transfer of the physical assets did not entitle MetroGAS to engage in the distribution of gas, as the holding of a license is mandatorily required for that purpose.[119]

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[117] Exhibit J-14.

[118] Exhibit J-115.

[119] For instance, clauses 4.3(g), 4.4(d) and 6.1(i) (Exhibit J-115).

124. While Argentina was critical of reliance on the *Tranvías* case in a different context,[120] its criticism confirms the need to focus on property rights. For instance, in its *Alegato Final* Respondent argued that Argentina's offer to renegotiate constitutes an acknowledgement of the investor's property rights.[121] Recognition of these rights was not contingent on their registration as an "*activo*" in the books of MetroGAS.

125. Under the circumstances, the Tribunal finds no support for the contention that property rights are an "asset" only to the extent that they are listed as an "*activo*" for accounting purposes in a company's books. There is no question that MetroGAS received, in terms of value, something more than the physical assets inventoried in the Share Transfer Agreement. MetroGAS was granted a license and other statutory rights without which the physical assets could not have been put to use. In fact, the MetroGAS License was to enter into force on the very same day as the transfer of the physical assets.[122]

126. Interpreted in the light of Argentine jurisprudence, the term "*activo*" in Article 1(a) of the

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[120] Paragraphs 159 to 167 of the *Alegato Final* set out Argentina's position with respect to this case in the context of its allegations of *force majeure* and *imprevisión* under Argentine law.

[121] "*No hay afectación sustancial del derecho de propiedad en la medida que existe un reconocimiento de ese derecho a través del proceso de renegociación, y una voluntad de Argentina de readecuar el contrato . . .*" (*Alegato Final*, paragraph 166(d)).

[122] Clause 4.2.2 of the Share Transfer Agreement (Exhibit J-115).

Spanish language Argentina-U.K. BIT is not semantically different from the concept of "asset" employed in the English version. Thus construed, both terms are broader than the accounting reading advocated by Argentina and hereby rejected by the Tribunal.

127. The Tribunal consequently finds that the rights conferred under the Regulatory Framework described in Chapter III.B of this award, including under the MetroGAS License, come under the term "*activo*" and "asset" in the definition of "Investment" set out in Article 1(a) of respectively the Spanish and English versions of the BIT.

**2. "Claims to Money" – "*Títulos de Crédito*"**

128. Argentina also pointed to a discrepancy between the two authentic language versions of Article 1(a)(iii) of the Argentina-U.K. BIT.[123]

| Spanish Version | English Version |
|---|---|
| *(iii) títulos de crédito directamente relacionados con una inversión específica y todo otro derecho a una prestación contractual que tenga un valor financiero.* | (iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value. |

[123] The signature page of the BIT indicates that the treaty was done ". . . *in two originals . . . in the English and Spanish languages, both texts being equally authoritative.*"

129. Respondent conceded that the laws and regulations of Argentina do not provide a definition of *título de crédito*.[124] Argentina, nonetheless, drew the Tribunal's attention to the narrow legal meaning of the term according to many legal scholars:[125]

> *. . . el documento escrito, firmado, nominativo, a la orden o al portador, que menciona la promesa unilateral de pago de una suma de dinero o de una cantidad de mercadería, con vencimiento determinado o determinable; o de consignación de mercaderías o de títulos especificados y que socialmente sea considerado como destinado a la circulación.*

130. For Argentina, Article 1(a)(iii) of the BIT only extends protection to investors where their "Investment" takes the form of a "*título de crédito*" (*i.e.*, a "negotiable instrument"). Conversely, BG believes that the English term "claims to money" is broader in scope and includes claims to money under contracts entered into by MetroGAS. Simply put, the divergence of the Spanish "*título de crédito*" and the English "claims to money" is semantically irreconcilable.

131. The Tribunal's analysis therefore begins with Article 33 of the Vienna Convention on the Law of

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[124] *Alegato Final*, paragraph 181.

[125] Argentina did not identify the legal scholars or the source of this definition.

Treaties (the Vienna Convention), which specifically addresses the interpretation of multilingual treaties:[126]

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of a treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

132. The presumption of Paragraph 3 is rebuttable where, like here, the difference in meaning is not removed by reference to Articles 31[127] and 32.[128]

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[126] Exhibit JL-103.

[127] "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

*Appendix F*

Paragraph 3 of Article 33 directs the interpreter to consider the object and purpose of the treaty.

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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 connection with the conclusion of the treaty;
   b) any instrument which was 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.
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."

[128] "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable."

133. The United Kingdom and Argentina introduced their BIT with the following paragraphs:

> The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina;
>
> Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State;
>
> Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;
>
> Have agreed as follows . . .

134. Adoption of the Spanish term of the BIT as advocated by Argentina would considerably restrict the coverage of the treaty, discourage "greater investment" and defeat the shared aspiration expressed by Argentina and the U.K. in executing this instrument in 1993.

135. The Tribunal is also persuaded by Argentina's expression of its own understanding of the treaty prior to this dispute. As recalled earlier, Decree 669/00 expressly acknowledges that investors in the privatization of Gas del Estado would be entitled to protection under ". . . *Tratados de Protección Recíproca*

*de Inversiones . . .*" entered into by Argentina.[129] It was clear at the time that BG's investment in MetroGAS would not take the form of "*títulos de crédito*" as this term is now understood by Argentina.

136. Likewise, Resolution 308/02[130] and Decree 1090/02[131] excluded from the renegotiation process any licensee seeking to enforce the rights under its license through an investment arbitration. It is difficult to understand why Respondent would seek to prohibit investment arbitration, if the underlying rights sought to be enforced do not qualify as an "Investment", as now argued by Argentina.

137. For these reasons, the Tribunal adopts the English text of Article 1(a)(iii) of the Argentina-U.K. BIT for purposes of this award.[132]

### 3. Conclusion

138. The Tribunal finds that BG's ownership interest as described in Paragraph 112(a) of this award is an "Investment" for the purposes of Article 1(a)(ii) of the Argentina-U.K. BIT.

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[129] Exhibit J-226, p. 2.

[130] Article 11 (Exhibit J-347).

[131] Article 1 (Exhibit J-334).

[132] Conventional international law provides further confirmation of this finding. "Claims to money" are an "investment" pursuant to Article 1(6)(c) of the Energy Charter Treaty (ECT). The ECT translation of the term into Spanish is "*créditos pecuniarios*".

139. The Tribunal also finds that "*claims to money which are directly related to a specific investment or to any performance under contract having a financial value*" squarely fall within the definition of "Investment" of the BIT. Nonetheless, as noted in Paragraph 118, the survival and precise content of those rights, and BG's standing to exercise them, will be taken up by the Tribunal in Sections D and E below.

**C. Are BG's Claims Admissible?**

140. The Argentina-U.K. BIT provides that recourse to arbitration is possible only where disputes have been submitted for 18 months to the competent tribunal of the State which hosts the investment and: (i) the tribunal has not issued a final decision; or (ii) the parties are still in dispute after the decision. To recall, the text of Article 8(1) and (2) provides:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.
>
> (2) The aforementioned disputes shall be submitted to international arbitration in the following cases:
>
> (a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

141. Argentina argued that failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible. It is to be noted that Article 8(1) of the BIT entitles Argentina to trigger domestic litigation of treaty disputes,[133] and there is no evidence on the record that Argentina even attempted to do so.

142. BG argued that this requirement is senseless as there is no chance that in a case of this nature a decision could ever be rendered within the eighteen-

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[133] Article 8 provides that investment disputes under the BIT shall be submitted ". . . *at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.*"

month period. BG further contended that the MFN clause of the Argentina-U.K. BIT[134] entitles BG to rely on the more favorable treatment extended by Argentina to US investors. The Argentina-U.S. Bilateral Investment Treaty does not require prior recourse to local courts for a period of 18 months. Finally, BG relied on the customary international law rule that the requirement of exhaustion of local remedies may be disregarded in cases where ". . . *the course of justice is unduly slow or unduly expensive in relation to the prospective compensation.*"[135]

143. Customary international law becomes relevant, but only as a point of departure for the Tribunal's analysis of the evolution of international investment law. Under traditional international law, mistreated investors did not have standing to sue the host State of their investment. Instead, they had to rely on their home State's willingness to espouse their claim by

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[134] Article 3: "(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State. (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."

[135] "State Responsibility", Report by Robert Ago, ILC Special Rapporteur, Yearbook of the ILC 1977, vol. II (Part Two, page 48, paragraph 50, footnote 204). Quoted by BG with approval in its Post-Hearing Brief, paragraph 185 (emphasis omitted).

offering diplomatic protection. Diplomatic protection, in turn, would only give rise to international proceedings if local remedies were exhausted.[136]

144. Exhaustion of local remedies, however, is not an absolute bar to international adjudication. Article 15 of the International Law Commission Draft Articles on Diplomatic Protection attempts to codify the exceptions:

> Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

145. The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement

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[136] The rule is ". . . *an important principle of customary international law* . . .". Exhibit JL-195 (*Case Concerning the Elettronica Sicula S.p.A. (United States of America v Italy)*, Judgment of 20 July 1989, ICJ Reports 1989, *E.L.S.I.*).

of their treaty rights by directly bringing action against the State in whose territory they have invested. Investors may seek redress in arbitration without securing espousal of their claim or diplomatic protection. The Argentina-U.K. BIT is a paradigm of this evolution.

146. For the reasons mentioned above, BG's reliance on the exceptions to the customary international law rule of exhaustion of local remedies in this matter is difficult to accept. The Tribunal accepts Argentina's position that as a matter of treaty law investors acting under the Argentina-U.K. BIT must litigate in the host State's courts for 18 months before they can bring their claims to arbitration.

147. As a matter of treaty interpretation, however, Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration. Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication.

148. In this case, the regular operation of the courts in Argentina came under significant pressure after promulgation of the Emergency Law. Concerned with judicial decisions which might undermine the full implementation of emergency legislation, the administration of President Duhalde enacted Decree

214/02,[137] whose purpose was to bar recourse to the courts by those whose rights were felt to be violated:

> *. . . la preservación de la paz social como el necesario reordenamiento de las relaciones jurídicas, no se compadece con la masiva concurrencia a los tribunales de quienes procuran la resolución de sus pretensiones, cuando ellas son de imposible satisfacción, sin causar daño irreparable a la economía y al derecho de todos aquellos que no podrían ver satisfechos sus propios derechos de propiedad, de producirse el colapso final del sistema financiero.*

149. As a matter of policy, Decree 214/02 provided for a stay of all suits brought by those whose rights were allegedly affected by the emergency measures adopted by the government:

> *. . . corresponde disponer la suspensión temporaria de la tramitación de todos los procesos judiciales y medidas cautelares y ejecutorias en los que se demande o accione en razón de los créditos, deudas, obligaciones, depósitos o reprogramaciones financieras que pudieran considerarse afectados por las normas y disposiciones dictadas en el marco de la crisis y la emergencia.*

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[137] Exhibit J-292.

*Appendix F*

150. Article 12 is the operative provision which implements the stated policy objective:

> *. . . se suspende por el plazo de . . . (180) días el cumplimiento de las medidas cautelares en todos los procesos judiciales, en los que se demande o accione contra el Estado Nacional y/o las entidades integrantes del sistema financiero, en razón de los créditos, deudas, obligaciones, depósitos o reprogramaciones financieras que pudieran considerarse afectados por las disposiciones contenidas en el Decreto Nº 1570/01, en la [Ley de Emergencia], en el Decreto Nº 71/02, en el presente decreto, en el Decreto Nº 260/02, en las Resoluciones del MINISTERIO DE ECONOMIA y en las Circulares y demás disposiciones del BANCO CENTRAL DE LA REPUBLICA ARGENTINA dictadas en consecuencia y toda otra disposición referida a dicha normativa.*
>
> *Por el mismo lapso se suspende la ejecución de las sentencias dictadas con fundamento en dichas normas contra el Estado Nacional, los Estados Provinciales, los Municipios o la CIUDAD AUTONOMA DE BUENOS AIRES, sus entidades autárquicas o descentralizadas o empresas o entes estatales, en todos los procesos judiciales referidos a dicha normativa.*

151. The Tribunal notes that the Emergency Law remains in full force five years after its promulgation in 2002, and there is no indication on the record that

its enforcement has been attenuated since its original promulgation.[138]

152. Decree 320/02[139] provides further insight into the intervention of the Executive Branch of government to prevent judicial adjudication and enforcement of property rights after the adoption of the Emergency Law. The introductory paragraphs of this decree, signed by President Duhalde on 15 February 2002, recall the State's authority to restrict the regular exercise of patrimonial rights,[140] and underscore that the policy objectives of the Emergency Law and its regulations may be defeated by unfettered judicial challenge.[141]

153. It is not within the province of this Tribunal to pass judgment on the policy reasons prompting promulgation of Decrees 214/02 and 320/02, nor to question the sovereign prerogative in their adoption. However, it seems fitting to examine the reasonableness of the expectation that judicial

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[138] Law 26,204 extended the application of the Emergency Law until 31 December 2007 (Exhibit J-740).

[139] Exhibit J-298.

[140] The eleventh *Considerando* of Decree 320/2002 (Exhibit J-298) relies on the Supreme Court precedent that extraordinary circumstances authorize the State to ". . . *restringir el ejercicio normal de algunos derechos patrimoniales tutelados por la Constitución* . . .".

[141] This is the legislative intent expressed in the *Considerandos* of Decree 320/02 (Exhibit J-298).

remedies should have been exhausted at a time where the Executive Branch was seeking to prevent any judicial interference with the emergency legislation.

154. Later, in June and August of 2002, Argentina provided in Resolution 308/02[142] and Decree 1090/02[143] that any licensee seeking judicial redress would be excluded from the renegotiation process of its license. The relevant provisions in fact create an incentive for licensees not to go to the courts:

> Article 1 of Decree 1090/02
>
> *Los concesionarios que efectuaren reclamos por incumplimiento contractual fuera del proceso de renegociación . . . quedarán automáticamente excluidos de dicho proceso.*
>
> Article 11 of Resolution 308/02
>
> *Las empresas concesionarias o licenciatarias que mientras se desarrolle el proceso de renegociación en curso, efectuaren una presentación en sede judicial o ante un tribunal arbitral, articulada sobre el presunto incumplimiento contractual fundado en las normas dictadas en razón de la emergencia, serán intimadas por el MINISTERIO DE ECONOMIA, como Autoridad de Aplicación del régimen dispuesto por el Decreto 293/02, a desistir de tal acción, bajo apercibimiento de que si no lo hicieran, se*

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[142] Exhibit J-347.

[143] Exhibit J-334.

*instarán los actos para disponer su exclusión de dicho proceso.*

155. Argentina took the position in this arbitration that, had BG brought its grievance to domestic courts, Argentina would have collaborated to promote achievement of a prompt final judgment.[144] The Tribunal must assume this to be true under normal circumstances. However, the Tribunal is also persuaded that under the dire circumstances surrounding the emergency measures, the Executive Branch sought to prevent the collapse of the financial system by (i) directly interfering with the normal operation of its courts, and (ii) by excluding litigious licensees from the renegotiation process.

156. The Tribunal has given due consideration to Minister Rosatti's opinion that it would take Argentine courts more than six years to reach a decision in a case like this.[145] Yet, this opinion is not central to the Tribunal's finding on this issue. Rather, the Tribunal notes that a serious problem would loom if admissibility of Claimant's claims were denied thus allowing Respondent at the same time to:

a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations;

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[144] *Alegato Final*, paragraph 234.

[145] Exhibit J-439.

b) insist that Claimant go to domestic courts to challenge the very same measures; and

c) exclude from the renegotiation process any licensee that does bring its grievance to local courts.

157. The Tribunal consequently finds admissible the claims brought by BG in this arbitration, thus rendering unnecessary the examination of the relevance of Article 3 of the BIT (Most Favored Nation) to determine whether Claimant should have sought relief by the courts of Argentina during at least a period of 18 months before resorting to arbitration.

**D. Is the Dispute Contractual?**

158. Article 8(2) of the BIT provides for arbitration of certain investment disputes. Argentina argued that:[146]

a) Argentina did not assume any commitment with respect to BG;[147]

b) the dispute submitted to arbitration by BG is not a "dispute with regard to an investment" within the terms of the treaty;

c) BG's claim is contractual in nature; and

d) a claim for expropriation requires "something more" than a breach of contract.

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[146] *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, pp. 19-28.

[147] *Alegato Final*, paragraph 247.

159. The Tribunal's focus for the moment concerns jurisdiction only and thus Argentina's claim that there has been no expropriation will be addressed below in Chapter VII. Argentina's other objections fall into one of two categories: the existence or not of specific commitments (paragraph 158(a) above) and the nature of BG's claim (paragraph 158(b) and (c) supra). The Tribunal now takes up these issues *seriatim*.

### 1. Specific Commitments

160. The privatization of the gas industry in Argentina during the 1989-1992 period and the ensuing Regulatory Framework were described earlier in Chapter III of this award. This Section of the award examines the representations directly or indirectly made by Argentina during that process.

161. As mentioned, the concept of *Gas del Estado*'s privatization originated in Law 23696 of 17 August 1989. Shortly thereafter, on 11 December 1990, Argentina and the United Kingdom executed their BIT.

162. As indicated earlier, under the Gas Law enacted on 20 May 1992 tariffs were to be "just and reasonable".[148] While the Gas Law is silent as to the currency for the calculation or expression of the tariffs, it does provide that:

a) prudent and efficient gas distributors would collect ". . . *ingresos suficientes para satisfacer todos los costos operativos razonables* . . .

[148] Article 2(d).

*impuestos, amortizaciones y una rentabilidad razonable . . .*";[149]

b) tariffs must be such that they provide for "*rentabilidad razonable*" (*i.e.*, a return commensurate to the return of other activities of equal or comparable risk);[150]

c) tariffs would be adjusted by reference to international market indicators;[151] and

d) tariffs would be subject to review every five years,[152] or on an extraordinary basis.[153]

163. The Bidding Rules, the Gas Decree and the MetroGAS License are more explicit about the currency for the calculation and expression of the tariffs.

164. Section 7.1 of Annex F of the Bidding Rules of 20 July 1992 provides that:[154]

*Las tarifas están expresadas en pesos convertibles según la Ley 23,928 a la paridad de*

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[149] Article 38(a).

[150] Article 39.

[151] Article 41.

[152] Article 42.

[153] Upon the request of the service provider (Article 46), or *ex officio* by ENARGAS (Article 47).

[154] Exhibit J-100.

> *1 = 1 con el dólar estadounidense. Las mismas . . . serán ajustadas inmediata y automáticamente en caso de variación de la paridad. A estos efectos se considerará la cantidad de moneda argentina necesaria para adquirir un dólar estadounidense en la plaza de Nueva York.*

165. Section 7.5 of the Bidding Rules permits tariff adjustment for inflation in accordance with US PPI:

> *La tarifa del Distribuidor . . . y la tarifa de transporte . . . serán [ajustadas] semestralmente . . . de acuerdo con la variación operada en el* índice *de precios al por mayor de productos industriales de los EE.UU. . . . según se establezca en la licencia correspondiente y los restantes requisitos que se establezcan en el Reglamento de Tarifas y Condiciones Generales del Servicio. La Autoridad Regulatoria establecerá el mecanismo para el ajuste.*

166. The Gas Decree of 18 September 1992 establishes that the US dollar is the currency for the calculation of transportation and distribution tariffs.

> *En la adecuación normal y periódica de la tarifas que autorice, [ENARGAS] se ajustará a los siguientes lineamientos:*
>
> *(1) Las tarifas de Transporte y Distribución se calcularán en Dólares.*[155] *El Cuadro Tarifario*

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[155] Article 1(1) of the Gas Decree defines "*Dólar*" as "*. . . la moneda de curso legal en los Estados Unidos de América*".

> *resultante será expresado en pesos convertibles según la Ley No. 23,928,*[156] *teniendo en cuenta para su reconversión a pesos la paridad establecida en el Artículo 3 del Decreto No. 2.128/91.*[157]

167. Further, Article 41(3) of the Gas Decree requires inclusion in the respective licenses of a tariff adjustment methodology based on international market indicators.

168. Article 42 of the Gas Decree mandates ENARGAS to issue rules applicable to the review of tariffs every five years. The Gas Decree offers the following guidance to the regulator:

> (. . . .) *La revisión global del método empleado para el cálculo de las tarifas . . . se mantendrá por un nuevo período de Cinco (5) años contados a partir de su vigencia, procurando observar los principios de estabilidad, coherencia y previsibilidad tanto para los Consumidores como para los Prestadores.*
>
> *[ENARGAS] establecerá las normas de procedimiento para la revisión del método empleado en el cálculo de las tarifas que asegure la participación de los sujetos de la Ley.* (. . . .)

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[156] The Convertibility Law (Exhibit J-79).

[157] Article 3 of the *Decreto No. 2.128/91* (Exhibit J-86) establishes a 1 to 1 parity between the Argentine peso and the US dollar.

169. Article 46 of the Gas Decree applies to the extraordinary review of tariffs:

> *[ENARGAS] deberá establecer los requisitos que deberán cumplir los Transportistas, Distribuidores o consumidores en sus solicitudes de modificación de Tarifas o del Reglamento del Servicio a fin de acreditar la necesidad de tales modificaciones.*
>
> *Las modificaciones contempladas en el Artículo 46 de la Ley deberán basarse en circunstancias específicas no previstas con anterioridad, y no podrán ser recurrentes. Las mismas no incluyen el reajuste que contempla el Artículo 42 de la Ley.* (. . . .)

170. Article 4.5 provides reassurance to licensees that their license may not be modified without their consent:

> (. . . .) *Las licencias otorgadas no . . . serán modificadas durante su vigencia sin el consentimiento de los licenciatarios. No se considerarán modificaciones a la licencia (i) las modificaciones que [ENARGAS] introduzca en el Reglamento del Servicio, sin perjuicio del derecho de [ENARGAS]o del licenciatario a requerir el correspondiente ajuste de las tarifas si el efecto neto de tal modificación alterase en sentido favorable o desfavorable, respectivamente, el equilibrio económico-financiero existente antes de tal modificación; y (ii) los reajustes de la tarifa que conste[n] como anexo de la licencia y que se practiquen de*

> *acuerdo con la Ley, esta Reglamentación y los términos de la respectiva licencia. Al convocar a licitación en caso de extinción de una licencia, [ENARGAS] podrá modificar los términos de la licencia vigente hasta ese momento.*

171. The Information Memorandum of September 1992 was circulated to raise interest in the privatization of *Gas del Estado* among foreign investors.[158] This Memorandum touted the availability of real dollar tariffs:[159]

> The privatisation of Gas del Estado offers an unique investment opportunity. Outlined below are some of the attractive characteristics of the privatisation.
>
> (. . . .)
>
> **Attractive tariffs, in real dollar terms.** [Emphasis in the original] The initial tariffs have been set at a level intended to provide the new companies with an attractive return on investment, including the investment necessary to renovate the systems. The tariff regulation, which is based on the U.K. style of price capping formula, allows the new companies to maintain

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[158] Exhibit J-101.

[159] Exhibit J-101, p. 8. Appendix A (p. A-9) further confirms that "*[t]ariffs will be calculated in dollars but expressed in convertible Pesos.*"

> the real dollar value of their tariffs and provides incentives to invest in improving efficiency.
>
> [Emphasis added.]

172. The Information Memorandum draws attention to the tariff and adjustment regimes of the Gas Law and of the Gas Decree:[160]

> The Gas [Law] provides that:
>
> - tariffs should be at a level which enables the licensee to earn a reasonable rate of return; and
> - profitability should reflect the efficiency of the licensee and satisfactory performance of the licensed service.
>
> The Gas [Law] specifies also that Licensees shall adjust tariffs in accordance with a mechanism which refers to appropriate international market indicators, modified by a factor intended to promote efficiency while providing the licensee with an incentive to invest in the system. The adjustment mechanism shall be reviewed every five years by the NGRE, taking account of the two principles stated above. This mechanism has been adopted in a number of other major utilities internationally and is described as "price capping with periodic regulatory review" (also commonly known as "RPI-X").

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[160] Exhibit J-101, pp. 26 and 27. These principles are restated in Appendix A of the Information Memorandum.

(. . . .)

> The Regulatory Decree sets out the principles of tariff regulation and the licence contains the detailed adjustment formula. The tariffs and prices are calculated in U.S. dollars and expressed in convertible Argentine pesos as provided in the Convertibility Law (No. 23,928 and its Decree No. 2128/91). The allowed adjustments will also be calculated in U.S. dollars.
>
> Licensees may adjust their tariffs semi-annually to reflect changes in the U.S. Producer Price Index (PPI), which will be used as the market indicator mentioned in the Gas [Law] (. . . .)

173. MetroGAS received its 35 year License on 21 December 1992. The MetroGAS License:

a) confirms the application of the US dollar as the currency of reference for the calculation and adjustment of tariffs (Article 9.2);

b) Annex III includes an indication that tariffs are expressed "*en $ convertibles ley 23,928*"[161] (Annex III);

c) sets out the different tariff review and adjustment mechanisms (Articles 9.3, 9.4 and 9.6);

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[161] Law 23.928 is the Convertibility Law.

d) requires that modifications to the *Reglamento de Servicio* respond to the evolution and need to improve service, and it calls for consultations with the licensee and a tariff adjustment if the economic and financial equilibrium is disturbed (Article 9.1);

e) requires the consent of the licensee to modify the *Reglas Básicas* of the License (Article 18.2); and

f) prohibits price controls and entitles the licensee to compensation in case of departure from this rule (Article 9.8).

174. Finally, on 28 December 1992, GASA, the Initial Shareholders, MetroGAS, the *Estado Nacional* and *Gas del Estado* entered into a Share Transfer Agreement.[162] Clause 4.2.2 of this agrerement provides for the entry into force of the MetroGAS License.

* * *

175. The genesis of Argentina's privatization of *Gas del Estado* and the representations made to foreign investors at every step of the process are irreconcilable with Respondent's defense. While formally the Regulatory Framework and the MetroGAS License apply to MetroGAS, the record unequivocally shows that the entire privatization process was designed to invite the participation of foreign investors. How the investment is structured is frequently a function of regulatory requirements or fiscal considerations. This,

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[162] Exhibit J-115.

however, does not remove the focus from foreign investors as the main target of Argentina's privatization efforts.

176. It is also difficult to square the investment protection paradigm offered by the Argentina-U.K. BIT with Argentina's position that its commitments are to MetroGAS alone. BG is entitled to rely on these commitments in connection with its allegations of breach of the substantive provisions of the BIT with respect to its "Investment" in Argentina. But this is a matter for Section E below.

**2. Nature of BG's Claims**

177. Under Article 8 of the Argentina-U.K. BIT, treaty disputes with regard to an "Investment" may be submitted to arbitration.

178. As already noted, BG contended that its "Investment" for purposes of the Argentina-U.K. BIT takes the form of (i) an indirect ownership interest in GASA and MetroGAS; and (ii) certain rights. BG's Statement of Claim describes the "Investment" as follows:[163]

> 49. Since article 1(a)(ii) of the UK Treaty defines investment as *inter alia* "shares in stock" and "any other form of participation in a company, established in the territory of either of the Contracting Parties", BG's participations in the Argentine companies MetroGAS and GASA

[163] Statement of Claim, paragraphs 49 and 50

> constitute protected investments under the U.K. Treaty.
>
> 50. Moreover, BG has (i) interests in claims to money and performance under contracts entered into by MetroGAS; and (ii) benefits from the Licence granted by the Government to MetroGAS to carry out gas distribution services in Argentina. These also constitute protected investments under Article 1(a)(iii) and (v) of the UK Treaty.

179. BG has thus submitted to arbitration a dispute relating to damage to such ownership interest and rights. This is, according to BG, the dispute "*with regard to an investment*" in the instant matter. BG argued that Argentina breached the BIT with respect to the following "Investments":

a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

b) BG's rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

180. Argentina has objected to this Tribunal's jurisdiction on grounds that Argentina has not consented to the arbitration of this dispute:[164]

> *60 Observe el Tribunal que el desacuerdo planteado en el caso sub examine está referido a las disposiciones contenidas en una licencia*

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[164] *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral,* p. 23.

*otorgada para la distribución de gas natural y en el marco regulatorio respectivo. Tales desacuerdos no están vinculados con la única inversión realizada por BG y en consecuencia no habilitan la jurisdicción arbitral de conformidad con el artículo 8 del TBI. Las alegadas disputas jurídicas que puedan surgir de dicha licencia e instrumentos deberán ser sometidas, conforme se explica infra, a la jurisdicción de tribunales nacionales libremente consentidas por las partes correspondientes. La República Argentina no niega que los contratos puedan constituir inversiones protegidas. Para protegerlos, simplemente, se requiere que los contratos pertenezcan al inversor, lo que aquí no ocurre.*

*61 Conforme lo expresa LA DEMANDANTE en el párrafo 389 de la Demanda, todos los compromisos que supuestamente la República Argentina habría violentado surgen directamente de la licencia y de instrumentos que forman el marco regulatorio del gas. Por ello, debieron ser planteados en el foro pactado, que no es un tribunal del CNUDMI. LA DEMANDANTE, consciente de la prorroga de jurisdicción que libremente había pactado Metrogas, intenta confundir al Tribunal sobre la real naturaleza de sus reclamos.*

181. The fact that claims under a treaty may relate to underlying rights set out in domestic law, or in a concession, license or contract is not, in and of itself, an impediment to adjudication in the treaty forum. The Tribunal finds persuasive support for this proposition

in other investment arbitration awards relied upon by Claimant.[165] The Tribunal refers in particular to the Annulment Committee findings in *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*:[166]

> . . . where 'the fundamental basis of a claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in the contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty.

182. In *Eureko v. Poland* the tribunal followed the *Vivendi Annulment Committee* decision in upholding its authority to ". . . *consider whether the acts of which*

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[165] Exhibit JL-427 (*Enron Corp & Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2004, paragraphs 91 and 93); Exhibit JL-495 (*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paragraph 76); Exhibit JL- 435 (*Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, paragraphs 180-183).

[166] Exhibit JL-371 (*Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, paragraph 101).

*Eureko complains, whether or not also breaches of* [contract]*, constitute breaches of the treaty*".[167]

183. The Tribunal therefore has jurisdiction to determine if the measures complained of by Claimant constitute a breach of the treaty with respect to "Investments" made by BG, regardless of whether or not the same measures are in breach of the MetroGAS License.

184. Still, BG's claims are properly before this Tribunal only to the extent that BG has standing to bring them. In other words, the question is whether BG is entitled to claim that Argentina has breached the Argentina-U.K. BIT with respect to its "Investments" as follows:

a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

b) BG's alleged rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

185. The next Section of this award examines the issue of derivative claims.

### E. May BG Bring "Derivative Claims"?

186. BG argued that Argentina breached the Argentina-U.K. BIT with respect to the following BG "Investments":

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[167] Exhibit JL-471 (*Eureko B.V. v Republic of Poland*, ad hoc arbitration, Partial Award, 19 August 2005).

a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

b) BG's rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

187. The Tribunal will thus examine the derivative nature of BG's treaty claims with respect to equity (Article 1(a)(ii) of the BIT) and with respect to "Investments" that take the form set out in Article 1(a)(iii) and (v) of the BIT.

### 1. Article 1(a)(ii) of the BIT

188. Paragraph 113 of this award records Argentina's acknowledgement that BG holds an indirect shareholding interest in GASA and in MetroGAS. This interest falls squarely within the definition of "Investment" in Article 1(a)(ii) of the BIT.[168]

189. In responding to specific Tribunal questions, BG argued that Argentina dismantled the tariff regime applicable to MetroGAS and destroyed the promised economic equilibrium. This, in turn, allegedly abolished its rights to:[169]

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[168] "['I]nvestment' means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes: . . . (ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties; . . .".

[169] Post-Hearing Brief, paragraph 245.

a) ". . . tariffs sufficient for [MetroGAS] to pay back interest and capital on its debt to third parties . . ."; and

b) ". . . recover the value of its equity stake (all of the sums spent in MetroGAS on acquiring its shareholding and in growing the business through reinvested income), and a reasonable rate of return on those amounts . . ."

190. Thus articulated, BG's claims are derivative. BG does not claim that Argentina's measures were specifically directed against its shareholding in GASA and MetroGAS. BG claims instead that damage to the value of its shares was caused by (or derives from) measures adopted by Argentina which had a negative impact on the activities of MetroGAS and, hence, on the value of its shareholding in GASA and in MetroGAS.

191. Argentina objected to the jurisdiction of this Tribunal on grounds that derivative claims are proscribed by international law and by domestic corporate law.

192. In support for its position under international law, Argentina initially relied on *Barcelona Traction,*

*Light and Power Co Ltd*,[170] and it later invoked other more recent decisions, including *GAMI v Mexico*.[171]

193. The Tribunal finds the *GAMI* decision apposite and compelling as it relates generally to derivative claims, and specifically to the significance of *Barcelona Traction*.

194. GAMI, a U.S. investor, owned 14.18% of a Mexican company (GAM) in the business of producing sugar. GAM owned 5 sugar mills which were formally expropriated by the Mexican government in September of 2001.

195. Mexico did not expropriate GAM, nor did it formally seize GAMI's shares in GAM. GAMI's argument was that the formal expropriation of the sugar mills rendered its shares worthless because the mills were GAM's only productive asset.

196. The *GAMI* tribunal framed the issue of derivative shareholder claims as follows:[172]

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[170] *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral,* pp. 84 *et s.*. Exhibit JL-111 (*Barcelona Traction, Light and Power Co Ltd.*, *Belgium v Spain*, Judgment 5 February 1970, ICJ Reports 1970).

[171] *Alegato Final*, paragraph 266. Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, UNCITRAL /NAFTA, Final Award of 15 November 2004).

[172] Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, (*GAMI*), UNCITRAL /NAFTA, Final Award of 15 November 2004, paragraph 27).

> The disputing Parties have devoted considerable efforts to the issue whether GAMI is entitled to claim on account of its derivative prejudice as a shareholder. The heart of this debate is whether governmental acts or omissions that adversely affect GAM may be pleaded as breaches of NAFTA because they had the result of reducing the value of GAMI's stake in GAM.

197. The tribunal found that "[c]*hapter 11* [of the NAFTA] *does not require a claimant shareholder to be a majority or controlling owner for his investment to qualify for protection.*"[173] In its submission to the *GAMI* tribunal, the United States acknowledged that investors like GAMI were entitled to bring action under the North American Free Trade Agreement (NAFTA) on their own behalf. However, the United States argued that they may only do so with respect to damage to their own interest, and not for injuries to the corporation. Both Mexico and the United States relied on *Barcelona Traction* in support for this proposition.[174] The Tribunal disagreed:[175]

> The Tribunal . . . does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection. The ICJ itself accepted in *E.L.S.I.* [footnote omitted] that US

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[173] *Id,* paragraph 28.

[174] *Id,* paragraph 29.

[175] *Id,* paragraph 30.

> shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures *imposed on that entity*.

198. The *GAMI* tribunal found support for its findings in *Goetz v Burundi*:[176]

> *Le Tribunal observe que la jurisprudence antérieure du CIRDU ne limite pas la qualité pour agir aux seules personnes morales directement visées par les mesures litigieuses mais l'étend aux actionnaires de ces personnes, qui sont les véritables investisseurs.*

199. Like the *GAMI* tribunal, this Tribunal relied on *Vivendi* for a more explicit confirmation of the legitimacy of derivative shareholder claims:[177]

> . . . it cannot be argued that CGE did not have an "investment" in CAA from the date of conclusion of the Concession Contract, or that it was not an "investor" in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its

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[176] Exhibit JL-289 (*Antoine Goetz et consorts v République du Burundi*, ICSID Case No ARB/95/3, Award 2 September 1998, 15 *ICSID Review – Foreign Investment Law Journal* 457).

[177] Exhibit JL-371 (*Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, paragraph 50).

> investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach . . .

200. The conclusion of the tribunal's reasoning in *GAMI* is directly on point to the instant dispute:[178]

> . . . The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.

201. The Tribunal finds that no authority on the record, including *Consortium Groupement L.E.S.I. DIPENTA v. Algeria*,[179] leads to a different conclusion or presents an interpretation of *Barcelona Traction* that is inconsistent with the findings in *GAMI*.

202. But *Barcelona Traction* is inapposite to this case for other reasons as well:

a) the case does not stand for what Argentina purports - the central legal principle decided in *Barcelona Traction* is that the right of diplomatic protection of a corporate entity

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[178] Exhibit JL-447 (*GAMI,* paragraph 33).

[179] Exhibit JL-457 (*Consorzio Groupement L.E.S.I. – Dipenta v Algerian Democratic Republic*, ICSID Case No ARB/03/08, Award 10 January 2005).

should be attributed to the State of incorporation, a point of law not at issue here;

b) the ICJ specifically stated that it was not deciding whether shareholders could bring a claim for losses to their interests, since the only claim made was for losses to the enterprise;[180] and

c) even if *Barcelona Traction* were somehow relevant to the case at hand, the agreement of Argentina and the U.K., as set out in the BIT would override an international decision from 1970.

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[180] The ICJ held: ". . . The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders have an independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights . . . The Court has noted . . . that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further." Exhibit JL-108 (*Barcelona Traction, Light and Power Co Ltd* (*Belgium v Spain*), Judgment 5 February 1970, ICJ Reports 1970 paragraphs 48 and 49).

203. Under the Argentina-U.K. BIT, BG is clearly an "Investor" and its shareholding interest in GASA and MetroGAS is undoubtedly an "Investment".

204. For this reason as well Argentina's reliance on principles of domestic corporate law must fail. BG's claim is made under the Argentina-U.K. BIT. BG is an "Investor" who has made an "Investment" in Argentina within the definition of Article 1(a)(ii) of the treaty. It is further uncontroverted that BG's shares in GASA and MetroGAS are "assets" within the meaning ascribed to the term in this award pursuant to Argentine law. The meaning of the BIT is to be determined not by analogy with private law rules, but from the words of treaty itself and in the light of the purpose which it sets out to achieve.[181]

205. This Tribunal therefore has jurisdiction to hear BG's claims as they relate to its indirect shareholding in MetroGAS and GASA (Article 1(a)(ii) of the BIT).

### 2. Article 1(a)(iii) and (v) of the BIT[182]

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[181] The *Loewen* tribunal took this view in the context of a NAFTA dispute: Exhibit JL-398 (*The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, *Loewen*, ICSID Case No ARB(AF)/98/3, Award 26 June 2003, paragraph 233).

[182] "['I]nvestment' means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes: . . (iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value; . . . (v) business concessions conferred by law or

206. Under Article 1(a)(iii) and (v) of the BIT, the term "Investment" also includes:

a) claims to money which are directly related to a specific "Investment";

b) claims to performance under contract having a financial value; or

c) business concessions conferred by law or under contract.

207. BG argued that its "Investment" takes the form of:

a) ". . . *claims to money and performance under contracts entered into by MetroGAS*";[183] and

b) ". . . *benefits from the Licence granted by the Government to MetroGAS to carry out gas distribution services in Argentina.*"[184]

[Emphasis added]

208. BG's grievance is that Argentina breached the BIT causing damage to BG's "claims to money" and "claims to performance" under the MetroGAS License:[185]

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under contract, including concessions to search for, cultivate, extract or exploit natural resources."

[183] Statement of Claim, paragraph 50.

[184] *Id.*

[185] Post-Hearing Brief, paragraph 176.

> Here BG has an interest in the economic value of the Licence, i.e. the right for MetroGAS to receive a net stream of income allowing it, commercial risks aside, to recover its investment and to obtain a reasonable rate of return. This is the asset that qualifies as a "claim to money" and "a claim to contractual performance under contract having financial value" under Article 1(a)(iii) and thus as a protected investment under the Treaty. [Footnote omitted].
>
> Further, BG has an interest that the rights of MetroGAS under the Licence (that is, the basic premises of MetroGAS' tariff regime) be respected, since those rights underpin precisely the economic value of the Licence . . . BG's interest in those Licence rights is the asset that qualifies as a protected investment under Article 1(a)(v) of the Treaty.
>
> [Emphasis added]

209. Does BG own "claims to money" and "claims to performance" or other rights under the MetroGAS License? May BG put "claims to money" and "claims to performance" or assert other rights derived from the MetroGAS License before this Tribunal? One of these two questions must be answered in the affirmative in order to establish BG's *ius standi*.

210. The answer to the first question is a matter of record. BG is not a party to the MetroGAS License[186]

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[186] Counter-Memorial on Jurisdiction, paragraph 91.

and Claimant has not established that it can directly assert claims (to money, performance or otherwise) under the MetroGAS License. The question then becomes whether BG can bring those claims before this Tribunal indirectly, acting on behalf of MetroGAS.

211. Argentina correctly noted[187] that some treaties include a mechanism for foreign investors to bring claims on behalf of an entity in the territory of the host State which they own or control. One example is Article 1117 of the NAFTA:[188]

> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

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[187] *Alegato Final*, paragraph 88.

[188] Exhibit J-140.

*Appendix F*

212. Article 25(2)(b) of the Washington Convention addresses standing from the perspective of the entity in the territory of the host State:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who 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 as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

> (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 <u>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</u>.
>
> . . .
>
> [Emphasis added]

213. Under both the NAFTA and ICSID treaties the "investor" must own or control the local entity.

214. The Argentina-U.K. BIT is of little assistance to BG. It does not provide a mechanism for BG to bring claims derived from the License on behalf of MetroGAS. "*Disputes with regard to an investment*" may only include "*an investor of one Contracting Party and the other Contracting Party*."[189] BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert other rights, which it is not entitled to exercise directly. There is no

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[189] Article 8 of the Argentina-U.K. BIT.

authority on the record, including *CMS*,[190] identifying the source of the Tribunal's authority to depart from Article 8 of the BIT.

215. This finding is consistent with BG's analysis of its own alleged damages. BG's expert did not provide a valuation of damage to BG's rights in the MetroGAS License independent of the loss of value of its shareholding interest in GASA and MetroGAS. The theory, of course, is that any damage to MetroGAS will reflect on the value of BG's equity ownership in GASA and MetroGAS. This finding does not disturb the end result.

### 3. Conclusion

216. This Tribunal has jurisdiction over BG's claims of breach of the Argentina-U.K. BIT relating to its shareholding interest in GASA and MetroGAS.

217. BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert any other right, derived from the MetroGAS License.

218. These determinations and the Tribunal's finding in paragraph 183 of the award are also dispositive of Argentina's contention that domestic courts have exclusive jurisdiction over BG's claims. Any rights which MetroGAS might have under the jurisdictional clause of the MetroGAS License are not an obstacle to

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[190] Exhibit JL-399 (*CMS Gas Transmission Company v The Republic of Argentina,* ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction 17 July 2003.)

the jurisdiction of this Tribunal over the claims of BG as set out in paragraph 216 above.

**F. Are Measures of General Application Actionable under the Argentina-U.K. BIT?**

219. Argentina took the position in this arbitration that measures of general application are not actionable under the Argentina-U.K. BIT.

> *Para poder solicitar la aplicación de un tratado de protección de inversiones, las medidas que se alegan perjudiciales deben estar dirigidas específicamente contra aquéllas. Medidas universales que están destinadas a impactar sobre inversiones y sobre no inversiones, sobre nacionales y sobre extranjeros, no constituyen materia para ser consideradas por este Tribunal. Una atribución semejante importaría hacer caer bajo la competencia de este Tribunal una política pública y no un conflicto legal.*
>
> [Emphasis added]

220. Respondent found support for this position in *Methanex Corporation v. United States of America*,[191] a matter under Chapter 11 of the NAFTA (*Methanex I*).

221. Objecting to Argentina's submission, BG contended that it does not complain of economic conditions in Argentina, nor does it take issue with the government's general economic policies or measures.

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[191] Exhibit JL-372 (*Methanex Corporation v. United States of America*, Partial Award, 7 August 2002)

Rather, so BG, its claims relate to the measures that directly and specifically violate concrete commitments that Argentina made to BG as a foreign investor in the privatized gas industry and that the measures infringed specific protections that Argentina owes to UK investors under the BIT.[192]

222. As regards *Methanex I*, BG submitted that the case was based on NAFTA, not on a bilateral investment treaty, and that the jurisdictional threshold set by Article 1101(1) of the NAFTA requires a stronger connection between the measures complained of and the investment than that provided by Article 8 of the BIT. BG contended that in any event, the findings support BG's case rather than Argentina's. Referring in this connection to the decision of the tribunal in *Pope & Talbot v Canada*, BG submitted that the measures need not be primarily directed at the investment as the measures complained of effectively repudiated the specific and fundamental guarantees deliberately provided by Argentina to entice BG's investment and on which BG relied in making that investment.[193]

223. Indeed, the Tribunal notes that the Argentina-U.K. BIT does not include language like the text at issue in *Methanex I* (*i.e.*, Article 1101 of the NAFTA) and the instant dispute is not a NAFTA dispute. However, this decision merits examination as it was heavily relied upon by Argentina.

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[192] Counter-Memorial on Jurisdiction, paragraph 61.

[193] Counter-Memorial on Jurisdiction, paragraphs 72-75.

224. At issue in *Methanex* were measures of general application enacted by the State of California to ban the sale and use of methyl tertiary-butyl ether, or MTBE, a gasoline additive. On 7 August 2002 the *Methanex I* tribunal rendered a partial award addressing whether measures of general application are actionable under the NAFTA. Concretely, the *Methanex I* tribunal interpreted the following provision of the NAFTA:

> Article 1101: Scope and Coverage
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.
>
> . . .
>
> [Emphasis added]

225. Argentina finds support in two *Methanex I* assumptions and findings, (i) that Article 1101(1) creates a restrictive jurisdictional threshold, and (ii) that the "relating to" language of Article 1101(1) of the NAFTA requires some "*legally significant connection*" beyond effect between the complaining

investor and the measures that are subject to complaint:[194]

> We decide that the phrase "relating to " in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them, as the USA contends. Pursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention, we base that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA's Chapter 11. . . .

226. However, the Tribunal is not convinced that the decision in *Methanex I* is of any support to Argentina's objections. First, *Methanex I* was not about the rights of an investor (BG) that is a shareholder injured by measures that also injure the local companies (GASA and MetroGAS) in which it invested. Rather, *Methanex I* had to do with the rights of a producer of an input (methanol) of a product (MTBE), when that final product is banned or restricted.

227. Second, for the reasons set out below, the Tribunal does not believe that *Methanex I* provides a correct interpretation of the NAFTA.

228. The *Methanex I* tribunal viewed Article 1101(1) of the NAFTA as a jurisdictional threshold for an

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[194] Exhibit JL-372, *cit*, paragraph 147.

investor seeking to bring an investor-state claim, as opposed to a part of a general "scope and coverage" provision meant to introduce Chapter 11. *Methanex I* turns Article 1101 into a provision that makes the scope and coverage of Chapter 11 vary according to who is the complaining party, an interpretation at odds with the text and context of Article 1101 and the NAFTA.

229. Article 1101(1) is similar to introductory provisions in a number of other Chapters of NAFTA. Like those other introductory provisions, Article 1101 (1) sets out the scope of obligations under Chapter 11, including the obligations of Canada, Mexico and the United States, as well as the obligations of each government to all covered investors and their investments.

230. The context of Article 1101(1), as well as the object and purpose of the NAFTA, demonstrate that the interpretation of Article 1101(1) in *Methanex I* cannot be sustained. Several Chapters of NAFTA have exceptions to obligations that would simply be unnecessary if measures that did not "relate to" other NAFTA investors or their investments were outside the scope of the obligations. These exceptions would also be unnecessary if some "*legally relevant connection*" beyond or in addition to effect were necessary for a measure to be within the scope of the obligations. For instance, the following NAFTA provisions would be pointless under the interpretation of NAFTA Article 1101(1) in *Methanex I*:

a) Article 1101(4), preserving the right of the State to perform basic social services such as law enforcement and public education;[195]

b) Articles 1109(4) and (5);[196]

c) Mexico's energy reservations in Annex III and other exceptions in Annexes VI and VII of the NAFTA;[197]

d) the reservations listed by Canada, Mexico and the United States in Annexes V and VI;[198]

e) Article 1401(3) allowing NAFTA Parties to exclusively conduct or provide for public pensions plans and social security systems;

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[195] Since the exercise of these functions by the state does not "relate" or "refer" to foreign investors or indeed have any other connection other than effect on foreign investors or their investments.

[196] The "equitable, non-discriminatory and good faith application of laws relating to . . . bankruptcy" and the other laws mentioned in those provisions would not require exemption from the transfers obligations, since such laws do not refer to foreign investors or their investments nor have a relationship beyond effect.

[197] Because the non-discriminatory measures of general application listed there do not "relate or refer to" any investor or investment, and they would thus *ipso iure* escape the coverage of Chapter 11 under *Methanex I*.

[198] Because none would be within the scope of the NAFTA if "relating to" meant "referring to" or some other relationship beyond the effect of the measures on foreign investors or their investments.

f) Articles 1405(5), (6), and (7), concerning equal competitive opportunities;[199]

g) Article 1411 on transparency;[200] and

h) the reservations laboriously listed by the three countries in Annex VII.[201]

231. Applied to the instant matter, *Methanex I* would discharge Argentina of its BIT obligations simply because its measures do not, on their face, target any investor, and it would render the promises used to attract foreign investment meaningless.

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[199] Paragraphs 5, 6 and 7 establish an "equal competitive opportunities" standard to deal with the problem that applying exactly the same measures to all investors and institutions, domestic or foreign, may sometimes result in disparities of treatment (a situation commonly referred to as *de facto* denial of national treatment). Under the *Methanex I* theory, measures that were non-discriminatory on their face but had discriminatory effects would be outside the scope of the Chapter, and there would be no need to have special rules for assessing their legitimacy.

[200] This provision would have little meaning if it would only apply to measures that "relate to " or "refer to" foreign investors. The provision clearly is intended to be a comprehensive obligation, and not only limited by a strained interpretation of Article 1101(1).

[201] For example, the United States has a reservation in Annex VII related to financial services which applies generally to offers on commodity futures and options, thereby affecting both domestic and foreign investors/investments alike. Why would it be necessary for the United States to take an exception to the obligations of the treaty if this is a measure of general application.

232. Finally and tellingly, Article 8(1) of the Argentina-U.K. BIT refutes Argentina's position that not all measures come under its application. This provision bans not just direct seizures of an investment, but also ". . . *measures having an effect equivalent to nationalization or expropriation*". If accepted, the *Methanex I* interpretation would largely nullify the prohibition of indirect expropriation and measures tantamount to expropriation.

233. The Tribunal finds no basis for adopting an interpretation that would render the substantive rights and obligations of the Argentina-U.K. BIT ineffective.

**G. Is the Renegotiation Process an Obstacle to this Tribunal's Jurisdiction?**

234. Argentina's position is quite simple: this Tribunal is precluded from adjudicating BG's claims because the renegotiation process contemplated by the emergency legislation may yield a successful outcome and a new license:[202]

> *157. El corolario de las medidas tomadas por la UNIREN en acuerdo con las Licenciatarias es que resulta inminente la aprobación final de la renegociación de la licencia de Metrogas, garantizándose que la relación contractual seguirá adelante por el prolongado lapso restante.*

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[202] *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral,* paragraphs 157 and 158.

> *158. Mal puede entonces hablarse de expropiación, y mucho menos, de expropiación* de *una inversión, cuando de lo que se trata es de una improcedente deducción de la controversia arbitral, en pleno proceso de renegociación de los contratos.*

235. More precisely, Argentina took the position that BG should be stripped of standing because MetroGAS might accept a new deal:[203]

> *159. . . . la inminente suscripción de los Acuerdos referenciados con la licenciataria Metrogas, pone en evidencia la total ausencia de legitimación* de *LA DEMANDANTE para incoar el presente arbitraje, pues ha quedado sin sustento su reclamo, y por ende las alegadas pérdidas que dice haber sufrido, todo lo que se enmarca en una desafortunada decisión empresaria, debiendo asumir el riesgo y cargar exclusivamente con las consecuencias de su decisión.*

236. In opposition, BG contended that the renegotiation process is irrelevant to jurisdiction and, in any event, that Argentina's objection is misplaced, given that the renegotiation process relates to MetroGAS, not to BG. BG has never participated in the renegotiation process and its claims under the BIT are entirely independent of that process. Further, BG submitted that Argentina is trying to use this process

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[203] *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral,* paragraph 159.

to hide the devastating impact of the measures it took.[204]

237. The Tribunal recalls here Argentina's measures adopted during the summer of 2002, attempting to preclude investors from seeking redress in arbitration or before local courts.[205] Coupled with the finding of lack of jurisdiction now sought by Argentina, these measures would yield the following result:

a) only MetroGAS would have standing to appear in the renegotiation process;

b) the exclusive forum to bring grievances would be UNIREN (to the exclusion of the courts and arbitration under the Argentina-U.K. BIT);

c) the licensees and their foreign affiliates could not expect to enforce the original terms of the Regulatory Framework (including their license); and

d) any substantive right under the BIT would be lost.

238. Argentina, however, has offered no authority and no plausible interpretation of the BIT that would support a result so inconsistent with the object and purpose of the treaty, and so destructive of its representations to BG.

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[204] Counter-Memorial on Jurisdiction, paragraphs 77 and 78.

[205] Resolution 308/02 (Exhibit J-347) and Decree 1090/02 (Exhibit J-334).

239. More generally, Argentina's argument that BG's claims are subject to the renegotiation process is irrelevant to a determination as to this Tribunal's jurisdiction. The claims are admissible and properly before the Tribunal as set out in Sections C to F above, and any determination as to the merits of BG's claims is a matter of substance. BG's claims under the treaty are independent of the renegotiation process. BG may at any time withdraw them, or even forego enforcement of an award, if the renegotiation were to yield a result to its satisfaction. The *CMS* tribunal properly addressed this issue:[206]

> It is not for the tribunal to rule on the perspectives of the renegotiation process or on what TGN might do in respect of its shareholders, as these are matters between Argentina and TGN or between TGN and its shareholders.

240. Argentina's jurisdictional objection as it relates to the renegotiation process is accordingly dismissed.

### H. Conclusion

241. In its examination of BG's claims for breach of Articles 5 and 2.2 of the Argentina-U.K. BIT the Tribunal shall consider Argentina's representations and commitments as set out in Section D above.

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[206] Exhibit JL-399 (*CMS Gas Transmission Company v The Republic of Argentina,* ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction 17 July 2003, paragraph 86).

242. Subject to paragraph 217 of this award, the Tribunal has jurisdiction with respect to all of BG's claims which are admissible in this arbitration.

243. BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert in this arbitration any other right, derived from the MetroGAS License.

**VII. Article 5 of the BIT (Expropriation)**

244. BG contended that Argentina has breached Article 5 of the BIT as it allegedly expropriated BG's investments without compensation. BG's primary case on expropriation is that Argentina has expropriated its shareholding in MetroGAS through the substantial destruction of the value of that shareholding in breach of commitments in the Regulatory Framework. BG's alternative case is that Argentina has expropriated its rights under or related to the Licence, *i.e.*, BG's interest over the economic value of the Licence and BG's interest that the rights of MetroGAS under the Licence be respected. Argentina objected to BG's contention and submitted that there has been no violation of Article 5 of the BIT.

245. Article 5 of the BIT provides as follows:

> (1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except of a public purpose

> related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.
>
> (2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituent under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, the provisions of paragraph (1) of this Article shall apply.

246. The Tribunal summarizes in the following paragraphs the Parties' contention with regard to BG's expropriation claim.

*Appendix F*

## A. Summary of Parties' Contentions

### 1. BG's Position

247. As to BG's primary case, the substantial destruction of the value of BG's shareholding in MetroGAS, BG contended that it is based on the well-established principle that a substantial deprivation of the value and economic benefit of an investment even without any alteration of formal ownership rights qualifies as an expropriation. In this connection, BG referred to the Wood-Collins Report, demonstrating that the value of BG's investment in MetroGAS has suffered a reduction of 99% in value due to the measures adopted by Argentina, described in Section D of Chapter III above.[207]

248. BG contended that, from a legal standpoint, a finding of expropriation does not require a demonstration that the host State has benefited from the taking. In any event, so argued BG, Argentina has admitted that its measures had a redistributive effect, transferring wealth to which BG was entitled. Further, BG submitted that the purpose for the adoption of the infringing measures is irrelevant: under Article 5(1) of the BIT compensation is due even where the expropriation is *"for a purpose related to internal needs"*.[208]

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[207] Post-Hearing Brief, paragraphs 223-225.

[208] Post-Hearing Brief, paragraph 226.

249. In addition, BG submitted that Argentina permanently eliminated the tariff regime guaranteed under the Regulatory Framework, since there is no prospect that BG will be reinstated to the position it enjoyed before Argentina adopted the measures.[209]

250. BG contended that Argentina disregards a wealth of international case law holding that regulatory and/ or police power measures constitute expropriation if contrary to specific commitments and assurances granted to investors. This is of particular relevance in the case of indirect expropriation where the investor retains formal title but the value of the rights attached to such title is diminished or destroyed. The measures can be said to, not only affect the value of the business, but effectively "deprive" the value of the business.[210]

251. Under BG's alternative case, BG submitted that its rights under or related to the Licence are assets that qualify as a protected investment under Article 1(a) of the BIT, and in particular sub-paragraphs (iii) and (v) of this provision. BG contended that Argentina's abolition of the right to economic equilibrium and the tariff regime underpinning this principle constitutes an expropriation of BG's rights under or related to the Licence.[211]

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[209] Post-Hearing Brief, paragraph 227.

[210] Post-Hearing Brief, paragraphs 228-237.

[211] Post-Hearing Brief, paragraphs 238-241.

**2. Argentina's Position**

252. Argentina denied that any expropriation under Article 5 of the BIT has occurred. Argentina contended that the reasonableness, proportionality and the purpose of the emergency measures need to be taken into account to ascertain whether there has been an expropriation under the BIT.[212]

253. In contending that only an indirect or *de facto* expropriation may be of relevance to the present dispute, Argentina submitted that the wording of Article 5 of the BIT makes it apparent that the measures must at least produce the same effect as an expropriation.[213]

254. Argentina further indicated that MetroGAS recorded a net income of US$99.3 million during the first semester of 2006. Argentina also argued that the value of MetroGAS shares has increased since the crisis and that this increase is consistent with the term of 35 years for which the MetroGAS License was stipulated.[214]

255. In emphasizing the wide scope of the regulatory and police powers of a State, Argentina insisted that a claim for indirect expropriation calls for a test of proportionality, balancing the lawfulness and significance of purpose of the measures, including

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[212] *Alegato Final*, paragraph 313.

[213] *Alegato Final*, paragraphs 317-319.

[214] *Alegato Final*, paragraphs 321-323; 428.

whether such purpose could have reasonably been achieved in a less detrimental manner, against the damage suffered as a consequence of the measures.[215]

256. As to BG's expectations under the Regulatory Framework, Argentina contended that the applicable Regulatory Framework is the same as that approved when BG decided to invest, adapted to the new macroeconomic context resulting from the crisis. In analyzing the Regulatory Framework, Argentina contended that contrary to BG's allegations, Argentina had not amended specific regulations concerning the gas industry, but has issued a general rule applicable to the society as a whole. According to the Emergency Law, the goal was *"ordenar el contexto macroeconómico a partir de la crisis, manteniendo las mismas condiciones de previsibilidad para la inversión."* Further, Argentina drew attention to Sections 18.2 and 18.3 of the MetroGAS License, in which it is held, *inter alia,* that any provisions of the License may be held invalid and unenforceable pursuant to a judgment of the local courts. Thus, the Emergency Law and the provisions adopted as a consequence thereof could not be in breach of the BIT.[216]

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[215] *Alegato Final*, paragraphs 327-329.

[216] *Alegato Final*, paragraphs 331-336; 390-398. For Section 18.2 of the MetroGAS Licence, see paragraph 48 above. Section 18.3 of the MetroGAS License provides that: *"Si alguna disposición de esta Licencia fuera declarada inválida o inexigible por sentencia firme del tribunal competente, la validez y exigibilidad de las restantes disposiciones de esta Licencia no serán afectadas. Cada*

257. Further, Argentina submitted that BG's claim for expropriation is inadmissible on grounds of unjust enrichment as, between 1992 and 2001, MetroGAS collected from users an overcharge amounting to between 6% and 7% as prevention of an economic emergency. This means that loss of profitability was anticipated with the payment of the country risk overcharge.[217]

**B. The Tribunal's Findings**

258. In determining whether Argentina has violated Article 5 of the BIT by expropriating BG's investment, the Tribunal has to define what constitutes expropriation, as it is not defined in the BIT.

259. For the purpose of the present dispute, direct expropriation is of no relevance, since it is *"understood as the forcible* appropriation *by the State of the tangible or intangible property of individuals by means of administrative or legislative action"*.[218] This is not what has happened in this case because Argentina has not appropriated BG's investment. Rather, the Tribunal has to consider whether Argentina has adopted *"measures having effect equivalent to . . . expropriation"*,

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*estipulación de la Licencia será válida y exigible en la mayor medida permitida por la ley aplicable."*

[217] *Alegato Final*, paragraphs 369-370.

[218] *LG&E Energy Corpl, LG&E Capital Corp., LG&E Internacional Inc. V. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 187.

as provided in Article 5(1) of the BIT, constituting indirect expropriation.[219]

260. Tribunals have defined indirect expropriation as measures that have the effect of "interfering" with or "neutralizing" property.

261. This standard appears in the Iran-U.S. Claims Tribunal's *Starrett Housing Corporation*:[220]

> [I]t is recognized in international law that the measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

262. Subsequent tribunals, including *Impregilo*, *Lauder*, and *Pope & Talbot*, have likewise applied this standard in determining whether an investor's property has been indirectly expropriated.

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[219] For a comprehensive summary of cases and customary international law in general with respect to the definition of expropriation see JL-405 (*Fireman's Fund Insurance Company v The United Mexican States*, NAFTA ICSID Case No. ARB(AF)/02/01, Award dated 17 July 2006, Paragraph 176).

[220] JL-157 (*Starrett Housing Corporation v. Islamic Republic of Iran,* Case No 24, Interlocutory Award No ITL 32-24-1, 19 December 1983, 4 Iran-US CTR 122, p. 154).

*Appendix F*

263. The *Impregilo* Tribunal provided that:[221]

> . . . all the key decisions relating to indirect expropriation mention the 'interference' of the Host State in the normal exercise, by the investor, of its economic rights.
>
> Moreover, the effect of the measures taken must be of such importance that those measures can be considered as having an effect equivalent to expropriation.

264. The *Lauder* Tribunal held that ". . . *indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property.*"[222]

265. Finally, *Pope & Talbot* held that indirect expropriation required consideration of ". . . *whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from its owner.*"[223]

266. Most recently, the tribunal in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Corp. v. The Argentine Republic* summarized as follows the

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[221] JL-460 (*Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision of the Tribunal on Objections to Jurisdiction, 22 April 2005, paragraphs 278 and 279).

[222] JL-351 (*Ronald S Lauder v Czech Republic*, *Lauder*, UNCITRAL Arbitration, Final Award, 3 September 2001, paragraph 200).

[223] JL/326 (*Pope & Talbot Inc v Government of Canada*, Interim Award 26 June 2000, paragraph 100).

requirements for establishing indirect expropriation under the Argentina-U.S. BIT as follows:[224]

> Generally, the expression "equivalent to expropriation" or "tantamount to expropriation" found in most bilateral treaties, may refer both, to the so-called "creeping expropriation" and to the de facto expropriation. Their common point rests in the fact that the host State's actions or conduct do not involve "overt taking" but the taking occurs when governmental measures have "effectively neutralize[d] the benefit of property of the foreign owner." Ownership or enjoyment can be said to be "neutralized" where a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment. As to the differences, it is usual to say that indirect expropriation may show itself in a gradual or growing form –creeping expropriation— or through a sole and unique action, or through actions being quite close in time or simultaneous –de facto expropriation.

267. Thus, the question with regard to BG's primary case is whether the measures adopted by Argentina, as described in Chapter III.D above, have had the effect of

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[224] *LG&E Energy Corpl, LG&E Capital Corp., LG&E Internacional Inc. V. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 188; *see* also Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic,* UNCITRAL, Partial Award dated 13 September 2001, paragraph 604).

"interfering with" or "neutralizing" the benefit of BG's property, specifically, of BG's shareholding in MetroGAS.

268. The Tribunal notes that a State may exercise its sovereign power in issuing regulatory measures affecting private property for the benefit of the public welfare. Compensation for expropriation is required if the measure adopted by the State is *"irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that ". . . any form of exploitation thereof. . ." has disappeared. . . ."*[225] Conversely, a measure does not qualify as equivalent to expropriation if the *"investment continues to operate, even if profits are diminished"*.[226]

269. Having considered the foregoing, the Tribunal concludes that Argentina has not violated Article 5 of the BIT, as it did not expropriate BG's investment.

270. Specifically, the impact of Argentina's measures has not been permanent on the value of BG's shareholding in MetroGAS. It might well be that the measures adopted by Argentina were severe causing a fluctuation of BG's investment during the crisis. However, MetroGAS' business never halted, continues to operate, and has an asset base which is recovering.

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[225] Exhibit JL-397 (*TECMED SA v. The United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraph 116).

[226] *LG&E* (paragraph 191); *see also Pope & Talbot* (paragraphs 101-102).

271. Further, in reliance on the set of requirements set forth in *Pope & Talbot*, the Tribunal does not see that a substantial deprivation of BG's shareholding in MetroGAS has occurred, depriving BG of the control of the investment in MetroGAS or managing the day-to-day operations of MetroGAS. Nor have the measures caused the arrest and detention of MetroGAS officials or employees. Nor has Argentina interfered in the administration of the company, impeding the distribution of dividends to MetroGAS' shareholders, or interfering in the appointment of officials and managers.

272. It follows that BG's alternative case in relation to BG's rights under or related to the License must fail as well, given that the Tribunal does not find that the measures adopted by Argentina caused a permanent, severe deprivation of BG's rights with regard to its investment.

**VIII. Article 2.2 of the BIT (Promotion and Protection of Investment)**

273. In addition to expropriation, BG argued that Argentina has breached the standards of treatment provided in 2.2 of the BIT. Argentina objected to BG's contention.

274. Article 2.2 of the BIT provides as follows:

> Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting

> Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

## A. Fair and Equitable Treatment

275. What follows is a summary of the numerous legal and factual contentions of BG and Argentina as presented in the Parties' written and oral submissions with respect to Article 2.2 of the BIT.

### 1. Summary of Parties' Contentions

#### a. BG's Position

276. BG contended that Argentina treated BG's investment unfairly and inequitably in failing to provide BG with a stable and predictable investment environment in accordance with its legitimate and reasonable expectations.

277. Referring to the origin of the standard of fair and equitable treatment and its relationship with the international minimum standard of treatment, BG contended that fair and equitable treatment is an overriding general duty which encompasses other standards and certainly the international minimum standard for the treatment of aliens.

278. In reliance upon recent case law, BG contended that the minimum standard of treatment, also as

interpreted by the NAFTA Free Trade Commission in relation to Article 1105(1) of the NAFTA, equating fair and equitable treatment with the customary international law minimum standard of treatment of aliens, has evolved such that it is an autonomous treaty concept to be given its plain meaning, and thus not simply synonymous with the customary international minimum standard. In BG's view, case law has consistently held that fundamentally altering the investment framework against legitimate investor expectations is by definition unfair and inequitable.[227]

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[227] BG's Post-Hearing Brief, paragraphs 258-269 referring to Exhibit JL-495 (*Azurix Corp. v. Argentina,* ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 372); Exhibit JL-472 (*Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova*, Award dated 22 September 2005, paragraph 4.2.4); Exhibit JL-471 (*Eureko B.V. v. Republic of Poland*, Partial Award dated 19 August 2005, paragraph 232); Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, UNCITRAL /NAFTA, Final Award of 15 November 2004, paragraph 91); Exhibit JL-431 (*MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, Award dated 25 May 2004, paragraph 114); Exhibit JL-429 (*Waste Management, Inc. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/3, Final Award dated 30 April 2004, paragraph 98); Exhibit JL-397 (*TECMED S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraph 154); Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic,* UNCITRAL Partial Award dated 13 September 2001, paragraph 611); Exhibit JL-350 (*Metalcad Corporation v. The United Mexican States,* NAFTA ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000, paragraph 99); Exhibit JL-345 (*Pope & Talbot v. Canada,* NAFTA UNCITRAL, Award dated 10 April 2001, paragraph 111).

279. To the extent that Argentina relied upon its well-intentioned measures to face a state of emergency, BG contended that Argentina ignores that the standard of fair and equitable treatment is an objective standard and that it is not necessary to establish bad faith, as recently held in *Azurix Corp. v. Argentina.*[228]

280. With respect to the factual scenario, BG submitted that Argentina lured investors like BG into investing in its recently privatized gas industry by representing to them that the investment would be governed by a stable tariff regime, which would guarantee them a reasonable real-dollar income.

281. BG contended that the tariff regime owed its promised stability to the following main features:

a) that tariffs would provide efficient and prudent operators with sufficient revenue to cover all reasonable costs, including the cost of capital, taxes, amortization and a "reasonable rate of return" (the "economic-financial equilibrium" or the principle of "recovery of costs");

b) that tariffs would be calculated in U.S. dollars and converted to pesos for billing purposes at the applicable exchange rate;

c) that tariffs would be adjusted every six months in accordance with the US PPI;

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[228] BG's Post-Hearing Brief, paragraph 271 referring to Exhibit JL-495, *cit*, paragraph 372.

d) that tariffs would be subject to the Five-Year Review and the Extraordinary Review, which would ensure the continued economic-financial equilibrium of the License;

e) that tariffs would not be frozen or subject to price controls without compensation; and

f) that the tariff regime would not be changed without the Licensees' consent.[229]

282. BG asserted that after enticing BG to invest, Argentina took a series of damaging measures that destroyed the key guarantees of the Regulatory Framework under which BG reasonably expected to operate. These measures were at odds with the stability and predictability of the investment framework required by the principle of fair and equitable treatment. In summary, BG submitted that since August 2000 MetroGAS has operated in an unpredictable and, to a large extent, incomprehensible investment environment, because the government of Argentina:

a) suspended the US PPI adjustment of tariffs, by way of an injunction issued in August 2000 and subsequent decisions of ENARGAS;

b) flatly abolished the calculation of MetroGAS' tariffs in dollars, as the Convertibility Law of 2002 converted the July 1999 dollar tariffs into pesos at the artificial rate of one to one and

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[229] Statement of Claim, paragraphs 12 and 433; Post-Hearing Brief, paragraph 5.

definitely abolished the adjustment of those tariffs in accordance with the US PPI;

c) effectively abolished the tariff review mechanisms established under the Regulatory Framework. Both the Five-Year Review and the Extraordinary Review, would have required Argentina to adjust those peso tariffs to cover MetroGAS' drastically increased costs in order to assure its reasonable rate of return; and

d) established a little more than fictitious renegotiation process, which has produced no concrete serious offer to re-establish the guarantees of the tariff regime, or alleviate the imbalance of the License.[230]

**b. Argentina's Position**

283. Argentina objected to the violation of the standard of fair and equitable treatment under Article 2.2 of the BIT and contended that the impact of the collapse on BG's business is related to a general crisis in which the measures adopted were aimed at maintaining the sustainability of the economy in general, and of the public service companies in particular.

284. Argentina submitted that the fair and equitable treatment is not an independent standard and it argued that this standard only requires treating investors in accordance with the international

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[230] Statement of Claim, paragraphs 440-442.

minimum standard. Argentina criticized that BG's broad interpretation turns the fair and equitable treatment standard into a strict liability standard with negative consequence for both the States and international law. Argentina relied on certain NAFTA and ICSID decisions and suggested that this is also the position held by the United States when approving their several BIT models.[231]

285. Referring to Article 8.4 of the BIT, Argentina stated that the Parties expressly stipulated the applicability of the law of the State party to the controversy, in this case, the law of the Argentine Republic. Therefore, the Tribunal must take into account the determination of the powers of the State to issue measures tending to protect their public policy, and the acknowledgment of any such powers on the basis of the rules contained in the BIT. In Argentina's view, the well-intended measures taken by Argentina were reasonable and justified in terms of the macro-economic context in which they were adopted to face

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[231] *Memorial de Contestación*, paragraphs 338 *et seq*.; *Alegato Final*, paragraphs 430-442 referring to Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States,* NAFTA UNCITRAL, Award dated 26 January 2006); Exhibit JL-347 (*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia,* ICSID Case No. ARB/99/02, Award dated 25 June 2001); Exhibit JL-314 (*Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United Mexican States,* NAFTA ICSID Case No. ARB(AF)/97/2, Award dated 1 November 1999); Exhibit JL-329 (*SD Myers, Inc. v. Government of Canada,* NAFTA UNCITRAL, First Partial Award dated 13 November 2000); Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004).

the state of emergency. Thus, it must be borne in mind that under international law, the fair and equitable treatment standard must be applied differently in normal circumstances and under an emergency situation.[232]

286. In Argentina's view the Regulatory Framework has not been subject to radical change and it has at all times been honored. Contrary to BG's intention, Argentina held that the Regulatory Framework offers no guarantees, including the alleged guarantee to dollar denominated tariffs. Further, BG may not claim a right to annual profitability for 35 years, plus amortizations or short-term profits, as in cases of financial investments, since BG made an investment in public service assets. It has to be noted that the impact of the collapse on BG's business is related to a general crisis in which the measures adopted were aimed at maintaining the sustainability of the economy in which public service companies operate.[233]

287. As to BG's submission that States are to maintain stable investment environments in accordance with the investor's legitimate expectations, Argentina submitted that the Parties did not include a "stabilization clause" in the BIT. Therefore, it is inadmissible for BG to try to achieve the same effect, as it would seem to imply that the State cannot modify the provisions on the basis upon which the investment was made. Emphasizing that the Emergency Law was

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[232] *Alegato Final*, paragraphs 444-450.

[233] *Alegato Final*, paragraphs 455-465.

grounded, Argentina asserted that even if BG's interpretation of the standard of fair and equitable treatment were to follow, its claim ought to be dismissed nonetheless.[234]

288. In summary, Argentina submitted that the program which has been applied since 2002 had the following priorities:

a) initiating a path towards the recovery of economic activities;

b) immediately handling the urgent social situation brought about by the economic depression;

c) preventing the collapse of the financial system;

d) precluding the dilution of saving deposits frozen within the financial system;

e) re-organizing the Argentine, provincial and municipal financial systems;

f) facilitating the performance of such contracts as may have been affected by the crisis, precluding the unjust enrichment of certain groups and the resulting poverty of others; and

g) normalizing financial relations with the rest of the world and with multilateral credit organizations affected by the default on public debt.[235]

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[234] *Alegato Final*, paragraphs 471-474.

[235] *Alegato Final*, paragraph 466.

### 2. The Tribunal's Findings

289. The Tribunal must determine whether the measures adopted by Argentina and described in Chapter III.D above are in breach of the standard established under the first sentence of Article 2.2 of the BIT:

> Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party.

290. The Parties raised the issue of the relationship between the undefined concept of fair and equitable treatment in the BIT and the international minimum standard under general principles of international law. More precisely, BG argued that fair and equitable treatment in the Argentina-U.K. BIT is an overriding general duty which encompasses other standards - and certainly the international minimum standard. Conversely, Argentina took the position that the fair and equitable standard of Article 2.2 of the BIT affords no protection in addition to the international minimum standard. Thus, at the very least, there is no dispute between the Parties that a breach of the international minimum standard automatically yields a violation of the obligation to accord fair and equitable treatment under the Argentina-U.K. BIT.

291. For the reasons set out below, this Tribunal has concluded that the measures adopted by Argentina fall below the international minimum standard and it is consequently not necessary for this award to examine

whether the Argentina-U.K. BIT provides a more generous independent standard of protection.

292. The Tribunal's analysis starts with the standard of fair and equitable treatment as aptly articulated in *Waste Management II* - drawing from the *SD Myers, Mondev, ADF* and *Loewen* decisions:[236]

> . . . the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.

293. This point of departure is particularly fitting as all of these NAFTA tribunals were under an obligation to consider that the concept of fair and equitable treatment "*. . . does not require treatment in addition to or beyond that which is required by the customary*

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[236] Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, paragraph 98).

*international law minimum standard of treatment of aliens.*"[237]

294. But *Waste Management II* is apposite to the instant for one more reason: its unambiguous statement that commitments to the investor are relevant to the application of the minimum standard of protection under international law:

> In applying [the] standard it is relevant that treatment is in breach of representations made by the host state which were reasonably relied on by the claimant.

295. As illustrated by *Generation Ukraine v. Ukraine*, this principle is also recognized in the context of litigation under bilateral investment treaties:[238]

> . . . the protection of [legitimate expectations] is a major concern of the minimum standards of treatment contained in bilateral investment treaties.

296. And as illustrated by *Revere Copper and Brass, Inc. v. Overseas Private-Investment Corp.*, the

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[237] *See* Notes of Interpretation issued by the NAFTA Free Trade Commission in 31 July 2001.

[238] Exhibit JL-407 (*Generation Ukraine, Inc. v. Ukraine,* ICSID Case No. ARB/00/9, Award dated 16 September 2003, paragraph 20.37).

importance of assurances given to investors predates the BIT generation:[239]

> We regard these principles as particularly applicable where the questions is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.

297. In this connection, the tribunal in *LG&E* summarized the nature of the investor's expectations as follows:[240]

> It can be said that the investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law . . .

298. The duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides

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[239] Exhibit JL-135 (*Revere Copper and Brass, Inc v Overseas Private - Investment Corp.* award of 24 August 1978, 56 *International Law Reports* 258, at 1331).

[240] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 130).

to invest. This does not imply a freezing of the legal system, as suggested by Argentina. Rather, in order to adapt to changing economic, political and legal circumstances the State's regulatory power still remains in place. As previously held by tribunals addressing similar considerations, ". . . *the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.*"[241]

299. Similarly, the tribunal in *CMS* concluded that:[242]

> 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.

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[241] *Saluka Investments v. Czech Republic* (UNCITRAL Partial Award dated 17 March 2006, paragraph 304); see also Exhibit JL-374 (*Marvin Feldman v. The United Mexican States,* NAFTA ICSID Case No. ARB(AF)/99/1 Award dated 16 December 2002, paragraph 112): "[g]overnments, 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 certain activities less profitable or even uneconomic to continue."

[242] Exhibit JL-464 (*CMS Gas Transmission Company v. the Argentine Republic,* ICSID Case No ARB/01/8, Award dispatched to the parties on 12 May 2005, paragraph 277).

300. The words of the President of Argentina in his presentation of the BIT to the Argentine Congress in 1992 highlight the need to establish a climate of stability and confidence to attract investments:[243]

> *. . . A través de ellos, los estados aceptan mantener inalterables durante su vigencia ciertas normas de tratamiento de inversiones, con lo que se espera establecer un clima de estabilidad y confianza para atraer inversiones*.
>
> [Emphasis added]

301. As to the requirement of bad faith, Argentina relies on the findings in *Genin*[244] and *Waste Management II*.[245] In the former decision, the tribunal held solely that a violation of the minimum standard "*would include acts showing a willful neglect of duty . . . or even subjective bad faith"* (emphasis added). In the latter, the tribunal found that the standard set forth in the *Neer* case, involving willful neglect of duty and bad faith, has been rejected. Therefore, the Tribunal holds that, in concurrence with prior arbitral findings, the violation of the standard of fair and

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[243] Exhibit J-108.

[244] Exhibit JL-347 (*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia,* ICSID Case No. ARB/99/02, Award dated 25 June 2001, paragraph 367).

[245] Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, paragraphs 93 and 98).

equitable treatment does not require bad faith by the host State.[246]

302. The Tribunal is mindful of the evolution of the international minimum standard. The NAFTA tribunal in *Thunderbird* summarized this evolution as follows:[247]

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[246] Exhibit JL-373 (*Mondev International Ltd. v. The United States of America,* ICSID Case No. ARB(AF)/99/2, Award dated 11 October 2002, paragraph 116); Exhibit JL-398 (*The Loewen Group, Inc. and Raymond Loewen v. The United States of America,* ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003, paragraph 132); Exhibit JL-433 (*Occidental Exploration and Production Company v The Republic of Ecuador,* London Court of International Arbitration, Administered Case No UN 3467, Final Award of 1 July 2004, paragraph 186); Exhibit JL-397 (*TECMED S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraph 153); Exhibit JL-429, *cit*, paragraph 93; Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic,* ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 280); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 129); Exhibit JL-495 (*Azurix Corp. v. Argentina,* ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 372); Exhibit JL-435 (*Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, paragraphs 293-300).

[247] Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States,* NAFTA UNCITRAL Award dated 26 January 2006, paragraph 194); see also *e.g.*, Exhibit JL-435, *cit*, paragraphs 299-300; Exhibit JL-495, *cit*, paragraphs 361-372; Exhibit JL-373, *cit*, paragraph 116; Exhibit JL-329 (*S.D.Myers, Inc. v. Government of Canada,* NAFTA UNCITRAL, First Partial Award dated 13 November 2000, paragraphs 259 *et seq*.).

> The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law. Notwithstanding the evolution of customary law since decisions such as [the] *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.

303. In the instant matter, the measures adopted by Argentina fall below the international minimum standard for several reasons.

304. Faced with the economic crisis of inflation and public deficit of the late 1980s, Argentina sought to attract in particular foreign investors to invest in formerly state-owned gas companies. The Gas Law, Gas Decree and MetroGAS License, described in detail in Chapter III.B above, were all part of an attractive Regulatory Framework addressing specific risks with the emphasis on an efficient, just and reasonable tariff regime. It is not a mere coincidence that the different regulations were enacted within two years after the BIT was signed.

305. Of predictable interest to foreign investors were those parts of the Regulatory Framework in conjunction with the specific commitments represented by Argentina, as described in Chapter VI.D.1 above, in which Argentina guaranteed, *inter alia,* (i) to apply U.S. dollars as the currency of reference for the calculation of tariffs before their conversion in Argentine pesos for billing purposes (Article 41(1) of the Gas Decree and Section 9.2 of the *Reglas Básicas* of the MetroGAS License); (ii) semiannual adjustment regime of the tariffs in accordance with the US PPI (Section 9.4.1.1 of the *Reglas Básicas* of the MetroGAS License; (iii) the entitlement of the revision of the tariffs every five years, and, upon request an "extraordinary review" on "objective grounds" to maintain that tariffs are at a sufficient level to provide a reasonable rate of return (Article 38 of the Gas Law); and (iv) the reassurance that the licenses may not be modified without the consent of the licensees, entitling the investor to compensation in case the Government changed the tariff regime (Sections 9.8 and 18.2 of the MetroGAS License). The availability of real-dollar tariffs was specifically highlighted in the Information Memorandum circulated by Argentina to promote the privatization amongst foreign investors.[248]

306. These conditions appealed to BG, and resulted in its investment in MetroGAS. Considering also the incorporation of provisions relating to the stability of the Regulatory Framework in the MetroGAS

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[248] See paragraphs 160-176 above.

License,[249] BG could reasonably rely on the Regulatory Framework.

307. Argentina, however, entirely altered the legal and business environment by taking a series of radical measures, starting in 1999, as described in Chapter III.D above. Argentina's derogation from the tariff regime, dollar standard and adjustment mechanism was and is in contradiction with the established Regulatory Framework as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment. In so doing, Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment.

308. In this connection it bears emphasis that the second suspension of the US PPI, formalized by Decree 669/00, recognized that the licensees had "*derecho legítimamente adquirido*" to the US PPI tariff adjustments[250] and acknowledged that Bilateral Investment Treaties are a part of the legal framework relevant to investments in Argentina.[251] As it turns out,

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[249] See paragraphs 48-51 above.

[250] Exhibit J-226, Decree 669/00, page 2: "*Que dicho sistema de ajuste constituye una premisa básica, condición de los pliegos licitatorios y de las ofertas adjudicadas que fueron su consecuencia, y por lo tanto importa un derecho legítimamente adquirido por parte de las Licenciatarias adjudicatarias de cada licencia.*"

[251] Exhibit J-226, Decree 669/00, page 1: "*Que el proceso privatizador y las inversiones resultantes encuentran amparo legal en la normativa vigente, y en especial, también en los Tratados de*

the gas distribution tariffs have not been adjusted for inflation since July 1999 and, thus, have remained frozen at pre-crisis values.

309. Argentina also breached the international minimum standard in relation to UNIREN's authorization to renegotiate the Government agreements with public service providers. As stated at paragraph 80 above, the Emergency Law and subsequent legislation were enacted to promote a new deal with the licensees, impeding the application and execution of the original Regulatory Framework. Also, Argentina enhanced the violation of the standard of fair and equitable treatment under the BIT by formalizing in Resolution 308/02 and Decree 1090/02 the exclusion from the imposed renegotiation process of any licensee that sought redress in an arbitral or other forum.

310. In summary, when the situation of currency devaluation materialized, Argentina fundamentally modified the investment Regulatory Framework, which, as stated above, provided for specific commitments that were meant to apply precisely in a situation of currency devaluation and cost variations. Thus, Argentina reversed commitments towards BG, when BG relied the most on its legitimate and reasonable expectations of a stable and predictable business and legal investment environment.

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*Protección Recíproca de Inversiones suscriptos por al REPUBLICA ARGENTINA y ratificados por diversas leyes.*"

### B. Protection and Constant Security

311. Further, the Parties are in dispute about the scope and application of the second part of the first sentence of Article 2.2 of the BIT, which reads *"Investments of investors of each Contracting Party . . . shall enjoy protection and constant security in the territory of the other Contracting Party"*.

312. BG submitted that the measures taken by Argentina were at odds with Argentina's active protection and constant security obligation of BG's investments, as required under the first sentence of Article 2.2 of the BIT.

#### 1. Summary of Parties' Contentions

##### a. BG's Position

313. BG follows the decision of the tribunal in *Azurix,* by linking the standard of fair and equitable treatment to the general duty to protect investments.[252]

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[252] Post-Hearing Brief, paragraph 275.

314. In reliance on the findings in *AAPL*[253] *AMT*[254] and *CME*,[255] BG submitted that the standard of protection and constant security provided in the BIT is one of due diligence, requiring Argentina to exercise reasonable care and actively protect BG's investment. Thus, the duty of protection and security of investments is infringed by government measures that fail to apply the rules specifically designed to govern and protect the investment by withdrawing protection and security previously granted to an investment, regardless of whether property is physically destroyed or whether judicial remedies may be available.[256]

315. More specifically, BG contended that in accordance with *AAPL* the duty to ensure the protection and security of the investment embodies an "*objective standard of vigilance*" which is violated by

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[253] Exhibit JL-208 (*Asian Agricultural Products Ltd v. Sri Lanka,* ICSID Case No. ARB/87/3, Award dated 27 June 1990 (AAPL)).

[254] Exhibit JL-275 (*American Manufacturing & Trading Inc v. The Republic of Zaire,* ICSID Case No. ARB/93/1, Award dated 21 February 1997 (AMT))

[255] Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic,* UNCITRAL, Partial Award dated 13 September 2001*,* paragraph 613).

[256] Statement of Claim, paragraphs 421 *et seq.*; Post-Hearing Brief, paragraphs 273 *et seq.*

the *"mere lack or want of diligence, without any need to establish malice or negligence."*[257]

316. Referring to the decision in *AMT*, BG submitted that the tribunal interpreted the standard as requiring the active conduct of the host State in taking *"all measure of precaution to protect the investments."*[258]

317. As to the scope of the standard, BG relies on *CME,* which found that:

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.[259]

318. With respect to BG's factual contentions concerning the violation of Argentina's protection and constant security obligation, BG submitted that Argentina's duty involved, in particular, and at the very least, the application of the Regulatory Framework that it set up for the specific purpose of ensuring the viability, legal and economic protection and security of the investment. BG asserted that Argentina did exactly the opposite, in complete

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[257] Post-Hearing Brief, paragraph 273 quoting *AAPL* (paragraphs 48, 77 and 85).

[258] Post-Hearing Brief, *ibid*., quoting *AMT* (paragraph 6.05).

[259] Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic,* UNCITRAL, Partial Award dated 13 September 2001,paragraph 613).

disregard for the protection and constant security of BG's investment.[260] The detailed factual contentions of BG are set forth in paragraphs 276-282 above. Although they relate to the standard of fair and equitable treatment, they are relevant with regard to the standard of protection and constant security as in BG's view the duty of protection and constant security of investments is part of the standard of fair and equitable treatment.

**b. Argentina's Position**

319. Argentina denied that it has violated the standard of protection and constant security under the BIT and criticized that BG does not specify which duty to act it has violated. Argentina contended that BG has neither a factual nor a legal basis to make Argentina responsible for having omitted due diligence.

320. In contesting the relevance of the case law relied upon by BG, Argentina stated, without the benefit of any references, that jurisprudence and doctrine are unanimous in conceiving that the standard of protection and security is a standard of "physical protection". BG, however, has not invoked any act of physical violence against its investment.[261]

321. Relying on *Tecmed,* Argentina highlights that *"the security and protection guarantee is not absolute and that it does not impose upon the Government*

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[260] Post-Hearing Brief, paragraph 276.

[261] *Memorial de Contestación*, paragraph 574.

*issuing it strict liability."* In the context of the present case, Argentina submitted that MetroGAS had all the possibilities of resorting to the legal system in force in Argentina in order to protect its contractual rights under the same terms and conditions as any other litigant.[262]

322. Finally, Argentina relies on the notion of emergency and draws attention to the fact that, during the period under examination, the country was undergoing the worst economic, social and institutional crisis of its history.[263]

### 2. The Tribunal's Findings

323. The Tribunal can be relatively brief in relation to the allegations of BG. BG's claim with respect to the standard of protection and constant security must fail.

324. The Tribunal observes that notions of "protection and constant security" or "full protection and security" in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised. Indeed, the authorities relied upon by BG confirm this:

a) in *AAPL* the tribunal had to determine under the Sri Lanka-U.K. BIT whether the physical destruction of property of AAPL and the killing of a farm manager and permanent staff members were in violation of the provision of

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[262] *Memorial de Contestación*, paragraphs 575 and 576.

[263] *Memorial de Contestación*, paragraph 577.

protection and security under Article 2.2 of the Sri Lanka-U.K. BIT;[264]

b) in *AMT* the tribunal found that under the U.S.–Zaire BIT, Zaire had violated the protection and security standard required by the treaty in relation to lootings carried out against AMT's investment.[265]

325. Similarly at issue in *E.L.S.I* was the occupation of the investor's plant by its workers following its requisition by the Mayor of Palermo[266] and *Wena Hotels Limited v. Arab Republic of Egypt* relates to the forceful seizure of property.[267]

326. The Tribunal is mindful that other tribunals have found that the standard of "*protection and constant security*" encompasses stability of the legal framework applicable to the investment. By relating the standards of "*protection and constant security*" and "*fair and equitable treatment*" such tribunals have found that the host State is under an obligation to

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[264] *AAPL* (paragraphs 28 and 53).

[265] *AMT* (paragraphs 6.05-6.12).

[266] Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy),* 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989).

[267] Exhibit JL-331 (*Wena Hotels Ltd v A RA-b Republic of Egypt,* ICSID Case No ARB/98/4, Award of 8 December 2000, paragraphs 84-95).

provide a "*secure investment environment*".[268] However, in light of the decisions quoted above, the Tribunal finds it inappropriate to depart from the originally understood standard of "*protection and constant security*".

327. Considering the facts of this dispute and the Parties' submissions, the Tribunal notes that BG has not alleged physical violence or damage in the implementation of the measures adopted by Argentina, nor does the Tribunal see that such violence or damage has in fact occurred.

328. Accordingly, the Tribunal concludes that Argentina has not breached the standard of protection and constant security set out in Article 2.2 of the Argentina-U.K. BIT.

### C. Unreasonable and Discriminatory Measures

329. BG also contended that, in violation of the second sentence of Article 2.2 of the BIT, Argentina impaired BG's use and enjoyment of its investment by unreasonable and discriminatory measures, by placing a disproportionate and discriminatory burden on MetroGAS and BG. Argentina objected to BG's allegations.

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[268] Exhibit JL-495 (*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 408); *Siemens v. The Argentine Republic,* ICSID Case No ARB/02/8, Award of 6 February 2007, paragraph 303, referring to the Argentina-Germany BIT which includes, however, the qualified term of ¨legal security¨ in the relevant provision.

330. The second sentence of Article 2.2 of the BIT provides as follows:

> Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

**1. Unreasonable Measures**

**(a) Summary of Parties' Contentions**

**(i) BG's Position**

331. BG contended that Argentina's measures are unreasonable because they dismantled the entire tariff regime of the gas distribution industry.

332. As the term "unreasonable measures" is not defined, BG relies on the following definition provided by the commentator R. Happ that,

> [I]t is possible to understand 'unreasonable' in two different ways: Either as a procedural concept, that is whether the governmental measure furthers the government's objectives (sic.) is the less restrictive measure and whether the impairment is proportional to the achieved end; or as a substantive concept. However, since it is always in the eye of the beholder whether the measure is substantially reasonable or not,

> the substantive concept approach must be rejected."[269]

333. BG submitted that Argentina's unreasonable measures of dismantling the entire tariff regime of the gas distribution industry are "*contrary to the expectations of BG and of any reasonable and impartial person*". According to BG, Argentina's Regulatory Framework created and fuelled legitimate expectations which were specifically incompatible with the sorts of measures that it subsequently adopted. It was, thus, unreasonable to strip BG of the key guarantees upon which its investment was based.[270]

334. Further, BG contended that the measures are unreasonable, because, in comparison to BG, other sectors were excluded from the scope of the *pesificación* and freezing of prices and tariffs, or otherwise benefited from compensatory and mitigating measures, or were at least permitted to increase their prices in accordance with inflation.[271]

### (ii) Argentina's Position

335. In its defence, Argentina contended that the measures adopted where justified and proportional to

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[269] Statement of Claim, paragraph 449, quoting R. Happ, "Dispute Settlement under the Energy Charter Treaty", (2002) 45 German Yearbook of International Law 331.

[270] Statement of Claim, paragraphs 450-451; Post-Hearing Brief, paragraph 277.

[271] Statement of Claim, paragraph 452.

the aim sought and within the context of the collapse of the Argentine economy.

336. In equating the legal meaning of "unreasonable" with "arbitrary",[272] Argentina contended that the arbitrariness standard demands the verification of certain extremes: (i) the capricious violation of the legal system in force without reason or justification; and (ii) the determination of the context which gives rise to the adoption of the government measures. For Argentina, measures are not arbitrary absent a premeditated intent to breach the rules in force and to act in a way contrary to the law.[273]

337. Argentina submitted that by respecting the law, it took adequate steps to safeguard the general welfare of all players in the Argentine economy, including foreign investors. Explaining in detail the aim of each measure taken by it, Argentina contended that the actions taken were reasonable and proportional to the purpose sought. Argentina's goal was that companies could continue to operate, to obtain revenues and make a profit. Argentina puts special emphasis on the commenced renegotiation process of utility contracts to which MetroGAS is part as well.[274]

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[272] The Tribunal notes that the Spanish versions of Argentina's submissions refer also to "*medidas arbitrarias*" and not only to "*medidas irrazonables*" (see, *e.g.*, *Alegato Final*, paragraph 476).

[273] *Alegato Final*, paragraphs 476-479.

[274] *Memorial de Contestación*, paragraphs 420-469; 510-525; *Alegato Final*, paragraphs 471-482.

338. In the alternative and in reliance on *E.L.S.I.*, Argentina contended that an action taken by the host State may be considered illegal and yet not be arbitrary under international law.[275]

**(b) The Tribunal's Findings**

339. The Tribunal has to determine whether the measures taken by Argentina, described in Chapter III.D above, are unreasonable in a way that impairs the ". . . *management, maintenance, use, enjoyment or disposal* . . ." of BG's investment in Argentina.[276]

340. The term "unreasonable" is not defined in the BIT. Therefore, the Tribunal has to look at its ordinary meaning for international law.

341. While there might be some overlap, the Tribunal does not deem it appropriate to equate "unreasonableness" and "arbitrariness". First, the term "arbitrary" does not appear in Article 2.2 of the Argentina-U.K. BIT. Moreover, one connotation of "arbitrariness" under international law involves a breach beyond the ordinary meaning of "reason" seemingly calling for ". . . *a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.*"[277]

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[275] *Memorial de Contestación*, paragraph 516.

[276] Article 2.2 of the Argentina-U.K. BIT.

[277] Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy),* 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989).

342. Like the "fair and equitable treatment" standard, "reasonableness" should be measured against the expectations of the parties to the bilateral investment treaty, rather than as a function of the means chosen by the State to achieve its goals:[278]

> . . . As with the fair and equitable standard, the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behaviour in light of the goals of the Treaty.[279]

343. Thus, withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investments is by definition unreasonable and a breach of the treaty.

344. Argentina adopted certain measures to address its economic, political and social crisis. It is not for this Tribunal to pass judgment on the reasonableness or effectiveness of such measures as a matter of political economy. Rather, this Tribunal is concerned with the interpretation and application of Article 2.2 of the Argentina-U.K. BIT. As indicated above, Argentina unilaterally withdrew commitments which induced BG

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[278] See paragraphs 294 to 300 of this award.

[279] Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic,* UNCITRAL, Partial Award dated 13 September 2001*,* paragraph 158).

to make its investment in Argentina and this constitutes unreasonable action and a breach of this provision of the treaty.

345. Argentina guaranteed, *inter alia*:

(a) the application of U.S. dollars as the currency of reference for the calculation of tariffs before their conversion into Argentine pesos for billing purposes;

(b) a semi-annual adjustment regime of the tariffs in accordance with the US PPI;

(c) revision of the tariffs every five years;

(d) an "extraordinary review" mechanism based on "objective grounds" to ensure that tariffs provide a reasonable rate of return; and

(d) the reassurance that the licenses may not be modified without the consent of the licensees, entitling the investor to compensation in case the government changed the tariff regime.

The availability of real-dollar tariffs was specifically highlighted in the Information Memorandum circulated by Argentina to promote the public tender amongst foreign investors.[280]

346. Unilateral withdrawal by Argentina of these key components of the Regulatory Framework was from the perspective of the Argentina-U.K. BIT unreasonable

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[280] See paragraphs 160-176 above.

and it was therefore in breach of the second sentence of Article 2.2 of the treaty.

### 2. Discriminatory Measures

#### (a) Summary of Parties' Contentions

##### (i) BG's Position

347. BG contended that the measures adopted by Argentina discriminated against BG. BG stressed that in contrast to other sectors of the Argentine economy that were permitted to recover swiftly from the impact of the measures, Argentina consciously placed a disproportionate burden on largely foreign-controlled energy companies like MetroGAS.

348. BG advocated a flexible interpretation of what constitutes a "discriminatory" measure. In reliance on *Feldman* and *Occidental,* BG contended that measures may be discriminatory even if not based on nationality, and even where discrimination is not express or intentional. Rather, it suffices that the measures have a discriminatory effect. Further, according to BG, it is not necessary that differential treatment be in the same economic sector.[281]

349. BG submitted that the Argentine Government itself noted the discrimination by stating that *"one sector transfers resources to another."*[282] The measures taken by Argentina to limit the impact of its measures

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[281] Statement of Claim, paragraph 456.

[282] Exhibit J-472.

in sectors such as oil and gas production, banking and public contracts, were not made available to gas distributors and transporters. Thus, Argentina's measures were and continue to be discriminatory.[283]

**(ii) Argentina's Position**

350. Argentina objected to BG's legal and factual contentions and invoked the principle of discriminatory treatment articulated in *E.L.S.I.* and *Genin*: *i.e.,* that discriminatory treatment is to give foreign investors a less favorable treatment than that granted to nationals.[284] Argentina added to this understanding the notion that discrimination is characterized by capricious, unreasonable or absurd criteria.[285]

351. Argentina submitted that the measures were general in nature, aimed at overcoming a period of generalized collapse of the economy and extended equally to all inhabitants, in all sectors. Thus, foreign investors as licensees of public services cannot remain outside this situation. The measures taken by Argentina affected all entities falling within the special category set forth in Article 8 of the Emergency Law, including BG. Argentina explained that each public service is governed by different regulations, agreements and characteristics that provided for

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[283] Post-Hearing Brief, paragraph 278.

[284] *Memorial de Contestación*, paragraphs 495-502.

[285] *Alegato Final*, paragraph 483.

different rate adjustments from the ones established in the provisions applicable to the natural gas industry:[286]

> *No puede pretenderse válidamente que el régimen aplicable al agua potable y a las cloacas sea igual al aplicable al gas natural o a los transportes públicos o a la electricidad o al servicio postal: todos ellos son servicios públicos pero no por ello están sujetos a las mismas normas o regímenes*.[287]

352. Argentina also relied on the renegotiation process, which it portrayed as evidence of equality of treatment of MetroGAS and BG.[288]

353. It was also Argentina's position that at no time did MetroGAS or BG receive unequal treatment within the same sector, as MetroGAS was not subject to a special or more onerous sacrifice.

**(b) The Tribunal's Findings**

354. The Tribunal notes Claimant's reliance on *Marvin Feldman v. Mexico* and *Occidental v. Ecuador* in support for its claim of discrimination.[289] Both of these cases relate to the alleged breach of an obligation

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[286] *Memorial de Contestación*, paragraphs 530-568; *Alegato Final*, paragraphs 486-495.

[287] *Memorial de Contestación*, paragraph 531.

[288] *Memorial de Contestación*, paragraphs 530-568; *Alegato Final*, paragraphs 486-495.

[289] Post-Hearing Brief, paragraph 379.

which, in the Argentina-U.K. BIT, is set out in Article 3.[290] Claimant did not argue that Argentina breached Article 3, nor did it provide an explanation of the relationship between Article 2.2 and Article 3.

355. Nonetheless, the Tribunal accepts for the sake of its analysis, that a measure in breach of the national treatment or MFN standards of Article 3 of the BIT would unavoidably also be "discriminatory" in the sense of the second sentence of Article 2.2 of the BIT.

356. In determining whether discrimination has occurred, the Tribunal considers it appropriate to follow the "three-part" test discussed in *Thunderbird v. Mexico.*[291] Under this test, it is necessary to:

a) identify the relevant entities of the national treatment comparison, to determine whether they are in like circumstances;

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[290] Article 3 of the BIT provides as follows: "(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State. (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."

[291] Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States,* NAFTA UNCITRAL, Award dated 26 January 2006, paragraph 170).

b) consider the relative treatment received by each such entity so as to ascertain the best level of treatment available to any other domestic or foreign investor; and

c) consider such factors as may be relevant to justify any difference in treatment.

357. It may well be that the measures adopted by Argentina did differentiate gas-distribution companies from other public service providers. However, there is no discussion on the record as to why BG was "in like circumstances" to companies operating, for instance, in the transmission and distribution of electricity.

358. In fact, it would at first glance appear that MetroGAS was not "in like circumstances" relative to other licensees who did not agree to the suspension of the US PPI adjustments at the invitation of the Secretary of Energy on 6 January 2000, and again on 17 July 2000.

359. The Tribunal notes that also by applying the standards set out in *E.L.S.I.* to establish the existence of discriminatory measures, as suggested by BG, it is not apparent that Argentina's measures were "*not taken under similar circumstances against another national.*"[292]

360. Under the circumstances, the Tribunal is not convinced that Argentina's measures discriminated

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[292] JL-195 (*Case Concerning the Elettronica Sicula S.p.A. (United States of America v Italy)*, Judgment of 20 July 1989, ICJ Rep. 1989, pages 61-62).

against BG in the sense of the second sentence of Article 2.2 of the Argentina-U.K. BIT.

**D. Observance of Obligations Entered Into With Regard to BG's Investments**

361. The final part of Article 2.2 of the Argentina-U.K. BIT provides that:

> Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

362. In reply to a question put to the Parties by the Tribunal, BG took the position that Argentina had breached the Argentina-U.K. BIT by violating the MetroGAS License:[293]

> Argentina's violations of the Licence do amount to a violation of the Treaty, and in particular the prohibition of expropriation without compensation, fair and equitable treatment, and all the subordinated standards of treatment of Article 2(2) of the Treaty.

363. This claim must fail in the light of the Tribunal's earlier finding that BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert other rights, derived from the MetroGAS License (see Chapter VI.E.2 above).

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[293] Post-Hearing Brief, paragraph 282.

364. However, BG also contended that the same principles included in the MetroGAS License were incorporated in the Gas Law, the Gas Decree and the Bidding Rules.[294] Chapters III.A-B and VI.D.1 of this award discuss the genesis of the privatization of *Gas del Estado*. Chapter VI.D.1 focuses in particular on the representations made by Argentina to promote interest in the privatization and attract foreign investors, including BG.

365. The rules announced by Argentina in the Information Memorandum and materialized in the Gas Law, the Gas Decree and the Bidding Rules were clearly not addressed at MetroGAS alone. As indicated in paragraph 176 of this award, BG is entitled to rely on these commitments in connection with its allegations of breach of the substantive provisions of the BIT with respect to its "Investment" in Argentina.

366. In Chapter VIII.A above, this Tribunal has already concluded that the adoption of measures by Argentina which destroyed key elements of the much publicized Regulatory Framework, constitutes a breach by Argentina of its substantive obligation under the Argentina-U.K. BIT to accord BG fair and equitable treatment.

## IX. National Emergency and State of Necessity

367. Defending the measures as described in Chapter III.D above, Argentina submitted that the severe economic, social and political crisis it has undergone

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[294] Post-Hearing Brief, paragraph 283.

exempted Argentina from liability in light of a state of emergency or a state of necessity. Argentina referred in its primary defense to Article 4 of the BIT, contending that it has not violated any standard of the BIT. Alternatively, Argentina resorted to the doctrine of "necessity" under customary international law. To summarize, Argentina argued that even if the Tribunal finds that there has been a violation of the BIT, measures adopted by Argentina to palliate the greatest crisis in Argentine history were justified by a "state of necessity" under both Argentine and customary international law.[295] BG objected to both defenses.

368. The Tribunal will now summarize the Parties' contentions.

## A. National Emergency under the BIT

369. Article 4 of the BIT provides as follows:

> Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter

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[295] Initially, Argentina submitted as a separate defence that the measures it had adopted were constitutional under Argentine law (*see Memorial de Contestación*, paragraphs 686-700). However, during the course of the proceedings, Argentina appears to have incorporated this defence in the state of necessity defence under international law.

> Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.
>
> [Emphasis added]

**1. Summary of Parties' Contentions**

**a. Argentina's Position**

370. Argentina submitted that Article 4 of the BIT expressly establishes the case of a foreign investor suffering losses by virtue of a state of national emergency. Thus, the BIT legitimates actions taken by the host State, provided that the foreign investor is treated in equality with other investors, domestic or foreign, with respect to losses suffered in the territory of the host State.[296]

371. As to the standard required under Article 4 of the BIT, Argentina contended that there should be no discrimination as regards measures established to repair or compensate losses suffered. The term "losses" incurred is used in a broad sense, including any kind of harm. With regard to compensation, Argentina highlighted that Article 4 of the BIT does not demand for payment of compensation, but refers to the treatment given to investors as regards "*restituciones,*

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[296] *Memorial de Contestación*, paragraphs 670-671; *Alegato Final*, paragraphs 496-497.

*indemnizaciones, compensaciones u otros resarcimientos."*[297]

372. Relying on *AAPL*, Argentina submitted that the losses allegedly incurred are not limited to destruction of property due to armed hostilities, insurrections or other uses of force, but refer to any situation of risk or disaster on a national level calling for immediate action.[298]

373. Objecting to BG's comparison drawn on the basis of Article XI of the Argentina-U.S. BIT, which BG submitted was an "exculpatory expression" not contained in the Argentina- U.K. BIT, Argentina contended that the principle enshrined in Article XI of the Argentina-U.S. BIT exists regardless of its inclusion in the BIT. According to Argentina, a bilateral investment treaty cannot prevent a State party from adopting such measures as it deems necessary to maintain the public order and guarantee the protection of its own essential security interests.[299]

374. Following this interpretation, Argentina contended that it acted in accordance with Article 4 of the BIT. The measures adopted by Argentina were due to a state of national emergency, pre-dating the

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[297] *Memorial de Contestación*, paragraph 672; *Dúplica*, paragraph 739; *Alegato Final*, paragraph 506.

[298] *Memorial de Contestación*, paragraph 673; *Dúplica*, paragraphs 736-742; *Alegato Final*, paragraphs 499-505.

[299] *Dúplica*, paragraph 743.

adoption of the measures. Thus, the losses the population suffered were not the result of the measures taken by Argentina, but the result of the combination of factors leading to the state of emergency, including:

a) the resignation of the constitutional President of the Argentine Republic amidst an extraordinary political-institutional collapse, followed by a succession of several presidents;

b) the strong devaluation of the national currency in the international markets;

c) the collapse of the Argentine banking system; and

d) the serious social crisis with poverty, indigence and unemployment rates hitting record levels and tens of people killed in the midst of confrontations in the Federal Capital City, as well as in the rest of the country.[300]

375. Argentina stated that in light of these severe circumstances, the enactment of the Emergency Law was a measure to mitigate the damages suffered by society as a whole, by according equal treatment to all national and foreign companies.[301]

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[300] *Memorial de Contestación*, paragraph 676; *Alegato Final*, paragraphs 513-515.

[301] *Memorial de Contestación*, paragraph 678; *Alegato Final*, paragraphs 520-521.

**b. BG's Position**

376. BG disagrees that Article 4 of the BIT has an exonerating effect. The only point of concurrence with Argentina's interpretation of Article 4 of the BIT is that in BG's view this provision does not require Argentina to make reparation to a protected investor on any specific basis. Article 4 provides that if any domestic or third-state investor is accorded any such reparation for loss suffered in a situation of "national emergency", among others, then qualifying investors under the BIT *"shall be accorded . . . treatment . . . no less favourable"*.[302]

377. BG objected to Argentina's submission that Article 4 of the BIT is not limited to cases of physical destruction of property caused by force in circumstances of armed conflict. According to BG, Article 4 of the BIT is in the nature of provisions commonly referred to as "war and civil disturbance" clauses or "losses due to war" clauses. The purpose of Article 4 of the BIT was to cover cases in which general international law or insurance contracts exclude state responsibility altogether, or the payment of compensation. BG submitted that in any event, neither Article 4 of the BIT nor any other provision of the BIT "legitimizes" the measures adopted by Argentina, or Argentina's failure to provide compensation.[303]

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[302] Reply, paragraph 396.

[303] Reply, paragraphs 392(a) and 397 *et seq.,* also referring to the decision in *CMS* where the tribunal analyzed Article XI of the Argentina-U.S. BIT, which includes in BG's view a typical

378. In summary, BG's position is that Article 4 of the BIT operates in situations where: (i) an investor has suffered damages as a result of armed conflict or similar circumstances; but (ii) that investor does not have a specific entitlement to reparation under another provision of the BIT or customary international law; and (iii) another investor, whether domestic or foreign, has been granted reparation, whether by operation of another treaty, domestic law, or simply on a discretionary basis. In such circumstances, Article 4 of the BIT provides that a qualifying investor is entitled to "treatment no less favorable" than that accorded to the investors who have been accorded compensation or other forms of reparation. BG relied also on the findings of the tribunals in *AMT* and *AAPL*.[304]

379. Further, BG submitted that the content of Article 4 of the BIT is clear from the context of the BIT as a whole. In relation to Article 2.2 of the BIT, BG submitted that in the event that the treatment established under Article 2.2 of the BIT is not afforded, and Article 2.2 of the BIT is accordingly breached, reparation is due under general rules of customary international law. Similarly, the right to receive "prompt, adequate and effective compensation" according to Article 5.1 of the BIT requires no support from Article 4 of the BIT in order to operate. Therefore,

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exculpatory language (paragraphs 332 *et seq.*); Post-Hearing Brief, paragraph 292(a)-(b).

[304] Reply, paragraphs 406-409, referring to *AMT* (paragraphs 3.04 and 6.4-6.14).

BG concluded, Argentina cannot invoke Article 4 of the BIT to restrict the distinct obligations incumbent upon it under Articles 2.2 and 5.1 of the BIT.[305]

380. Finally, BG contended that even if Article 4 of the BIT were applicable in the present case, it would only underline the preferential treatment that Argentina accorded to several other sectors and activities. BG submitted that as compensation for the impact of the Emergency Law, Argentina has adopted special rules with respect to several categories of investors, including gas producers, banks, construction companies, seaport and airport operators.[306]

**2. The Tribunal's Findings**

381. The Tribunal finds that no state of emergency defense is available to Argentina under the Argentina-U.K. BIT. In the Tribunal's view, neither Article 4 of the treaty, nor the BIT as a whole, exonerate Argentina's breaches on grounds of state of emergency or state of necessity.

382. Applying the interpretive principles of Article 31 of the Vienna Convention, this Tribunal concludes that Article 4 of the BIT does no more than ensure that the State does not treat the foreign investor less favorably than its own investor or investors of any third State with regard to *"restitution, indemnification, compensation or other settlement"* in case the foreign

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[305] Reply, paragraphs 410-414.

[306] Reply, paragraphs 160 and 415-416.

investor suffers losses due to, *inter alia*, a state of national emergency. Article 4 of the BIT provides for a specific expression of the national treatment and most favored nation standard in relation to the compensation of losses resulting from certain actions. Article 4 is merely concerned with the situation where nationals of the host State are indemnified or compensated, or benefit from a settlement. In this context, foreign investors should not be treated less favourably. Liability and compensation are thus expressly mandated, not excused.[307]

383. In this context, the tribunal in *CMS* held under the Argentina-U.S. BIT, which contains a similar provision as the present Article 4 of the BIT, that:

> The plain meaning of the Article [Article IV(3)] 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 the applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.[308]

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[307] Note in this context also the title of Article 4 of the BIT: "Compensation for Losses".

[308] Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic,* ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 375); *see also Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic,* ICSID Case No. ARB/01/3,

384. The fact that Article 4 of the BIT contemplates the state of national emergency as a distinct category of exceptional circumstances is of no assistance to Argentina. This fact was noted by the tribunal in *LG&E* in respect of a similar provision in the Argentina-U.S. BIT (Article IV.3).[309] However, the tribunal in *LG&E* did not accept Argentina's invocation of state of necessity on the basis of Article IV.3 of the

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Award dated 15 May 2007, paragraph 320, referring to Article IV(3) of the Argentina-U.S. BIT, which contains similar wording as Article 4 of the present BIT: *"The Tribunal must note that the only meaning of Article IV(3) is to provide a minimum treatment to foreign investments suffering losses in the host country by the simultaneous interplay of national and most favored nation treatment, and this is only in respect of measures the State "adopts in relation to such losses", that is corrective or compensatory measures."; AMT* (paragraph 6.14), referring to Article IV(1)(b) of the U.S.–Zaire BIT, which wording is similar to Article 4 of the present BIT and stating that Article IV(1)(b) of the U.S.–Zaire BIT "*reinforce*[s] *further the engagement of the responsibility of the State for ensuring the protection and security of the investment made . . . in accordance with . . . the BIT."*

[309] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v The Argentine Republic* (*LG&E*), ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, paragraphs 243 and 261). Article IV(3) of the Argentina-U.S. 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.*"

Argentina-U.S. BIT, but rather of Article XI for a limited period of time (1 December 2001 – 26 April 2003).

385. The Tribunal notes that the Argentina-U.K. BIT does not include a national security exception analogous to Article XI of the Argentina-U.S. BIT.[310] Consequently, the Tribunal need not express an opinion as to a possible national security exception, or its impact on a State's obligation to pay compensation for breaches of the BIT, as it was done in the *LG&E* award, rendered under the Argentina-U.S. BIT.

386. Further, there is no support for Argentina's submission that, in the absence of an express provision, Article XI of the Argentina-U.S. BIT should automatically be read into the Argentina-U.K. BIT.

387. Accordingly, the Tribunal concludes that Argentina cannot invoke a state of emergency or state of necessity on the basis of the BIT to excuse liability for the breach of Article 2.2 of the BIT.

**B. The State of Necessity under Customary International Law**

388. Having reached the above conclusion, the Tribunal turns now to Argentina's alternative defense

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[310] Article XI of the Argentina-U.S. BIT: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*"

that it be excused from liability based on the state of necessity under customary international law.

389. As stated above, Argentina has contended in the alternative that in the event the Tribunal should come to the conclusion that there was a breach of the BIT, Argentina should be exempt from liability in the light of the doctrine of state of necessity or state of need under customary international law, as codified in Article 25 of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter the "ILC Draft Articles"). BG objected to the application of the doctrine of necessity in this case and submitted that even if it were applicable, its constituent elements, as set forth in Article 25 of the ILC Draft Articles, are not made out on the facts of this case; ultimately, even if one were to concede Argentina's defense of necessity, the legal consequence would be that Argentina has an obligation to compensate BG for the losses it incurred since the inception of the adopted measures, pursuant to Article 27 of the ILC Draft Articles.

390. The Tribunal finds it useful to quote in full Article 25 of the ILC Draft Articles:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

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

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

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

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

**1. Summary of Parties' Contentions**

**a. Argentina's Position**

391. Argentina contended that the exoneration of a State from international liability in case of a "state of necessity" is expressly recognized by customary international law, as codified in Article 25 of the ILC Draft Articles. State of necessity, according to Argentina, is a defense contemplated in international law that is binding both for the Argentine Republic and for the United Kingdom. In Argentina's view, a "state of necessity" exists where the State is compelled to depart from an international obligation with another State in order to preserve an essential state interest in a situation of grave or imminent danger. In this connection, Argentina contended that it complied with

legal emergency criteria provided for in its National Constitution.[311]

392. Argentina referred to several cases supporting its position that the legal protections accorded to foreign investors under bilateral investment treaties do not deprive States parties of their sovereign powers to maintain public order and address emergencies. Argentina submitted that such cases suggest that State obligations to foreign investors and investments are qualified by non-textual but legally operational understandings about the continuation of State emergency powers and other State powers.[312]

393. Following the requirements set forth in Article 25 of the ILC Draft Articles, Argentina contended that the Argentine government was compelled to act due to a serious emergency situation which compromised its essential interests, its economic-financial survival, as well as social and institutional stability. Argentina referred in particular to the statements of Mr. Ratti and Mr. Simeonoff, explaining the budgetary and financial limitations of the Argentine State and the

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[311] *Memorial de Contestación*, paragraphs 700-716; *Dúplica*, paragraphs 771 *et seq.*; *Alegato Final*, paragraphs 522-525.

[312] Kingsbury Report (paragraphs 28-34), referring to, *inter alia,* Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy),* 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989, *E.L.S.I.* paragraphs 74 and 127) and Exhibit JL-397 (*TECMED S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraphs 118, 133, 139).

impoverishment of the population causing unprecedented social unrest.[313]

394. Referring to the requirements of Article 25(1)(a) of the ILC Draft Articles, Argentina further contended that the measures adopted amounted to the only way of protecting the essential interests of the State. In this regard it is Argentina's position that "the only way" criterion for a plea of necessity can best be met by introducing a proportionality and rational alternative test. Argentina expanded on its view of the appropriate test to be applied by the Tribunal: (i) whether the measures had a legitimate objective; (ii) whether the measures were adapted to the pursuit of such objective; and (iii) whether the government adopted the less disruptive alternative. In Argentina's view the *pesification* of dollar-denominated obligations and the restructuring of the private and public obligations was a proportionate and reasonable solution within the context of the very serious emergency in Argentina. Argentina pointed out that the existence of diverging points of views as to whether the adopted measures were the only way to cope with the crisis in late 2001 is not an impediment to the application of the "state of necessity" defense, as there will always be controversy regarding governmental, economic and financial measures.[314]

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[313] *Alegato Final*, paragraphs 527-530.

[314] *Memorial de Contestación*, paragraphs 726-753; *Alegato Final*, paragraphs 531-536; Kingsbury Report (paragraph 39).

395. Argentina also submitted that the measures it adopted did not seriously affect any essential interest of any other State, or of the international community.[315]

396. In addition, Argentina contended that none of the international obligations invoked by BG exclude the state of necessity, especially in the light of Article 4 of the BIT, which foresees situations which may constitute a state of necessity.[316]

397. Further, Argentina submitted that it has not contributed to the occurrence of the "state of necessity". Argentina points to external factors that decisively led to the emergency situation, including the rise in interest rates, the crisis in other emerging markets, the devaluation in Brazil, and the ensuing decline in exports. Argentina supported its view by reference to the statement of its expert witness Prof. Roubini.[317]

398. Finally, Argentina rejected BG's contention that should the defense of a state of necessity be accepted, the State invoking it is indefectibly bound to redress the damages suffered. Argentina contended that on the contrary, it would make no sense to accept that the State acted in a state of necessity, protecting its essential interests, and to demand reparation, thus

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[315] *Alegato Final*, paragraph 537.

[316] *Alegato Final*, paragraph 538.

[317] *Memorial de Contestación*, paragraphs 718-725; *Alegato Final*, paragraphs 539-542.

risking the very essential interests that the State intended to protect. Objecting to BG's reliance on Article 27 of the ILC Draft Articles, Argentina referred to its expert witness Prof. Kingsbury, stating that the ILC Draft Articles do not set forth that compensation should be granted in all cases where the state of necessity is alleged.[318]

**b. BG's Position**

399. BG objected to Argentina's contentions.

400. As a preliminary point, BG submitted that the U.K. formally opposed to the inclusion by the ILC of a provision on "*necessity*" (*i.e.,* the present version of Article 25 of the ILC Draft Articles). BG highlighted that the ILC Draft Articles are a non-binding codification of customary international law. As a consequence, Article 25 of the ILC Draft Articles can have no application in bilateral relations involving the U.K., and therefore no role in a claim under the present BIT. BG characterized the U.K. as a "*persistent objector*" to the rule set forth in Article 25 of the ILC Draft Articles.[319]

401. Further, BG criticized Argentina's understanding that the State's obligations under a BIT become qualified by that State's powers to take measures in a situation of emergency under a national law of general application. In BG's view this places

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[318] *Alegato Final*, paragraphs 543-548.

[319] Post-Hearing Brief, paragraphs 296-301.

Article 8(4) of the BIT and Argentine law on a footing of equality, a result that would be inconsistent with Article 27 of the Vienna Convention according to which treaty obligations preempt conflicting national law. Further, the lack of workable definitions of and distinctions between "*emergency*" and "*necessity*" would grant the State a self-judging power to escape its international obligations. BG confirmed, though, that some BITs, including U.K. BITs, do expressly grant a right of derogation in times of "*extreme emergency*", and that right is both explicit and carefully circumscribed in the relevant texts. However, the present BIT grants no such right.[320]

402. As to the content of Article 25 of the ILC Draft Articles, BG submitted that Argentina bears the onus of proving that all requirements of the doctrine of necessity as reflected in Article 25 of the ILC Draft Articles have been met without interruption from January 2002 (when the Emergency Law was enacted) to the present day.[321]

403. In focusing on specific questions with regard to the requirements of Article 25 of the ILC Draft Articles, BG contended that Argentina is debarred from invoking Article 25 of the ILC Draft Articles because it failed to satisfy the general requirements of the second paragraph of this provision. Given the object and the purpose of the BIT, Argentina may not

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[320] Post-Hearing Brief, paragraphs 302-309.

[321] Reply, paragraphs 430 *et seq.*; Post-Hearing Brief, paragraph 310.

dispose of guarantees freely extended to attract BG's long-term investment on the argument that certain risks have materialized, when the very purpose of the guarantees was to transfer the associated risks to Argentina.[322]

404. Further, BG contended that Argentina contributed to its economic crisis. BG submitted that the evidence shows that Argentina's crisis was largely brought about by successive government failures to address chronic and serious structural economic problems. Relying, *inter alia*, on Professor Roubini's expert report and an IMF study, BG submitted that several endogenous causes contributed to Argentina's crisis, highlighting fiscal problems and labor-market "rigidities". According to the IMF study, for instance, the principal causes for the crisis were home-grown and the "*chief locus of vulnerability [of the Argentine economy] was the increase in public-sector indebtedness.*"[323]

405. BG also took exception with Argentina's understanding of Article 25(1)(a) of the ILC Draft Articles. Specifically, BG disagreed with Argentina's assertion that the words "the only way" are not to be read on their face but should be interpreted as importing a test of "proportionality and rational alternatives". In BG's view the words "the only way" are clearly designed to discourage abuse of the doctrine of necessity. BG further stated that Argentina's

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[322] Reply, paragraphs 441-447

[323] Post-Hearing Brief, paragraphs 313-315.

reading of Article 25(1)(a) of the ILC Draft Articles confirms the risk of abuse of the doctrine of necessity historically expressed by the U.K.. BG contended that the findings of an ICSID tribunal and the ICJ confirm the only interpretation that is consistent with the express language, negotiating history, and legislative intent of Article 25(1)(a) of the ILC Draft Articles. In any event, BG indicated that the "*pesificación*" and freezing of MetroGAS' tariffs fail Argentina's proportionality test.[324]

406. Finally, BG contended that Argentina was unable to prove the "grave and imminent peril" that allegedly forced Argentina to take the measures it took. Argentina's economic difficulties, acute as they were from December of 2001 to January of 2002, never mounted to a "grave and imminent peril" to an "essential interest" of the Argentine State within the meaning of Article 25(1)(a) of the ILC Draft Articles as illustrated by the fact that: (i) the institutions of Government continued to operate at all times in accordance with the Constitution; (ii) the GDP per capita on purchasing power parity terms remained the highest in Latin America, according to the IMF; and (iii) since May 2002 the economic indices have reached historic records surpassing pre-crisis levels, particularly in the case of GDP and unemployment. It is thus not possible to argue that an "economic crisis" continues to exist in Argentina and consequently

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[324] Post-Hearing Brief, paragraphs 316-319.

Argentina cannot invoke necessity to excuse the measures it adopted.[325]

**2. The Tribunal's Findings**

407. In the Tribunal's view, Argentina's defense relating to Article 25 of the ILC Draft Articles fails whether the Tribunal rejects or accepts the application of this provision.

408. Article 25 may relate exclusively to international obligations between sovereign States. From this perspective, Article 25 would be of little assistance to Argentina as it would not disentitle BG, a private investor, from the right to compensation under the Argentina-U.K. BIT.

409. Furthermore, the Commentary to the ILC Draft Articles indicates that a defense based on necessity is precluded "*where the international obligation in question explicitly or implicitly excludes reliance on necessity*."[326] It can be argued that the Argentina-U.K. BIT implies such an exclusion. Thus, Argentina would not be entitled to invoke necessity to unilaterally revoke vested rights (*e.g.*, a dollar denominated tariff and economic equilibrium) designed precisely to operate in situations where a run on the currency would lead to a situation of necessity. There is no question that Argentina is entitled to adopt such

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[325] Reply, paragraphs 453-463; Post-Hearing Brief, paragraphs 320-325.

[326] Exhibit JL-358 (United Nations Report of the International Law Commission, 53rd session (2001), A/56/10 at p. 204).

measures as it deems appropriate to emerge from the state of emergency. However, it remains obligated to pay compensation. This is one view as to how bilateral investment treaties operate to induce foreign investment. Assuming that necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT.[327]

410. In any event, even if the Tribunal were to apply Article 25,[328] it must be recalled that this "*is a most exceptional remedy subject to the very strict conditions because otherwise it would open the door to elude any international obligation*".[329] The tribunal in *LG&E* said it appropriately:

> The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in

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[327] Certainly, where the bilateral investment treaty at hand contains an exculpatory provision and such provision finds application, compensation is not payable to the extent that such provision exonerates that party from liability.

[328] Dismissing BG's allegation that the U.K. has always been a "*persistent objector*" to this provision (Post-Hearing Brief, paragraphs 296-301).

[329] *Enron* (paragraph 304).

> principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its Draft Articles on State Responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.[330]

411. The Tribunal does not believe that Argentina has met the "very restrictive conditions", given that measures adopted by Argentina included: (i) luring BG and other investors to accept a temporary suspension of the dollar denominated tariff and the adjustment mechanism by indicating that the measures would be temporary; (ii) threatening companies that resorted to arbitration; (iii) attempting to force investors which commenced arbitration to withdraw these proceedings as a condition to negotiations; and (iv) setting up a mechanism for the revision of the concessions that was

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[330] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v The Argentine Republic* (*LG&E*) (ICSID Case No. ARB/02/1) Decision on Liability dated 3 October 2006 (paragraph 248). The tribunal in LG&E did not rely on the ILC Draft Articles for concluding that Argentina can invoke state of necessity. Instead, that tribunal relied on Article XI of the Argentina-U.S. BIT, a provision which, as noted above, does not exist in the Argentina-U.K. BIT.

never intended to restore the conditions of Argentina's initial representations.

412. Accordingly, whether the Tribunal accepts or rejects the application of Article 25 of the ILC Draft Articles, the result is the same: Argentina may not invoke the "state of necessity" doctrine under customary international law to excuse liability for breach of Article 2.2 of the Argentina-U.K. BIT, or its obligation to pay compensation under the treaty.

## X. Damages

413. Considering the Tribunal's findings above that Argentina has breached the BIT with respect to the standard of fair and equitable treatment and by adopting unreasonable measures under Article 2.2 of the BIT, the Tribunal now turns to: (i) the appropriate standard for determining damages; and (ii) the quantification of any such damages.

414. Claimant seeks: ". . . *full compensation for Argentina's breaches of the Treaty, which amounts to the loss in the fair market value of its investment in MetroGAS caused by the Measures.*"[331]

415. Claimant's expert, Mr. Wood-Collins, applied a discounted cash flow (DCF) methodology to calculate ". . . *that the Measures have reduced the value of BG's investment in MetroGAS as at 1 January 2002 by US$238.1 million.*"[332] This is the amount of damages

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[331] Post-Hearing Brief, paragraph 327.

[332] Wood-Collins Report, paragraph 1.7.

sought by Claimant for the alleged violation by Argentina of Article 2.2 and/or Article 5.1 of the Argentina-U.K. BIT.

416. Argentina took the position that:

a) any liability is excused by "unforeseeable changed circumstances" (*teoría de la imprevisión*) under Article 1198 of the Argentine Civil Code, an issue already addressed by the Tribunal in Chapter V above;

b) the renegotiation process would yield such restitution as BG may be entitled to;[333]

c) BG is not entitled to full reparation;[334] and

d) the Wood-Collins report is flawed.[335]

417. The Tribunal acknowledges that MetroGAS may wish to make its peace with Argentina in the context of the domestic renegotiation process. This, however, has not occurred. This Tribunal continues to be seized in this arbitration with a mandate under the Argentina-U.K. BIT to determine the standard and quantum of damages to which BG might be entitled.

418. The Tribunal has concluded that Argentina did not breach Article 5 of the BIT and so this award deals

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[333] *Alegato Final,* paragraph 559.

[334] *Alegato Final,* paragraph 567.

[335] *Alegato Final,* paragraphs 571-591.

only with reparation for the breach of Article 2.2 of the BIT.[336]

### A. Standard

419. Unlike Article 5 (Expropriation), Article 2 of the Argentina-U.K. BIT does not provide a standard for compensation. Claimant relied on international law and the awards of prior tribunals in support for its position that it is entitled to the fair market value of its investment in MetroGAS.

420. BG argued that the reparation standard for expropriation set out in Article 5 of the Argentina-U.K. BIT applies equally to a breach of Article 2.2 of the treaty. BG found support for the automatic extension of the standard of Article 5 in *CMS v Argentina*. The argument appears as follows in BG's Post-Hearing Brief (footnotes omitted):[337]

> Article 5(1) of the Treaty defines such compensation in the event of an expropriation as the genuine, or fair market, value of the investment, immediately before the expropriation, plus interest until the date of payment. The Treaty contains no such provision for compensation payable in respect of a breach of Article 2(2). However, when faced with a similar case of cumulative breaches of treaty,

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[336] As found by the Tribunal in Sections A and C of Chapter VIII of this award.

[337] Post-Hearing Brief, paragraph 331.

> the tribunal in CMS v Argentina resorted to the same standard of "fair market value" to determine the compensation due, noting that:
>
> "while this standard figures prominently in respect of expropriation, it is not excluded in other cases where the effect of the breach results in important long term losses."

421. This reasoning is scant. In fact, principles of treaty hermeneutics militate for the conclusion that one should not read into Article 2.2 of the BIT a standard which Argentina and the U.K. expressly confined to Article 5 of the BIT.

422. For other reasons, however, "fair market value" can be relied upon as a standard to measure damages for breach of the obligation to accord investors treatment in accordance with Article 2.2 of the BIT. While the Tribunal is disinclined to automatically import such standard from Article 5 of the BIT, this standard of compensation is nonetheless available by reference to customary international law.

423. BG's analysis of international law focuses on the principle established in 1928 by the Permanent Court of International Justice in the *Case Concerning the Factory at Chorzów*.[338] This matter addressed the issue

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[338] Exhibit JL-26 (*Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland), Factory at Chorzow,* Judgment on the Merits, 13 September 1928, PCIJ Series A, No. 21). Post-Hearing Brief, paragraph 330.

of compensation for the expropriation of a nitrate factory at *Chorzów* in Upper Silesia.

424. In its decision on jurisdiction of 26 July 1927, the Permanent Court found that reparation is due for failure to apply a convention even where the convention itself is silent on the issue:[339]

> It is a principle of international law that a breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.

425. The Permanent Court elaborated further on the standard of reparation in adjudicating the merits of the dispute on 13 September 1928:[340]

> 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 reestablish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or,

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[339] *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland),* Jurisdiction, 26 July 1927, PCIJ Series A, No. 9, p. 21.

[340] Exhibit JL-26, p. 47.

> 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.

426. As stated above, *Factory at Chorzów* is also about expropriation. However, its vitality was energized and its scope broadened beyond the law of takings by Article 31 of the ILC Draft Articles:[341]

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

427. Under this rule, which seeks to codify customary international law, the obligation of the responsible State to make full reparation relates to the ". . . *injury caused by the internationally wrongful act.*" The injury, as stated by paragraph 2 of Article 31, includes any material damage caused by the wrongful act. Material

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[341] Exhibit JL-482. (James Crawford, "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002)

damage here ". . . *refers to damage to property . . . which is assessable in financial terms.*"[342]

428. The damage, nonetheless, must be the consequence or proximate cause of the wrongful act.[343] Damages that are "*too indirect, remote, and uncertain to be appraised*" are to be excluded.[344] In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of "full reparation" under the ILC Draft Articles.

429. The Tribunal will be guided by these principles. Provided that the damage is not speculative, indirect, remote or uncertain, the Arbitral Tribunal may have recourse to such methodology as it deems appropriate in order to achieve the full reparation for the injury caused to BG by Respondent's breach of Article 2.2 of the Argentina-U.K. BIT.

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[342] Exhibit JL-482, *cit*, p. 202.

[343] United States-Germany Mixed Claims Commission, Administrative Decisions No. II, R.I.A.A., vol. VII, p. 23 (1923) (quoted by James Crawford in Exhibit JL-482; "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002, note 488).

[344] *Trail Smelter* arbitration, R.I.A.A., vol. III, p. 1931 (1938, 1941), at p. 1931 (quoted by James Crawford in JL-482; "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002, note 489).

## B. Calculation

430. BG's expert Mr. Wood-Collins:

a) assessed the loss in the fair market value of BG's investment in MetroGAS as at 1 January 2002;

b) adjusted the result of (a) above to account for the part of the loss which might be borne by the creditors of GASA and calculated BG's "historical loss" for the period of January 2002 to December 2005.[345]

431. The Tribunal now turns to these calculations.

### 1. The GASA Debt Restructuring

432. As indicated above, GASA owns 70% of MetroGAS and BG owns 54.7% of GASA. Thus, BG's share of MetroGAS owned through GASA is 38.3%. Combined with the 6.8% of MetroGAS that BG owns directly, BG's share of MetroGAS is 45.1%.[346]

433. At the time that the Emergency Law was promulgated, GASA had US$70 million in outstanding debt. This debt was purchased in 2004 and 2005 by two investment funds, Ashmore and Marathon. On 7 December 2005, GASA entered into an agreement with

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[345] The Post-Hearing Brief updates the calculation to 1 September 2006 (paragraph 456).

[346] 45.11% more exactly.

the Ashmore and Marathon Funds to restructure its debt.[347]

434. Pursuant to this agreement, GASA's debt was to be cancelled in exchange for: (i) the issue by GASA and/or transfer by its shareholders to Ashmore Funds of 30% of GASA's shares; (ii) the transfer to Ashmore Funds of approximately 3.65% of shares in MetroGAS held by GASA; (iii) the transfer to Marathon Funds of approximately 15.35 % of shares in MetroGAS held by GASA. After the restructuring, BG's investment in MetroGAS would be reduced by 18.8%, from 45.1% to 26.3%.

435. This transaction is subject to approvals in Argentina. Section 4.2(i) of the Master Restructuring Agreement provides that:

> 4.2 Conditions Precedent to the Consummation of the Restructuring. The Closing is subject to the satisfaction or waiver of the following conditions:
>
> [. . .]
>
> . . . Governmental Approvals. (i) The Company and each of the Creditors shall have received a certified copy of each authorization, consent, order, approval, license, ruling, permit, exemption, filing or registration specified on Schedule 1 hereto. . . . (ii) The New GASA By-Laws and the issuance by the Company of New

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[347] Exhibit J-604. "Ashmore Funds" and "Marathon Funds" are terms defined in the Master Restructuring Agreement.

> Equity shall have been approved by the Comisión Nacional de Valores.

436. It is a matter of record that not all required approvals have been issued by the Argentine authorities and that none have been waived. The transactions contemplated by the Master Restructuring Agreement have therefore not closed and the restructuring of the GASA debt has not been consummated. In addition, the creditors are now entitled to terminate under Section 7.2 of the Master Restructuring Agreement:

> 7.2. Termination.
>
> [. . .]
>
> b) Termination by the Creditors. Each of the following events and circumstances shall be a "Creditor Event of Terminator" hereunder:
>
> [. . .]
>
> (vii) The Closing shall not have occurred by one year from the Execution Date [7 December 2006] other than as a result of non-compliance by a Creditor with its obligations hereunder.

437. Under the circumstances, this award cannot assume that the necessary approvals will be secured and there is no guarantee that the Master Restructuring Agreement will remain in force. The Arbitral Tribunal will therefore proceed on the basis that no restructuring of the GASA debt has been successfully completed.

### 2. Loss in Fair Market Value

438. Using DCF analysis, Mr. Wood-Collins valued BG's 45.1% investment in MetroGAS immediately before and after promulgation of the Emergency Law.[348] The difference between the two valuations, adjusted to consider GASA debt, yields the following result:[349]

**Damages to BG's investment in MetroGAS as at 1 January 2002**
**Total Loss at 1 January 2002**

| | | |
|---|---|---|
| Future value of BG's MetroGAS shares | | |
| Without Measures | US$277.7 m | |
| With Measures | US$2.3 m | |
| Damage | | US$275.4 m |
| GASA adjustment | | |
| Without Measures (Note 1) | (US$38.3 m) | |
| With Measures (Note 2) | (US$1.0 m) | |
| Impact of damage | | (US$37.3 m) |

[348] Although Mr. Wood-Collins refers to "With Measures" and "Without Measures" scenarios, his "Without Measures" valuation does not consider any of the pre-Emergency Law measures listed in his Letter of Instruction (Annex A, Wood-Collins Report).

[349] Table 1 of the Wood-Collins Report, p. 2.

*Appendix F*

| **Total BG interest in MetroGAS on 1 January 2002** | | |
|---|---|---|
| **Without Measures** | **US$239.4 m** | |
| **With Measures** | **US$1.3 m** | |
| **Damage** | | **US$238.1 m** |

Notes
1. Cost of discharging BG's 54.7% share of GASA's US$70.0 m debt.
2. Cost of reducing BG's share in MetroGAS from 45.1% to 26.3%.

439. This Tribunal has reached the conclusion that the Wood-Collins Report leads to a result which is uncertain and speculative. Specifically, the Tribunal is not persuaded by Mr. Wood-Collins' US$1.3 million valuation of BG's investment in Argentina in his "With Measures" scenario.

440. The Wood-Collins Report dismisses valuations of US$21.3million and US$18.8 million with little explanation.[350] More importantly, during testimony, Mr. Wood-Collins failed to satisfactorily reconcile his valuation of US$1.3 million with the implied value of the Ashmore/Marathon transaction, whereby US$38.2 million of debt was cancelled in exchange for an 18.8% interest in MetroGAS.[351] Regardless of the motivations of these funds, BG was willing to relinquish an 18.8%

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[350] Wood-Collins Report, paragraphs L.27 and L.28, p. 104.

[351] Tr. Wood-Collins 1265:13 to 1279:16, 1291:13-1293:13.

indirect interest in MetroGAS in exchange for a US$38.2 million write-off. This transaction would result in a post-Emergency Law value of BG's 45.11% interest in MetroGAS of US$91,825,244.15.[352] In the Tribunal's view this transaction provides an objective indication of the value of BG's investment after the Emergency Law.

441. The record also includes evidence of a transaction involving an interest in MetroGAS before the enactment of the Emergency Law.[353] Mr. Wood-Collins considered this transaction:[354]

> 4.22 On 12 July 1998, Perez Companc sold 25% of GASA for US$75 million. This implies that 100% of GASA was worth US$300 million. At that time GASA had debts of US$130 million and its sole asset was 70% of the shares of MetroGAS. As such, those shares in MetroGAS must have been valued at US$430 million.

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[352] (1) $70,000,000 (BG's share of the GASA debt) x 54.67% (BG's ownership in GASA) = $38,269,000; (2) $38,269,000 (value to BG of cancellation of its share of the GASA debt) / 18.8% (capitalization of the GASA debt to Ashmore and Marathon) = $203,558,510.64; (3) $203,558,510.64 (total implicit value of MetroGAS) x 45.11% (total BG interest in MetroGAS) = $91,825,244.15

[353] Exhibit J-183.

[354] Wood-Collins Report, Section 7, pp. 34 and 35 (footnotes omitted).

> 4.23 Consequently, 100% of the MetroGAS shares must have been valued at US$614.3 million and therefore BG's 45.1% share of MetroGAS had an implied value of US$277.0 million.

442. Considering that BG's exact total (direct and indirect) ownership interest in MetroGAS is 45.11%, the implied value of such interest is actually US$277,110,730. It is the Tribunal's view that this is also a better proxy of the value of BG's investment before promulgation of the Emergency Law.

443. Consequently, the Tribunal's calculations based on actual transactions yield the following damage to BG's investment:

| | | |
|---|---|---|
| Without Measures | US$277,110,730.00 | |
| With Measures | US$91,825,244.15 | |
| Damage | | US$185,285,485.85 |

444. Argentina shall thus pay BG damages in the sum of US$185,285,485.85.

445. In its Reply, BG articulated its prayer for damages as follows:[355]

> (. . .) In view of the foregoing, BG requests that the Tribunal:

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[355] Reply, paragraph 535.

(. . .)

(d) Order that Argentina compensate BG in the sum equivalent to $238.1 million, plus interest at the average interest rate applicable to US six month certificates of deposit, compounded semi-annually;

(. . .)

446. It is noteworthy that BG's Reply does not include an independent claim for historical loss. In its Post-Hearing Brief, BG further stated the following with respect to historical loss:[356]

> (. . .) the historical loss forms an important component of BG's total loss, and has not been challenged.

447. Thus, because the Tribunal has already adjudicated BG's claim as articulated, there is no need for the award to independently address historical loss. Nonetheless, to the extent that BG's pleadings could be interpreted as asserting an independent claim for historical loss, the Tribunal records that there is no support for any such claim.

448. Mr. Wood-Collins' calculation of historical loss results from certain projections prepared by MetroGAS in September of 2001 (the MetroGAS 2001 Projections). The date of these projections is unclear. Claimant stated that they were prepared by MetroGAS on 21

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[356] Reply, paragraph 535.

September 2001.[357] Mr. Wood-Collins dates them on 27 September 2001.[358] However, the actual "MetroGAS spreadsheet" that Mr. Wood-Collins used as a source for his calculations is not on the record.

449. The MetroGAS 2001 Projections as presented by Annex E of the Wood-Collins Report are oblivious to the economic crisis that preceded the measures adopted by Argentina in January of 2002. Annex E projects a historical spike in the payment of dividends by MetroGAS (*i.e.,* over US$280 million for the 2002-2005 period)[359] precisely at a time (September of 2001) where internal and external shocks rendered the Argentine economy particularly vulnerable. As indicated in paragraph 54 of this award, Argentina could not address the combined effect of these shocks through exchange rate or monetary policies.

450. This is a fact that the business community could not ignore even in the absence of the measures that Argentina adopted a few months later. The Tribunal recalls here that the MetroGAS 2001 Projections were prepared by MetroGAS at a time when the adjustment of tariffs for US inflation had already been suspended and was subject to challenge before the Argentine courts.

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[357] Post-Hearing Brief, footnote 473.

[358] Wood-Collins Report, Annex E.

[359] These payments also exceed the 95% dividends policy adopted by MetroGAS in its "2001 Plan Assumptions" set out in Exhibit CRA-10 of the Wood-Collins Report.

451. From a legal perspective, there is no evidence on the record of a dividend policy approved pursuant to the corporate procedures set out in the By-Laws of MetroGAS.[360]

452. For these reasons, to the extent that Claimant has made an independent claim for historical loss, the Tribunal finds that it is not reasonable to rely on the MetroGAS 2001 Projections in support for any such claim. In addition, the Tribunal notes that implicit in the valuation of the Pérez Companc and Ashmore/Marathon transactions discussed above is an expectation of cash flow to equity.

453. For these reasons, the Tribunal does not enter any decision for payment of damages in excess of the sum set out in paragraph 444 above.

**C. Interest**

454. This Tribunal agrees with BG that interest at a reasonable commercial rate is appropriate to compensate BG in full for Argentina's breach of the Argentina-U.K. BIT. The Tribunal further finds, however, that interest should run from 6 January 2002, the date of promulgation of the Emergency Law, and not from 1 January 2002, as argued by BG, until payment of this award by the Republic of Argentina.

455. The rate of interest is a function of the instrument in which BG could have reasonably invested funds available to it on 6 January 2002. The

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[360] Exhibit J-117.

Tribunal agrees with Mr. Wood-Collins that investment in a highly secure, dollar denominated, liquid and short-term instrument would have enabled BG to rapidly redeploy its funds.[361] The Tribunal further accepts that US Treasury six-month certificates of deposit meet these criteria and that interest should be compounded semi-annually. The Tribunal finally notes that Argentina did not address BG's claim to interest or the reasonableness of assuming US Treasury certificates of deposit, and it did not challenge the authorities relied upon by BG in support for its position on compound interest.[362] The Tribunal finds that these authorities are persuasive.

456. The Tribunal notes in particular that the standard of "full reparation" articulated in Section X.A

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[361] Wood-Collins Report, paragraph 8.2.

[362] Exhibit JL-190 (FA Mann, "Compound Interest as an Item of Damage in International Law" (1988), 21 *University of California Davis Law Review* 577); Exhibit JL-268 (JY Gotanda, "Awarding Interest in International Arbitration", (1966), 90 *American Journal of International Law* 40); Exhibit JL-350 (*Metalclad Corp v The United Mexican States,* Case No ARB(AF)/97/1, Award of 30 August 2000, paragraphs 128 and 131); Exhibit JL-328 (*Emilio Agustín Maffezini v The Kingdom of Spain,* ICSID Case No ARB/97/7, Award of 13 November 2000,, paragraphs 96-97); Exhibit JL-322 (*Compañía del Desarrollo de Santa Elena, SA v The Republic of Costa Rica,* Case No ARB/96/1, Final Award of 17 February 2000, paragraphs 97-107); Exhibit JL-331 (*Wena Hotels Ltd v A RA-b Republic of Egypt,* ICSID Case No ARB/98/4, Award of 8 December 2000, paragraphs 128-130); Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic,* ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 471).

above would not be achieved if the award were to deprive Claimant of compound interest. If invested in January of 2002, the sums awarded would have earned compound interest – investment in six month certificates of deposit involves earning compound interest.

457. For these reasons, the Tribunal finds that Respondent shall pay Claimant interest on the sum of US$185,285,485.85 from 6 January 2002 until the date of payment, at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually.

## XI. Costs

458. BG brought a claim for US$238.1 million plus interest. This award finds for BG in the amount of US$185.3 plus interest. BG therefore prevailed with respect to 78% of the amount it claimed.

459. As to jurisdiction and admissibility, while this Tribunal has entered an affirmative finding on jurisdiction, it also concluded that BG does not have standing to bring "claims to money" and "claims to performance", or to assert other rights, derived from the MetroGAS License (see paragraph 217 above).

460. Under the circumstances and pursuant to Article 40 of the UNCITRAL Rules, the Tribunal finds that it is reasonable for Argentina to bear 70% of: (i) the costs of the arbitration as fixed in paragraph 462 below; and (ii) BG's legal fees and expenses.

*Appendix F*

461. Pursuant to Article 38 of the UNCITRAL Rules, the fees of the Tribunal are hereby fixed as follows:

a) Guillermo Aguilar Alvarez,

US$323,168.13

b) Albert Jan van den Berg,

US$328,308.14

c) Alejandro Garro,

US$197,095.17

462. In addition, the expenses of the Arbitral Tribunal amount to US$261,907.82. This sum includes the fees and expenses of the Administrative Secretary, the costs of translating the award, and the administrative fee of $59,312.50 paid to ICSID as custodian of the funds deposited by the Parties pursuant to Article 41 of the UNCITRAL Rules (Section 16 of Procedural Order No. 2). Moreover, the costs of the Preliminary Conference and of the evidentiary hearing are US$126,020.74. This yields a total for the costs of the arbitration, including Tribunal fees and expenses, and costs of the Preliminary Conference and evidentiary hearing, of US$1,236,500.00.

463. The Parties paid the deposit fixed by the Tribunal to cover its fees and expenses (Article 41 of the UNCITRAL Rules) as follows:

*Appendix F*

a) Claimant:

US$618,250.00

b) Respondent:

US$618,250.0

**Total: US$1,236,500.00**

464. There was a shortfall for payment of arbitral fees after 16 July 2006, caused by events set out in the Tribunal's letter to the Parties of 25 September 2007. All three arbitrators and the Tribunal's Administrative Secretary have waived a portion of their fees in order not to burden the Parties with a request for supplemental payments. Accordingly, nothing remains payable.

465. In addition, BG submitted a claim for legal fees and expenses in the sum of US$624,390.00[363] and GB£3,448,773.00. In the Tribunal's view, these sums are reasonable.

466. Accordingly, to comply with the Tribunal's order as set out in paragraph 460 above, Respondent shall pay Claimant:

a) the sum of US$247,300.00 for costs of the arbitration as fixed in paragraph 462 above; and

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[363] This comprises the amounts set out in paragraphs 461 to 464, as updated in BG's costs submission of 4 June 2007.

b) the sum of US$437,073.00 and GB£2,414,141.10 as legal fees and expenses incurred by Claimant in this arbitration.

## XII. Decision

467. For the foregoing reasons, the Arbitral Tribunal unanimously renders the following award:

(1) Subject to decision number (2) below, this Arbitral Tribunal has jurisdiction with respect to all of BG Group Plc.'s claims which are admissible in this arbitration.

(2) BG Group Plc. does not have standing to seize this Tribunal with "claims to money" and "claims to performance" under the Argentina-U.K. BIT, or to assert in this arbitration any other right derived from the MetroGAS License.

(3) The Republic of Argentina breached Article 2.2 of the Argentina-U.K. BIT.

(4) The Republic of Argentina shall pay BG Group Plc. the sum of US$185,285,485.85 (one hundred and eighty five million two hundred and eighty five thousand four hundred and eighty five US dollars and 85/100) for damages to BG Group Plc.'s investment claimed in this arbitration.

(5) The Republic of Argentina shall pay BG Group Plc. interest on the sum set out in decision (4) above from 6 January 2002 until the date of payment, at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually.

(6) The Republic of Argentina shall pay BG Group Plc. the sum of US$247,300.00 for costs of the arbitration.

(7) The Republic of Argentina shall pay BG Group Plc. the sums of US$437,073.00 (four hundred thirty seven thousand and seventy three US dollars) and GB£2,414,141.10 (two million four hundred and fourteen thousand one hundred and forty one British Pounds and 10/100) for legal fees and expenses incurred by BG Group Plc. in this arbitration.

(8) All other claims are rejected.

Done in Washington D.C., on 24 December 2007 in equally authoritative English and Spanish versions.

/s/Albert Jan van den Berg
Albert Jan van den Berg
Arbitrator

/s/Alejandro M. Garro
Alejandro M. Garro
Arbitrator

/s/Guillermo Aguilar Alvarez C.
Guillermo Aguilar Alvarez C.
President

## APPENDIX G

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 11-7021**
**September Term, 2013**
**1:08-cv-00485-RBW**

**[Filed May 21, 2014]**

| | |
|---|---|
| Republic of Argentina, | ) |
| | ) |
| Appellant | ) |
| | ) |
| v. | ) |
| | ) |
| BG Group plc, | ) |
| | ) |
| Appellee | ) |
| | ) |

**BEFORE:** Henderson and Rogers, Circuit Judges; Sentelle, Senior Circuit Judge

**O R D E R**

Upon consideration of appellant's petition for rehearing, it is

**ORDERED** that the petition be denied. In ordering that the district court orders be affirmed, the court concluded that Argentina's remaining challenges lacked merit. To wit: The arbitral panel provided a colorable reading of international law and the Treaty

in concluding BG Group's derivative claim was permissible and did not exceed the panel's authority. *See, e.g., Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1180 (D.C. Cir. 1991). Argentina failed to offer the kind of direct and definite evidence required to show partiality of the arbitrator, *see Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996). Its "undue means" objection based on similar witness statements is frivolous absent evidence the witnesses did not subscribe to the statements or they were false, *see Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995). Assuming the manifest-disregard-of-law standard applies, Argentina failed to show either that the "state of necessity" doctrine clearly applied or that the arbitral panel refused to apply it or ignored it. *See LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001). Finally, Argentina's public policy challenges to confirmation of the damages award failed to overcome the "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), and the high hurdle for applying the public policy exception, *see TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007); no "basic notions of morality and justice" were violated by either the damages calculation or BG Group's derivative action. *Id.* (citation omitted) (internal quotation marks omitted); *cf.* Restatement (Second) of Contracts § 304.

**Per Curiam**

*Appendix G*

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk