

International Centre for Settlement of Investment Disputes  
Washington, D.C.

In the proceedings between

Suez, Sociedad General de Aguas de Barcelona S.A.,  
and InterAgua Servicios Integrales del Agua S.A.

(Claimants)

and

The Argentine Republic  
(Respondent)

(ICSID Case No. ARB/03/17)

### **DECISION ON LIABILITY**

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*Members of the Tribunal*

Professor Jeswald W. Salacuse, President  
Professor Gabrielle Kaufmann-Kohler, Arbitrator  
Professor Pedro Nikken, Arbitrator

*Secretary of the Tribunal*

Mr. Gonzalo Flores

*Representing the Claimants:*

Mr. Nigel Blackaby  
Mr. Lluís Paradell  
Ms. Noiana Marigo  
Freshfields Bruckhaus Deringer LLP

*Representing the Argentine Republic:*

Until 26 January 2010:  
Dr. Osvaldo César Guglielmino  
Procurador del Tesoro de la Nación

From 27 January 2010:  
Dr. Joaquín Pedro da Rocha  
Procurador del Tesoro de la Nación

**Date:** 30 July 2010

## **Table of Abbreviations**

ASSA	Aguas Santafesinas S.A.
APSF	Aguas Provinciales de Santa Fe S.A.
BIT	Bilateral Investment Treaty
DIPOS	Dirección Provincial de Obras Sanitarias
ENRESS	Ente Regulador de Servicios Sanitarios
ICSID	International Centre for Settlement of Investment Disputes
OSN	Obras Sanitarias de la Nación
PGMDS	Plan General de Mejoras y Desarrollo de Servicios
Province	Province of Santa Fe
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

## TABLE OF CONTENTS

I	Procedural Background .....	1
	A. Commencement of the Arbitration .....	1
	B. Constitution of the Tribunal .....	2
	C. Preliminary Session and Scheduling .....	3
	D. Respondent’s Challenge to Jurisdiction .....	3
	E. Petition for Participation as Amicus Curiae .....	4
	F. Withdrawal of APSF as a Claimant.....	5
	G. The Tribunal’s Decision on Jurisdiction .....	6
	H. Hearing on the Merits.....	7
	I. Respondent’s First Arbitrator Challenge.....	7
	J. Respondent’s Second Arbitrator Challenge .....	8
II	The Facts of This Case .....	9
	A. Background .....	9
	B. The Privatization of the Santa Fe Water and Sewage Systems .....	10
	C. The Selection of the Claimants’ Consortium as Concessionaire.....	11
	D. The First Six Years of Operation (1995-2001).....	12
	E. The Argentine Financial Crisis (2001-2003).....	14
	F. Attempts to Renegotiate the Concession .....	15
	G. The Termination of the Concession.....	17
III	The Law Applicable to This Dispute.....	18
IV	The Legal Framework of the APSF Concession .....	20
	A. Legislative and Regulatory Measures.....	21
	B. The Concession Contract.....	29
	C. General Considerations .....	36
V	The General Nature of the Claimants’ Claims and Argentina’s Defenses .....	37
VI	Responsibility for Direct or Indirect Expropriation.....	38
	A. The Applicable Treaty Provisions .....	38
	B. Measures Taken to Cope with the Crisis .....	43
	C. The Province’s Refusal to Revise the Tariff .....	45
	D. The Province’s Termination of the Concession .....	47
	E. Argentina’s Police Powers Defense .....	52
	F. The Tribunal’s Conclusions .....	53
VII	Responsibility for Failure to Provide Protection and Security .....	54
	A. The Applicable Treaty Provisions .....	54
	B. Analysis and Jurisprudence .....	54

C.	The Tribunal’s Conclusions .....	62
VIII	Responsibility for Failure to Accord Fair and Equitable Treatment.....	62
A.	The Applicable Treaty Provisions .....	62
B.	The Claimants’ Position .....	66
1.	Failure to Revise Tariff .....	67
2.	Imposed Renegotiation .....	68
3.	Unilateral Termination of the Concession.....	68
C.	The Respondent’s Position .....	69
D.	Analysis .....	70
1.	Santa Fe’s Refusal to Revise the Tariff.....	78
2.	Santa Fe’s Measures to Renegotiate the Concession.....	81
3.	Santa Fe’s Termination of the Concession .....	83
E.	The Tribunal’s Conclusions. ....	84
IX	Argentina’s Defense of Necessity .....	85
A.	The Nature of the Defense.....	85
B.	Argentina’s Position .....	86
C.	The Claimants’ Position .....	87
D.	Analysis .....	88
X	Further Procedure; Cost and Expenses .....	91
XI	The Tribunal’s Conclusions with Respect to the Respondent’s Liability.....	92

## I Procedural Background

### A. Commencement of the Arbitration

1. On 17 April 2003, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received a Request for Arbitration (“the Request”) against the Argentine Republic (“the Respondent” or “Argentina”) from Aguas Provinciales de Santa Fe S.A. (“APSF”), Suez, Sociedad General de Aguas de Barcelona S.A. (“AGBAR”) and InterAgua Servicios Integrales del Agua S.A. (“InterAgua”), (together, “the Claimants”). APSF was a company incorporated in Argentina. Suez, incorporated in France, and AGBAR and InterAgua, both incorporated in Spain, are major shareholders in APSF. The Request concerned the Claimants’ investments in a concession for water distribution and waste water treatment in the Argentine Province of Santa Fe and a series of alleged acts and omissions by Argentina, including Argentina’s alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.<sup>1</sup>

2. In the Request, the Claimants invoked Argentina’s consent to dispute settlement through ICSID arbitration provided in the 1991 Bilateral Investment Treaty between France and the Argentine Republic (the “Argentina–France BIT”)<sup>2</sup> and in the 1991 Bilateral Investment Treaty between the Argentine Republic and the Kingdom of Spain (the “Argentina-Spain BIT”).<sup>3</sup>

3. On 17 April 2003, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged

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<sup>1</sup> On the same date, the Centre received two further requests for arbitration under the ICSID Convention regarding water concessions in Argentina from (i) Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. and (ii) Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. regarding similar investments and disputes. As explained below, these requests would later be registered by the Centre and submitted by agreement of the parties to one same Tribunal. The first of the above-mentioned proceedings, involving Aguas Cordobesas S.A., would eventually be discontinued following an agreement between the parties.

<sup>2</sup> Accord entre le Gouvernement de la République française et le Gouvernement de la République Argentine sur l’encouragement et la protection réciproques des investissements (Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments), signed on 3 July 1991 and in force since 3 March 1993; 1728 UNTS 298.

<sup>3</sup> Acuerdo para la promoción y protección recíprocas de inversiones entre el Reino de España y la República Argentina (Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic), signed in Buenos Aires on 3 October 1991 and in force since 28 September 1992; 1699 UNTS 202.

receipt and transmitted a copy of the Request to the Argentine Republic and to the Argentine Embassy in Washington D.C.

4. On 17 July 2003, the Acting Secretary-General of the Centre registered the Request, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention” or “the Convention”). The case was registered as ICSID Case No. ARB/03/17 with the formal name of *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*.<sup>4</sup> On that same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

B. *Constitution of the Tribunal*

5. The parties could not reach an agreement on the number of arbitrators to comprise the arbitral tribunal nor on the method for their appointment. Accordingly, on 22 September 2003, the Claimants requested that the tribunal be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; *i.e.* one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties. The Claimants appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national as arbitrator. The Argentine Republic in turn appointed as arbitrator Professor Pedro Nikken, a national of Venezuela.

6. In the absence of an agreement between the parties on the name of the presiding arbitrator, on 21 October 2003 the Claimants, invoking Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), requested the Centre to make this appointment. With the agreement of both parties, the Centre appointed Professor Jeswald W. Salacuse, a national of the United States of America, as the President of the Tribunal.

7. On 17 February 2004, the Deputy Secretary-General of ICSID, in accordance with ICSID Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun

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<sup>4</sup> As noted in footnote 1 *supra*, on this same date the Centre registered two further requests for arbitration regarding water concessions in Argentina: ICSID Case No. ARB/03/18 (*Aguas Cordobesas S.A., Suez, and AGBAR v. Argentine Republic*) and ICSID Case No. ARB/03/19 (*Aguas Argentinas S.A., Suez, AGBAR and Vivendi Universal S.A. v. Argentine Republic*).

on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal. The parties agreed that the same tribunal would hear and decide ICSID Case No. ARB/03/17 along with three other cases involving water concessions in the provinces of Buenos Aires (ICSID Case No. ARB/03/19 and the arbitration instituted by AWG against the Argentine Republic under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules), and Cordoba (ICSID Case No. ARB/03/18). The proceedings instituted under the UNCITRAL Arbitration Rules are also being administered by ICSID following the parties' agreement and the Tribunal's consent.

C. *Preliminary Session and Scheduling*

8. Under ICSID Arbitration Rule 13, the Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The parties could not agree on a suitable date for the first session within the prescribed time limits. The Tribunal accordingly held its first session without the parties via telephone conference on 19 April 2004.

9. On 7 June 2004, the Tribunal held a session with the parties at the seat of the Centre in Washington, D.C. During the session the parties confirmed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections in this respect.

10. During the session the parties also agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal.<sup>5</sup> The Tribunal, after consultation with the parties, also fixed a timetable for the written and oral pleadings in this case.

D. *Respondent's Challenge to Jurisdiction*

11. In accordance with the agreed timetable, on 20 September 2004, the Claimants filed their Memorial on the Merits with accompanying documentation. On 26 November 2004 Argentina filed a Memorial with objections to jurisdiction.

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<sup>5</sup> During the session the parties agreed on a series of procedural matters related to the present case, ICSID Cases Nos. ARB/03/19 and ARB/03/18 and the UNCITRAL arbitration instituted by AWG. These agreements included a staggered schedule of written and oral submissions. A copy of the minutes of the session was enclosed as Annex No.1 to the Tribunal's Decision on Jurisdiction.

12. By letter of 3 December 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with ICSID Arbitration Rule 41(3). On 1 February 2005, the Claimants filed their Counter-Memorial on Jurisdiction.

13. As agreed upon during the 7 June 2004 session, a hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. on 9 May 2005. Mr. Nigel Blackaby, Mr. Lluís Paradell and Ms. Noiana Marigo from Freshfields Bruckhaus Deringer LLP, Mr. Bernardo Iriberry, from the Buenos Aires-based law firm Estudio Cardenas Cassagne y Asociados, Messrs. Jean-Paul Minette and Patrice Herbert from Suez Environment and Mr. Miquel Griño, from AGBAR, attended the hearing on behalf of the Claimants. Messrs. Jorge Barraguirre and Ignacio Torterola from the *Procuración del Tesoro de la Nación Argentina*, attended the hearing on behalf of the Respondent. Also present on behalf of the Respondent were Ms. Liliana Campomanes from CEARINSA (*Comisión de Estudio de Arbitrajes Internacionales de la Provincia de Santa Fe*), Mr. Carlos Reyna from the *Ente Regulador de Servicios Sanitarios de la Provincia de Santa Fe* and Mr. Félix López Amaya, of the *Fiscalía de Estado of the Province of Córdoba*. During the hearing Messrs. Blackaby and Paradell addressed the Tribunal on behalf of the Claimants. Messrs. Barraguirre and Torterola addressed the Tribunal on behalf of the Argentine Republic. The Tribunal posed questions to the parties, as provided in Rule 32(3) of the Arbitration Rules.

14. Following the hearings on jurisdiction, the Respondent at various times filed unsolicited documents and arguments further contesting the Tribunal's jurisdiction. On each occasion, the Tribunal requested the Claimants' views on these arguments and documents, and the Claimants totally rejected them each time. Finding that the Respondents had a full and complete opportunity to present their objections to jurisdiction in their memorial and oral arguments at the hearing on jurisdiction and finding further that the arguments presented in these unsolicited filings duplicated those that the Respondents had submitted in their oral arguments and memorial, the Tribunal by letter of March 24, 2006 requested the parties to refrain from making any new unsolicited submissions.

E. *Petition for Participation as Amicus Curiae*

15. On 25 June 2005, a non-governmental organization, *Fundación para el Desarrollo Sustentable*, based in Rosario in the Province of Santa Fe, and three individuals filed with the tribunal a *Petición de Participación como Amicus Curiae* (Petition for Participation as *Amicus Curiae*). Following the filing of the *Petición*, the Tribunal invited the parties to make any



observations they might have in this regard, and both parties submitted their views on this matter. On 17 March 2006 the Tribunal issued an *Order in Response to a Petition for Participation as Amicus Curiae* setting out the conditions under which the Tribunal would consider *amicus curiae* submissions.<sup>6</sup> No such petition was ever filed.

F. *Withdrawal of APSF as a Claimant*

16. By letter of 11 January 2006, counsel for Claimants informed the Tribunal of the decision of APSF to withdraw its claim in case No. ARB/03/17. Upon invitation of the Tribunal, the Respondent filed its observations to this withdrawal by letter of 8 February 2006. The Respondent did not object to the withdrawal of APSF but requested that APSF provide copies of the minutes of the shareholders' meeting at which this decision was made. At the same time, Respondent advanced further arguments objecting to the Tribunal's jurisdiction and claiming that APSF's decision to withdraw somehow extinguished the claims of the other Claimants in this case. At the invitation of the Tribunal, counsel for APSF provided copies of the minutes of the APSF's shareholders' meeting of 4 May 2005 and of the APSF's board of directors' meeting of 10 January 2006, authorizing the discontinuance of its claim before this Tribunal. At the same time, counsel for the Claimants rejected each of the Respondent's arguments challenging the Tribunal's jurisdiction with respect to the other Claimants. The Tribunal provided copies of these documents to the Respondent and requested its observation concerning APSF's withdrawal.

17. By letter of 31 March 2006, the Respondent informed the Tribunal that "... the Argentine Republic does not oppose the proposed cessation by the Concessionaire... APSF..." in ICSID arbitration ARB/03/17 ("... *la República Argentina no se opone al desistimiento planteado por la[s] Concesionaria[s] APSF...*"), but argued that such withdrawal had legal consequences with respect to the Tribunal's jurisdiction over the shareholder Claimants and their claims.

18. In its deliberations on this request, the Tribunal found that neither the ICSID Convention nor the Rules specifically provided for the withdrawal of one party from an arbitration proceeding which is to continue thereafter. ICSID Arbitration Rule 44, the provision of closest relevance to the action requested by the Claimant APSF, allows the discontinuation of an arbitration proceeding at the request of a party when the other party does not object. But Arbitration Rule 44 by a strict reading of its terms does not apply to the withdrawal of a single party. Nonetheless,

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<sup>6</sup> Available at ICSID's website [icsid.worldbank.org](http://icsid.worldbank.org). A similar request had previously been filed with the same tribunal by five non-governmental organizations (NGOs) in ICSID Case No. ARB/03/19. The Tribunal's *Order in Response to a Petition for Transparency and Participation as Amicus Curiae* in that case, of 19 May 2005, is available at [icsid.worldbank.org](http://icsid.worldbank.org).

the Tribunal, relying on Article 44 of the ICSID Convention, which grants ICSID tribunals the power to decide procedural questions not covered by the Convention or the Rules, concluded that it had the power to order the discontinuance of proceedings with respect to one party at its request when the other party did not object. The Tribunal found that permitting such discontinuance in this case was in accordance with the basic objective of the ICSID Convention of facilitating the settlement of investment disputes, of which ICSID Arbitration Rule 44 is a specific manifestation. It also was of the view that the continued participation of APSF in this proceeding would serve no useful purpose in bringing about a fair and correct resolution of the present arbitration.

19. On 14 April 2006, the Tribunal therefore entered Procedural Order No. 1 *Concerning the Discontinuance of Proceedings with Respect to Aguas Provinciales de Santa Fe S.A.*, directing that: (i) the proceedings in ICSID Case No. ARB/03/17 with respect to the Claimant APSF be discontinued and that the said Claimant APSF cease to be a party with effect from 14 April 2006; and (ii) that the proceedings in ICSID Case No ARB/03/17 continue in all other respects. With respect to the Respondent's arguments that the withdrawal of APSF from the case had implications for the Tribunal's jurisdiction over the shareholder Claimants and their claims, the Tribunal concluded that these objections were more appropriately addressed in its decision on jurisdiction.

G. *The Tribunal's Decision on Jurisdiction*

20. After having considered each and every jurisdictional objection raised by the Respondent, the Tribunal rejected them all, except for the fourth objection based on the status of APSF as an Argentine corporation, which objection had become moot because of the discontinuance of the proceedings in the case with respect to APSF. In its Decision on Jurisdiction of 16 May 2006,<sup>7</sup> the Tribunal thus decided that ICSID and this Tribunal had jurisdiction over ICSID case No. ARB/03/17. The Tribunal therefore directed the case to proceed on the merits in accordance with the ICSID Convention, the ICSID Rules, and the applicable bilateral investment treaties. The Tribunal accordingly made the necessary Order for the continuation of the procedure pursuant to ICSID Arbitration Rule 41(4). Subsequently, with the consultation of the parties, the Tribunal scheduled dates for a hearing on the merits.

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<sup>7</sup> Available at [icsid.worldbank.org](http://icsid.worldbank.org).

H. *Hearing on the Merits*

21. A hearing on the merits took place from 28 May 2007 through 1 June 2007 at the seat of the Centre in Washington, D.C. Each side in the case presented a number of witnesses for examination by the other side and questions from the Tribunal. Mr. Nigel Blackaby, Mr. Lluís Paradell and Ms. Noiana Marigo from Freshfields Bruckhaus Deringer LLP; Mr. Bernardo Iriberry, from Estudio Cardenas, Di Cío, Romero, Tarsitano & Lucero, Abogados in Buenos Aires; Mr. Julio Durand from Estudio Cassagne, Abogados in Buenos Aires; Ms. María Victoria Stratta, from Estudio Jurídico Stratta in Buenos Aires, Mr. Jean-Marie Guvain, Ms. Isabelle Froment-Meurice and Mr. Jean Bernard Lemire from Suez Environment; Mr. Miquel Griño, from AGBAR attended the hearing on behalf of the Claimants. Messrs. Adolfo Gustavo Scrinzi, José Luis Cassinerio, Jorge Barraguirre, Fabián Rosales Markaida, Mauricio D’Alessandro Longhin, Alejandro Turyn, Facundo Perez Aznar, Diego Gosis Nicolas Grosse, Javier Pargament, and Carlos Winograd and Ms. Adriana Busto, Ms. Mercedes Balado and Ms. Alejandra Mackluf, from the *Procuración del Tesoro de la Nación Argentina*, Mr. Ignacio Torterola, from the Embassy of the Argentine Republic in Washington D.C., and Mr. Francisco Iturraspe and Ms. Liliana Campomanes, from *Fiscalía del Estado* of the Province of Santa Fe, attended the hearing on behalf of the Respondent. The Tribunal posed questions to the parties, as provided in Rule 32(3) of the Arbitration Rules. At the end of the hearing, the Tribunal directed the parties to simultaneously file post-hearing briefs by 6 July 2007.

I. *Respondent’s First Arbitrator Challenge*

22. On 12 October 2007, after the filing of post-hearing submissions by both parties, the Respondent filed with the Secretary of the Tribunal a Proposal pursuant to Article 57 of the Convention and Rule 9 of the ICSID Arbitration Rules to disqualify Professor Gabrielle Kaufmann-Kohler as a member of the Tribunal “...by virtue of the objective existence of justified doubts with respect to her impartiality.” (para. 1) (“... *en virtud de la existencia objetiva de dudas justificadas respecto de su imparcialidad*”). The alleged basis for this request arose out of the fact that Professor Kaufmann-Kohler had been a member of an ICSID tribunal in the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*,<sup>8</sup> which had rendered an award against Argentina on 20 August 2007.

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<sup>8</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3); hereinafter “Vivendi II.”

23. Once the Tribunal became aware of the Respondent's Proposal, Professor Kaufmann-Kohler immediately withdrew from Tribunal deliberations, and the two remaining Tribunal members suspended proceedings in the three cases pending before it on 15 October 2007, forwarded the Respondent's Proposal to the Claimants with a request for their observations, and invited Professor Kaufmann-Kohler to furnish any explanations that she wished to make. After receiving submissions from the parties and from Professor Kaufmann-Kohler, the two remaining members of the Tribunal deliberated and, on 22 October 2007, made a *Decision on the Proposal for the Disqualification of a Member of the Tribunal*,<sup>9</sup> rejecting the Respondent's Proposal and directing that the state of suspension of the proceedings be terminated.

J. *Respondent's Second Arbitrator Challenge*

24. On 29 November 2007, the Respondent filed with the Tribunal a second Proposal to disqualify Professor Kaufmann-Kohler (hereinafter "Respondent's Second Proposal") under Article 57 of the Convention and Rule 9 of the ICSID Arbitration Rules "...on the basis that Professor Kaufmann-Kohler does not meet the conditions required to be an arbitrator in the above mentioned proceedings, pursuant to the provisions set forth in Article 14(1) of the ICSID Convention." Specifically, the Respondent alleged that "... Mrs. Kaufmann-Kohler cannot be 'relied upon to exercise independent judgment,'... since [she] holds the position of Director of the UBS group...", which held shares in Suez and engaged in certain other activities relating to the international water sector. Moreover, the Respondent asserted that Professor Kaufmann-Kohler failed to disclose this fact to the parties and to ICSID as is required by the ICSID Arbitration Rules. The Respondent's Second Proposal also extended to two other ICSID cases, not subject to the jurisdiction of this Tribunal, in which Professor Kaufmann-Kohler is also serving as an arbitrator.<sup>10</sup>

25. On receipt by the Tribunal of the Respondent's Second Proposal, Professor Kaufmann-Kohler withdrew from Tribunal deliberations, and the two remaining members suspended the proceedings on 4 December 2007, forwarded the Respondent's Second Proposal to the Claimants with a request for their observations, and invited Professor Kaufmann-Kohler to furnish any explanations that she wished to make.

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<sup>9</sup> Available at [icsid.worldbank.org](http://icsid.worldbank.org).

<sup>10</sup> *Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/22) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23).

26. After receiving an explanation from Professor Kaufmann-Kohler and an exchange of observations on the matter from the parties, the remaining members of the Tribunal in a Decision dated May 12, 2008<sup>11</sup> determined that Professor Kaufmann-Kohler's position as a non-executive director of UBS did not affect her independence as an arbitrator in the above-entitled case and that she had no obligation to disclose her UBS directorship to the parties or to the Tribunal, thus terminating the suspension of the present case.

27. The Tribunal has now considered and deliberated upon the parties' various written submissions and the oral arguments presented during the course of the hearing on the merits. Having considered the relevant facts and evidence, the ICSID Convention, the Argentina-France BIT, the Argentina-Spain BIT, as well as the written and oral submissions of the parties' representatives, the Tribunal has reached the following decision.

## **II The Facts of This Case**

### *A. Background*

28. This investment dispute arises out of the privatization of the water and waste water services in the Province of Santa Fe, Argentina. To accomplish the privatization, the Provincial authorities granted a Concession to an entity, Aguas Provinciales de Santa Fe S.A. (APSF), organized and managed by the Claimants, all of whom had significant interests and experience in the water business. The Respondent is a federal republic consisting of the autonomous city of Buenos Aires and twenty-three provinces, one of which is the Province of Santa Fe, located in the north of the country.

29. Prior to the granting of the Concession in this case, the provision of water and waste water services in Argentina had been the responsibility of state-owned and managed entities. From 1912 until 1980, *Obras Sanitarias de la Nación* (OSN), an entity owned and operated by the federal government, provided water and sewage services throughout most of the territory of Argentina. In 1980, the government of Argentina decentralized water and sewage services, transferring these functions to provincial authorities. From 1980 until 1995, the Province of Santa Fe, through its *Dirección Provincial de Obras Sanitarias* (DIPOS), a provincially-owned entity, had the responsibility of providing water and waste water services to the principal urban areas in the Province.

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<sup>11</sup> Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal of 12 May 2008.

30. During the 1980s, the Argentine economy and particularly the country's public enterprises suffered severe problems. Argentina experienced extremely high inflation, steep budgetary and fiscal deficits, a serious lack of investment capital, and no less than four currency crises, each resulting in a currency devaluation of over 90%. Its public enterprises, such as DIPOS, also ran large deficits, suffered from under-investment in their plants and services, and in general were not managed efficiently. With respect to DIPOS, the result of this situation was the deterioration in the quality of water and sewage services provided to the public, and the inability to expand the service to all inhabitants of the area, a situation that raised significant public concern.

B. *The Privatization of the Santa Fe Water and Sewage Systems*

31. To address the situation at a national level, in 1989 Argentina enacted the State Reform Law,<sup>12</sup> which declared the country's public services to be in a state of emergency and proposed to launch a broad program of privatization to remedy the situation, by which the Argentine government would transfer the assets, operations, and functions of various designated State-owned companies and entities to private and primarily foreign investors in accordance with certain specified legal arrangements. The State Reform Law also invited the country's provinces to participate in the privatization process. Subsequently, Argentina took certain other measures attractive for private and foreign investment to its territory. Less than two years after the State Reform Law, Argentina adopted the Convertibility Law by which it tied or "pegged" the value of the Argentine Peso to the United States Dollar and established a currency board requiring that the amount of Argentine currency in circulation be equivalent to the foreign currency reserves held by the State.<sup>13</sup> Starting in 1990, it also began to conclude bilateral treaties "for the reciprocal promotion and protection of investments" with various countries. By the year 2000, it had concluded 57 such bilateral investment treaties, commonly known as BITs, including the July 1991 Argentina-France BIT, and the October 1991 Argentina-Spain BIT, under which the Claimants assert various rights in this case.

32. In 1989, almost immediately after the federal government had launched its privatization program, the Province of Santa Fe took measures to facilitate the privatization of certain provincial services and entities. Accordingly, Santa Fe adopted its own Emergency and State Reform Law<sup>14</sup> which designated the specific services and entities to be privatized and defined the

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<sup>12</sup> Law No. 23,696 of 18 August 1989 (the State Reform Law).

<sup>13</sup> Law No. 23,928 of 27 March 1991.

<sup>14</sup> Law No. 10,472, as amended by Law No. 10,798 of 22 January 1990

rules by which the privatization would be conducted. The general approach was to enact specific laws for each entity to be privatized. The Santa Fe Emergency and State Reform Law listed DIPOS as one of the provincial entities to be privatized

33. Despite this measure, the Province of Santa Fe would not actually privatize its water and sewage services for over six years. In order to give impetus to the privatization project, in January 1994 it selected two international consulting firms, William Halcrow & Partners Ltd. and Grupo Consultor Interbonos Capital Markets S.A., to advise it on the economic and technical aspects of water and sewage privatization. Subsequently, in November 1994, the Province enacted Law No. 11,220, known as the *Santa Fe Water Law*, to govern the privatization by concession of the water distribution and waste water services in the Province. This law provided for an international bidding procedure to enable private investors to obtain a thirty-year concession for the operation and development of specified water and waste water systems in the province. A model contract, annexed to the bidding rules, specified certain provisions governing the financial aspects of the proposed concession, including the tariff regime, investment commitments, and financial guarantees. The Province, in cooperation with the federal authorities, actively publicized its desire to privatize these systems, preparing and distributing a prospectus aimed at private investors, both foreign and national.<sup>15</sup> Throughout the process, various international institutions, particularly the World Bank and the Inter-American Development Bank, strongly supported Argentina's privatization program with advice, financing, and encouragement.

C. *The Selection of the Claimants' Consortium as Concessionaire*

34. In response to these measures, Claimants Suez (then known as Lyonnaise des Eaux) and AGBAR, together with Argentine companies Banco de Galicia y Buenos Aires S. A., Sociedad Comercial del Plata S.A., and Meller S. A., formed a consortium in January 1995 to participate in the bidding for the concession to operate specified water distribution and waste water systems in the Province of Santa Fe. Claimant InterAgua was not a member of the bidding consortium. It would subsequently acquire 9.47 % of APSF shares in 1996 and additional 5.45% in 1998.

35. On 30 August 1995, the Province of Santa Fe awarded this consortium the Concession by Decree No. 2141/95. Claimants Suez and AGBAR were also members of the consortium that had been awarded the concession to operate the water and sewage system of Buenos Aires in 1993. The Buenos Aires consortium would also result in an investment dispute subject to ICSID

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<sup>15</sup> The "Information Memorandum," Claimants' Exh. C-28.

arbitration over which the present Tribunal also has jurisdiction and in which Suez and AGBAR are claimants.

36. Pursuant to the Santa Fe bidding rules, the consortium formed on 8 November 1995 an Argentine company, Aguas Provinciales de Santa Fe S.A. (APSF), to hold and operate the Concession. On 27 November 1995, APSF formally concluded a thirty-year Concession Contract with the Province, and on 5 December 1995 assumed control and management of the water distribution and waste water systems in the fifteen most important urban areas in the Province of Santa Fe. The Concession Contract, which will be discussed at length below in the Tribunal's consideration of the Concession's legal framework, not only specified the tariff regime but also mandated service quality standards and expansion and investment goals that the Concessionaire was required to meet. Pursuant to the Concession Contract, the Concessionaire did not own the assets of the water and sewage service it was to manage and develop, nor its investments in them, and it was required at the end of the Concession to return the service to the Argentine State in good operating condition. Following the legal requirements, Claimant Suez was designated as the operator of the Concession, for which it was to receive a management fee, and its rights and responsibilities in that capacity were defined in a Management Contract annexed to the Concession Contract.

D. *The First Six Years of Operation (1995-2001)*

37. Due to the poor state of the water and sewage system subject to the Concession, the Concessionaire was obligated under the Concession Contract to undertake major investments for expansion and improvement. The investment requirements exceeded the amounts that might be gained immediately from tariff revenues; consequently, the Concessionaire sought loans from local and international sources, primarily from multilateral lending agencies whose loans were denominated and payable in U.S. dollars. The multilateral agencies required as a condition for lending that the shareholders in APSF promise to provide financial support to APSF in the event it was unable to make scheduled payments under the loans. In addition, the consortium members were required to secure a bank guarantee in favor of the Provincial Government to guarantee their promised performance and investments under the consortium. According to the Claimants' Memorial on the Merits, by 31 December 2001, APSF had invested a total of US\$257.7 million in the Concession, consisting of US\$60 million in APSF's initial capital, US\$67.3 million of cash



flows generated by APSF, and US\$130.4 million primarily from the international loans provided by multilateral lending agencies.<sup>16</sup>

38. In pursuit of agreed upon plans, APSF began to expand the service network. As a result of these investments, substantial improvement and expansion of the water distribution and sewage systems appears to have taken place. Evidence offered by the Claimants and not challenged by the Respondent indicates that between 1995, when APSF assumed the Concession, and 2000 the population with access to drinking water increased from 1,600,000 persons to 1,809,000 persons (an increase of 13%) and the population with access to sewage services increased from 865,000 persons to 1,234,000 persons (an increase of 43%). Moreover during that same period, the production of drinking water increased from 469,000 cubic meters a day to 860,000 cubic meters a day (an increase of 73%), the sewage treatment capacity increased from 9,300 cubic meters a day to 37,925 cubic meters a day (an increase of 308%), and installed water meters increased from approximately 20,000 to 80,000 (an increase of 300%). It would therefore seem that as a result of the Concession the Province achieved at least some of the goals that it had sought in undertaking the privatization of the provincial water and waste water treatment systems. Although the Respondent made various allegations at the hearing on the merits concerning APSF's poor performance, it does not appear from the evidence that the Provincial authorities raised serious performance issues with APSF during the first six years of the Concession. Indeed, the Governor of the Province, in a speech to the provincial legislature, praised the privatization of water services as "...inevitable and turned out to be positive...", noting that the investments by APSF in the period 1995-2000 was US\$250 million, an increase of 620% over the \$40 million investment by the Province during 1990-1995 and that "all investment made became part of the assets of the Province."<sup>17</sup>

39. As APSF expanded service to new customers, it would require them to pay an "infrastructure charge," as permitted by the Concession regulatory framework, to defray the costs of connection to the service. This charge generated significant negative public reaction. As a result, the Province by letter of 15 April 1997 requested APSF to suspend the invoicing of infrastructure charges to consumers, and, at the same time, asked APSF to temporarily cease expansion works. The Province and APSF almost immediately entered into negotiations to resolve this problem. Ultimately, in April 1999, APSF and the Province made an agreement providing for cross-subsidization whereby all users would contribute to finance the costs of

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<sup>16</sup> Claimants' Memorial, para. 161.

<sup>17</sup> Governor's speech to the provincial legislature, 1 May 2000, Claimants' Hearing Exh. H-A-8.

expansion and the individual infrastructure charge would be reduced, a solution that was embodied in Law 11,665 of 28 April 1999.

E. *The Argentine Financial Crisis (2001-2003)*

40. In 1999, the Argentine Republic began to experience a severe economic and financial crisis that had serious consequences for the country, its people, and its investors, both foreign and national. In response to this continuing crisis, the government adopted a variety of measures to deal with its effects in the following years. The early manifestation of this impending crisis was the increasing difficulty that Argentina was experiencing in paying its foreign debts. The government's early response to this situation was the institution of an austerity program that tightened fiscal policies, reduced public spending, and raised taxes. These measures did not reverse the deteriorating situation, which had a negative impact on the economy of the Province and the finances of APSF.

41. To confront this situation, APSF and the Provincial authorities engaged in a series of negotiations with respect to the tariffs to be permitted under the Concession and APSF's investment obligations. As a first step, the Province of Santa Fe and APSF agreed to open formal negotiations with a view to preserving the financial equilibrium of the Concession, while instituting transitory measures to assist underprivileged users of the service. By Decree No. 1691/00 of 14 June 2000, the Province formally launched a renegotiation to adjust the tariff regime in view of the new economic circumstances facing the Province. The results of this process were three "*Actas*" or agreements. The first of these was *Acta I*, signed 25 August 2000, creating a social or subsidized tariff for low-income consumers. The second, *Acta II*, signed 6 December 2000, provided for a methodology to calculate the economic and financial equilibrium of the Concession. *Acta II* was then sent for comments to ENRESS, the provincial regulatory authority. As a result of ENRESS's comments, certain changes were made in the agreement which in modified form became *Acta III*, signed on 20 December 2000. In March 2001, the Provincial Minister of Public Works transferred *Acta III* to the Provincial Governor for his signature, but *Acta III* was never approved by the Governor.

42. In the meanwhile, as the crisis deepened at the end of 2001 and the beginning of 2002, the Argentine national government adopted a series of measures of increasing severity. In December 2001, it enacted Decree No 1570/01 of 3 December 2001, which imposed a "*corralito*" or "little fence" upon bank accounts, limiting the amounts of cash withdrawals by account holders. The resulting negative public reaction and disturbances prompted by this measure forced

then President de la Rúa to resign on 20 December. There followed in succession the appointment of four presidents during the following ten days until the election of President Eduardo Duhalde who would serve out the remainder of the presidential term, which lasted until the end of 2003.

F. *Attempts to Renegotiate the Concession*

43. Under President Duhalde, Argentina enacted a series of emergency legislative measures that to a significant extent repealed or modified previously important provisions of Argentine law. One of the most important of these was the Emergency Law<sup>18</sup> No. 25,561 of 6 January 2002, which: i) abolished the currency board that had linked the Argentine Peso to the U.S. dollar, resulting in a significant depreciation of the Argentine Peso; ii) abolished the adjustment of public service contracts according to agreed upon indexations; and iii) authorized the Executive branch of government to renegotiate all public service contracts. Under Article 9 of the Law, the renegotiation of public service contracts was to take account of the following criteria: 1) the impact of tariffs on economic competitiveness and income distribution; 2) the quality of service and investment plans; 3) the interests of the consumers and the accessibility of services; 4) the safety of the system; and 5) the profitability of the enterprises. Article 10 stated that in no case were the provisions of the Law to authorize a suspension or alteration of the contractual obligations incurred by the affected public services.

44. The effect of the depreciation of the Peso, which would eventually fall to 3 Argentine Pesos to one U.S. Dollar, was to substantially increase APSF's costs, especially those arising from its obligations to service its dollar-denominated foreign loans. Claiming that the government's measures destroyed the profitability of their investments in violation of the commitments made to them in securing the Concession, the Claimants in January 2002 sought to obtain from the provincial government adjustments in the tariffs that APSF could charge for water distribution and waste water services, as well as modifications of other operating conditions.<sup>19</sup> On March 1, 2002, ENRESS formally rejected APSF's request for a tariff revision,<sup>20</sup> and on the same day the Provincial authorities ordered a renegotiation of the Concession Contract.<sup>21</sup>

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<sup>18</sup> Law No. 25,561 (*Ley de Emergencia Pública y de Reforma del Régimen Cambiario*) of 6 January 2002. (the "Emergency Law") Exh. C-78.

<sup>19</sup> E.g., Letter from APSF to ENRESS, dated 10 January 2002, Exh. C-79; Letter from APSF to the Secretary of Public Services of the Province of Santa Fe, dated 15 January 2002, Exh. C-80; Letter from APSF to the Secretary of Public Works and Services, dated 17 January 2002, Exh. C-83.

<sup>20</sup> ENRESS Resolution 55/02, dated 1 March 2002, Exh. C-89.

<sup>21</sup> Decree 221/02, dated 1 March 2002, Exh. C-90.

45. In May 2002, APSF defaulted on its foreign debt payment obligations. Because of their existing agreements with the multilateral lenders, the Claimants as shareholders of APSF were required to inject funds into the company to repay a portion of APSF's debts. Throughout the remainder of 2002, APSF persisted in seeking tariff revisions from the provincial authorities as means of returning its operations to profitability, but it had no success in this endeavor, while the Province continued to insist on a renegotiation of the Concession Contract.

46. After a further period of fruitless negotiations, the Claimants submitted in April 2003 a Request for Arbitration of their dispute with the Argentine Republic to ICSID under the ICSID Convention, pursuant to the Argentina-France and the Argentina-Spain BITs. In their subsequent Memorial of 20 September 2004, the Claimants alleged that the Argentine Republic was legally responsible under the above-mentioned BITs for the Province of Santa Fe's wrongful actions, which expropriated Claimants' investment in violation of Article 5(2) of the Argentina-France BIT and Article V of the Argentina-Spain BIT, and which failed to treat Claimants' investment fairly and equitably in breach of Article 3 and 5(1) of the Argentina-France BIT and Article IV(1) of the Argentina-Spain BIT. As a result, pursuant to both BITs, Claimants sought compensation for their alleged loss. At that time, the Claimants in this case consisted of APSF, the concession company, and three of its non-Argentine shareholders: Suez, a French company holding 51.69% of APSF shares; AGBAR, a Spanish Company holding 10.89% of APSF shares, and InterAgua, a Spanish company holding 14.92% of APSF shares.<sup>22</sup>

47. Further negotiations continued thereafter between APSF and the Province for the next two years without result. In general, APSF insisted on a tariff revision in accordance with the terms of the Concession Contract to account for the devaluation of the country's currency and the significant cost increases incurred in the operation of the Concession situation; however, the Provincial government resisted any tariff revisions while insisting that APSF meet its investment and other commitments under the Concession Contract. In the meanwhile, as a result of APSF's default on its foreign loans, the Claimants, as shareholders of APSF who had entered into support agreements with the lenders as a condition for the loans, purchased a portion of the outstanding loans from international lenders. Economic conditions in the Province were further worsened by the occurrence of serious flooding in 2003 caused by unusually heavy rains.

48. In December 2003, a new provincial administration took office, and this event appears to have led to a new phase in the renegotiation process. Under the newly elected governor, the

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<sup>22</sup> Claimants' Memorial, para. 41.

Provincial authorities became more adamant in their refusal to consider a tariff revision and increased their demands on APSF to augment their investments and to complete other onerous obligations. At the same time, the Governor expressed approval in the press for the idea that the Provincial water and water systems be renationalized. Also, the Province granted a 129% tariff increase to the provincially owned electricity company. Eventually, in late 2005, the Province proposed to APSF modest tariff increases but coupled them with substantially increased investment obligations. Judging this proposal as failing to provide a solution to APSF's financial problems, the Claimants sought to sell their shares for US\$1 to local investors, but the Province refused to approve the transfer.

G. *The Termination of the Concession*

49. In a claimed state of insolvency, APSF issued a notice of termination of the Concession to the Santa Fe Provincial authorities on 16 March 2005 and proposed to transfer the service to the Province. On 29 April 2005, in response, the Ministry rejected the proposal.

50. On 26 May 2005, APSF notified the Province of its decision to terminate the Concession Contract and asked the Province to receive the water and waste water service that was subject to the Concession. The following day, the Province, by Decree No. 1024, declared that the Concession Contract remained in force and ordered the execution of the performance bonds that the Claimants' consortium had made at the time that APSF entered into the Concession Contract. In August 2005, the Province executed the performance bond. It nonetheless continued to reject any tariff adjustment and it also declined to receive the service. It also rejected APSF's request to sell its shares in APSF to a group of local investors.

51. Ultimately, on 13 January 2006, APSF entered into liquidation and asked the Province to retake the service within 5 days as provided in the Concession Contract.

52. On 31 January 2006, by Decree No. 243/06, the Province of Santa Fe terminated the Concession Contract because of the liquidation and the following week, on 8 February 2006, assumed operation of the water and sewage services that had been the subject of the APSF Concession Contract. Later in the year, by Resolution No. 513/06, the Provincial authorities confirmed that the Province would pay the Claimants no compensation and that the Province would also pursue claims against APSF shareholders for failure to fulfill APSF's obligations under the Concession Contract. In the meanwhile the Province created a new state company *Agua Santafesinas S.A. (ASSA)*, to operate the service previously entrusted to APSF. In 2006,

according to one of the Respondent's witnesses, ASSA operated at a loss of 1.353 million Argentine Pesos. The Province provided subsidies to cover the operating loss and in addition furnished 42.3 million Argentine Pesos for new investments in the system.<sup>23</sup>

53. As a result of the Respondent's actions, the Claimants allege that they have lost their entire investment in APSF which, valued as of December 2006, amounted to US\$199,370,699 in the case of Claimant Suez, US\$35,113,434 in the case of Claimant Agbar, and \$19,177,028 in the case of Claimant Interagua.

### **III The Law Applicable to This Dispute**

54. Article 42(1) of the ICSID Convention states the rule governing the applicable law that this tribunal is to follow in deciding this dispute. It provides: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of law) and such rules of international law as may be applicable."

55. In this case, the Claimants are asserting certain rights accorded to them by reason of individual bilateral investment treaties concluded by the Argentine Republic with the Claimants' respective home countries. Thus, Claimant Suez, incorporated in France, asserts rights under the Argentina-France BIT and Claimants AGBAR and InterAgua, both incorporated in Spain, claim rights under the Argentina-Spain BIT. The two treaties contain relatively similar provisions specifying the law that a tribunal is to apply in deciding a dispute arising there under. The governing laws specified in the treaties can be regarded as the "rules of law agreed by the parties" under Article 42(1) of the ICSID Convention. Indeed, when accepting to arbitrate under the terms of a treaty, the investor also accepts the choice of law provided in such treaty.

56. The purpose of both BITs is the promotion and protection of investments by investors of one Contracting State in the territory of the other Contracting State. They seek to achieve this purpose by defining the legal obligations under international law of each Contracting State toward the investments of investors from the other Contracting State with respect to their treatment of those investments. Following the pattern of hundreds of other BITs that have been concluded throughout the world, the BITs in question in the present case guarantee specific treatment to investors from other Contracting Parties, including protection from expropriation, fair and equitable treatment, and full protection and security, among others.

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<sup>23</sup> Testimony of Ms. Belotti, Hearing Transcript (Spanish) D4:P1169:L6-8, and D4:P1216:L4-18.

57. While the rights of the parties under Argentine law were, according to the legal framework governing the Concession, to be judged by Argentine courts, the rights of the Claimants under the above-mentioned BITs are to be judged by this Tribunal. As this Tribunal emphasized in its Decision on Jurisdiction in this case, treaty claims under a BIT are separate and distinct from any contract claims that the Claimants may have under Argentine Law.<sup>24</sup> This Tribunal has jurisdiction only to judge treaty claims, not contract claims. In judging those treaty claims, the tribunal must apply the law specified by such treaties.

58. Article 8.4 of the Argentina-France BIT provides: “The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.”

59. Article X(5) of the Argentina-Spain BIT provides: “The arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.”

60. While the above quoted language lists the various legal sources from which a tribunal may draw in deciding an investor-State dispute arising under a specific BIT, it does not establish a hierarchy of norms to be followed by a tribunal. Nor does it determine how the individual listed elements are to relate one to another in the formulation of a tribunal decision. Those issues are to be determined by individual tribunals in deciding specific cases.

61. These provisions make clear that Argentine domestic law is applicable to the extent relevant, together with international law. In the present case, the provisions of the respective BITs are paramount, except where the treaty itself allows the application of domestic law or private agreements. The various Contracting Parties through bilateral investment treaties, which are solemn instruments of international law, have made specific commitments and promises to one another as to the treatment that they shall accord to investments of the other Contracting Party. In accordance with Article 27 of the Vienna Convention on the Law of Treaties (VCLT), a party may not invoke the provisions of its internal law as justification for its failure to perform its

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<sup>24</sup> Decision on Jurisdiction, 16 May 2006, paras. 44-45.

treaty obligations. Thus, Argentina may not avoid its treaty commitments with respect to the treatment to be accorded the Claimants by invoking the provisions of its internal laws, regulations, or administrative acts.

62. The question that the Tribunal must answer is whether Argentina's treatment of the Claimants through its legislation, regulations, and administrative actions violated its commitments under the BITs. In order to assess such treatment, for example Argentina's actions to deal with its financial crisis, the Tribunal must make reference to and analyze Argentine law in order to judge whether those acts comply with or violate Argentina's international obligations under the BITs. But such internal legislation and regulations by themselves cannot legally override or modify Argentina's commitments and obligations in treaties to which it is a party.

63. The provisions of the Argentina-France BIT also allow for the application of the private and/or specific agreements concluded in relation to investments, which certainly includes the Concession Contract. However, claims for breach of the Concession Contract are not within the jurisdiction of the Tribunal, whose jurisdiction is limited to claims arising under the BITs. In assessing these latter claims, the Tribunal will therefore resort primarily to the text of the BITs themselves as well as to any relevant rules of international law. But it may also refer to domestic laws or to the provisions of the Concession Contract relevant for the evaluation of the claims arising under the BITs, for instance as a reflection of the Claimants' expectations. It must be noted, in this connection, that not every breach of the domestic regulatory framework may amount to a breach of any of the applicable BITs.<sup>25</sup>

#### **IV The Legal Framework of the APSF Concession**

64. An analysis of this investment dispute must begin with an understanding of the legal framework of the Concession granted to APSF, the company created by the Claimants, since that framework is an important source of the rights, obligations, and expectations of the parties to the dispute. Moreover, the Concession Contract at the heart of this dispute expressly provides that certain legal rules, notably those of the Santa Fe Water Law and the Concession Bidding Rules, to be discussed below, take precedence over the terms of the Concession Contract itself. Thus, Article 1.9 of the Concession Contract states that the rules applicable to the Concession are, in order of precedence, 1) the Santa Fe Water Law (Law 11,220), 2) the Bidding Rules (*El Pliego*),

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<sup>25</sup> *Elettronica Sicula SpA (ELSI)*, ICJ Reports 1989, p. 15 at p. 51 ¶ 73; *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Jurisdiction (26 April 2006), para. 168.



with its annexes and clarifying and modifying resolutions and circulars, 3) the offer submitted by the winning bidder in the tender, 4) the Concession Contract, and 5) the rules set down by the Regulatory Entity created by the Santa Fe Water Law and other regulations that might be issued in the future.<sup>26</sup> We therefore shall now proceed to examine briefly the various individual elements of that legal framework as it existed under Argentine law. One may group the elements of the legal framework into two parts: 1) the legislative and regulatory measures establishing the legal framework; and 2) the Concession Contract between the Province of Santa Fe and APSF. The Argentina-France BIT and the Argentina-Spain BIT, which form an important part of the international legal framework of this dispute, will be considered in subsequent sections of this decision.

*A. Legislative and Regulatory Measures*

65. **The State Reform Law.** The legal impetus and foundation for the Concession that is the subject of this case was **Law No. 23,696 (*Ley de Emergencia Administrativa y Reforma del Estado*) of 23 August 1989**,<sup>27</sup> an act of the Argentine State declaring public services and enterprises to be in a state of emergency (Art. 1) and authorizing the Argentine President, referred to in the text as the National Executive Power (*Poder Ejecutivo Nacional*), to take specified remedial actions, particularly the privatization of State enterprises by various means, including the granting of concessions to private and foreign investors and to enterprises to operate individual public services (Art. 17). This law did not directly affect the water and sewage services of Santa Fe, which remained under provincial authority, but it did invite the provinces to “adhere to the regime of the present law”<sup>28</sup> and thus engage in its own privatization process.

66. **The Santa Fe Reform Law.** Within a few months of the enactment of the State Reform Law, the Province of Santa Fe enacted its own Emergency and State Reform Law (Law No. 10,472, dated 22 January 1990, as amended by Law No. 10798, dated 30 January 1992)<sup>29</sup> by

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<sup>26</sup> Article 1.9 of the Concession Contract (Exh. C-49):

“Las normas aplicables a la Concesión serán, en el orden de prelación que se indica:

1.9.1 La Ley 11,220.

1.9.2 El Pliego, sus anexos, y las resoluciones y circulares aclaratorias y modificatorias del mismo.

1.9.3 La Oferta.

1.9.4 El Contrato.

1.9.5 Las normas que dicte El Ente Regulador y otras normas reglamentarias que en el futuro se dicten.”

<sup>27</sup> Exh. C-5.

<sup>28</sup> Article 68, State Reform Law.

<sup>29</sup> Exhs. C-6 and C-13 to Claimants’ Memorial.

which the Province “adhered” to the principles and norms of the State Reform Law and specifically authorized the transformation or privatization of certain provincial services and works, including DIPOS. The Santa Fe Reform Law also stated that specific laws would provide for the transformation or privatization of each specified provincial entity.<sup>30</sup>

67. **The Convertibility Law.** Although Argentina and the Province had thus initiated a privatization process, the envisioned regulatory framework was not to emerge for nearly five years. In the meanwhile, Argentina continued to experience severe inflation and monetary instability, factors which negatively affected the investment climate in the country. In an effort to curb inflation, Argentina, at the initiative of a new Minister of the Economy (Domingo Cavallo), enacted **Law No. 23,928 (*Ley de la Convertibilidad del Austral*) of 28 March 1991**.<sup>31</sup> Known as the “**Convertibility Law**,” this legislative act, effective from 1 April 1991, basically did two things. First, under Article 1, the law tied or “pegged” the exchange rate of Argentine currency to the U.S. dollar by guaranteeing that the Central Bank of Argentina would exchange a fixed amount of Argentine currency for a fixed amount of U.S. dollars. At the time of its enactment, the law provided that the Central Bank would exchange 10,000 Argentine Australs for one U.S. dollar. Shortly thereafter, **Decree No. 2128/91 of 17 October 1991**<sup>32</sup> replaced the Austral with the Peso as the national currency, so that until the financial crisis of 2001 the Peso was pegged to the U.S. dollar at a rate of one peso per dollar. Second, the Convertibility Law placed various limitations on the actions of the Central Bank in an effort to prevent it from increasing the monetary supply to meet internal government fiscal needs, which in the past had led to severe inflation in the country. Thus, the Convertibility Law required the Central Bank to hold an amount of dollars, gold, or foreign exchange at least equivalent to 100% of Argentina’s domestic monetary base, the effect of which was to strictly limit the legal authority of the Central Bank to increase the supply of pesos, a limitation intended to reduce inflation and foster the monetary stability necessary to encourage investment. As these measures began to have effect and inflation in the country began to abate, work on the privatization program in various parts of the country accelerated.

68. **Santa Fe Water Law.** Nearly five years would pass before the Province enacted a law to privatize DIPOS, the provincial entity charged with providing water and sewage services to the public. In November 1994, the provincial legislature enacted Law No. 11,220, dated 24

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<sup>30</sup> Articles 29 and 30.

<sup>31</sup> Boletín Oficial, 28 March 1991, p. 6 (Exh. C-12).

<sup>32</sup> Exh. C-17.

November 1994, (the Santa Fe Water Law), which authorized and defined the procedure and conditions for the privatization of the service that was then being provided by DIPOS. Its effect was to establish a legal framework for the Concession that is central to this case. The regulatory framework thus created had, according to Article 2 of the Water Law, five basic objectives: 1) to guarantee the maintenance and to promote the improvement and development of the service in the entire area of the Province of Santa Fe; 2) to establish legal rules that assure quality and efficiency levels in accordance with the nature of the Service; 3) to establish a legal framework which reconciles an effective and efficient provision of the service by the provider, with the adequate exercise of state faculties relating to the protection of public health, the well being of the population, the environment, and the natural resources in the Province of Santa Fe; 4) to protect the rights of consumers and reconcile the action, rights, and attributions of the regulatory authorities and the service providers; and 5) to safeguard the public health, the water resources, and the environment as specified in the law.

69. In order to achieve these objectives, the Water Law, which was divided into six basic “Titles” (*Títulos*), provided for the objectives, the nature and extent of the service and its area, (Title I), the transformation process of the service and particularly the dissolution of DIPOS and the creation of an independent governmental authority *Ente Regulador de Servicios Sanitarios*, (ENRESS), under the Ministry of Public Works, Public Services and Housing, to regulate the provision of water and waste water services in the province (Title II); the privatization process of water services by means of a concession (Title III); the creation of a regulatory framework for the provision of such services (Title IV); special rules to protect against the contamination of the environment and natural resources (Title V) and complementary rules (Title VI).

70. As a public service, the concessionaire and the water and sewage service were subject to the control of ENRESS, whose organization, duties, and powers were specified in Chapter IV of Title I of the Water Law.<sup>33</sup> ENRESS was granted “comprehensive police, regulatory, and control powers over the provisions of the service throughout the province of Santa Fe ... and in particular to verify and control the fulfillment of the Concessionaire’s obligations under the applicable rules.”<sup>34</sup> For purposes of this dispute, Titles III and IV have the greatest significance. We shall therefore focus on some of their principal provisions.

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<sup>33</sup> Articles 19-31 of the Santa Fe Water Law.

<sup>34</sup> Article 20 of the Santa Fe Water Law.

71. Title III defined the process by which the water services of the Province would be privatized. Article 33 of the Water Law authorized the Executive Power of the Province, the Governor, to grant a public service concession for a period of thirty years in accordance with the provisions of the law. Toward this end, the law envisioned a public tender process which was to be conducted according to rules approved by the Executive Power. Article 34 stipulated a long list of elements that the contemplated “Bidding Rules and Conditions” (*Pliego de Bases y Condiciones*) were to encompass, including the minimum required investment, the parameters for the formulation of proposed tariffs, required guarantees for contract performance, the required experience of the operator of the concession, and the modalities of the concession contract. It provided for a three-step process for selecting the concessionaire, including 1) prequalification of the bidders and an evaluation of the technical aspects of their offers; 2) an analysis of the economic aspects of the offer and a preliminary decision; and 3) a final decision (*adjudicación*) on the award of the Concession.

72. Title IV of the Santa Fe Water Law defined the “regulatory framework for the provision of the service” (*marco regulatorio de la prestación del servicio*). It stipulated that the service was to be provided in conditions that assure the continuity, regularity, quality, and generality in such a way that it guaranteed an efficient supply to the consumers and the protection of the environment, the natural resources, and the health of the population. It then proceeded to specify in some detail various rules about the provision of service to particular types of consumers and in particular situations.

73. ENRESS had the responsibility to see that the Concessionaire conducted the water and sewage services in accordance with the rules of the legal and regulatory framework. Chapter III of Title IV of the Santa Fe Water Law defines in some detail the specific powers that ENRESS possesses to accomplish its task. In general, its regulatory powers were comprehensive and broad, and they included assuring the implementation of the regulatory framework, approving the tariff and pricing schedule of the service, approving the concessionaire’s proposed improvement and development plans, investigating complaints of consumers, and assuring that the concessionaire complied with regulations governing the service, among others.

74. Chapter IV of the Santa Fe Water Law listed the responsibilities and obligations of the Concessionaire in operating the water and sewage system and also specified the procedure by which the Concession Contract with the Concessionaire was to be made.

75. Chapter V of the Water Law sought to provide for the legal protection of the users of the water and sewage services operated by the Concessionaire by defining the rights of both actual and potential users, including the right to service according to the provisions of the Water Law, the right to required levels of service quality, the right to make claims against the Concessionaire for inadequate service, and the right to bring complaints against the Concessionaire before the Regulatory Entity, among others.<sup>35</sup> In order to give effect to complaints by users, the concessionaire would be required to maintain a Complaints Office (*Oficina de Reclamos*) staffed by competent persons and accessible to users.

76. Service quality being an important goal of the Water Law, Chapter VI defined in general terms the quality obligations of the Concessionaire with respect to the operation of the service. The principal objective of the quality provisions of the Water Law was to assure the provision of adequate service with respect to population and area coverage, water quality, water pressure, continuity of service, minimal service interruptions, effective treatment of sewage effluents, and responsiveness to the needs of the users.<sup>36</sup>

77. The principles of the tariff regime, an issue fundamental to this dispute, were set out in Chapter VII of Title IV, as well as in the Concession Contract. With respect to the price that the Concessionaire was entitled to charge consumers, Article 81(d) of the Santa Fe Water Law, on which Claimants rely, states the fundamental rule: “The total invoicing by the each Provider for prices and tariffs must reflect the economic cost of an efficient service, including the achievement improvements, expansion plans, and profits, taking into account in all cases the terms of the concession or service provision.”

78. In view of the fact that the Concession was to continue over thirty years, it was important and expected that the Water Law authorize the revision of tariffs in the light of changing circumstances. Article 88 did so in general terms, stating “Modifications: The Tariff regime and the schedule of prices and tariffs shall be revised and modified in accordance with the applicable rules.” This provision contained few specifics on either the process or the conditions justifying a tariff revision. Its function was a legislative authorization allowing such revisions. The applicable rules concerning the specifics of the tariff revision process were to be enunciated in the Bidding Rules and the Concession Contract, both of which will be discussed below. On the other hand, the Santa Fe Water Law was clear that tariff revisions were not to be used to protect the

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<sup>35</sup> Article 73 of the Santa Fe Water Law.

<sup>36</sup> Article 80 of the Santa Fe Water Law.

Concessionaire from decreased revenues attributable to commercial risks. The last sentence of Article 88 states: “In no case will the revision be a means to compensate for results arising from business risk (*riesgo empresario*) or to validate inefficiencies in the provided Service.”

79. Chapter VIII of Title IV of the Water Law concerned the principles governing payment for service. In general terms, the Concessionaire had the right and obligation to collect payment for services provided, and the Water Law imposed an obligation on users, including the State, its subdivisions, and state entities, to pay for services. If the Concessionaire were directed by the government to provide free or subsidized services to certain classes of consumers, then the entity making such orders was to pay for such service to those consumers.

80. Chapter IX deals with the preparation, approval, and implementation of plans for expanding and improving water and waste water service. The Water Law required that the applicable rules impose an obligation on the Concessionaire to improve and extend the service throughout the Province. In developing plans for this purpose, the Concessionaire was to consult with users, local authorities, and ENRESS. ENRESS approved all such plans and supervised their implementation by the Concessionaire, which had an obligation to implement approved plans.

81. Chapter X of the Water Law governed the Property Regime of the Concessionaires and other service providers. It applied to all property transferred to the Concessionaire, as well as to property that the Concessionaire later acquired or constructed for the purpose of meeting its obligations arising out of the Concession Contract, which became part of the service. Authorized service providers and Concessionaires were to administer them according to the applicable rules, but they would not own them. They also had an obligation to maintain and protect such property. At the end of the Concession, the Concessionaire was required to transfer to the State without charge, all property and assets used in the service in good condition (*buenas condiciones*) for use and operation.

82. Chapter XI treated the termination of the service providers’ rights to operate the Service. According to the Water Law, such termination was to take place in three ways: 1) upon completion of the contractual period, 2) by recovery of the service (*rescate del Servicio*) by the provincial authorities, or 3) or for other reasons established by the “Applicable Rules” (*Normas Aplicables*), a term that presumably referred to the contemplated bidding rules and concession

contracts. Contract rescission could only be effected by the “competent authority with the intervention of ENRESS.”

83. Chapter XII of Title IV established the “sanction regime” (*régimen sancionatorio*) applicable to Concessionaires, a means to ensure the service provider’s respect of the rules governing the Concession. It provided that Concessionaires are subject to the permanent control and disciplinary power of ENRESS, which is to be exercised according to the Applicable Rules. Article 111 defined the disciplinary procedure and the rights of the Concessionaire or service provider during that process. Article 112 defined the types of sanctions that ENRESS might impose for rule violations, including warnings (*apercibimiento*), and preventive intervention (*intervención cautelar*), whereby ENRESS might take over all or part of the Service in cases of extreme seriousness and urgency endangering the health of the population or the continuity of the provision of the Service.

84. Chapter XIII of Title IV dealt with dispute resolution, specifically those arising out of decisions of ENRESS and from complaints by consumers. ENRESS, in addition to acting to enforce the rules against service providers, had the authority to decide consumer complaints. ENRESS decisions, however, were subject to judicial review.

85. The final two titles in the Water Law concerned rules to protect of the environment and natural resources from contamination (Title V) and “complementary rules” (“*normas complementarias*”) (Title VI).

86. **The Bidding Rules.** To put in motion the required public international competitive bidding process to select a concessionaire, the Province of Santa Fe, by Decree 3927/94 dated 29 December 1994<sup>37</sup>, enacted bidding rules to govern the procedure and conditions for selecting the Concessionaire to provide water and sewage service to the Province. Divided into eight chapters, the bidding rules contained twelve annexes dealing the details of important requirements as well as a model concession contract (Annex XII, *normas contractuales*) that was to be the basis of the Concession Contract between the eventual concessionaire and the Province.

87. Chapter 1 of the Bidding Rules provided for basic provisions of the proposed Concession, including its objective, period, basic applicable norms, definitions of important terms, and rules of interpretation, most of which were ultimately integrated directly and verbatim into the Concession Contract, to be discussed below.

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<sup>37</sup> Exh. C-36

88. Chapter 2 of the Bidding Rules defined the general procedure for the bidding and tendering process that was to determine the future concessionaire. It provided that the bidding was to consist of a “triple envelope system” (*el sistema de triple sobre*).<sup>38</sup> Subsequent Chapters of the Bidding Rules would define in detail the documentary and informational requirements for each envelope and the standards for evaluating them. The first envelope was to consist of a prequalification phase to determine whether an interested party had the necessary financial and technical qualifications. Only potential bidders that were judged to have such qualifications could participate in subsequent stages of the bidding. The second “envelope” was to consist of the technical aspects of the bid in which the bidder would specify the means and technology by which it proposed to carry out the concession. Finally, the third envelope in the bidding process addressed the financial and economic aspect of the bidder’s proposal. A key element in this “economic-financial offer” was the cost of water to the consumer. Article 5.41 therefore required each bid to contain the price of a cubic meter of water, referred to as the “Pq” which would be maintained through the entire period of the Concession, but without prejudice to the provisions on tariff modifications contained in the various annexes.

89. In the evaluation process, the economic-financial bids received were to be ranked in descending order, according to the least price proposed for a cubic meter of water.

90. The Bidding Rules further stipulated in some detail the nature of the documentation and information required to accompany the bid, the procedure by which the bid would be analyzed and evaluated, the method by which a decision would be made to decide on the winning bid, and the process for resolving any challenges to such decision. They also stipulated that the winning bidder must form a company (*sociedad anónima*) under Argentine law to enter into the concession contract and carry out the concession. To ensure the performance of its obligations under the contract, the concessionaire had to post a bank guarantee of US\$50,000,000 in favor of the Province, and maintain such guarantee throughout the entire period of the concession. Similarly, the entity designated as operator of the concession had to establish a guarantee of US\$10,000,000 to guarantee the performance of its operational duties under the Concession.

91. The Bidding Rules specified the provisions to be included in the concession contract, particularly the obligations of the Concessionaire with regard to service quality, development and investment in the water and waste water system, relations with the ENRESS, the regulatory entity, studies and plans for the development of the system, five year investment plans, the

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<sup>38</sup> Article 2.2, Bidding Rules



property regime, the regimes governing concession property and personnel, and the tariff regimes. These principles were for the most part incorporated into the concession contract, usually verbatim, and will be discussed in detail below. Annexed to the Bidding Rules was a Model Concession Contract which embodied in contractual language the principles stated in the Bidding Rules. In particular, the Model Contract contained provisions concerning the revision of tariffs. It provided for two types of tariff revisions: 1) revisions because of increases in costs and 2) extraordinary revisions caused by specified economic factors. In deciding on revisions for increases in costs, the regulatory authority was to consider operating cost increases caused by changes in such factors as fuel, construction materials, and cost projections for investments. Extraordinary revisions could be prompted by changes in water quality rules, modification of the Argentine Peso-U.S. Dollar exchange rate, and the creation, substitution or modification of taxes.

#### B. *The Concession Contract*

92. **The Concession Contract.** A lengthy and detailed document of over 100 pages, plus annexes, the Concession Contract between the Province of Santa Fe, represented by the Governor and referred to in the Concession Contract as “the Conceding Authority” (“el Concedente”), and Aguas Provinciales de Santa Fe S.A., referred to as “the Concessionaire” (“el Concesionario”), was signed on 27 November 1995. On 5 December 1995, APSF took possession of the conceded water and waste water systems in specified municipalities of the Province of Santa Fe. The Concession was to last for a minimum of thirty years, that is, until at least until the year 2025. The purpose of the Concession Contract was to specify the respective rights and responsibilities of the parties concerning the transfer, operation, and development of that system during the term of the Concession. As indicated above, the Concession by its terms was to be interpreted and applied within a stated hierarchy of legal norms set down in Article 1.9. These norms included: 1) Law No. 11,220 (the Santa Fe Water Law); 2) the Bidding Rules and their annexes and clarifying and modifying circulars, including the Model Contract; 3) the Offer presented by APSF during the bidding process; 4) the Concession Contract; and 5) the rules enacted by ENRESS and other regulatory rules that might be set down in the future.

93. The Concession Contract is divided into fifteen chapters and contains fifteen annexes. Chapter 1 on General Aspects states the purposes of the Concession, defines important terms used in the Contract, sets down rules of interpretation, and specifies the duration of the Concession as thirty years from the date of APSF’s taking possession of the system with the possibility of extending it for further periods of time as provided in the Water Law and the Concession Contract

itself. It is also to be noted that the Concession Contract states that the Concession is granted to APSF free of any required payment or “canon” by APSF.<sup>39</sup> Many of the provisions in the Concession Contract are particularized versions of the principles stated in the Santa Fe Water Law and the Bidding Rules.

94. Chapter 2 entitled “The Concessionaire” (*El Concesionario*) concerns the concessionary company and, as required by the Bidding Rules, established basic principles concerning its minimum capital (US\$60,000,000), required its domicile to be the city of Santa Fe, and stated that the purpose of the company throughout the period of the Concession to be exclusively the performance of the Concession Contract. Moreover, it requires the Operator (then Lyonnaise des Eaux, now Suez) to hold 25% of the Company’s capital, in addition to other rules affecting its shareholders. An annexed Management Contract governed the rights and responsibilities of the Operator.

95. In Chapter 3, the Concession Contract stated the service norms to be followed by APSF in carrying out the Concession. These norms dealt with the continuity, regularity, quality, and generality of service to be provided by the Concessionaire to the users. Specific provisions concerned area coverage of the systems, specified water pressure requirements, required water flow volumes, service cuts, waste water overflows, treatment of effluents, and required levels of customer relations.

96. As a public service, the Concession was subject to close regulation by the Regulatory Entity (ENRESS), and Chapter 4 of the Concession Contract sought to define the principles governing the relationship between the Concessionaire and the Regulatory Entity. As a general principle, the two parties were “... to establish and maintain a fluid relationship that facilitates the performance of this Concession Contract.”<sup>40</sup> The Concessionaire by the terms of the Concession Contract had an obligation to cooperate with the Regulatory Entity, and the nature of that required cooperation was specified in some detail. At the same time, the Concession Contract required the Regulatory Entity to cooperate with the Concessionaire by among other things “... exercising its police, regulatory, and control powers in a manner that does not interfere with the management of the Concessionaire.”<sup>41</sup>

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<sup>39</sup> Article 1.7 of the Concession Contract.

<sup>40</sup> Article 4.1 of the Concession Contract.

<sup>41</sup> Article 4.3 of the Concession Contract.

97. Throughout the period of the Concession, the Concessionaire had an obligation to undertake studies, develop expansion and improvement plans, maintain records, and make information available on the details of the service it was providing. Chapter 5, entitled “Studies, Plans and Reports” (*Estudios, Planes, e Informes*) specified in detail the nature of the Concessionaire’s obligations with respect to these matters. In particular, it had to prepare and execute the General Plan for Improvement and Development of the Service (*Plan General de Mejoras y Desarrollo Servicio*), known as a PGMDS, to guide the development of the water and waste water systems so as to meet the needs of the area served.

98. The fact that the Concessionaire was to be transferred the possession of an existing water and sewage system with its personnel for which it would have the responsibility for effective management, development, and expansion during a fixed period of time and further that it had the obligation to transfer that system back to the Province upon the termination of the Concession required special rules concerning the property and personnel of the system and any contracts made by the Concessionaire during the life of the Concession. Accordingly, Chapter 6 of the Concession Contract defines the rules governing the property regime (*régimen de bienes*), specifying the various categories of property subject to the Concession and the rules governing their acquisition, use, protection, amortization, and disposal. Among other things, it provided that at the end of the Concession the Concessionaire was to transfer without financial payment back to the Province all assets of the Concession, including those it had subsequently acquired or constructed.<sup>42</sup> Chapter 7 on the Personnel Regime (*Régimen de Personal*) governs basic rights of Concession employees. Chapter 8 on the Tax Regime (*Régimen Tributario*) makes the Concessionaire liable for the payment of various taxes and government charges, while Chapter 9 on Contracts and Contracting Procedures (*Contratos y Procedimientos de Contratación*) provided for a system by which the Concessionaire, a public service, is to make contracts with third parties

99. In order to assure the performance of the Concession and the provision of the crucial public services it governs, the Concession Contract in Chapter 10 required the Concessionaire to establish a bank guarantee of US\$50,000,000, subject to periodic readjustments on the basis of inflation and changes in investment plans, in favor of the Province of Santa Fe.<sup>43</sup> Chapter 10 of the Concession Contract, entitled “Guarantees and Insurance Regime” (*“Régimen de Garantías y Seguros”*), defined the nature of this guarantee, the contingencies and risks that it covered, and the conditions under which it might be executed. Chapter 10 also specified the type of insurance,

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<sup>42</sup> Article 6.8.2 of the Concession Contract.

<sup>43</sup> Article 10.1.1 of the Concession Contract

primarily liability insurance, worker accident insurance, property damage, and life insurance, which the Concessionaire must maintain throughout the period of the Concession Contract.

100. The Concession Contract's provisions on tariffs, contained in Chapter 11 ("Tariff Values, Prices, and Their Modifications" (*Valores Tarifarios, Precios y sus Modificaciones*)), as well as in Annex IX, are central to the present dispute between the parties. The first part of Chapter 11, and its related Annex IX, established the tariffs to be charged to users at the beginning of the Concession. Article 11.3 stipulates that such tariff shall remain in force throughout the period of the Concession, without prejudice to the application of Article 11.4 which concerned tariff revisions. Article 11.4 authorized and defined the procedures for revising tariffs by the Regulatory Entity. Under the Concession Contract, tariff revisions could not be used to penalize the Concessionaire for past profits earned nor might it be used to compensate the Concessionaire for losses arising out of business risks.<sup>44</sup>

101. The Concession Contract specifically stated in article 11.4.1.3: "The Concession is based on the principle of business risk."<sup>45</sup> However, the Concession Contract also provided for the possibility of a tariff revision on the happening of events that were deemed to be outside the control of the Concessionaire. The principal specified events justifying a tariff revision were 1) modifications of the investment plan, known as PGMDS; 2) changes in costs related to the operation of the Concession; 3) changes in quality standards required of the Concession; 4) changes in the Argentine Peso-U.S. Dollar exchange rate; 5) changes in taxes; and 6) changes in environmental legislation. In considering requests for tariff revisions, the Regulatory Authority was always to take into account the principles of Article 81 the Santa Fe Water Law,<sup>46</sup> discussed above. A Tariff Revisions for Change in Costs was to take place whenever an increase or decrease of more than 4% occurred in the costs of a specified and exclusive list of elements needed in the operation of the Concession, as follows: fuel, chemical products, electricity, personnel, construction materials, and the exchange rate.<sup>47</sup> Article 11.11.4.2 specifies the methods for calculating such increases or decreases in the cost of these items, usually by reference to particular indices. With respect to determining changes in costs due to exchange rate changes, the Concession Contract specifically states that applicable basis for such calculation is the Dollar-Peso parity fixed by Law No. 23,928.

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<sup>44</sup> Article 114.1.2 of the Concession Contract

<sup>45</sup> "La Concesión está basada en el principio del riesgo empresario."

<sup>46</sup> Article 11.4.1.5 of the Concession Contract.

<sup>47</sup> Article 11.11.4.2 of the Concession Contract.

102. The Concession Contract also provides for “Extraordinary Tariff Revisions” on the happening of certain specified events in Article 11.4.5.1. These include changes in water quality standards, changes in norms for the protection of the environment, and most important for purposes of this case a “modification of the convertibility relation in relation to the United States Dollar fixed by National Law No. 23,928.”<sup>48</sup> For both ordinary and extraordinary tariff revisions, the Concession Contract required the provincial authorities to make a decision within thirty days.<sup>49</sup>

103. Chapter 12 of the Concession Contract dealt with the obligations of the Concessionaire in providing service under the Concession, with non-performance, and resulting sanctions that may be imposed on the Concessionaire. Article 12.1 stated the basic nature of the Concessionaire’s responsibility: the Concessionaire was to assume the Concession at its own technical, economic, and financial risk and was responsible to the Province and to third parties for the obligations and requirements from the beginning of the service as of the time it took possession. Neither the Conceding Authority (*i.e.* the Province) nor the Regulatory Entity was responsible to third persons for the obligations assumed by the Concessionaire. Failure to meet its obligations could result in one of two sanctions: warning (*apercibimiento*) or fines (*multas*), which the Regulatory Entity was empowered to impose.<sup>50</sup> Chapter 12 defined the norms to be applied in judging and sanctioning the Concessionaire, the procedure to be followed, and the nature of warnings and fines to be imposed by the Regulatory Entity in particular cases.

104. Chapter 13 concerned the Termination and Extension of the Concession (*Extinción y Prórroga de la Concesión*). Article 13.1 stated that termination of the Concession Contract may be caused by the expiration of the period of the Contract, cancellation due to the fault of the Concessionaire, cancellation due to the fault of the Conceding Authority (*Concedente*), cancellation for act of God (*caso fortuito*) or force majeure, bankruptcy (*concurso preventivo*), dissolution or liquidation of the Concessionaire or recovery (*rescate*) of the service. It then defines in detail the nature of each of these causes for termination. For example, among the sixteen specified faults of the Concessionaire justifying termination of the Concession Contract are service failures to carry out the legal provisions or regulatory provisions either of the

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<sup>48</sup> Article 11.4.5.1 of the Concession Contract.

<sup>49</sup> Article 11.4.6 of the Concession Contract.

<sup>50</sup> Article 13.3 of the Concession Contract.

Regulatory Entity or of the Concession Contract and repeated and unjustified delays in making agreed annual or projected investments<sup>51</sup>

105. At the same time, the Concession Contract gave the Concessionaire the right to terminate the Concession Contract for fault committed by the Conceding Authority. On this point, Article 13.4 provided as follows: “The Concessionaire may rescind the contract for fault of the Conceding Authority whenever a normative provision, legal action, act or omission of the Regulatory Entity, the Conceding Authority (*Concedente*), or any other organ of the Province of Santa Fe results in a serious failure to perform an obligation assumed by the Conceding Authority, which causes serious prejudice to the Concessionaire or which impedes the reasonable continuation of the execution of this Contract.”<sup>52</sup>

106. The consequences of termination by fault of the Concessionaire and termination by fault of the Conceding Authority are set out in Articles 13.8.2 and 13.8.3 of the Concession Contract, respectively.

107. Chapter 14, entitled “Transitional Regime,” established the rules to be followed during the time that APSF took possession and assumed the management of the system that up to that point had been under the control of DIPOS.

108. Chapter 15, the last chapter in the Concession Contract, concerned “Final Provisions” (*Disposiciones Finales*). Of note here is that the parties to the Concession Contract agreed to submit any matter concerning the interpretation and application of the Concession Contract to the exclusive jurisdiction of the courts of the Province of Santa Fe, and specifically renounce recourse to any other forum or jurisdiction whatsoever.<sup>53</sup>

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<sup>51</sup> Articles 13.3 and 13.4 of the Concession Contract.

<sup>52</sup> The original Spanish version of Article 13.4 reads as follows:

“13.4 Culpa del Concedente

El Concesionario podrá rescindir este Contrato de Concesión por culpa del Concedente, cuando de una disposición normativa, acto, hecho o omisión del Ente Regulador, del propio Concedente, o de algún otro órgano de la Provincia de Santa Fe, resulte un incumplimiento grave de las obligaciones asumidas por el Concedente que cause un grave perjuicio al Concesionario o que impida la razonable continuación de la ejecución del Contrato.”

<sup>53</sup> Article 15.4 of the Concession Contract. The original Spanish text of Article 15.4 reads as follows:

“15.4 Jurisdicción

109. **Subsequent Revisions.** The legal framework of the Concession, as described in the preceding paragraphs, remained stable from the date that the Claimants assumed responsibility for the water and waste water system in the Province of Santa Fe in November 1995, until the Argentine crisis of 2001-2003. Throughout those more than five years, the parties appeared to accept that framework as the basis of their relationship. As noted above, because of public opposition to the infrastructure charge, the Provincial authorities and APSF negotiated an agreement in 1999 which allowed an increase in tariffs of 13.85% and an end to the infrastructure charge for specific consumers, thus providing in effect a cross-subsidization whereby all users would contribute to finance the costs of expansion and the individual infrastructure charge would be reduced, a solution that would be embodied in Law No. 11,665 of 28 April 1999<sup>54</sup>. This solution sought to maintain the level of total tariff revenue collected by APSF and at the same alleviate the burden of certain charges on particular consumers. Its effect, according to the Claimants, was to preserve the “equilibrium principle,” whereby revenues would be balanced by costs and a profit, which they argue was the basis of the Concession.

110. In the year 2000, faced with a deteriorating situation, the Provincial authorities became concerned about the inability of certain elements of the population to pay for water and waste water services. It therefore requested APSF to enter into discussions to find a solution to this problem. The two sides subsequently made an agreement on 7 February 2000, providing for temporary measures to alleviate the burden on segments of the population that could not afford to pay and to begin formal negotiation to establish a mechanism that would allow the equilibrium principle to be preserved in the new situation. The Preamble of their agreement specifically stated that their aim was “to adopt a mechanism ensuring the economic and financial equilibrium of the Concession.”<sup>55</sup>

111. The contemplated negotiations did take place and resulted in three agreements or *actas*. *Acta I*, concluded on 25 August 2000, provided for some measures to alleviate the burden on consumers, who could not afford to pay for water and waste water services, and at the same time adjusted some of the Concessionaire’s investment and performance obligations so as not to worsen APSF’s financial situation. On 6 December 2000, the parties agreed to a second

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Sin perjuicio de lo establecido en el artículo 115 de la Ley 11.220, en caso de cualquier controversia relativa a la interpretación y ejecución del Contrato, las partes de someten a la jurisdicción local de la Provincia de Santa Fe, con renuncia expresa a cualquier otro fuero o jurisdicción que pudiera corresponder por cualquier causa.”

<sup>54</sup> Exh. C-58.

<sup>55</sup> Agreement between the Province of Santa Fe and APSF on transitory measures for the Concession, 7 February 2000, Exh. C-61.

agreement, *Acta II*, which established an economic model to assure the maintenance of the Concession's financial equilibrium. Two weeks later, on 20 December 2000, the Ministry and APSF made a third agreement, *Acta III*, which sought to implement *Acta II* by setting out new regulations for low-income users of the service, defining the equilibrium principle by establishing a mathematical formula for calculating tariffs, and settling various other claims between the parties. In order to be implemented, *Acta III* had to secure the Provincial Governor's approval. Although it was submitted to his office, the Governor never ratified it. The crisis of 2001-2003 would cause it to become side tracked.

### C. *General Considerations*

112. Viewed as a whole, the legal framework of the Concession sought to achieve and balance two basic objectives. First, it sought to attract private and foreign capital and know-how to the management and development of the Santa Fe water and sewage systems, a sector that had previously been a governmental service exclusively. In order to attract the large amounts of capital needed, the framework had to assure private investors the opportunity to earn a reasonable profit. Given the fact that such investors would have to commit massive amounts of capital in the early years of the Concession, and would only be repaid with an adequate return over a thirty-year period from the Concession's revenues, the tariff system was a key factor for enabling an investor to make a profit. An important element of the tariff system, in view of Argentina's volatile economic history and the length of the Concession period, was the mechanism for revising the tariff to take account of changing circumstances during those thirty years. Thus, in order to attract the interest of investors, Santa Fe created a legal framework that assured investors the possibility of making a profit and of dealing with changes that might seriously affect the profitability of the enterprise. Argentina's conclusion of some fifty-seven bilateral investment treaties, two of which are applicable to this case, sought to bolster its efforts at investment promotion by using international law to further assure foreign investors, like the Claimants, of their rights if they chose to invest in the country.

113. A second important objective of the legal framework was to assure the efficient provision of water and sewage service at low cost. Toward this end, the legal framework gave the Provincial governmental authorities a certain degree of regulatory discretion in setting tariffs and in determining other important matters relating to APSF's activities. Although the Claimants assert that the tariff regime of the Water Law was based on the "Equilibrium Principle", guaranteeing the Concessionaire a recovery of all costs plus a return on invested capital, it is



important to note three features of the legal framework: 1) the term “Equilibrium Principle” appears nowhere in the text of the Santa Fe Water Law, although it was used in certain government documents; 2) the Water Law conditions tariffs on the attainment of service efficiency by the Concessionaire; and 3) the Concessionaire was to assume the business risks of the operation.

114. Moreover, the Concession’s legal framework did not contain certain elements that were found in Argentina’s privatized concessions in other economic sectors. Thus, the legal framework to which APSF was subject: 1) did not allow the payment or conversion of tariffs in U.S. Dollars or other convertible currencies; 2) did not provide for the adjustment of tariffs at fixed times according to an agreed upon index; and 3) did not specifically exempt the Concession from price controls.<sup>56</sup> Moreover, instead of specifically mandating that the tariff was to provide for all costs and reasonable return to the investors, Article 81 of the Santa Fe Water Law provided: “The total invoicing by the each Provider for prices and tariffs must reflect the economic cost of an efficient service, including the achievement of improvements, expansion plans, and profits, taking into account in all cases the terms of the concession or service provision.”

115. On the other hand, it is clear that the legal framework of the Concession sought to protect the Concessionaire from changes in the legal parity of the Argentine Peso with the U.S. Dollar and from significant increases in costs. The operation and development of a water and sewage system in a large province in a country that had experienced significant economic and financial difficulties in the past involved numerous risks. The Concession’s legal framework sought to apportion those risks between the private investors and the Province of Santa Fe. That is to say, neither the Claimants nor Santa Fe alone assumed all of the risks that such an enterprise would face.

## **V The General Nature of the Claimants’ Claims and Argentina’s Defenses**

116. In submitting their case to this Tribunal, the Claimants rely on specific treaty rights which they claim that Argentina has failed to respect. In effect, they allege that Argentina’s treatment of the Claimants’ investments violates three specific treaty provisions: 1) guarantees against direct and indirect expropriation of their investments; 2) guarantees to accord their

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<sup>56</sup> See, e.g. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability (3 October 2006), for a discussion of the legal framework applicable to a gas transmission project.

investments full protection and security; and 3) guarantees to accord their investments fair and equitable treatment. In response, Argentina argues that none of its actions violate treaty provisions. Moreover, it advances two affirmative defenses based on international law: 1) that the defense of necessity under international law excuses any failure to satisfy its BIT commitments, and 2) that measures of which the Claimants complain, arising as they did out of the Argentine crisis, were within the legitimate police powers of the Respondent and therefore did not constitute a violation of either of the BITs. The Tribunal will next examine the nature and validity of the three alleged treaty violations, as well as Argentina's affirmative defenses under international law.

## **VI Responsibility for Direct or Indirect Expropriation**

### *A. The Applicable Treaty Provisions*

117. Both BITs applicable to this case provide for the protection of investments by investors of one Contracting Party from acts of direct or indirect expropriation by the other Contracting Party in fairly similar terms.

Article 5(2) of the Argentina-France BIT states:

*“2. The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalization measures or any other measures having a similar effect of dispossession, except for reasons of public necessity and on condition that the measures are not discriminatory or contrary to a specific undertaking.*

*Any such dispossession measures taken shall give rise to the payment of prompt and adequate compensation the amount of which, calculated in accordance with the real value of the investments in question, shall be assessed on the basis of the normal economic situation prior to any threat of dispossession.”*

Article V of the Argentina-Spain BIT provides:

*“Nationalization and Expropriation*

*Nationalization, expropriation, or any other measure having similar characteristics or effects that might be adopted by the authorities of one Party against investments made in its territory by investors of the other Party shall be effected only in the public interest, in accordance with the law, and shall in no case be discriminatory. The Party adopting such measures shall pay the investor or his assignee appropriate compensation, without undue delay, and in freely convertible currency.”*

118. For these provisions to apply to this case, and thus enable the Claimants to obtain compensation for the loss of their investments, this Tribunal must find, guided by the interpretation rules set forth in Articles 31 and 32 of the VCLT, that such losses resulted from “*measures*” (“*mesures*” in French or “*medidas*” in Spanish) taken by Argentina that resulted in the expropriation of Claimants’ investment or had the effect of such expropriation. The application of the above-quoted treaty provisions therefore requires the existence of three elements: 1) an expropriable investment of a Claimant; 2) a measure taken by Argentina; and 3) an expropriation of that investment as a result of that measure.

119. A first question then is whether the Claimants had an investment susceptible of expropriation under the two BITs applicable to this case. In its Decision on Jurisdiction in this case, this Tribunal held that the Claimants had made an investment for purposes of both Article 25 of the ICSID Convention and the relevant provisions of the applicable BITs.<sup>57</sup> For the purpose of assessing the Claimants’ expropriation claim, the Tribunal must now determine the specific assets allegedly expropriated. The Claimants, as shareholders in APSF, had an indirect interest in the Concession to operate the water and sewage system of Santa Fe for a period of thirty years. Neither APSF nor its shareholders owned or had any legal interest in the physical assets of the system. Those assets, whether existing at the time of the granting of the Concession or constructed or introduced into the system thereafter, were the property of the Province of Santa Fe. APSF as holder of the Concession had only a legal right to receive a stream of revenue from the operation of the system for a period of time under the conditions specified in the legal

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<sup>57</sup> Decision on Jurisdiction, 16 May 2006, paras. 29 and 49.

framework of the Concession described above. That right owned by APSF falls within the treaty definition of “investment”, which by the terms of the applicable BIT, includes “claims and rights to any benefit having any economic value” (Article 1.1(c) ) of the French Treaty) and “rights derived from any kind of contribution made with the intention of creating economic value” (Article 1.2 of the Spanish Treaty). As shareholders in APSF, the Claimants had an indirect interest in those same rights. Company shares are considered “investments” under the Argentina-France BIT (Article 1 (b)) and the Argentina-Spain BIT (Article 1(b)(2)). The economic value of such shares would be directly affected by any action taken against the assets of APSF. Thus, the Claimants had investments capable of protection from expropriation.

120. None of the treaties applicable to this case defines the noun “measure.”<sup>58</sup> A dictionary definition of the term states that a measure is “a plan or course of action taken to achieve a particular purpose.”<sup>59</sup> Thus, the various legislative, regulatory, and administrative actions taken by the Provincial and Federal Argentine authorities prior to, during, and following the country’s financial crisis certainly qualify as “measures.” Such measures undoubtedly had an effect on the Concession. Many may have complicated and made difficult the Claimants’ operation of the Concession and reduced the profitability of their investment. Others, such as Article 2 of Law No. 25,790 of 1 October 2003, which among other things directed that decisions of the executive branch not be limited by the regulatory framework of the Concession, may have abrogated or limited APSF’s and the Claimants rights under Argentine law. But whether any or all of such measures constitute expropriation or have the effect of expropriation is quite a different matter. It is that question that this tribunal must address. It should also be noted, although Argentina never disputed it, that measures taken by the provincial authorities are attributable to the Argentine State under international law.

121. The treaty provisions quoted above cover both direct expropriations and indirect expropriation. In the former situation, a host government uses its sovereign powers to seize assets by depriving an investor of its title to or control over those assets. In case of an indirect expropriation, sometimes referred to as a “regulatory taking,”<sup>60</sup> host states invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or canceling investors’ legal title to their assets or

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<sup>58</sup> Compare section 201 of the North American Free Trade Agreement, which states that “**measure** includes any law, regulation, procedure, requirement or practice.”

<sup>59</sup> Oxford English Dictionary.

<sup>60</sup> S.R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AJIL 475 (2008).

diminishing their control over them.<sup>61</sup> While determining the existence of a direct expropriation is usually not difficult because of the usually obvious physical manifestations that come with depriving an investor of title and control, identifying an indirect expropriation is often a much more complicated matter which requires an inquiry into whether a regulatory measure has the effect of an expropriation on an investment or is a valid exercise of a State's regulatory power. As the tribunal in the NAFTA case of *Feldman v. Mexico* acknowledged, recognizing a direct expropriation is not difficult but '...it is much less clear when governmental action that interferes with broadly-defined property rights...crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line.'<sup>62</sup> As will be seen below, the Claimants assert that Argentina took both direct and indirect expropriatory measures.

122. An initial problem in applying the above-quoted treaty provisions to this case is that neither of the BITs specifically defines the term "expropriation." However, Article 5(2) of the Argentina-France BIT, quoted above, provides some elaboration of the term when it refers to "...similar acts of dispossession..." and "...such dispossession measures..." Thus, expropriation, at least in the Argentina-France BIT, requires a "dispossession" of the investor. The requirement of "dispossession" as an element of expropriation is supported by scholars and jurisprudence in previous cases in which tribunals had to determine whether an expropriation had taken place. That inquiry is directed particularly at the "effects" of the measure on an investment, rather than at the intent of the government enacting the measure. Each of the BIT articles quoted above specifically refers to the "effects" of an expropriation measure and thus affirms the importance of evaluating the effects of a measure on the investment in determining whether an expropriation has taken place.

123. International tribunals treat the severity of the economic impact caused by a regulatory measure as an important element in determining if the measure constitutes an expropriation requiring compensation. One question often asked is whether the challenged governmental measure resulted in "substantial deprivation" of the investment or its economic benefits. Thus,

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<sup>61</sup> See e.g. R Dolzer & Ch Schreuer, *Principles of International Investment Law* (2007) 89-92; A. Reinisch, *Expropriation* in P. Muchlinski et al.(eds) *The Oxford Handbook of International Investment Law* (2008) 407-412.

<sup>62</sup> *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1); Award (16 December 2002), at para. 100.

the tribunal in *Occidental v. Ecuador*<sup>63</sup> applied “the criterion of substantial deprivation” in determining whether the imposition of an Ecuadorian tax constituted an indirect expropriation. In *CMS v. Argentina*,<sup>64</sup> which also relates to the Argentine crisis of 2001-2003, the claimant, an investor in a gas transportation company, alleged that Argentina’s decision to suspend a tariff adjustment formula for gas transportation during the crisis constituted an indirect expropriation. In evaluating this claim, the tribunal, after reviewing the relevant arbitral jurisprudence, stated that ‘the essential question is to establish whether the enjoyment of the property has been effectively neutralized,’ because ‘the standard where indirect expropriation is contended is that of *substantial deprivation*.’ (emphasis added) Moreover, such deprivation must have permanent or lasting results. For example, in *LG&E v. Argentina*, the tribunal found that the effects of Argentina’s measures on the claimants’ investment were not permanent, stating that such measures could not constitute expropriation “without a permanent, severe deprivation of LG&E’s rights with regard to its investment, or almost complete deprivation of the value of LG&E’s investment.”<sup>65</sup> Thus, in applying the provisions of the three BITs applicable to this case, this Tribunal will have to determine whether they effected a substantial, permanent deprivation of the Claimants’ investments or the enjoyment of those investments’ economic benefits.

124. The Claimants in their pleadings complained against Argentina’s “Measures,” referring collectively to numerous actions taken by Argentina from the time that the crisis began to emerge in 1999 until the Concession was terminated in 2006. Specifically, the Claimants cite eight specific measures taken by the Province. They include a) rejection of APSF’s requests for tariff adjustments; b) abandonment of the tariff regime; c) halting the renegotiation process and imposing more onerous conditions; d) abusively demanding that APSF comply with its obligations under the Concession Contract when it was already operating at a loss; e) abusive demands that APSF commit more funds and increase its capital; e) refusal of the Claimants’ attempt to sell their shares to local investors; e) unilateral termination of the Concession after driving the APSF into liquidation; and f) refusal to compensate the Claimants for the loss of their investment as required by the Concession Contract.<sup>66</sup> In order to evaluate the expropriatory nature of these numerous measures, the Tribunal must examine them individually. Basically, the measures of which the Claimants complain fall into three categories: 1) acts of a general legal or

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<sup>63</sup> *Occidental Exploration and Production Company v. the Republic of Ecuador*, LCIA Case No UN3467 (Final Award) (1 July 2004), at para. 89.

<sup>64</sup> *CMS Gas Transmission Company v. the Argentine Republic* (ICSID Case No ARB/01/8) (Award) (12 May 2005), at para. 262.

<sup>65</sup> *LG&E supra* note 56 at para. 200.

<sup>66</sup> Claimants’ Post Hearing Brief para. 198.

regulatory nature, not directed specifically at APSF or the Claimants, enacted to cope with the financial crisis and its aftermath; 2) the failure of the Provincial in response to APSF's repeated requests to revise the tariff charged to users by the Concession during and after the crisis; and 3) the actions taken by the Provincial authorities at the time of the termination of the Concession. The Tribunal will examine the nature of these three categories of measures to determine whether they constituted measures of expropriation under the applicable BITs.

B. *Measures Taken to Cope with the Crisis*

125. Beginning in 2001, the Argentine government enacted various measures in an effort to cope with the financial crisis descending on the country. Among these measures of which the Claimants complain are Decree No 1570/01 of 3 December 2001 which imposed a “*corralito*” or “little fence” upon bank accounts so as to limit the amounts of cash withdrawals by account holders, the imposition of new taxes, and most of Emergency Law<sup>67</sup> No. 25, 561 of 6 January 2002, which i) abolished the currency board that had linked the Argentine Peso to the U.S. dollar, resulting in a significant depreciation of the Argentine Peso; ii) abolished the adjustment of public service contracts according to agreed upon indexations; and iii) authorized the Executive branch of government to renegotiate all public service contracts and led to various other measures surrounding the efforts by the Argentine government to renegotiate public service contracts. These measures certainly made the operation of the Concession more difficult, reduced its profitability significantly, and appear to have abrogated or modified certain acquired rights of the Claimants. However, they did not affect the possession by APSF of the Concession. APSF remained in possession of the Concession through this period and continued to provide water and sewage services to the Province of Santa Fe. Moreover, the Claimants as APSF shareholders continued to control APSF and to retain possession of their APSF shares undisturbed. Thus, the Tribunal finds that no overt taking of the Concession's rights during this period occurred as a result of these measures and therefore no direct expropriation, as that term is understood under the BITs and in international law, took place.

126. Did these measures constitute an indirect expropriation or a measure tantamount to expropriation? The fact that the effect of such measures may have diminished the value of an investment does not in and of itself constitute an indirect expropriation. In *LG&E*,<sup>68</sup> which considered the effect on investors in the gas sector of the measures that Argentina took to deal with the crisis, the tribunal found that such measures did not constitute either a direct or an

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<sup>67</sup> *Supra* note 18.

<sup>68</sup> *LG&E supra* note 56, Award (25 July 2007).

indirect expropriation under the Argentina-U.S. BIT. Citing *CME Czech Republic B.V. v. Czech Republic*, the *LG&E* tribunal stated that a measure tantamount to expropriation occurs when governmental measures “effectively neutralize[d] the benefit of the property of the foreign owner.” It then stated: “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.”<sup>69</sup> The *LG&E* tribunal ultimately found that no expropriation, direct or indirect, had taken place as a result of the measures taken by Argentina. Similarly in *CMS*, noted above, although the tribunal recognized that the measures under dispute had an important effect on the investor’s business, it found no substantial deprivation and thus no breach of the expropriation provision of the Argentina-US BIT. It also pointed out that “the investor is in control of the investment; the government does not manage the day-to-day operations of the company...and the investor has full ownership and control of the investment.”<sup>70</sup> The same can be said of the Claimants in the present case with respect to the measures taken by Argentina to cope with the crisis. The events surrounding the termination of the APSF Concession are a different matter that will be discussed below.

127. Claimants in several other investor-State arbitrations arising out of the 2001-2003 crisis have alleged that Argentina’s measures to deal with the crisis constituted acts of indirect expropriation. In nearly all of those cases, the tribunals rejected that claim on the grounds that those measures did not amount to a permanent, substantial deprivation of the economic substance of the investment.<sup>71</sup> In only one case, *Siemens v. Argentina*<sup>72</sup> did a tribunal find that Argentina’s actions constituted expropriation. In that case, the tribunal did not find that general measures enacted by Argentina to deal with the crisis were expropriations but rather that a specific government decree terminating Siemens’ contract with the Argentine government was an expropriation.

128. As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State’s legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation. The *American Law Institute’s Restatement (Third) of the Foreign Relations Law of the United States*

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<sup>69</sup> *Ibid.*, at para. 188. Citing *Pope & Talbot, Inc. v. Canada*, Interim Award (26 June 2000), at para. 100.

<sup>70</sup> *CMS supra* note 64 at para. 263.

<sup>71</sup> *LG&E supra* note 56; *CMS supra* note 64; *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Award (14 July 2006); *Enron Corp. and Ponderosa Assets S.A. v. Argentine Republic* (ICSID case No. ARB/01/3), Award, (22 May 2007).

<sup>72</sup> *Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/8), Award (6 February 2007).



underscores this point when it states that “... a State is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action that is commonly accepted as within the police power of States, if it is not discriminatory...”<sup>73</sup> In the context of investment disputes, the doctrine of police powers has been referred to, for instance, in *Methanex v. United States*<sup>74</sup> and *Saluka v. the Czech Republic*.<sup>75</sup> In this latter decision, the tribunal noted that “the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary law today.”

129. In analyzing the measures taken by Argentina to cope with the crisis, the Tribunal finds that they did not constitute a permanent and substantial deprivation of the Claimants' investments. Although they may have negatively affected the profitability of the APSF Concession, they did not take or reduce the property rights of APSF or its investors and did not affect the ability of APSF to hold the Concession and to direct its operations and activities. The Tribunal therefore concludes that such measures did not violate the above quoted BIT articles with respect to direct or indirect expropriation; however, that is not to say that they have not violated other treaty commitments.

C. *The Province's Refusal to Revise the Tariff*

130. The Claimants also assert that the Province's failure to revise the tariff in response to APSF's repeated requests constitutes direct or indirect expropriation. In making a literal interpretation of the BITs, one encounters an initial question with respect to the Claimants' assertion. Both treaties require the existence of a governmental “measure” in order to found a claim for expropriation. Can a *failure* to take action, such as to revise a tariff, constitute a “measure”? In *Olguín v. Paraguay*, the tribunal expressed the opinion that “[e]xpropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place.”<sup>76</sup> A “measure,” which is not defined in any of the

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<sup>73</sup> American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, Vol. 1, sec. 712, comment g.

<sup>74</sup> *Methanex Co. v. United States of America* (UNCITRAL), Award (3 August 2005), pt. IV, ch. D, para. 7

<sup>75</sup> *Saluka Investments B.V. v. the Czech Republic* (UNCITRAL), Partial Award (17 March 2006), at para. 262.

<sup>76</sup> *Eudoro A. Olguín v. Republic of Paraguay* (ICSID Case No ARB 96/5), Award, (26 January 2001), at para. 84.

two BITs, is usually interpreted to mean an action taken to achieve a particular purpose. In this case, although Argentina refused to revise the tariff, that action of refusal was not an omission but the result of a carefully considered decision formally communicated to APSF and that decision constitutes a measure within the meaning of both treaties. The decision not to revise the tariff in response to APSF's requests was certainly teleologically driven.

131. The Claimants argue that the Province's failure to revise the tariff according to the terms of the legal framework deprived them of the economic benefit of their investment and therefore constituted an indirect expropriation. The economic value of the investment was the tariff income that APSF was to receive from payments by consumers for water and sewage services. That income, according to the legal framework described above, was dependent on the tariff which was in turn to be determined in such a way as to allow APSF to earn a profit on its operations. The Concession, according to the Claimants, was based on the principle of financial equilibrium, the principle that the applicable tariff would be set at a level to assure that the income from consumer payments would cover all costs of operation, including debt service, and provide APSF a reasonable profit. By refusing to apply the legal framework to revise the tariff in the presence of steeply rising costs, the provincial and federal authorities' measures prevented APSF from achieving the required financial equilibrium and therefore destroyed the economic value of the Concession, resulting in an indirect expropriation.

132. Argentina denies that the Province's refusal to revise the tariff was a measure of expropriation or constituted a regulatory taking. It argues that it was not obligated to increase the tariff under the legal framework of the Concession, that the principle of financial equilibrium was not embodied in the Concession, that APSF, as Concessionaire, had assumed certain risks incident to the operation of the Concession which the Province, as the conceding authority was not obligated to protect APSF against. It points to the fact that its refusal to revise the tariff did not result in a taking necessary for an expropriation and that any complaints by APSF concerning the application of the tariff regime were in effect contract claims to be settled according to the dispute resolution mechanism of the Concession, not treaty claims to be resolved in international arbitration.

133. In support of its expropriation claims arising out of Argentina's exercise of its regulatory powers or failure thereof, the Claimants rely particularly on the cases of *CME* and *Vivendi II*. In both of those cases, the Claimants had lost their investments as a result of State measures, and the tribunals in both cases found that expropriations had taken place. With respect to the former

case, the present Tribunal notes that *Lauder v. Czech Republic*,<sup>77</sup> which the Claimants did not discuss in their pleadings, dealt with identical facts to those of the *CME case* and a similar BIT, but concluded that the Czech government's measures in that case did not constitute an expropriation, thus significantly diminishing the precedential value of *CME*. Moreover, in *CME*, the challenged Czech government action was an affirmative action by the government whereas in the present case the Claimants are complaining of Argentina's failure to exercise its regulatory powers affirmatively in favor of APSF. With respect to *Vivendi II*, which did not arise out of the Argentine crisis of 2001-2003, the provincial government undertook a series of deliberate actions, such as forbidding the collection of unpaid waters and sewage bills in the courts, which had the effect of depriving the concessionaire of the means of enforcing legitimate monetary claims necessary for the economic viability of its enterprise. In the present case, the governmental authorities took no such similar actions against AASA or the Claimants.

134. An indirect expropriation requires a substantial deprivation of an investment. No such substantial deprivation occurred as a result of Santa Fe's refusal to revise the tariffs to be applied by APSF. Throughout the period 1999-2006, APSF remained in control of the Concession and its authority to manage and direct the operation of the water and sewage system was undiminished. The Tribunal therefore concludes that the Province's failure to revise the tariff, despite APSF's repeated requests during this period, did not constitute either a direct or indirect expropriation of the Claimants' investment in APSF.

D. *The Province's Termination of the Concession*

135. On January 31, 2006, the Provincial authorities took measures, described above, to terminate the Concession granted to APSF in 1995 and to retake possession of the water distribution and waste water systems that had been the subject of the Concession. Moreover, the Province also liquidated the performance bond which APSF and the Claimants had established to guarantee their performance under the Concession and it refused to pay the unamortized value of APSF's investments pursuant to the Concession Contract. Did such measures constitute either a direct or indirect expropriation of the Concession?

136. The Claimants assert that such measures which resulted in a complete deprivation of APSF's rights in the Concession constituted a clear case of not just an indirect expropriation but also a direct expropriation. They argue that such termination makes their situation different from the situations that prevailed in *CMS v. Argentina*, *LG&E v. Argentina*, *Azurix v. Argentina*, and

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<sup>77</sup> *Ronald S. Lauder v. the Czech Republic* (UNCITRAL), Final Award, (3 September 2001).

the other cases cited above in which tribunals deciding cases arising out of the Argentine crisis determined that the measures taken by Argentina to cope with the crisis did not constitute either a direct or indirect expropriation. The key difference, according to the Claimants, was that in those cases, the investors remained in ownership and control of their investments but that the Claimants in the present case, because of the Province's abrupt termination of the Concession, did not. As a result of the termination, the Claimants assert that Santa Fe gained a much improved and expanded water and sewage system without having to pay compensation for it. In support of their position, the Claimants cite the cases of *CME*<sup>78</sup> and *Vivendi II*.<sup>79</sup> In both of those cases, the Claimants had lost their investments as a result of State measures and the tribunals in both cases found that expropriations had taken place.

137. In order to determine whether an expropriation has taken place as a result of the Province's termination of the Concession, the Tribunal must examine and analyze the rights held by APSF in the Concession. Neither APSF nor its shareholders owned or had any property rights in the physical assets of the water and sewage system of the Province of Santa Fe. Had they owned the system, a seizure of that system by the Province would have constituted an expropriation and the Claimants would have been entitled to protection under the expropriation provisions of the BITs applicable to this case. Instead, APSF held contractual rights as a Concessionaire to operate that system and to derive income from that operation. That Concession gave APSF certain rights, which included the right to collect revenues generated by tariffs paid by consumers during a period of thirty years. But APSF's rights to that revenue and to continue to operate the water and sewage system of the Province were by no means absolute, as the Claimants seem to suggest in their pleadings. Those rights were subject to various conditions concerning such matters as efficiency, adequacy of service, and achievement of investment commitments for improvement and expansion of the system, among others. Moreover, as discussed above, the Concession Contract specifically granted the Argentine government the right to terminate the Concession due to the fault of the Concessionaire and to retake possession of the water and sewage system.

138. In the fall of 2005, APSF itself had sought transfer its shares to local investors and, when that failed, to transfer the system back to the Province. The Province denied both requests. APSF's request placed a certain pressure on Argentina to plan for the eventuality of APSF's

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<sup>78</sup> *CME Czech Republic BV (The Netherlands) v. the Czech Republic*, (UNCITRAL), Partial Award, (13 September 2001).

<sup>79</sup> *Supra* note 8, Award (20 August 2007).

unilateral withdrawal. Subsequently, faced with a deteriorating situation and confronted with the overwhelming need and public duty to assure the continued provision of water and waste water services to millions of people in a vast provincial area, the provincial government invoked its rights under the Concession Contract and terminated the Concession. Argentina argues that under the Concession Contract it had the right to terminate the Concession for serious fault and that such a serious fault existed in this case. During the attempt to renegotiate the Concession Contract, the Argentine regulatory authorities had also imposed various high fines on APSF for certain deficiencies in operation.

139. In response, the Claimants assert that the Province's abusive actions had driven APSF into liquidation and that their plight was due entirely to the illegal and unjustified actions of the Provincial authorities. They suggest that the aim of the Province was to drive APSF out of business and renationalize the water and waste water systems of the province.

140. International law has recognized that contractual rights may be the subject of expropriation at least since the *Norwegian Shipowners' Claims case*.<sup>80</sup> The *Chorzów Factory case* would come to a similar conclusion.<sup>81</sup> Although the two treaties applicable to the present case do not specifically so state, the inference is clear from the fact that their definitions of investments include concessions conferred by law or contract that contractual rights in a concession, like rights in physical assets, are protected from expropriation. But just as in a case of the expropriation of physical assets, a tribunal must first understand the nature of the rights allegedly expropriated before proceeding to determine whether they have been expropriated under international law. To assess the nature of these rights in a case of alleged expropriation of contractual rights, one must look to the domestic law under which the rights were created. APSF's and the Claimants' contractual rights in the Concession, which the Claimants allege were expropriated, were created by the legal framework and the Concession Contract described above.

141. Under that legal framework, the Province of Santa Fe had a right to terminate the Concession Contract upon certain conditions, mentioned above. In January 2006, it purported to exercise its contractual rights when it terminated the Concession with APSF. In this regard, the situation was different from that existing in *the Norwegian Shipowners Claims Case*, the *Chorzów Factory Case*, and the *CME v. Czech Republic Case* on which the Claimants rely. In those cases, the respondent State was interfering in a contract between the claimants and a third

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<sup>80</sup> *Norwegian Shipowners' Claims (Nor v U.S.)*, (Perm Ct Arb 1922) 1 RIAA 307.

<sup>81</sup> *Case Concerning the Factory at Chorzów (FRG v. Pol)* (1927) PCIJ Series A No 9.

party. In the present case, the Respondent was taking action with respect to a contract to which it was a party and whose terms gave it a right to terminate under certain conditions. The Tribunal also notes that *Lauder v. Czech Republic*,<sup>82</sup> which the Claimants did not discuss in their pleadings, dealt with identical facts to those of the *CME case* and a similar BIT, but which concluded that the Czech government's measures in that case did not constitute an expropriation.

142. In investor-State arbitrations which involve breaches of contracts concluded between a claimant and a host government, tribunals have made a distinction between *acta iure imperii* and *acta iure gestionis*, that is to say, actions by a State in exercise of its sovereign powers and actions of a State as a contracting party. It is the use by a State of its sovereign powers that gives rise to treaty breaches, while actions as a contracting party merely give rise to contract claims not ordinarily covered by an investment treaty. As pointed out in *Siemens v. Argentina*, "... for the behavior of the State as a party to a contract to be considered a breach of an investment treaty, such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract."<sup>83</sup> In *Siemens*, the tribunal found that Argentina took a series of measures based not on its contract with the Siemens subsidiary but on the exercise of its public authority, one of which was a governmental decree not based on contract but which terminated the contract. It therefore found that Argentina had expropriated Siemens' contractual rights. A similar finding was reached in *Vivendi II*, where the tribunal concluded that the measures taken by the Province of Tucumán amounted to an expropriation of the investor's contractual rights.<sup>84</sup> However, the mere fact that there is some government involvement in the events that lead to the termination of a contract does not necessarily mean that such termination is the result of an exercise of sovereign powers, as noted recently by the tribunal in *Bayindir v. Pakistan*.<sup>85</sup>

143. In the present case, did the Province act in the exercise of its sovereign powers (*acta iure imperii*) or as an ordinary contracting party (*acta iure gestionis*) when it terminated the Concession Contract with APSF? If the former, then Argentina may have expropriated the contractual rights of APSF and the Claimants. If the latter, then no expropriation has taken place and the Claimants have only contractual claims under the legal framework described above. While Argentina exercised its public authority on various occasions during the crisis, the Tribunal

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<sup>82</sup> *Supra* note 77.

<sup>83</sup> *Supra* note 72, at para. 248.

<sup>84</sup> *Supra* note 8, Award (20 August 2007), at para. 7.5.34.

<sup>85</sup> *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29), (hereafter "*Bayindir v. Pakistan*") Award (27 August 2009), at paras. 128-129, 315.

does not consider that the Province's termination of the Concession Contract was an exercise of such authority. Rather, its actions were taken according to the rights it claimed under the Concession Contract and the legal framework. Indeed, the provincial authorities' behavior in ending the Concession Contract seems not unlike the behavior of a private contracting party faced with the threatened termination of an important long-term supply contract: it quickly made other provisions for supply of the needed commodity or service and then took steps to end the deteriorated contractual relationship itself.

144. This Tribunal views the dispute between the Claimants and the Province concerning the termination of the Concession as essentially contractual in nature. Indeed, Argentina's action in terminating the Concession purportedly in accordance with the Concession's terms was not an act of expropriation but rather the exercise of its alleged contractual rights. Even its liquidation of the Performance Bond was based on an alleged contractual right since Argentina was the beneficiary of that bond. Whether such alleged exercise of contractual rights was legally in accord with the Concession Contract and the Performance Bond is a matter for the dispute settlement processes applicable to that Contract and the Performance Bond. The Tribunal does not ignore that, under certain circumstances, the unlawful exercise of a contractual remedy may support the conclusion that there has been a treaty breach. As noted in an award recently rendered by another ICSID tribunal:

“[...] in assessing whether there has been a treaty breach a tribunal may review contract matters [ ... ] These considerations do not imply that the assessment of a treaty breach in the context of a contractual relationship requires a determination that the contract has been breached. Breach of contract and breach of treaty are separate questions giving rise to separate enquiries [ ... ] Because the enquiries are different, the fact that a State exercises a contract right or remedy does not in and of itself exclude the possibility of a treaty breach.”<sup>86</sup>

145. In its assessment of the existence of a treaty breach, the Tribunal has taken into account, insofar as relevant, the contractual conduct of the Province. It concludes, however, that measures taken by the Province to terminate the Concession were ostensibly an exercise of its contractual rights but not measures of expropriation. Therefore, irrespective of the conclusions that the dispute settlement processes applicable to the Concession Contract and the Performance Bond

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<sup>86</sup> *Id.*, par. 136-138.

may yield, the Tribunal concludes that Argentina's conduct in this regard was not in breach of the expropriation clauses of the BITs.

E. *Argentina's Police Powers Defense*

146. Argentina asserts that the actions of the Province of Santa Fe with respect to APSF and the Claimants were a legitimate exercise of its police powers both under international law and Argentine law and that such police powers are therefore a complete defense to any alleged treaty violations, not only with respect to the Claimants' expropriation claims but also with respect to their claims of Argentina's denial of full protection and security and fair and equitable treatment. In making this argument, it relies particularly on Article 10(5) of the Harvard Draft Convention on the International Responsibility of States For Injuries to Aliens, particularly its provision that an "uncompensated taking of an alien property or a deprivation of the use or enjoyment of property which results from ... a general change in the value of currency....shall not be considered wrongful..." if such measure is non-discriminatory, not the result of a violation of Draft provisions on the right to a fair trial, not an unreasonable departure from generally recognized principles of justice, and not an abuse of powers.<sup>87</sup>

147. While this Tribunal does not pronounce on the legal authority of the Draft, it does acknowledge that States have a legitimate right to exercise their police powers to protect the public interest and that the doctrine of police powers, as the above-quoted excerpt from the Draft clearly states, has been particularly pertinent in cases of expropriation where tribunals have had to balance an investor's property rights with the legitimate and reasonable need for the State to regulate. Those cases and the police powers doctrine are inapplicable in the present dispute because the Tribunal has already ruled that the Claimants have not suffered an expropriation because they have not been deprived of their property rights by Argentina's measures.

148. The police powers doctrine is a recognition that States have a reasonable right to regulate foreign investments in their territories even if such regulation affects investor property rights. In effect, the doctrine seeks to strike a balance between a State's right to regulate and the property rights of foreign investors in their territory. However, the application of the police powers doctrine as an explicit, affirmative defense to treaty claims *other* than for expropriation is inappropriate, because in judging those claims and applying such principles as full protection and security and fair and equitable treatment, both of which are considered in subsequent sections of

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<sup>87</sup> The 1961 Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens, 55 *American Journal of International Law* 545 (1961).



this Decision, a tribunal must take account of a State's reasonable right to regulate. Thus, if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate. Consequently, for that same tribunal to make a subsequent inquiry as to whether that same State has exceeded its legitimate police powers would require that tribunal to engage in an inquiry it has already made. In short, a decision on the application of the police powers doctrine in such circumstance would be duplicative and therefore inappropriate.

149. In its pleadings with respect to the police powers defense, Argentina has also argued that international law grants it sovereignty over its own currency and that no international wrong can result from actions which it takes to manage that monetary system. It asserts that its failure to revise the APSF tariff is protected by the powers that international law grants it over its sovereignty. The problem with the Respondent's argument on this point is that the Claimants are not challenging Argentina's right to regulate its currency. What they challenge is the Province's failure to fulfill its obligations under the Concession Contract once Argentina had exercised its police power to regulate its currency. The police power doctrine does not protect Argentina from liability for treaty violations in that circumstance. A measure by a State of general currency devaluation and its deliberate refusal to respect a specific commitment made to a foreign investment are two very different matters.

150. At one point in the pleadings, the Respondent seemed to argue that the Respondent's police powers *under Argentine law* also constituted a defense to liability under the applicable BIT. The nature of police powers under Argentine law is not relevant in the present proceeding since, as discussed in paragraph 61 of this decision, Article 27 of the VCLT specifically provides that "[a] party may not invoke provisions of its internal law as justification for its failure to perform a treaty."

#### F. *The Tribunal's Conclusions*

151. After examining the various measures taken by Argentina from the onset of the crisis in 1999, until the termination of the Concession in 2006, the Tribunal concludes that none of them, either individually or collectively, violated the BIT provisions governing direct and indirect expropriations.

## VII Responsibility for Failure to Provide Protection and Security

### A. *The Applicable Treaty Provisions*

152. The Claimants also allege that Argentina has breached the provisions of the BITs in that they have denied the Claimants protection and security. The specific treaty provision on which they rely are as follows: Article 5(1) of the Argentina-France BIT states:

*Investments made by investors of one Contracting Party shall be fully and completely protected and safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in article 3 of this Agreement.*

Article III.1 of the Argentina-Spain BIT provides:

*Article III*  
*PROTECTION*

*Each Party shall protect within its territory investments made in accordance with its legislation by investors of the other Party and shall not obstruct, by unjustified or discriminatory measures, the management, use, enjoyment, extension, sale and, where appropriate, liquidation of such investments.*

153. At the outset, it should be noted that whereas the Claimants' pleadings refer to these treaty provisions as guaranteeing "full protection and security," a term found in many bilateral investment treaties, that specific phrase appears nowhere in the two BITs applicable to this case. The Argentina-France BIT promises that investments will be "fully and completely protected and safeguarded..." and the Argentina-Spain BIT promises only that the Contracting Parties "shall protect" investments. It remains to be seen whether the BITs are in effect promising differing levels of protection and whether the level of protection they provide is different from that offered by the many treaties employing the terminology of "full protection and security".

### B. *Analysis and Jurisprudence*

154. In seeking to apply these provisions, this Tribunal is confronted initially with two basic questions: Protection from whom? Protection against what? In other words, from whom is a Contracting Party to protect an investor and against what specific actions by such person is a

Contracting Party to secure protection? The Claimants argue that in withdrawing certain alleged guarantees made to the Concessionaire and its investors Argentina withdrew "...the legal protection and security previously granted to an investment...".<sup>88</sup> Thus, Claimants' interpretation of the above-quoted treaty provisions is that Argentina promised to protect the investments of the other Contracting Party from actions that Argentina itself might take in the exercise of its legal and regulatory authority. The Respondent, on the other hand, takes the position that the provisions on protection and security apply primarily to protection from physical acts against an investor or investment and that only in exceptional circumstances should they be applied to other situations.

155. The origin of the terms "full protection and security", "constant protection and security," or simply "protection and security" appears to lie in the bilateral commercial treaties that countries concluded in the nineteenth and early twentieth centuries, such as the friendship, commerce and navigation (FCN) treaties made by the United States during that period.<sup>89</sup> For example, of twenty-two early commercial treaties concluded by the United States before 1920, fourteen contained reference to "special protection" and the remaining eight specified "full and perfect protection" of persons' private property.<sup>90</sup> As an illustration, Article 3 the FCN treaty that the United States concluded with Brunei in 1850 provided that His Highness the Sultan of Borneo "...engages that such Citizens of the United States of America shall as far as lies within in his power, within his dominions enjoy *full and complete protection and security* for themselves and for any property which they may acquire..." (emphasis added).<sup>91</sup> A number of bilateral treaties of other countries also employed this term.<sup>92</sup>

156. Traditionally, courts and tribunals have interpreted the content of this standard of treatment as imposing a positive obligation upon a host State to exercise due diligence to protect the investor and his property from physical threats and injuries, not as imposing an obligation to protect covered investments and all investors from all injuries from whatever sources. In the

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<sup>88</sup> Claimants' Reply, para. 361.

<sup>89</sup> K. Vandeveld, "*The Bilateral Investment Treaty Program of the United States*," 21 Cornell Int'l L.J. 203, 204. (1988).

<sup>90</sup> W. Wilson, R., "*Property-protection Provisions in United States Commercial Treaties*," 45 Am. J. Int'l L. 84, 92-96(1951).

<sup>91</sup> Treaty of Friendship, Commerce and Navigation with Brunei, 10 Stat. 909; Treaty Series 331 (entered into force July 11, 1853).

<sup>92</sup> See for example the bilateral treaty between Italy and Venezuela, stating that "citizens of each State should enjoy in the territory of the other 'the fullest measure of protection and security of person and property, and should have in this respect the same rights and privileges accorded to nationals.'" Quoted in the *Sambiaggio* case, Italy-Venezuela Mixed Claims Commission, U.N. Reports of International Arbitral Awards, vol.X, p. 512.

*ELSI case*,<sup>93</sup> in which the United States brought a claim against Italy on grounds that the requisition of a U.S. investor's factory by the Mayor of Palermo, Italy, violated Article V(1) of the United States-Italy FCN treaty obligating the Contracting Parties to provide investors "the most constant protection and security," the International Court of Justice Chamber stated that: "The reference in Article V to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed."<sup>94</sup>

157. With the development of bilateral investment treaties, whose texts were influenced by the language of the earlier of FCN treaties, the drafters of BITs incorporated the term "full protection and security," or some variation thereof, in this new legal instrument designed to protect and promote foreign investment in a new era. Early interpretations of BIT provisions on full protection and security applied them essentially to protect investors and investments from physical injuries and threats, particularly from actions, usually unauthorized, by a country's army units or individual soldiers, or from disgruntled workers.<sup>95</sup> In each of these cases, the tribunals stressed that the treaty provision was not a guarantee against all injuries that might befall an investment but only required the host country to exercise due diligence. On the meaning of due diligence, tribunals and scholars have often referred to the statement of Professor A.V. Freeman in his lectures at the Hague Academy of International Law: "The 'due diligence' is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."<sup>96</sup> The late Professor Ian Brownlie observed that the decisions of tribunals give no definition of 'due diligence', but that 'obviously no very dogmatic definition would be appropriate, since what is involved is a standard which will vary according to the circumstances.'<sup>97</sup>

158. The fact that the "full protection and security" standard implies only an obligation of due diligence, as opposed to strict liability, has also been widely recognized in more recent arbitral case decisions.<sup>98</sup> On the other hand, there seems to exist no consensus as to the extent to which

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<sup>93</sup> *Elettronica Sicula S.p.A. (ELSI)*, (U.S. v. Italy), I.C.J. Reports 1989.

<sup>94</sup> *Ibid.* § 108, p.65.

<sup>95</sup> See *e.g.*, *Asian Agricultural Products Limited v. Sri Lanka* (ICSID Case No. ARB/ 87/3) Award (27 June 1990); *American Manufacturing and Trading, Inc. v. Zaire* (ICSID Case No. ARB/93/1) Award (21 February 1997).

<sup>96</sup> AV Freeman, *Responsibility of States for the Unlawful Acts of Their Armed Forces*; 88 *Recueil des Cours* (1956) 261.

<sup>97</sup> I. Brownlie, *Principles of Public International Law* (1990) 454.

<sup>98</sup> See, among others, *Saluka supra* note 75; at para. 483; *Rumeli Telekom A.S and Telsim Mobil Telekomunikasyon Hizmetleri A.S v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award (29 July

the full protection and security standard may exceed the State's obligation to provide mere physical security to the investor and his assets.

159. Traditionally, the cases applying full protection and security have dealt with injuries to physical assets of investors committed by third parties where host governments have failed to exercise due diligence in preventing the damage or punishing the perpetrators. In the present case, the Claimants are attempting to apply the protection and security clause to a different type of situation. They do not complain that third parties have injured their physical assets or persons, as in the traditional protection and security case. They are instead asserting that Argentina denied it protection and security by dint of the actions which Argentina itself took in exercise of its governmental powers against APSF's contractual rights under the Concession Contract and the governing legal framework. This Tribunal must therefore decide whether the treaty provisions apply to the Claimants' situation.

160. In recent years, a few arbitral tribunals have sought to expand the scope and content of the "full protection and security" clause beyond protection from physical injury, and have interpreted it to apply to unjustified administrative and legal actions taken by a government or its subdivisions that injured an investment's alleged legal rights. It is on these decisions that the Claimants rely, particularly *CME v. the Czech Republic*<sup>99</sup> and *Azurix Corp. v. Argentina*.<sup>100</sup> For example, in *CME*, which Claimants cite in support of their argument, the tribunal stated: "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."<sup>101</sup>

161. However, the precedential effect of the *CME* case might be reduced by the fact it was not a unanimous decision, and that the tribunal did not conduct a detailed analysis of this particular point. Furthermore, as is well known, the tribunal in the *Lauder* case, which was very closely related to the *CME* case, reached a diametrically different conclusion. With respect to the application of the full protection and security clause in the U.S.-Czech BIT, the tribunal in *Lauder*

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2008), at para. 668; *Waguih Elie George Siag & Clorinda Vecchi v. the Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award (1 June 2009), at para.447.

<sup>99</sup> *Supra* note 78.76

<sup>100</sup> *Supra* note 71.

<sup>101</sup> *Supra* note 78 at para. 613.

held that “... none of the facts alleged by the Claimants constitutes a violation by the Respondent of the obligation to provide full protection and security under the Treaty.”<sup>102</sup>

162. The *CME* tribunal was interpreting Article 3(2) of the Netherlands-Czech Republic BIT, stipulating that “each Contracting Party shall provide to such investments full security and protection” (emphasis added). That treaty formulation is somewhat different from the BIT provisions applicable to the present case. Notably the Argentina-Spain BIT refers only to “protect” without the qualifying word “full” or “fully,” while the Argentina-France BITs states that investors shall be “fully protected.” Does the difference in formulation affect the scope of protection afforded by the BITs? The tribunal in *Azurix Corp. v. Argentina* implied that it did, for it justified on that basis a finding that the Argentina-United States BIT providing for “full protection and security” applied to measures taken by a government and was not limited to physical actions. It stated: “However when the terms ‘protection and security’ are qualified by full and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”<sup>103</sup> Thus, *Azurix* seemed to suggest that the omission of “full” or “fully,” as is the case with the Argentina-Spain BITs in the present case, restricted the scope of protection only to physical security and protection. The tribunal in *Biwater* adhered to the same line of argument and noted that full protection and security “implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of “full security” only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.”<sup>104</sup>

163. Other tribunals have given less weight to the precise language used in the treaty when determining the scope of the full protection and security standard. For example, in *Parkerings v. Lithuania*<sup>105</sup> the tribunal found that: “It is generally accepted that the variation of language between the formulation ‘protection’ and ‘full protection and security’ does not make a difference in the level of protection a State is to provide.”<sup>106</sup>

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<sup>102</sup> *Supra* note 77, at para.309.

<sup>103</sup> *Supra* note 71, at para. 408.

<sup>104</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, (24 July 2008), at para. 729.

<sup>105</sup> *Parkerings-Compangiet AS v. the Republic of Lithuania* (ICSID Case No. ARB/05/08), Award (August 14, 2007).

<sup>106</sup> Para. 354, citing Rubins N., Kinsella S., *International Investment, Political Risk and Dispute Resolution* (2005) to justify this proposition.

164. With regard to the Argentina-France BIT, Article 5(1), which provides that “[i]nvestments made by investors of one Contracting Party shall be fully and completely protected and safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in Article 3 of this Agreement,” the interpretation of this treaty provision raises questions as to the interplay and scope of the two standards of “full and completely protected” and “fair and equitable treatment.” If the Tribunal should find that a breach of the fair and equitable treatment standard has taken place, does that mean that a breach of the guarantee of full and complete protection has also taken place? Some tribunals in the presence of a formulation like the language employed in Article 5(1) quoted above have found that both breaches take place simultaneously.<sup>107</sup>

165. The present Tribunal, however, takes the view that under Article 5(1), quoted above, the concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than fair and equitable treatment. Thus State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the Argentina-France BIT. On the other hand, all violations of fair and equitable treatment are not automatically also violations of full protection and security. Under the Argentina-France BIT, it is possible for Argentina to violate its obligation of fair and equitable treatment toward the Claimants without violating its duty of full protection and security. In short, there are actions that violate fair and equitable treatment that do not violate full protection and security.

166. The fact that the Argentina-France BIT employs the fair and equitable treatment standard and the full protection and security standard in two distinct articles and refers to them as separate and distinct standards leads to the conclusion that the Contracting Parties must have intended them to mean two different things. Thus in interpreting these two standards of investment treatment, it is desirable to give effect to that intention by giving the two concepts distinct meanings and fields of application.

167. In this respect, this Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm. This said, this latter standard may also include an obligation to provide adequate mechanisms and

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<sup>107</sup> *National Grid plc v. Argentine Republic* (UNCITRAL), Award (3 November 2008).

legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor.

168. The *Enron* tribunal discussed the more limited scope of the full protection and security standard by noting that “there might be cases where a broader interpretation could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation.”<sup>108</sup> Generally, this Tribunal also believes that an overly extensive interpretation of the full protection and security standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable.

169. As far as this Tribunal is concerned, it is inclined to think that the absence of the word “full” or “fully” in the full protection and security provisions in the Argentina-Spain BIT supports this view of an obligation limited to providing physical protection and related legal remedies for the Spanish Claimants and their assets.

170. The importance of the precise legal formulation used in a BIT provision is further illustrated in the *Siemens* award.<sup>109</sup> In that case, the investor initiated the arbitration under the German-Argentina BIT, alleging *inter alia* that Argentina breached its obligation to accord full protection and security through the conduct that led to the frustration of the investor’s contract. The respondent and the claimant had opposing positions on the scope of the protection under the BIT standard. According to Argentina, “security” implied only physical security, while the investor attributed to this term a wider meaning, in particular because the Treaty referred to ‘legal security.’ Thus, the Tribunal had to interpret whether ‘security’ referred merely to physical security or to security in a wider sense. Having noted that the definition of investment included tangible and intangible assets, the Tribunal said that “the obligation to provide full protection and security is wider than ‘physical’ protection and security.” It provided the following reasoning:

It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, “security” is qualified by “legal”. In its ordinary meaning “legal security” has been defined as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.” It is clear that in the context of this meaning the Treaty refers to security that it is not physical. In fact, one may question given the qualification of the term “security”, whether the Treaty covers physical security at all.

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<sup>108</sup> *Supra* note 71, at para. 286; see also *PSEG Global et al. v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award (19 January 2007), at para. 259.

<sup>109</sup> *Supra* note 72



Arguably it could be considered to be included under “full protection”, but that is not an issue in these proceedings. [§303]

Based on this understanding of ‘full protection and security’, the tribunal concluded that Argentina’s initiation of the renegotiation of the contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens’ investment, and thus constituted a violation of its obligations under the BIT. In the present case, neither of the BITs concerned refers to “legal security.” Therefore, this Tribunal is of the opinion that the formulations of protection and security employed in the present BITs do not extend to an obligation to maintain a stable and secure legal and commercial environment.

171. While strict textual interpretation of the treaty language would lead this Tribunal to conclude that the applicable BITs in the present case do not have the expansive scope on which the Claimants are basing their claim, there is another reason for the Tribunal not to follow the interpretation made in, *inter alia*, *CME* and *Azurix*. Neither the *CME* nor *Azurix* awards provide a historical analysis of the concept of full protection and security or give any clear reason as to why it was departing from the historical interpretation traditionally employed by courts and tribunals and expanding that concept to cover non-physical actions and injuries.

172. A few awards since *CME* have maintained the more traditional approach to interpreting the notion of full protection and security. In *Saluka*,<sup>110</sup> the tribunal determined that the Czech Republic did not violate the Czech Republic-Netherlands BIT which promised investors “full security and protection” when it took measures to stop trading in the claimant’s securities. The tribunal stated: “The practice of arbitral tribunals seems to indicate however that the ‘full protection and security clause’ is not meant to cover just any kind of impairment of an investor’s investment but to protect more specifically the physical integrity of an investment against interference by the use of force.”<sup>111</sup> More recently, a similar rationale has been applied by arbitral tribunals in *BG v. Argentina*, *PSEG v. Turkey* and *Rumeli v. Kazakhstan*.<sup>112</sup>

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<sup>110</sup> *Supra* note 75.

<sup>111</sup> *Ibid.* at para. 484.

<sup>112</sup> *BG Group Plc v. the Argentine Republic* (UNCITRAL), Award (24 December 2007), at paras. 323-328; *PSEG v. Turkey*, *supra* note 128, at paras. 258-259; *Rumeli v Kazakhstan*, *supra* note 98, at para. 669.

C. *The Tribunal's Conclusions*

173. Having considered the specific language of both of the applicable BITs and the historical development of the “full protection and security” standard under international law, as well as the recent jurisprudence, this Tribunal is not persuaded that it needs to depart from the traditional interpretation given to this term. Consequently, the Tribunal concludes that under the applicable BITs, Argentina is obliged to exercise due diligence to protect investors and investments primarily from physical injury, and that in any case Argentina’s obligations under the relevant provisions do not extend to encompass the maintenance of a stable legal and commercial environment. As a result, in the instant case Argentina has not violated its obligations under the respective BIT provisions.

**VIII Responsibility for Failure to Accord Fair and Equitable Treatment**

A. *The Applicable Treaty Provisions*

174. The Claimants further allege that Argentina has breached the applicable BITs in that it has failed to accord the Claimants’ investments “fair and equitable treatment” as required by the treaties. Specifically they assert that Argentina has breached Articles 3 and 5(1) of the Argentina France-BIT which provide:

Article 3

Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, in accordance with the principles of international law, to the investments of investors of the other Party and to ensure that the exercise of the right so granted is not impeded either *de jure* or *de facto*.

Article 5(1)

Investments made by investors of one Contracting Party shall be fully and completely protected and safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in article 3 of this Agreement.

175. They also allege that Argentina has violated Article IV(1) of the Argentina-Spain BIT:

*Article IV*  
*TREATMENT*

Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party

176. The applicable BITs require Argentina to accord “fair and equitable” (Argentina-Spain BIT) or “just and equitable” treatment (Argentina-France BIT) to the investments of the Claimants. For purposes of this case, the Tribunal finds that “fair and equitable” treatment and “just and equitable treatment” mean the same thing, and it therefore will use the term “fair and equitable treatment” to refer to both treaty formulations of the standard. The Tribunal notes however that the relevant provision of the Argentina-France BIT differs from that of the Argentina-Spain BIT in that Article 3 of the former BIT requires the Contracting Parties to accord to protected investments “...just and equitable treatment, in accordance with the principles of international law...” “*un traitement juste et équitable, conformément aux principes du droit international...*”; “*un tratamiento justo y equitativo conforme a los principios de Derecho Internacional...*”), but that the Argentina-Spain BIT does not include a similar reference to “the principles of international law.” None of the Parties in either their written or oral pleadings has suggested that this difference in treaty language requires the Tribunal to give a different meaning to the fair and equitable standard in applying the Argentina-France BIT from that reached in applying the Argentina-Spain BIT. The Respondent has argued, however, that the reference to “the principles of international law” in the Argentina-France BIT explicitly limits the content of the fair and equitable treatment obligation to the international minimum standard and that such limitation is also implicit in the Argentina-Spain BIT.<sup>113</sup> The Respondent’s argument raises two questions that the Tribunal must answer: 1) Does the reference in the Argentina-France BIT to “the principles of international law” mean that the fair and equitable treatment standard is limited to the minimum international standard? and 2) Even though the Argentina-Spain BIT contains no specific reference to international law or the minimum international standard, should the term “fair and equitable treatment” in that BIT be also limited to the international minimum standard?

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<sup>113</sup> Rejoinder Memorial By the Argentine Republic, para. 764.

177. As this Decision will later discuss, the meaning of “fair and equitable treatment” has been the subject of extensive and differing commentary by scholars and arbitral tribunals. A threshold question in its interpretation concerns the legal sources to which a tribunal should look in applying the concept of fair and equitable treatment to a specific fact situation. A survey of practice and scholarship on this question reveals three views: 1) that fair and equitable treatment must be measured only against the minimum standard required by customary international law; 2) that it must be measured against international law including all sources; and 3) that it must be measured against an independent self-contained treaty standard.<sup>114</sup> In making a decision on this question in the present case, the Tribunal is of course bound by the specific language of each of the applicable BITs. With respect to the Argentina-France BIT, it is to be noted that the text of the treaty refers simply to “the principles of international law,” not to “the minimum standard under customary international law.”

178. Following accepted principles of treaty interpretation, particularly Article 31(1) of the VCLT which requires that treaty terms be interpreted in accordance with their “ordinary meaning,” the Tribunal concludes that “in accordance with the principles of international law” means just what it says: that the tribunal is to interpret fair and equitable treatment under Article 3 of the Argentina-France BIT in accordance with all relevant sources of international and that it is not limited in its interpretation to the international minimum standard. The ordinary meaning of the words “principles of international law” is “the legal principles derived from all sources of international law.” Authoritative documents employing the term “international law” contain no implication that the term is limited to the international minimum standard and amply support the Tribunal’s interpretation of the term “international law.” Thus, Article 38 of the Statute of the International Court of Justice states that the function of the Court is to “decide in accordance with international law...” and then proceeds in the broadest terms to list the basic sources of international law. Similarly, the Restatement (Third) of the Foreign Relations Law of the United States, para. 101, provides that “international law ...consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.” The Tribunal therefore rejects the Respondent’s argument that the content of the fair and equitable treatment standard in the Argentina-France BIT is limited to the international minimum standard.

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<sup>114</sup> OECD, *Fair and Equitable Treatment Standard in International Investment Law* (Working Paper on International Investment 2004/3, September 2004) p. 8.

179. With regard to the Argentina-Spain BIT, there is even less plausible justification to limit the interpretation of fair and equitable treatment to the international minimum standard, as Article IV(1) of such treaty does not even contain a specific reference to the principles of international law. Consequently, the Tribunal rejects the Respondent's argument that the fair and equitable treatment standard as embodied in the Argentina-Spain BIT is implicitly limited by minimum international standard. The Tribunal also concludes that the reference to "the principles of international law" included in the Argentina-France BIT does not entail a different content in said treaty from that found in the Argentina-Spain BIT. In interpreting the words "fair and equitable treatment" and "just and equitable treatment" found in the two BITs and in applying them to determine the responsibility of the Respondent, the Tribunal is required to apply the principles of international law.

180. The term "fair and equitable treatment" has certain characteristics that must be recognized in applying it in this case. First, it is a vague and ambiguous expression on its face and is not defined in any of the treaties applicable to this case. Second, it has been widely used in hundreds of investment treaties throughout the world over the years with the result that numerous arbitral tribunals have interpreted and applied it to investor-State disputes arising in a wide variety of circumstances. Third, it is a flexible term that applies to all kinds of investments in all industries and economic endeavors.<sup>115</sup> Indeed, it is invoked so often in contemporary investor-State arbitration that one scholar has labeled it "an almost ubiquitous presence" in investment litigation.<sup>116</sup>

181. A fourth important characteristic of the term is that its application is crucially dependent on an evaluation of the facts of each case. As the tribunal in *Mondev* pointed out "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case"<sup>117</sup> Similarly, the tribunal in *Waste Management (II)* stated "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."<sup>118</sup> A fifth and final characteristic, evidenced by its wide use, generality, and flexibility, is that the term "fair and equitable treatment" seems to be viewed by Contracting States as a basic standard of treatment to be accorded to investors. The fundamental purposes of investment treaties, as stated

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<sup>115</sup> See C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 JWIT 3, pp. 357-386.

<sup>116</sup> Rudolph Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 *The International Lawyer* 87 (2005).

<sup>117</sup> *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, (11 October 2002), at para 118, 6 ICSID Reports 192, at para. 118.

<sup>118</sup> *Waste Management Inc. v. United Mexican States*, (ICSID Case No. ARB(AF)/00/3) Award (30 April 2004), at para. 99.

in their titles, are to promote and protect investments. Certainly, neither of those purposes could be achieved if treaties promised foreign investors treatment that was less than fair and less equitable. Indeed, to borrow the terminology of Hans Kelsen,<sup>119</sup> it is no exaggeration to say that the obligation of a host State to accord fair and equitable treatment to foreign investors is the *Grundnorm* or basic norm of international investment law.

182. In interpreting this vague, flexible, basic, and widely used treaty term, this Tribunal has the benefit of decisions by prior tribunals that have struggled strenuously, knowledgeably, and sometimes painfully, to interpret the words “fair and equitable” in a wide variety of factual situations and investment relationships. Many of these cases arose out of Argentina’s economic crisis of 2001-2003. Although this tribunal is not bound by such prior decisions,<sup>120</sup> they do constitute “a subsidiary means for the determination of the rules of [international] law.”<sup>121</sup> Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that ‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.

#### B. *The Claimants’ Position*

183. The Claimants assert that Argentina failed to accord their investments fair and equitable treatment as required by the applicable BITs. Drawing on several arbitral decisions, many of which arose out of the Argentine crisis, as did the present dispute, the Claimants argue that the principle of fair and equitable treatment protects foreign investors from the fundamental alteration of the investment framework which defeats the investor’s legitimate expectations. The bedrock concepts advanced by the Claimants are that Argentina actions: (1) made fundamental alterations of the investment framework; and (2) defeated the legitimate expectations of the Claimants as investors. They argue that Argentina actively encouraged the Claimants to invest in the water and

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<sup>119</sup> Hans Kelsen, *The Pure Theory of Law* (1934).

<sup>120</sup> Article 53(1) of the ICSID Convention states: ‘The award shall be binding on the parties...’ Schreuer suggests that this provision may be interpreted as “...excluding the applicability of the principle of binding precedent to successive ICSID cases.” He also notes that there is nothing in the preparatory work of the Convention suggesting that the doctrine of precedent should be applied to ICSID arbitration. C Schreuer, *A Doctrine of Precedent?* in P. Muchlinksi *et al* *The Oxford Handbook of International Investment Law* (2008) 1190.

<sup>121</sup> Statute of the International Court of Justice, Article 38(1)(d).

sewage systems of the Province of Santa Fe and that important elements of that inducement were the various commitments that the Province made to them in the legal framework governing the investment. For the Province to make unilateral, fundamental alterations in that framework and thereby frustrate the legitimate expectations of the Claimants is a denial of the fair and equitable treatment that Argentina promised to accord to investors in the BITs applicable to this dispute. They note that fair and equitable treatment is separate from the international minimum standard which in any case also sanctions conduct altering the investment framework in breach of legitimate investor expectations. Bad faith or malicious intent by a respondent State is not required to establish violation of the fair and equitable treatment standard.

184. As noted above in the discussion of the alleged measures of expropriation, the Claimants point in particular to three general areas in which Argentina's actions violated fair and equitable treatment with respect to the Claimants' investments: 1) the Province's failure to assure respect for the equilibrium principle and to revise the Concession's tariff in accordance with its legal framework, thereby altering the legal framework of the investment contrary to the Claimants' legitimate expectations; 2) the Province's efforts to force the renegotiation of the Concession Contract; and 3) Province's unilateral termination of the Concession Contract in 2006. The Tribunal will consider each of these three types of actions in turn.

### **1. Failure to Revise Tariff**

185. The Claimants assert that Argentina took numerous measures in 2002 that were fundamental alterations of the investment framework contrary to their legitimate expectations. These measures include in summary: (i) the Province's delays in responding to and ultimately its repeated rejections of APSF's requests for a tariff revision pursuant to the regulatory framework<sup>122</sup>; (ii) the Province's abandonment of the tariff regime, particularly its refusal to increase tariffs in response to the devaluation of the Peso as required by the Concession Contract, and imposing an onerous renegotiation process, subject to numerous extensions in order to modify the Concession's Regulatory Framework;<sup>123</sup> (iii) halting renegotiations and imposing more onerous operating conditions upon APSF as a condition for recommencing negotiations;<sup>124</sup> iv) requiring APSF to observe all obligations under the relevant contractual and regulatory

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<sup>122</sup> E.g. Resolution 55/02 of 1 March 2002, confirmed by Decree 391/02 of 18 March 2002 (Exh. C-89); Letter from the Renegotiation Commission, dated 27 June 2003 (Exh. C-121)

<sup>123</sup> Decree 221/02 dated 1 March 2002, (Exh. C-90); Decree 1252/02, dated 13 June 2002 (Exh. C-100); Decree 3789/02 dated 30 December 2002 (Exh. C-115); Decree 1855/03, dated 11 July 2003, (Exh. C-123-330); Decree 2362/04, dated 18 November 2004, (Exh. H-406).

<sup>124</sup> MOSPV Resolution 174/04, dated 9 August 2004 (Exh. C-140);

frameworks and to commit its reduced revenues to expansion while it was operating at a loss;<sup>125</sup> and (v) insisting that APSF fulfill all investment obligations, commit to additional investments, and to increase its capital.<sup>126</sup>

186. The Claimants also allege that Argentina placed a disproportionate and discriminatory burden on APSF, contrary to its duty to actively protect the Claimants' investments under the fair and equitable treatment standard. For example, the Province granted 129% increases in tariffs to the provincially owned electricity company.

## **2. Imposed Renegotiation**

187. The Claimants also assert that numerous actions taken during the imposed process to renegotiate the APFS Concession violated the Respondent's obligation to accord the Claimants' investments fair and equitable treatment. According to the Claimants, the Province took numerous actions to use this process to force changes in the Concession Contract against the will of the Claimants actions taken during this process, which became increasingly harsh and abusive and that ultimately its purpose was to drive APSF and the Claimants from the Province.

## **3. Unilateral Termination of the Concession**

188. The Claimants also assert that the abrupt termination by the Province of the Concession in 2006 violated the Respondent's treaty promises of fair and equitable treatment. Specifically, they argue that the Province's unilaterally and under false pretences terminated the Concession without compensation, ignoring its responsibility for the repudiation of the Equilibrium Principle. They point to the fact that after the termination the Province created a provincial owned company (ASSA) to operate the water and sewage system and that the Province has subsidized that new company company's deficit of over 1.3 million pesos in 2006 and has in addition provided it with 42 million pesos in investment funds, in contrast to its previous assertions of an inability to revise the tariff for reasons of financial stringency. They allege that under the fair and equitable treatment standard, the Province and Argentina were required actively to protect the Claimants and their investments but that instead, the Province refused to cooperate with APSF and its shareholders for over four years, and then terminated the Concession unilaterally and without any regard for the losses incurred by APSF and its shareholders. In particular, Provincial authorities

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<sup>125</sup> MOSPV Resolution 50/50 dated 15 March 2005 (Exh. H-458); MOSPV Resolution 55/05. dated 21 March 2005, Exh. H-460.

<sup>126</sup> Decree 1024/05, 27 March 2005 (Exh. H-472); ENRESS Resolution 285/05, 17 May 2005 (Exh. H-468); ENRESS Resolution 763/05, 30 November 2005 (Exh. H-490).



refused APSF's request to transfer services to another operator and prevented Claimants from transferring their shares to local investors. Having driven APSF into liquidation, the Province unilaterally terminated the Concession<sup>127</sup> and refused to provide any compensation to the Claimants for the loss of their investment while abusively calling the performance bond.<sup>128</sup>

C. *The Respondent's Position*

189. Argentina argues that the Claimants have not shown that its alleged acts and omissions amounted to conduct that falls below the fair and equitable treatment standard's threshold. Moreover, it denies that its actions toward the Claimants' investments violated the standard of fair and equitable treatment. Argentina asserts that it fulfilled its obligations in the light of the circumstances of the case. In any event, even if there were a failure to comply with the Concession Contract, such shortcoming would not amount to unfair and inequitable treatment. A showing of a treaty violation must be clear, but according to Argentina the Claimants' case fails to clearly establish such a finding. In addition they argue that while Claimants can invoke their shareholdings in APSF to establish that they have an investment for jurisdictional purposes, they cannot seek the substantive protection of the BITs with respect to a contractual relationship to which they are not a party.

190. Argentina argues that the Tribunal must analyze the conduct of the parties, taking into account all the circumstances of the case. In view of all the circumstances, it asserts that the Province acted in a reasonable, responsible, non discriminatory and proportionate manner in the light of its responsibility to the population within APSF's Concession area in the extraordinary economic circumstances that prevailed, the provision of drinking water and sewage services being of the highest of public purposes. It therefore argues that all the measures it took during the financial crisis were within its police powers as a sovereign State. Specifically, with respect to the termination of the Concession, Argentina asserts that the Province acted reasonably in the circumstances, that the Claimants had declared their intention to abandon the Concession, and that the Province had a responsibility to assure the continuation of a public service that was vital to the health and well-being of its population.

191. Secondly, Argentina argues that its actions were entirely foreseeable and that it therefore did not frustrate the legitimate expectations of the investors. According to Argentina, it was foreseeable that the Argentine government would adopt special measures in the event of a crisis,

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<sup>127</sup> Decree 243/06, 31 January 2006 (Exh. H-518).

<sup>128</sup> ENRESS Resolution 513/06, 11 October 2006 (Exh. H-581).

that in a crisis situation Argentina would seek to renegotiate concession contracts and that in the face of the Claimants' threat to abandon the Concession it would have to take measures to assure the continuation of a vital public service. Further, regarding the Claimants' legitimate expectations, Argentina argues that if the State made any representations or commitments, it was to APSF and not to its shareholders. The fair and equitable standard cannot generate expectations that have no grounding in the contractual documents regulating the relation between the State and the investor. Since there were no extra contractual guarantees regarding automatic tariff adjustment either to APSF or to the Claimants, it was wholly unreasonable for the Claimants to expect that the Republic would endorse a massive tariff increase given the severity of the crisis. As discussed by the *ad hoc* committee in *MTD v. Chile*,<sup>129</sup> and as confirmed in *MCI v. Ecuador*,<sup>130</sup> the *Tecmed*<sup>131</sup> standard that converts investor's expectations into international obligations is questionable.

192. With respect to the efforts to renegotiate the Concession Contract in light of the crisis, Argentina contends that the Province acted reasonably and that APSF and the Claimants were unreasonable and uncooperative during that process. Indeed, it asserts that the Claimants had decided even before the crisis to extricate themselves from the Concession because it was insufficiently profitable.

193. In general, Argentina asserts that the renegotiation process was open and transparent. It did not entail an obligation of result but simply one of means. It also pursued an equitable outcome. Toward this end, Argentina made concessions and proposals to APSF to resolve their dispute.

#### D. *Analysis*

194. In order to evaluate the arguments of the Claimants and the Respondent, this Tribunal must interpret and apply the above-quoted BIT provisions concerning Argentina's obligations to accord covered investments fair and equitable treatment. In this task, it is guided by Article 31(1) of the Vienna Convention on the Law of Treaties pursuant to which: "(1) [a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given the terms of the

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<sup>129</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment (21 March 2007), at para. 67.

<sup>130</sup> *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Award (July 31, 2007) at para. 278.

<sup>131</sup> *Técnicas Medioambientales TECMED S.A. v. United Mexican States* (ICSID Case No. ARB(AF)00/2), Award (29 May 2003).

treaty *in their context* and *in light of its object and purpose*” (emphasis added). Thus three elements are of particular importance in interpreting the relevant treaty provisions: (1) the ordinary meaning of the term “fair and equitable,” (2) the context in which the term “fair and equitable” is used; and (3) the object and purpose of the two relevant BITs.

195. An effort to determine the ordinary meaning of “just” or “fair and equitable treatment” does not result in an answer of great precision and specificity. At the outset, it should be noted that neither of the BITs applicable to this case define the three key words: “fair,” “equitable,” and “treatment.” “Treatment,” according to the Oxford English Dictionary, is “Conduct, behaviour; action or behaviour towards a person.” In its Decision on Jurisdiction in this case, the Tribunal stated the following with respect to the meaning of “treatment:” “The word “treatment” is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.”<sup>132</sup> The Tribunal will continue to employ that definition for purposes of this decision on the merits of the Claimants’ case. It should also be noted that under the terms of the two BITs the subject of the promised fair and equitable treatment is not the investor, but rather the investments made by the investor.

196. Defining the words “fair and equitable,” given their generality, vagueness, and the diverse ways in which those terms may be understood in various cultures and countries creates an especially difficult challenge. As the tribunal in *Saluka* stated after making its own strenuous efforts in this regard:

The “ordinary meaning” of the “fair and equitable treatment” standard can only be defined by terms of almost equal vagueness. In *MTD*, the tribunal stated that: “In their ordinary meaning, the terms “fair” and “equitable” [...] mean “just”, “even handed”, “unbiased” “legitimate.” On the basis of such and similar definitions, one cannot say more than the tribunal did in *S.D. Myers* by stating that an infringement of the standard requires “treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective.”<sup>133</sup>

As a result, analyzing the ordinary meaning of the terms “fair and equitable treatment” as they are used in the two BITs applicable to the present dispute yields little additional enlightenment.

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<sup>132</sup> Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A., Decision on Jurisdiction, May 16, 2006, at para. 55.

<sup>133</sup> *Supra* note 75, at paragraph 297.

197. The context of the term “fair and equitable” largely depends upon the contents of the treaty in which it is employed. Thus, the term must be interpreted not as three words plucked from the BIT text but within the context of the various rights and responsibilities, with all their various conditions and limitations, to which the Contracting Parties agreed. However, conducting such analysis *in abstracto*, namely without addressing specific relations between specific provisions of the BITs, would not take us further than the analysis of the ordinary meaning of the terms “fair and equitable”.

198. And finally, following the directives of Article 31(1) of the VCLT, the Tribunal must take account of the objects and purposes of the applicable BITs. Here, one must turn to the BIT preambles which express those objects and purposes. Each of the two BITs states those objects and purposes in slightly different language with slightly different emphasis. For example, the Preamble of the Argentina-France BIT states:

Desiring to develop economic cooperation between the two States and to create favorable conditions for French investments in Argentina and Argentine investments in France,

Convinced that the promotion and protection of such investments are likely to stimulate transfers of capital and technology between the two countries in the interest of their economic development...

Thus the purpose of the treaty is not merely to protect investments but to advance economic cooperation between France and Argentina and to achieve economic development of the two states by stimulating transfers of capital and technology.

199. The Preamble of the Argentina-Spain BIT provides as follows:

Desiring to intensify economic cooperation for the economic benefit of both countries,

Intending to create favorable conditions for investments made by investors of either State in the territory of the Other State,

Recognizing that the promotion and protection of investments in accordance with this Agreement will encourage initiatives in this field...

Here, too, the BIT seeks broad objectives beyond just investor protection in that its stated goal is to intensify economic cooperation between the two states so that both states may benefit from that economic intensification.

200. When one examines the stated purposes of both BITs, one sees that they have broader goals than merely granting specific levels of protection to individual investors. In the case of Argentina-France BIT and the Argentina-Spain BIT, the Contracting States are seeking to further economic cooperation between them. The protection and promotion of foreign investment, while important to attaining that goal, are only a means to that end. The Contracting States through these treaties pursue the broader goals of heightened economic cooperation between the two States concerned with a view toward achieving increased economic prosperity or development. The Tribunal must take those broader goals into consideration when it interprets and applies the term “fair and equitable treatment” in this case.

201. The Tribunal considers that the goal of “economic cooperation,” stated in the Argentina-France and the Argentina-Spain BITs, reaffirms and indeed strengthens, rather than diminishes, the importance of “fair and equitable treatment” in the treaty structure created by the Contracting Parties. The word cooperation, interpreted by reference to its Latin origins, means the action of working together. Economic cooperation refers to working together in the economic domain. Implicit in the notion of economic cooperation between States is the commitment to give fair and equitable treatment to important economic actors, such as investors, of a Contracting Party with which a State has committed to cooperate. Indeed, it is difficult to see how cooperation in the economic and investment domain could ever take place unless such fair and equitable treatment is accorded by each State to protected investors and investments from the other state. Thus, this Tribunal considers that fair and equitable treatment of investments is the *sine qua non* of the economic cooperation envisaged by France, Spain, and Argentina in the two BITs applicable to this case.

202. What, then, is the meaning of “fair and equitable treatment” with respect to the investments undertaken by the Claimants? Philosophers and scholars have devoted tomes to the subject of fairness.<sup>134</sup> While their work is helpful in understanding the abstract concept and its implications, it does not answer a fundamental and practical question that every arbitral tribunal must answer: By what criteria, standard, or test is an arbitral tribunal to determine whether the

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<sup>134</sup> See, e.g. John Rawls, *Justice as Fairness* (2001); Thomas Franck, *Fairness in International Law* (1995).

specific treatment accorded to the investments of a particular foreign investor in a given context is or is not “fair and equitable.”? To say that “fair and equitable” means “just,” “even-handed,” “unbiased,” or “legitimate,” as some tribunals have done,<sup>135</sup> is quite frankly to state a tautology. Such formulations are not judicially operational in the sense that they lend themselves to being readily applied to complex, concrete investment fact situations, like those found in the present case.

203. In an effort to develop an operational method for determining the existence or non-existence of fair and equitable treatment, arbitral tribunals have increasingly taken into account the legitimate expectations that a host country has created in the investor and the extent to which conduct by the host government subsequent to the investment has frustrated those expectations. When an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed. The theoretical basis of this approach no doubt is found in the work of the eminent scholar Max Weber, who advanced the idea that one of the main contributions of law to any social system is to make economic life more calculable and also argued that capitalism arose in Europe because European law demonstrated a high degree of “calculability.”<sup>136</sup> An investor’s expectations, created by law of a host country, are in effect calculations about the future.

204. Where a government through its actions subsequently frustrates or thwarts those legitimate expectations, arbitral tribunals have found that such host government has failed to accord the investments of that investor fair and equitable treatment. For example in *Saluka*, the tribunal stated:

An investor’s decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor’s expectation that the conduct of the host State subsequent to the investment will be fair and equitable.

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<sup>135</sup> See for example the tribunal in *MTD v. Chile* (*supra* note 129) stating the standards as follows “... in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.” para. 113; approved by the Annulment Committee, Decision on Annulment, 21 March 2007, para. 71 (“Thirdly, a standard formulated in the terms of paragraph 113 is defensible.”)

<sup>136</sup> Max Weber, *Economy and Society* 847, 855 (1922). See also David Trubek, “Max Weber and the Rise of Capitalism” *Wisconsin Law Review* 720-53 (1971) and Richard Swedberg, “Max Weber’s Contribution to the Economic Sociology of Law” 2 *Annu. Rev. Law Soc. Sci.* 61–81 (2006).

The standard of ‘fair and equitable treatment’ is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the “fair and equitable treatment” standard included in [the treaty] the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors’ legitimate and reasonable expectations.<sup>137</sup>

205. Many other tribunals have also linked the concept of fair and equitable treatment to the host State’s respect of the legitimate expectations which the investor had at the time of the investment. For example, in the *Tecmed* award, cited by subsequent cases,<sup>138</sup> the tribunal stated:

The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.

It is true that certain elements of the *Tecmed* standard have come under criticism for being too broad. Yet, its main components, and especially the importance of the parties’ legitimate and reasonable expectations have been confirmed in later decisions. For example, the Annulment Committee in *MTD v. Chile*, which questioned certain aspects of *Tecmed*, specifically stated: “...legitimate expectations, generated as a result of the investor’s dealings with the competent authorities of the host State may be relevant to the application of the guarantees contained in an investment treaty.”<sup>139</sup> The *MTD* Annulment Committee criticized the *Tecmed* decision for its “apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations (such as the obligation to compensate for expropriation)” as being “questionable,” stating the obvious fact in any investor-State dispute under a BIT that “[t]he obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have.”<sup>140</sup> In the present case, this Tribunal affirms that the source of Argentina’s obligations toward the Claimants reside only in the BITs and that the Tribunal’s task is to interpret the nature and scope Argentina’s obligation to accord the Claimants’ investments ‘fair and equitable treatment’ within the context of the facts presented in this case.

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<sup>137</sup> *Supra* note 75, at paras.301-302.

<sup>138</sup> *E.g. LG&E supra* note 56, at para. 127; *MTD supra* note 129, at para 114; *Occidental supra* note 63 at para. 185; *CMS supra* note 64, at para 279.

<sup>139</sup> *Supra* note 129 at para. 69.

<sup>140</sup> *Ibid* at para. 67.

206. Other tribunals have also taken into account investor expectations in interpreting the fair and equitable treatment standard. For instance, the tribunal in *Bayindir v. Pakistan* noted that:

"The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment"<sup>141</sup>

207. In examining the various cases that have justifiably considered the legitimate expectations of investors and the extent to which the host government has frustrated them, this Tribunal finds that an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, *acted in reliance upon those laws and regulations and changed their economic position as a result*. Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not accorded protected investments fair and equitable treatment.

208. In the instant case, it should be emphasized that the expectations of the Claimants with respect to their investment in the water and sewage system of Santa Fe did not suddenly and surprisingly come into their minds the way Athena sprang from the head of Zeus. Argentina through its laws, the treaties it signed, its government statements, and especially the elaborate legal framework which the Province designed and enacted, deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed to revitalize and expand the Province's water and sewage system.

209. However, in keeping with the BITs' basic goal of fostering economic, one must not look single-mindedly at the Claimants' subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view. It must ask a fundamental question: What would have been the legitimate and reasonable expectations of a reasonable investor in the

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<sup>141</sup> *Bayindir v. Pakistan*, para. 141, and references cited therein.



position of the Claimants, at the time they made their investment in 1995, about a proposed water and sewage concession investment that was to continue over a period of thirty years in Argentina, in view of the Concession's legal framework and bearing in mind that country's history and its political, economic, and social circumstances?

210. Of course, a Contracting Party under a BIT's fair and equitable treatment standard is not required to satisfy all of an investor's expectations. It is required to respect only those expectations that are legitimate and reasonable in the circumstances. What specifically are the characteristics of such expectations? The tribunal in *LG&E v. Argentina* tried to answer that question. It stated: "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; in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regulatory patterns."<sup>142</sup>

211. In a similar vein, the tribunal in *Duke v. Ecuador* stated that "[t]he stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest."<sup>143</sup>

212. The Concession Contract and the legal framework of the Concession described above clearly meet the conditions proposed in the cases just referred to. They set down the conditions offered by the Province at the time that Claimants made their investment; they were not established unilaterally but by the agreement between the Provincial authorities and the Claimants; and they existed and were enforceable by law. Like any rational investor, the

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<sup>142</sup> *LG&E supra* note 56, at para.130.

<sup>143</sup> *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award (18 August 2008), at para. 340.

Claimants attached great importance to the tariff regime stipulated in the Concession Contract and the regulatory framework. Indeed, their ability to make a profit was crucially dependent on it. The importance of the tariff regime was underscored even before the bidding took place, as shown *inter alia* by the “clarifying circulars (*circulares aclaratorias*) issued by the Province in response to questions raised by bidders concerning the terms of the Article 11.4.4.2 of the Model Contract concerning tariff revisions, particularly with respect to changes in exchange rates and financial costs.<sup>144</sup> These expectations of the Claimants were later included in the Concession Contract, a document which certainly reflects in detail the Claimants’ legitimate expectations, as well as those of the Province. In view of the central role that the Concession Contract and legal framework placed in establishing the Concession and the care and attention that the Province devoted to the creation of that framework, the Claimants’ expectations that the Province would respect the Concession Contract throughout the thirty-year life of the Concession was legitimate, reasonable, and justified. It was in reliance on that legal framework that the Claimants invested substantial funds in the Province of Santa Fe. And the Province certainly recognized at the time it granted the Concession to the Claimants that without such belief in the reliability and stability of the legal framework the Claimants – indeed no investor - would ever have agreed to invest in the water and sewage system of Santa Fe.

### **1. Santa Fe’s Refusal to Revise the Tariff**

213. Santa Fe’s persistent refusal to revise the tariff in accordance with the legal framework and the Concession Contract frustrated the expectations of the Claimants. Beyond the specific words and commitments of the regulatory framework and the Concession Contract, the Claimants, having entered into a thirty-year relationship with the Province, were entitled to expect that the Provincial authorities would manage that relationship in a cooperative manner, that is to say, that they would “work together” so that the relationship was mutually advantageous. Indeed, Article 4.1 of the Concession Contract required the Concessionaire and the Regulatory Entity “...to use all means at their disposal to establish and maintain a fluid relationship that facilitates the performance of the Contract.”<sup>145</sup> In effect, the legal framework seemed to envision a relationship between the Concessionaire and the Provincial authorities that would be a concrete example of the economic cooperation that the BITs sought to promote. During the first six years, such a cooperative relationship seemed to prevail. With the economic crisis and subsequent changes in government and in policies, that cooperative relationship clearly

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<sup>144</sup> See *e.g.* Circular Aclaratoria No. 10, dated 10 April 1995 (Exh. C-45).

<sup>145</sup> “El Concesionario y el Ente Regulador deberán arbitrar todos los medios a su alcance para establecer y mantener una relación fluida que facilite el cumplimiento del Contrato.”

evaporated and all signs of fluidity disappeared. Indeed, as is further discussed below, the Provincial authorities demonstrated extreme rigidity in their dealings with APSF and the Claimants.

214. The Respondent's argument that the Claimants should have expected that in the context of an economic and financial crisis Argentina would act as it did in the light of the history of economic instability of the country is not compelling. It was largely because of the country's history of instability that the Claimants required the incorporation of the specific clauses on extraordinary tariff adjustment reviews mentioned above. Moreover, a country cannot persuasively allege its historic instability to avoid its responsibility to foreign investors, when it specifically endeavored to remove this disincentive to foreign investment by providing specific assurances in a Concession Contract and in bilateral investment treaties. Indeed, one can say without exaggeration that Argentina's various actions toward foreign investments and investors in the 1990s were intended to overcome its negative economic history in the minds of the international financial and business community.

215. Moreover, there is strong evidence that the Province might have employed more flexible means that would have protected both its interests and those of the Claimants. For example, if the Province's concern was to avoid an increase in tariffs during a time of crisis, it might have relieved APSF, at least temporarily, of investment commitments that were placing a crippling burden on the Concession so long as tariffs did not increase. If Santa Fe's concern was to protect the poor from increased tariffs, it might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor, a solution clearly permitted by the regulatory framework. Indeed, Article 81 of the Water Law and Article 11.5.3 of the Concession Contract specifically recognized the possibility of setting the tariff levels to take account of social objectives, in which case the Concessionaire was to be compensated for the resulting reduction of revenues. APSF suggested these options on several occasions to the Provincial Authorities,<sup>146</sup> but none of them were accepted. In short, there appears to have been very little desire or effort after the outbreak of the crisis for Argentina to "work together" with APSF and the Claimants. On the contrary, there is evidence that Provincial authorities engaged in a public criticisms of APSF, an effort that had the effect of diminishing public willingness to pay APFS invoices in view of the clear suggestion that APSF's future was in question. At the same time, by contrast, the Provincial

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<sup>146</sup> *E.g.* Letter from APSF to the Governor of Santa Fe, dated 19 March 2002 (Exh. C-94); Letter from APSF to ENRESS, dated 12 February 2002 (Exh. C-88); Letter from APSF to the Renegotiation Commission, dated 11 December 2002 (Exh. C-109).

authorities demonstrated a clear desire to cooperate with the provincially-owned electric company by authorizing an increase in electricity tariffs of 129%.<sup>147</sup> Beginning in late 2001, the Province experienced significant and sustained economic growth<sup>148</sup> and by 2002 Provincial finances ceased to be in deficit.<sup>149</sup> Once the crisis had ended and economic growth returned to the Argentine economy, the government showed no greater willingness to find a way to work together with APSF and the Claimants. While Argentina seems to suggest that there was nothing else that the Province could have done in its relationship with APSF and the Claimants, the Tribunal is not persuaded that an amicable solution could not have been reached.

216. In interpreting the concept of fair and equitable treatment, the Tribunal must also bear in mind that the Concession by its terms was subject to the regulatory authority of the Province, which had a reasonable right to regulate. Thus in interpreting the meaning of “just” or “fair and equitable treatment” to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with Argentina’s and particularly the Province’s right to regulate the provision of a vital public service. As the *Saluka* tribunal stated, “[t]he determination of a breach of Article 3.1 by the Czech Republic [which required fair and equitable treatment of investors] therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other.”<sup>150</sup> What this means in the context of the present case is that the legitimate and reasonable expectations of the investors in APSF must have included the expectation that the Provincial government would exercise its legitimate regulatory interests with respect to the APSF Concession throughout the period of thirty years and in response to unpredictable circumstances that might arise during that time.

217. There is no question that under the legal framework Argentina and the Province had the right to regulate the activities of the Concession concerning a broad range of matters, including the tariff structure, investment standards, and performance. But APSF and the Claimants, as participants in any regulated industry, had the legitimate expectation that the Argentine authorities would exercise that regulatory authority and discretion within the rules of the detailed legal framework that the Province had established for the Concession. But when faced with the

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<sup>147</sup> Transcript(English) D3:P676:L15-14.

<sup>148</sup> Statistics of the *Instituto Provincial de Estadísticas y Censos*; Claimants’ Post-Hearing Brief, para. 179.

<sup>149</sup> Testimony of Walter Alfredo Agosto, Minister of Economy of Santa Fe, Transcript (English) D4:p984:L19-P985:L15.

<sup>150</sup> *Supra* note 75, at para. 306.

crisis, Santa Fe refused to do so. It still refused once the crisis had abated. Indeed, it enacted various measures directing the regulatory authorities not to respect important elements of the legal framework. These measures, which followed the adoption by the Argentine Federal Government of Emergency Law No. 25,561, in January 2002, include Decree 221/02 of 1 March 2002,<sup>151</sup> ENRESS Resolution 55/02 of 1 March 2002,<sup>152</sup> Decree 391/02 of 18 March 2002,<sup>153</sup> ENRESS Resolution 116/02, of 27 March 2002,<sup>154</sup> Decree 1252/02 of 13 June 2002,<sup>155</sup> the letter from the Renegotiation Commission to APSF, of 23 August 2002,<sup>156</sup> Decree 3789/02 of 30 December 2002,<sup>157</sup> Decree 1855/03, of 11 July 2003,<sup>158</sup> and Decree 2362/04, of 18 November 2004<sup>159</sup>. Such actions, considered together and in the light of the legal framework governing the Concession, particularly in connection with tariff adjustment, were outside the scope of Santa Fe's legitimate right to regulate and in effect constituted an abuse of regulatory discretion.

218. For the foregoing reasons, this Tribunal finds that the Province's persistent and rigid refusal to revise the tariff in accordance with the Concession Contract and the regulatory framework, particularly once the crisis had abated and economic growth returned, violated its commitments under both BITs to treat the Claimants' investments fairly and equitably.

## **2. Santa Fe's Measures to Renegotiate the Concession**

219. The Claimants also assert that Argentina denied them fair and equitable treatment when it forced them to engage in a renegotiation of the Concession. The Claimants allege that the Province unilaterally imposed a renegotiation process starting in 2002 and that they could not oppose such process. Argentina, on the other hand, argues that APSF had participated and indeed had requested previous renegotiation before the crisis, that it agreed to participate in the renegotiation process begun in 2002, and also that it did not object to that process.

220. There is reason to believe that APSF did willingly participate at first in the renegotiation process and that, while it might have objected to the process, in fact it did not. However, the Tribunal does not believe that these factors override the argument that, taken as a whole, Santa Fe's treatment of the Claimants during that process was unfair and inequitable, or that by

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<sup>151</sup> Exh. C-90.

<sup>152</sup> Exh. C-89.

<sup>153</sup> Exh. C-93.

<sup>154</sup> Exh. C-95.

<sup>155</sup> Exh. C-100.

<sup>156</sup> Exh. C-105.

<sup>157</sup> Exh. C-115.

<sup>158</sup> Exh. C-123.

<sup>159</sup> Annex R-137.

participating in the process without objection the Claimants somehow waived their right under the treaty to fair and equitable treatment by Argentina. Indeed, if APSF had refused to participate in the renegotiation process launched by the provincial government, APSF might have been accused of failing to meet the requirements of Article 4.1 of the Concession Contract, quoted above, requiring parties “...to use all means at [its] disposal to establish and maintain a fluid relationship that facilitates the performance of [the] Contract.”

221. In examining the nature of the renegotiation process, the Tribunal finds that it differs significantly from the various revisions or renegotiation processes provided by the Concession’s legal framework and from the Concession renegotiations and revisions, mentioned in paragraph 39 above, in which APSF had previously participated.

222. In light of the severity of these measures, the Tribunal questions whether the process thus established constituted a genuine “renegotiation” or whether it was actually an effort to compel fundamental changes in the Concession under that label. The essence of a renegotiation is that the parties freely agree to revise or amend an existing agreement. As the tribunal in *Enron* stated, “[a]ny process of negotiation requires of course that the parties genuinely agree on the outcome and this cannot be imposed or forced upon one party”<sup>160</sup> It appears that Santa Fe sought to structure the “renegotiation” process in such a way as to severely limit or indeed curtail the contractual freedom of APSF in order to arrive at a predetermined result desired by the provincial authorities. Indeed, through measures such as Decree 221/02 of 1 March 2002,<sup>161</sup> Decree 391/02 of 18 March 2002,<sup>162</sup> ENRESS Resolution 116/02 of 27 March 2002,<sup>163</sup> Decree 1252/02 of 13 June 2002,<sup>164</sup> Decree 3789/02 of 30 December 2002,<sup>165</sup> Decree 1855/03, of 11 July 2003,<sup>166</sup> Resolution 313/03, of 11 November 2003,<sup>167</sup> ENRESS Resolutions 125/04 and 126/04, of 4 March 2004,<sup>168</sup> Resolution 174/04, of 9 August 2004,<sup>169</sup> Decree 2362/04, of 18 November 2004,<sup>170</sup> Resolution 50/05, of 15 March 2005,<sup>171</sup> and the letter from the Province to APSF of 7

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<sup>160</sup> *Supra* note 71, at para.186

<sup>161</sup> Exh. C-90..

<sup>162</sup> Exh. C-93.

<sup>163</sup> Exh. C-95.

<sup>164</sup> Exh. C-100..

<sup>165</sup> Exh. C-115.

<sup>166</sup> Exh. C-123.

<sup>167</sup> Exh. C-128.

<sup>168</sup> Exh.s C-134 and C-135, respectively.

<sup>169</sup> Exh. C-140.

<sup>170</sup> Annex R-137.

<sup>171</sup> Exh. C-319.

February 2005,<sup>172</sup> considered all together and under the factual circumstances of the case, the Province unfairly curtailed APSF's reasonable freedom to negotiate the terms of the Concession Contract. In the opinion of the Tribunal, such a process cannot in fairness be said to constitute a renegotiation as that term is generally understood. It was certainly not the kind of renegotiation or revision process that APSF and the Claimants were led to expect by the legal framework of the Concession and the events of the first six years of the Concession.

223. The Tribunal finds that Argentina's treatment of APSF and the Claimants during the renegotiation process that began in 2002 was a breach of its promise of fair and equitable treatment under both BITs in question. It finds support for this conclusion in the decision in *BG Group v. Argentina*, in which the Tribunal noted, in this regard, that "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."<sup>173</sup>

### **3. Santa Fe's Termination of the Concession**

224. Santa Fe's termination of the Concession was abrupt, and its reasons for such action are not completely clear. The Province not only ended the Concession but it also demanded payment of the Performance Bond posted by the Claimants to guarantee APSF's performance and later refused to pay APSF the value of its unamortized investments received by the Province as a result of the termination.

225. On the other hand, the Tribunal is not unmindful of the difficult position in which the Province found itself as a result of the Claimants' own request to terminate the Concession in the fall of 2005. Santa Fe's refusal to allow a termination of the Concession at that time was no doubt prompted in part by the fact that, while it had the ultimate responsibility to provide vital water and waste water services to the population of the Province, it was not in position at that time to actually assume operational responsibility for those services. At that time and in those circumstances, it was not beyond the realm of possibility from the Province's perspective that the Claimants might abruptly quit the country, leaving an unprepared Provincial government to provide a basic service to fifteen cities in a large metropolitan area. It is likely that Santa Fe felt that it had to prepare for that eventuality while still causing APSF to provide the needed service

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<sup>172</sup> Exh. C-291.

<sup>173</sup> *Supra* note 112, para. 309.

under the Concession. Thus, to a certain extent it may be said that APSF's request to terminate the Concession may have been a factor in prompting the Province's decision to act suddenly to terminate the Concession itself a few months later. At the same time, it must be noted that it was the actions of the Provincial authorities in refusing to revise the tariff according to the legal framework and in forcing a renegotiation of the Concession – actions which this Tribunal has judged to be a violation of the fair and equitable standard – that put the Claimants in the position where they felt that had to give up the Concession.

226. Argentina's termination of the Concession was done pursuant to its Concession Contract with APSF. This Tribunal, as stated above, has no jurisdiction to judge whether Argentina's termination of the Concession breached the Concession Contract. Whether the Province breached the Concession Contract by terminating it is a matter for the dispute resolution procedures provided in the Concession Contract itself. In viewing the circumstances as a whole and the situation that existed at the time of the termination, the Tribunal finds that the record is insufficient to establish that Argentina's treatment of the Claimants' investments in terminating the Concession attained the level of violating the fair and equitable standards required by either one of the applicable BITs.

E. *The Tribunal's Conclusions.*

227. The Tribunal concludes that the Province's actions in refusing to revise the tariff according to the legal framework of the Concession and in pursuing the forced renegotiation of the Concession Contract contrary to that legal framework violated its obligations under the applicable BITs to accord the investments of the Claimants fair and equitable treatment. The date of both breaches can reasonably be deemed to be 18 March 2002, the date of Decree 391/02 by which the Province formally refused to revise the tariff, which APSF had been requesting during the previous two months. It can be considered as the first of a series of measures, when considered together, which frustrated the legitimate expectations of the Claimants and thus amounted to a violation of the fair and equitable treatment standards in the BITs.

228. A State may violate an investment treaty's fair and equitable treatment standard in many ways and with many differing consequences. The majority's finding in the present case that Argentina's various actions violated the fair and equitable treatment standard by frustrating the Claimants' legitimate and reasonable expectations is by no means a rejection of the conclusions of our esteemed colleague Professor Nikken in his separate opinion to the effect that Argentina failed to exercise due diligence in certain elements



of its treatment of the Claimants' investments. The majority agrees that Argentina failed to exercise due diligence, as that concept is generally understood, and that such failure resulted in a violation of the treaties' fair and equitable treatment standard. As discussed earlier in this Decision, the Tribunal finds that Argentina's actions also frustrated the Claimants' legitimate expectations and it has concluded that it is more appropriate to base its decision on that rationale.

## **IX Argentina's Defense of Necessity**

### *A. The Nature of the Defense*

229. Argentina argues that even if certain of its actions may have breached individual BIT provisions applicable to this case it is absolved of liability by virtue of the defense of necessity under customary international law. Both the Claimants and Argentina agree that the current state of the law on the defense of necessity is reflected in Article 25 of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (2001), which provides as follows:

#### **Article 25**

##### **Necessity**

- 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.

It is to be noted that the ILC Articles do not define the nature of the necessity defense in positive terms. Rather they limit themselves to stating the situations in which the defense of necessity may *not* be raised.

B. *Argentina's Position*

230. Argentina argues that it took the actions it did affecting the Claimants' investments out of the necessity of dealing with the financial crisis in order to safeguard essential interests of the State. It alleges that the crisis did not result from its own actions but from the crises that had previously struck other parts of the world, namely the financial and economic emergencies in Indonesia, Mexico, Brazil, and Russia. In order to protect its essential interests, it had to take the various measures that it did and that no other means of protecting those interests were available to it.

231. In support of its contentions, it cites the Decision on Liability in *LG&E v. Argentina* in which the tribunal accepted Argentina's defense of necessity, stating:

The essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In these circumstances an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.<sup>174</sup>

232. Argentina argues that it adopted the measures in order to safeguard the human right to water of the inhabitants of the country. Because of its importance to the life and health of the population, Argentina states that water cannot be treated as an ordinary commodity. Because of the fundamental role of water in sustaining life and health and the consequent human right to water, it maintains that in judging the conformity of governmental actions with treaty obligations this Tribunal must grant Argentina a broader margin of discretion in the present case than in cases involving other commodities and services. In order to judge whether a treaty provision has been violated, for example the provision on fair and equitable treatment, Argentina argues that this Tribunal must take account of the context in which Argentina acted and that the human right to water informs that context.

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<sup>174</sup> *Supra* note 56 at para. 257.

C. *The Claimants' Position*

233. The Claimants reject Argentina's defense of necessity as not being grounded in either law or fact. According to the Claimants' interpretation of the ILC Articles and customary international law, three conditions must be present before a State may invoke necessity as a defense to liability for an international obligation: 1) the possibility of invoking the defense must not be excluded by the international obligation that the State is seeking to avoid; 2) the State must not have contributed to the situation of necessity; and 3) the State's measures in question must have been the only way for the state to safeguard an essential interest against a grave or imminent risk. Moreover, the Claimants remind the Tribunal of the admonition of the International Court of Justice in the *Gabčíkovo-Nagymaros Project Case* that Article 25 "...is a most exceptional remedy subject to the very strict conditions because otherwise it would open the door to elude any international obligation."<sup>175</sup>

234. Claimants further argue that in fact Argentina satisfies none of the three conditions necessary to invoke the defense of necessity. They assert that the BITs in question were intended to protect investors in times of economic difficulties and thus excluded the invocation of the doctrine of necessity. Secondly, they argue that by its policies and actions Argentina contributed to the economic crisis that struck the country, thus further preventing it from raising the defense of necessity. And finally, they assert that the measures Argentina took to deal with the crisis, and of which the Claimants complain, were not the only means to safeguard an essential interest of the country from a grave or imminent peril. Indeed it argues that while the crisis was severe it did not compromise the existence of the State, as Argentina argues, and did not constitute a threat to an essential interest. Moreover the crisis was not a grave and imminent peril as evidenced by the fact that the Argentine economy began to recover in the second quarter of 2002. Further, the Claimants assert that there were a variety of other measures that Argentina and the Province might have taken with respect to the Concession, such as cross subsidies, temporary relief of APSF's investment obligations, or differentiated freezing of certain tariffs among different categories of consumers, which would have allowed it to deal with the crisis and still respect its commitments to APSF's investors.

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<sup>175</sup> *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) Judgment, 25 September 1997, ICJ at paras. 51-52.

D. *Analysis*

235. The crisis into which Argentina fell in 2001-2003 was undoubtedly one of the most severe in its history. It was characterized by extreme social disturbance, riots, violence, and almost total breakdown of the political system. Evidence in the record in the present case clearly shows its severity. Previous tribunals deciding disputes arising out of the crisis have also recognized and underscored its severity. For example, the tribunal in *CMS v. Argentina*, which would ultimately deny Argentina's plea of necessity, stated that it was "convinced that the crisis was indeed severe and the argument that nothing happened is not tenable."<sup>176</sup> The tribunal in *LG&E v. Argentina* found that "...from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and to protect its essential security interests,"<sup>177</sup> describing the conditions in the country at the time as "devastating."<sup>178</sup>

236. The severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations. The customary international law, as restated by Article 25 of the ILC Articles, quoted above, imposes additional strict conditions. The reason of course is that given the frequency of crises and emergencies that nations, large and small, face from time to time, to allow them to escape their treaty obligations would threaten the very fabric of international law and indeed the stability of the system of international relations. It is for this reason that the International Court of Justice, other tribunals, and scholars have warned of the defense's exceptional nature and of the strict conditions surrounding its application.

237. Article 25 imposes four conditions on the application of the defense of necessity. The first two relate to the nature of the State's act in violation of its obligations. Thus such act (1) must be the only way for it to safeguard an essential interest from grave and imminent peril and (2) must not seriously impair an essential interest of the State toward which the obligation exists or toward the international community as a whole. The other two conditions relate to the nature of the international obligation affected by such act and the contribution of such state in causing the situation of necessity. Thus, the third condition is that the obligation in question must not exclude the possibility of the defense of necessity and the fourth condition is that the State must not have contributed to the situation of necessity. We examine each of these four conditions within the context of the present case.

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<sup>176</sup> Para. 320.

<sup>177</sup> Para. 226.

<sup>178</sup> Para. 237.

238. *The first condition for the defense of necessity: Only way to safeguard an essential interest.* The provision of water and sewage services to the Province of Santa Fe certainly was vital to the health and well-being of a large population and was therefore an essential interest of the Argentine State and of the Province. On the other hand, the Tribunal is not convinced that the only way that Argentina and the Province could satisfy that essential interest was by adopting measures that would subsequently violate the treaty rights of the Claimants' investments to fair and equitable treatment. As discussed above, the Province could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Santa Fe and at the same time respected its obligations of fair and equitable treatment. The two were by no means mutually exclusive. Thus the Tribunal finds that Argentina has not satisfied the first condition for the defense of necessity.

239. *The second condition for the defense of necessity: Non-impairment of other more important interests.* In failing to accord the Claimants' investments fair and equitable treatment, Argentina may have injured the Claimants' interests, but it is difficult to see how Argentina's and the Province's actions impaired an essential interest of France, Spain, or the international community. The Tribunal therefore finds that Argentina has satisfied the second condition for the defense of necessity.

240. *The third condition for the defense of necessity: Treaty obligation does not exclude the necessity defense.* The texts of the two BITs in question do not specifically exclude or allow the admissibility of a defense of necessity. The *LG&E* case, upon which Argentina relies, involved the application of the U.S.-Argentina BIT which contained a clause stating that nothing in the treaty precluded a Contracting Party from taking "...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 own essential security interests"<sup>179</sup> Neither of the BITs applicable to the present case contains such a "non-precluded measures clause."<sup>180</sup> Argentina has suggested that its human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, *i.e.* human rights *and*

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<sup>179</sup> Article XI.

<sup>180</sup> See WW Burke-White & A von Staden, 'Investment Protection in Extra-Ordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' 48 *Virginia J of Intl L* 307 (2008).

treaty obligations, and must respect both of them. Under the circumstances of this case, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as was discussed above, Argentina could have respected both types of obligations. Viewing each treaty as a whole, the Tribunal does not find that any of them excluded the defense of necessity. Therefore Argentina must be deemed to have satisfied the third condition for the defense of necessity.

241. *The fourth condition for the defense of necessity: Non-contribution to the situation of necessity.* To invoke the defense of necessity, a State must not have contributed to its situation of necessity. The operative word of this condition is "contribute", not "cause" or "create." Thus, the fact that other actors, besides the State in question, may have contributed to that State's situation of necessity does not automatically mean that such State has not contributed to it. The Commentary to the ILC Articles makes it clear that such contribution must "...be sufficiently substantial and not merely incidental or peripheral." Thus, an important question is whether Argentina contributed to the crisis of 2001-2003 to an extent sufficiently substantial to rule out a necessity defense in compliance with international law. This being said, the Claimants in their pleadings viewed the crisis as created primarily by endogenous factors, primarily the economic policies of various Argentine governments. The Respondent, on the other hand, portrayed the crisis as caused by exogenous factors, primarily the various global crises, such as the one which struck Russia in 1999.

242. The Tribunal finds that a combination of endogenous and exogenous factors contributed to the Argentine crisis at the beginning of this century. Among Argentina's contributing factors to the crisis were excessive public spending, inefficient tax collection, delays in responding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making. In listing these factors, the Tribunal does not by any means intend to minimize the substantial external forces that were buffeting the Argentine economy. Its intent is to show that Argentina itself contributed to its situation of emergency. In this regard, this Tribunal must agree with the tribunal in *CMS v. Argentina*, which stated that "[t]he issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis

and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.”<sup>181</sup> One might also suggest if external, global factors alone had created Argentina’s crisis, it is surprising that other countries did not experience a crisis of equal magnitude at the time.

243. In sum then, the Tribunal denies Argentina’s plea of the defense of necessity against the Claimants’ claims of BIT violations, because Argentina’s and the Province’s measures in violation of the BITs were not the only means to satisfy its essential interests and because Argentina itself contributed to the emergency situation that it was facing in 2001-2003.

## **X Further Procedure; Cost and Expenses**

244. The Tribunal has decided to render a decision on liability before arriving at an award on damages. It has chosen to adopt this procedure for reasons of judicial economy. Given the complexity of this case and the extraordinarily voluminous nature of the record, the Tribunal by rendering a decision on liability now and thereby defining the scope of its investigation with respect to a determination of damages will be able more efficiently to define the mission of the independent expert that will assist the Tribunal in this determination.

245. The Tribunal is aware that a bifurcation of the merits phase of an ICSID case into determination of liability and a determination of damages is not common. On the other hand, the ICSID Rules do not preclude such an approach. Indeed, Article 44 of the ICSID Convention, which this Tribunal invoked to allow the withdrawal of APSF as a party to this dispute, specifically states: “If any question of procedure which is not covered by this Section or the Arbitration Rules or any rules agreed upon by the parties, the Tribunal shall decide the question.” The Tribunal relies on Article 44 in deciding on bifurcating the merits phase of this case for the reasons outlined above.

246. The Tribunal has specifically asked the advice of the parties with respect to the selection and role of an independent expert on damages in this case, and the parties have responded in the post-hearing submissions. The Tribunal will take account of the parties’ views in carrying out the damages phase of this case.

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<sup>181</sup> Para. 329.

247. Because important procedural matters remain to take place in this case, the Tribunal defers any decision on costs and expenses until the completion of the damages phase of these proceedings.

## **XI The Tribunal's Conclusions with Respect to the Respondent's Liability**

248. After examining the respective cases of the Claimants and the Respondent, the Tribunal:
- a. Rejects the Claimants' claim that the Respondent has directly or indirectly expropriated the investments of the Claimants;
  - b. Rejects the Claimants' claim that the Respondent has denied the Claimants' investments full protection and security;
  - c. Finds that the Respondent has denied the Claimants' investments fair and equitable treatment;
  - d. Rejects the Respondent's defense of necessity to the claims of the Claimants;
  - e. Defers a decision on damages for breach of fair and equitable treatment and a decision on costs to the Tribunal's award on damages; and
  - f. Dismisses all other claims.



*Jeswald Salacuse*

Prof. Jeswald W. Salacuse

President

*Gabrielle Kaufmann-Kohler*  
Prof. Gabrielle Kaufmann-Kohler  
Arbitrator

*Pedro Nikken*  
Prof. Pedro Nikken  
Arbitrator  
(subject to the attached separate opinion)