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CERTIFICATE

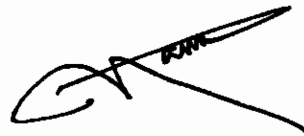
Continental Casualty Company

v.

Argentine Republic

(ICSID Case No ARB/03/9)

I hereby certify that the attached is a true copy of the English version of the Award of the Arbitral Tribunal in the above case, dated September 5 2008, rendered in the English and Spanish languages.



Nassib G. Ziadé
Acting Secretary-General

Washington, D.C., September 5, 2008

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

CONTINENTAL CASUALTY COMPANY
(CLAIMANT)

AND

THE ARGENTINE REPUBLIC
(RESPONDENT)

Case No. ARB/03/9

AWARD

Members of the Tribunal

Prof. Giorgio Sacerdoti, President
Mr. V.V. Veeder, Arbitrator
Lic. Michell Nader, Arbitrator

Secretary of the Tribunal

Tomás Solís

Representing the Claimant
Messrs. Barry Appleton,
Robert S. Wisner and
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Procurador del Tesoro de la Nación Argentina
Dr. Osvaldo César Guglielmino
Procuración del Tesoro de la Nación Argentina
Buenos Aires
Argentine Republic

Date of dispatch to the parties: September 5, 2008

TABLE OF CONTENTS

Page

I. Summary of the Procedure..1

The initial phase of the proceedings 1

II. The Jurisdictional Phase 6

A. Generally 6

B. Argentina's specific objections to jurisdiction...6

C. The Claimant's counter-arguments 9

D. The Tribunal's conclusion on the objections to jurisdiction...............................15

III. The Procedure Leading to the Award on the Merits 16

A. Argentina's arguments 16

B. The Claimant's arguments 22

C. Argentina's counter-arguments 28

IV. Preliminary Issue 35

A. Continental's request to add CNA ART as a Claimant 35

B. Tribunal's Conclusion...35

V. Factual Background 37

A. The economic evolution of Argentina from the introduction of the convertibility regime (1991) to the crisis (2001) 37

a) General overview...37

b) The Deterioration of the financial and economic situation of Argentina in 2001 until Decree 1570 of December 1 (Corralito) 45

(i) The events and economic policy initiatives that punctuated the deterioration of the situation of Argentina...46

(ii) The actions undertaken by CNA / Continental as to its investments in 2001 56

c) *The Measures adopted by Argentina during the crisis, specifically those challenged by the Claimant* 60

B. Subsequent measures by Argentina in 2002-2003 relevant to the present dispute 65

C. Relevant economic, financial and political developments in Argentina after the crisis 66

VI. Necessity: Argentina's Defence based on Article XI of the BIT and on State of Necessity under International Law 70

A. Differences between the two Defences 70

B. Whether Argentina's crisis in 2001-2002 qualifies under Article XI in that it involved the "maintenance of public order" and/or the protection of Argentina's "essential security interests" 75

C. Whether the Invocation of Article XI is "self-judging" 81

D. Whether the measures challenged were "necessary" in order maintain public order and protect essential security interests of Argentina 84

a) The applicable standard 84

b) Application of the standard 87

(i) Alternatives that might have been available when the challenged measures were taken 89
(a) In respect of the Corralito (the imposition of the bank freeze in December 2001) 89
(b) In respect of the devaluation of the peso 92
(c) In respect of the pesification of the U.S. dollar-denominated contracts and deposits 94
(d) In respect of the suspension of payments, default and rescheduling of the governmental financial instruments held by CNA 96
(ii) Whether Argentina could have adopted at an earlier time different policies that would have avoided or prevented the situation that brought about the adoption of the challenged measures 99

E. The effect of the applicability of Article XI 103

(i) In general 103
(ii) Has Argentina contributed to necessity? 104

VII. Specific Claims of Breaches 106

A. Claim of breach of Article V (Freedom of Transfer) 106

B. Claim of breach of Article II (2)(a) (Fair and Equitable Treatment) 110

a) In general 110

b) Capital gain tax 119

C. Claim of breach of Article IV (Prohibition of Direct and Indirect Expropriation) 120

D. Claim of Breach of Article II (2)(c) ("Umbrella clause") 128

VIII. Conclusions of the Tribunal 134

A. Calculation of Interest 134

B. Apportionment of the arbitral costs 138

IX. Decision of the Tribunal 140

X. Index of Cases 142

XI. Abbreviations 145

I. Summary of the Procedure

The initial phase of the proceedings

1. On January 17, 2003, the International Centre for Settlement of Investment Disputes ("ICSID or "the Centre") received a Request for Arbitration against the Argentine Republic (hereinafter "the Respondent" or "Argentina") from Continental Casualty Company (hereinafter "the Claimant" or "Continental"), a company incorporated under the law of the State of Illinois, United States of America. The Request concerned Continental's investment in CNA Aseguradora de Riesgos del Trabajo S.A. ("CNA ART" or "CNA"), an insurance company incorporated in Argentina, which Continental claims to wholly own, and Argentina's alleged breaches of Continental's rights as investor under the 1991 Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (the "Argentina–U.S. Bilateral Investment Treaty" or the "BIT").[1]

2. In its request, Continental invoked Argentina's advance consent to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or "the Convention") in the Argentina–U.S. Bilateral Investment Treaty.

3. By letter dated January 28, 2003, Continental supplemented its request, attaching a copy of a letter dated January 15, 2003 with its consent to arbitration in accordance with the procedures set out in the BIT, and a power of attorney authorizing the law firm of Appleton & Associates to represent it in these proceedings.

4. On January 29, 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 receipt and transmitted a copy of the request to the Argentine Republic and to the Argentine Embassy in Washington, D.C.

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1 Signed on November 14, 1991, entered into force since October 20, 1994.

5. By letter of March 14, 2003, the Centre requested Continental to provide: (i) further information regarding the steps taken to resolve the dispute through consultation and negotiation, as foreseen in Article VII(2) of the BIT; and (ii) confirmation that the dispute had not been submitted to the local courts of Argentina or any previously agreed dispute settlement procedures, in accordance with Article VII(3)(a) of the BIT. Continental responded by letter of March 17, 2003.

6. By letter of May 2, 2003, the Centre further asked Continental to clarify whether the condition set forth in the BIT that six months should elapse between the date in which the dispute arose and the submission of the request for arbitration had been fulfilled. Claimant responded by letter of May 5, 2003.

7. On May 22, 2003, the Acting Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention. On the same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

8. More than sixty days elapsed since the date of registration without the parties being able to agree on the number of arbitrators that would comprise the tribunal in this case or on the method for their appointment. Accordingly, on July 22, 2003, the Claimant requested that the tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention (i.e., a Tribunal comprising three arbitrators, one appointed by each party, and the third, presiding arbitrator, to be appointed by agreement of the parties).

9. On August 20, 2003 the Argentine Republic appointed Licenciado Michell Nader, a Mexican national, as an arbitrator. On August 22, 2003, the Claimant appointed Sir Elihu Lauterpacht, a national of the United Kingdom, as an arbitrator.

10. Also on August 22, 2003, more than ninety days having elapsed since the date of registration, Continental, invoking Article 38 of the ICSID Convention, requested that the Chairman of ICSID Administrative Council appoint the president of the tribunal.

11. With the agreement of both parties, the Chairman of the ICSID Administrative Tribunal appointed Professor Giorgio Sacerdoti, an Italian national, as the President of the Arbitral Tribunal. On October 6, 2003, the Acting Secretary-General, in accordance with Rule 6(1) of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date.

12. The first session of the Tribunal was held, with the agreement of the parties, on January 29, 2004, at the seat of the Centre in Washington, D.C. During the session the parties expressed 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.

13. During the first session the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. Among others, it was agreed that, in accordance with Arbitration Rule 22, the languages of the proceedings would be English and Spanish. The Claimant would file its pleadings in English and Argentina would file its pleadings in Spanish, with a subsequent courtesy translation into English. Also, the Tribunal, after consultation with the parties fixed the following schedule for the written phase of the proceedings: the Claimant would file a memorial on the merits within ninety (90) days from the date of the first session; the Respondent would file a counter-memorial on the merits within ninety (90) days from its receipt of the Claimant's memorial; the Claimant would file a reply within forty-five (45) days from its receipt of the counter-memorial; and the Respondent would file a rejoinder within forty-five (45) days from its receipt of the Claimant's reply.

14. During the first session it was noted that were Argentina to raise objections to jurisdiction, it may do so within the ninety (90) days time limit fixed for the filing of its counter-memorial on the merits. In that case, the proceedings on the merits would be suspended in accordance with Arbitration Rule 41(3) and the Claimant would file its counter-memorial on jurisdiction within forty-five (45) days from its receipt of the

Argentine Republic's objections to jurisdiction. The Tribunal would thereafter, in consultation with the parties, fix a date for a hearing on jurisdiction.

15. On April 27, 2004, the Claimant filed its Memorial on the Merits with accompanying documentation. The Claimant expanded therein the content of its Request for Arbitration, dealing with the "Facts of the Claims" and the "Legal Argument."

16. As indicated by the Claimant in its briefs, Continental is a company incorporated in Illinois, in the U.S., and is a subsidiary of CNA Financial Inc. (CNA), "a leading financial services provider which has its head offices in Chicago." Continental owns and controls CNA ART, which "is one of Argentina's leading providers of workers compensation insurance services." CNA ART was incorporated in Argentina in 1996 under the name of "OMEGA Aseguradora de Riesgos del Trabajo Sociedad Anómima." In June of 1997, Continental acquired a 70% interest in this company and increased its participation to practically 100% (precisely 99.9995%) in December 2000. Thereupon, Omega changed its name into CNA ART.

17. CNA ART, like other insurance companies, maintains a portfolio of investment securities in order to earn a return on its capital, consisting mainly of "low-risk assets such as cash deposit, treasury bills and government bonds." Under Argentinean regulations of CNA's insurance operation, "such capital must be invested within Argentina, with minor exceptions."

18. According to the Claimant, prior to March 2001, the CNA investment portfolio was primarily in assets denominated in Argentine pesos, which were at the time fully convertible to U.S. dollars at a one to one exchange rate. In order to hedge the risk of devaluation, CNA's management decided to invest assets within Argentina in low risk U.S. denominated assets. As a result of various investment operations, CNA held thereafter a portfolio of cash accounts, certificates of deposit, T-bills, Government bonds and Government loans (GGLs) for a U.S. value of $100,998,000.

19. Continental indicates that "[c]ommencing in December 2001, Argentina enacted a series of decrees and resolutions that destroyed the legal security of the assets held by

CNA ART. These measures frustrated CNA ART's ability to hedge against the risk of the devaluation of the peso." Claimant refers to "Argentina's restrictions on transfers out of its territory;" to "rescheduling of cash deposits;" to "pesification of U.S. dollar deposits;" to "pesification and default on its debt obligations," as well as to other measures. Continental indicates that due to these measures (collectively referred to as "Argentina's Capital Control Regime"), as an investor in Argentina, it has suffered an absolute loss in value of its assets of U.S. $46,412,000; in addition it is or was unable due to the "Bank Freeze" to access its investments in Argentina.

20. From a legal point of view, Continental asserts that it is protected under the BIT as "a U.S. investor with an investment in Argentina," its protected investment being namely CNA ART. Continental claims that by the conduct and acts summarily referred to above, Argentina has failed to meet its existing bilateral investment treaty obligations owed to it as a U.S. investor in Argentina. Continental claims that Argentina has violated, at least, the following provisions of the BIT:

(i) the requirement to observe obligations required by Art. II(2)(c) of the BIT;

(ii) the requirement to provide treatment in accordance with international law, including fair and equitable treatment and full protection or security, as required by Art. II(2)(b) of the BIT, as well as MFN treatment under Art. II(2)(a);

(iii) the requirement to permit all transfers relating to an investment without delay, set out in Art. V of the BIT; and

(iv) the requirement to pay compensation upon acts of expropriation, set out in Art. IV of the BIT.

21. In view of the facts and arguments set out in its Memorial, the Claimant submitted that "owing to these violations of the BIT, individually and in combination, the Investor is entitled to compensation in an amount equal to the full amount of the damages suffered as a consequence."[2]

2 Decision on Jurisdiction, paras. 22-27.

22. Based on an "Independent Valuators Report" it submitted to the Tribunal, Continental assessed its losses as follows: i) for the violation of contracts obligation, not less than U.S.$31 million; ii) for the violation of expropriation obligations, not less than U.S.$38 million.[3]

II. The Jurisdictional Phase

A. Generally

23. On June 29, 2004, Argentina filed a Memorial with objections to jurisdiction. Thereupon, by a letter of July 12, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with ICSID Arbitration Rule 41(3). Consequently, the proceedings continued on the issue of jurisdiction in accordance with the agreed procedural calendar.

B. Argentina's specific objections to jurisdiction

24. Argentina's specific objections to jurisdiction were the following:

(i) "Argentina has not given its consent to submit to this arbitration;"

(ii) "The dispute submitted by Claimant does not comply with the requirements of the Convention or those under the U.S.-Argentina BIT," particularly as to (a) the existence of a legal dispute and as to (b) the requirement that the legal dispute arises directly out of an investment;

(iii) "The company may not file a claim because the claim is premature 'or not ripe';"

(iv) "Continental's lack of action to submit a dispute to this Tribunal: the *ius standi.*

25. Under its first objection, Argentina took the position that it had not given its consent to ICSID arbitration with regard to the present dispute. Accordingly, it "insist[ed] on the need to examine the extent of the consent by the Argentine State to submit to the ICSID system" by examining, according to the principles of interpretation of treaties under international law, the relevant clauses of both the ICSID Convention and the Argentina-U.S. BIT.

3 Claimant's Memorial on the Merits, paras. 250-254.

26. Within its second objection, Argentina pointed out that it gave its consent under the BIT "only for those cases that – complying with requirements of the Washington Convention - are encompassed within the Treaty's scope of application." Argentina referred to three basic and essential requirements that restrict the jurisdiction of the arbitral tribunal pursuant to Art. 25(1) of the ICSID Convention:

a. the existence of a legal dispute;

b. directly arising out of an investment;

c. between a Contracting State and a National of another Contracting State.

27. As to requirement (a), Argentina submitted, based among other things on the *travaux préparatoires* of the ICSID Convention, that the dispute must be about "rights and obligations," about legal titles and not some "undesirable consequences" that have not as the proximate cause the host State's conduct in respect of its investment. In Argentina's view in this case the Claimant was not submitting a legal claim within those requirements because it "is not the holder of the legal rights that it alleged have been breached by the Argentine Republic."

28. As to requirement (b), Argentina submitted that the legal dispute must arise directly out of the investment in that "the measure or measures alleged as in violation of the U.S.-Argentina BIT must be ***specifically*** addressed to the investments." Argentina considered that the word "directly" in Art. 25(1) "may also be translated as specifically…. The measure must be addressed to the investment. Universal measures addressed to the general public cannot be considered by ICSID Tribunals. That would be to judge a public policy and not a legal conflict."

29. Argentina considered accordingly that in order for jurisdiction to be established "Continental must show which specific obligations, *vis-a-vis* the Claimant were breached by Argentina through its devaluation of the Peso, the establishment of a new exchange rate and the temporary pesification of the tariffs."

30. In Argentina's view, the only position that the Claimant was able to assert is its position as shareholder of CNA. According to Argentina, however, this position does not enable Continental to claim in the circumstances impairment to its "legal rights born out of the ownership of shares" due to Argentina's measures. Argentina submitted further that also the damages suffered by the investor must be direct, that is grounded on an action that "specifically impairs a legal right born out of the ownership of the shares." This requirement that those damages result from an interference with a right and not with a mere interest of the shareholders, be they minority or majority shareholders, was not met either in the present case, according to Argentina.[4]

31. Under its third objection to jurisdiction, Argentina considered that Continental's claim is not ripe – in legal terms and not just from a policy point of view – because the alleged damages constantly fluctuate since Argentina's negotiations with foreign creditors are not yet over; therefore, a claim based on indirect consequences that may have affected foreign shareholders of an Argentine corporation cannot be submitted before an arbitral tribunal under the BIT. Moreover, according to Argentina, this would be contrary to a proper interpretation of the BIT: "[s]hould it be admitted that this is applicable to the contractual relations governed by local law and submitted to the jurisdiction of the local courts, the scope of application of the BIT would be unlawfully extended."[5]

32. Finally, Argentina maintained that the dispute did not fall within the scope of the application of the BIT for different reasons, all related to the definition of "investment" suggested by Argentina as being the correct one under the Treaty. It is Argentina's view that the Claimant "has presented a claim founded on the loss in value of its investment represented by the acquisition of shares in an Argentinean corporation – CNA ART," and that the foreign investor has alleged "that its interests have been impaired by commercial and financial decisions taken in the framework of a shares investment business made within Argentina." Argentina submits further that the purchase of shares in that Argentine corporation is a business subject to Argentina's law, which is also the law applicable to

4 Decision on Jurisdiction, paras. 35-40.

5 Decision on Jurisdiction, para. 49.

the interest in those shares and more generally to the existing legal relationship between the Claimant and CNA. In view of the above, Argentina concludes that "the claimant has not proved that the Argentine State has issued any measure addressed directly to that acquisition of shares."

33. Argentina further indicated that since the investment of the Claimant consisted in shares of an Argentine company, while the measures affected the Argentinean corporation of which the Claimant is a shareholder, the lack of the required relationship between the dispute brought and the investment in accordance with the BIT resulted in a lack of jurisdiction on the "indirect claim," which is the subject matter of this dispute. This is because the situation here is that of a shareholder making a claim in connection to assets or circumstances related to the entity where it has interests, in disregard therefore of the acknowledged principle that the partners and the corporation are different legal persons. Argentina concluded that while the definitions of investment in the BIT are broad, CNA - whose interests have been affected - "does not qualify either as an investor or as an investment pursuant to the mentioned international instrument."[6]

C. The Claimant's counter-arguments

34. In conformity with the procedural time table, the Claimant submitted its Counter-memorial on jurisdiction on July 30, 2004. Continental requested the Tribunal to reject the objections of Argentina and to affirm the jurisdiction of the Tribunal. The Claimant argued generally in the first place that the "Proper Approach to a Jurisdictional Challenge" requires that the Tribunal determine whether the pleadings have disclosed a *prima facie* claim.

35. Specifically, in respect of the first and second jurisdictional objections of Argentina, the Claimant maintained that the dispute is a "legal dispute" because it arises from a conflict of rights rather than a conflict of interests. More specifically, according to the Claimant, the dispute at issue "concerns the different views of the Claimant and Argentina on questions of legal rights and obligations in connection with the existence of an investment, and the effects this may have on Argentina's obligations to honor debt

6 Decision on Jurisdiction, paras. 51-52.

instruments, to preserve the Claimant's property rights in the cash deposits and its right under the BIT to transfer capital."

36. Moreover, according to the Claimant, the requirement that a dispute must arise "directly" from an investment does not imply that the measure challenged must be "specifically" addressed at the business concerned. The Claimant submitted that for jurisdictional purposes, it is enough that the impugned measures *prima facie* adversely affect the Claimant's investment, so that the Tribunal is competent to examine whether those measures are in breach of specific commitments given to the investor.[7]

37. The Claimant also opposed Argentina's third objection to jurisdiction that the claim was not ripe. The Claimant recalled that in a previous decision an ICSID Tribunal had stated that the perspective of negotiations between Argentine authorities and a company owned by foreign investors and/or those investors were immaterial in order to determine the jurisdiction of the ICSID tribunal. The Claimant took the position that the principles relied on by Argentina in support of this objection do not affect the jurisdiction of the present Tribunal, which depends on the claim satisfying the requirements of Art.25 of the ICSID Convention and of the BIT.[8]

38. As far as the fourth objection to jurisdiction is concerned, the Claimant considered that it is "now well settled that an investor may bring an investor-state claim under the BIT for measures interfering with the legal rights of its Argentine subsidiary and not just for measures affecting the investor's shares in the subsidiary." The Claimant concludes on this point that "the ability of shareholders to claim for damages suffered by the company in which they hold shares," in any case when the protected investor is a controlling shareholder (as here), is well settled in jurisprudence and cannot be open to challenges at the jurisdictional stage.[9]

39. On August 6, 2004, Sir Elihu Lauterpacht resigned as an arbitrator in this case due to health conditions. Following Professor Sacerdoti's and Licenciado Nader's consent to

7 Decision on Jurisdiction, paras. 45-46.

8 Decision on Jurisdiction, para. 50.

9 Decision on Jurisdiction, paras. 53-54.

Sir Elihu's resignation and in accordance with Arbitration Rule 10, the proceedings were suspended until the vacancy created by Sir Elihu's resignation was filled. In accordance with Arbitration Rule 11(1), the Secretary of the Tribunal invited Continental to appoint a new arbitrator in replacement of Sir Elihu. By letter of September 14, 2004, the Claimant appointed Mr. V.V. Veeder, a national of the United Kingdom as an arbitrator. The proceedings were resumed in October 14, 2004, following Mr. Veeder's acceptance of his appointment.

40. By letter of December 16, 2004, the Tribunal proposed to the parties dates for holding the hearing on jurisdiction. The hearing was held, with the agreement of the parties, on February 1, 2005 at the seat of the Centre in Washington D.C. Messrs. Barry Appleton, Robert Wisner, Hernando Otero, Nick Gallus, Ali Ghiassi and Ms. Asha Kaushal from the law firm of Appleton & Associates, International Lawyers of Toronto Canada, and Ms. Sally Narey, General Counsel, Continental, attended the hearing on behalf of the Claimant. Ms. Cintia Yaryura and Ms. Maria Victoria Vitali from the Procuración del Tesoro de la Nación Argentina, Mr. Marcelo Massoni, from the Embassy of Argentina in Washington, D.C. and Mr. Roberto Bado from the Ministry of Economy of the Argentine Republic, attended the hearing on behalf of the Respondent. During the hearing, Messrs. Appleton and Wisner addressed the Tribunal on behalf of Continental. Ms. Yaryura and Vitali addressed the Tribunal on behalf of the Argentine Republic. The Tribunal posed questions to the parties, as provided in Arbitration Rule 32(3).

41. Subsequent to the hearing, the Tribunal received a communication from the Claimant pointing to recent ICSID decisions on jurisdiction issued in cases involving Argentina, and an answer from Argentina raising objections as to the relevance of those decisions. The Tribunal informed the parties, through the Secretariat, on July 20, 2005 that "it believes it is empowered to take judicial notice of such published decisions. However, in accordance with due process principles, the Tribunal is of the opinion that should it consider necessary for its decision on jurisdiction to specifically rely on points raised and discussed in those decisions, it should give an opportunity first to the parties to comment on those possibly relevant points. The Tribunal would accordingly do so should the situation envisaged occur."

42. On February 22, 2006, the Tribunal issued its Decision on Jurisdiction,[10] rejecting the Respondent's objections to jurisdiction and holding that the present dispute is within the jurisdiction of ICSID and the competence of the Tribunal.

43. In view of the objections raised by Argentina, the Tribunal considered that it had to ascertain, for the sole purpose of determining its competence under the ICSID Convention and the Argentina-U.S. BIT, whether the criteria that define disputes for the purpose of the ICSID jurisdiction under those two instruments had been met. These criteria are:

a. that the dispute is between Argentina (as a contracting party to ICSID and the BIT) and a national of the U.S.A., as defined in the BIT;
b. that the dispute is a "legal" dispute (Art. 25(1) ICSID Convention);
c. that said legal dispute arises "directly" out of an investment (Art. 25(1) ICSID Convention);
d. that said dispute is "an investment dispute" within the meaning of Art. VII of the BIT, namely "arising out or relating to…(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment;" and
e. that such investment is of the type covered under the BIT in accordance with the definition of "investment" found in Art.I(1)(a) of the BIT.[11]

44. Before starting its examination on the basis of the parties' documentation and arguments, the Tribunal found it appropriate to outline the proper methodology to resolve the jurisdictional challenge. The Tribunal asserted that "[i]n order to determine its jurisdiction, the Tribunal must consider whether the dispute, as presented by the Claimant, is *prima facie*, that is, at a summary examination, a dispute that falls generally within the jurisdiction of ICSID and specifically within that of an ICSID Tribunal established to decide a dispute between a U.S. investor and Argentina under the BIT. […] The object of the investigation is to ascertain whether the claim, as presented by the

10 Available at: http://www.investmentclaims.com.

11 Decision on Jurisdiction, para. 58.

Claimant, meets the jurisdictional requirements, both as to the factual subject matter at issue, as to the legal norms referred to as applicable and having been allegedly breached, and as to the relief sought.[12] For this purpose, the presentation of the claim as set forth by the Claimant is decisive. The investigation must not be aimed at determining whether the claim is well founded, but whether the Tribunal is competent to pass upon it."

45. The Tribunal continued:

> As to the *facts of the case*, the presentation of the Claimant is fundamental: it must be assumed that the Claimant would be able to prove to the Tribunal's satisfaction in the merit phase the facts that it invokes in support of its claim. This does not mean necessarily that the "Claimant's description of the facts must be accepted as true," without further examination of any type. The Respondent might supply evidence showing that the case has no factual basis even at a preliminary scrutiny, so that the Tribunal would not be competent to address the subject matter of the dispute as properly determined. In such an instance, the Tribunal would have to look to the contrary evidence supplied by the Respondent and should dismiss the case if it found such evidence convincing at a summary exam.[13] (Footnotes omitted)

46. Turning to the first requirement defining disputes for the purpose of ICSID jurisdiction, namely that concerning the disputing parties, the Tribunal acknowledged that Argentina was not disputing that the Claimant, Continental Casualty Company, was a juridical person having the nationality of another Contracting State in conformity with Art. 25(1)(a) of the ICSID Convention. More specifically, Argentina was not disputing that the Claimant met moreover the requirements of being a U.S. company under the BIT.[14]

47. With respect to the requirement that the dispute be of a "legal" nature, the Tribunal considered decisively the fact that the Claimant invoked specific legal acts and provisions as the foundation of its claim. In fact, the Claimant indicated that certain measures taken by Argentina have affected its legal rights stemming from contracts, legislation and the BIT. The Claimant further indicated specific provisions of the BIT granting various

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12 This corresponds to the traditional Roman law description of the elements of a claim: factum, *causa petendi* and *petitum*.

13 Decision on jurisdiction, paras. 61-64.

14 Decision on jurisdiction, para. 65.

types of legal protection to its investments in Argentina, that in its view have been breached by those measures. The Tribunal then "concluded that the Claimant had made legal claims against Argentina, so that the Tribunal was presented with a legal dispute within its jurisdiction."[15]

48. With respect to the requirement that the dispute arises "directly" out of an investment, the Tribunal dismissed the objection of the Respondent according to which the measures impugned by the Claimant were general measures taken by Argentina in case of emergency and affecting all the sectors of its economy and not "specifically" addressed against Continental's investments. The Tribunal, on the contrary, considered satisfied the jurisdictional requirement at issue since, in the first place, from a textual point of view the term "specific" cannot be considered as a synonym of "directly." A measure of the host State can affect directly an investment, so that the dispute as to the international legality of that measure arises directly out of that investment, even if the measure is not specifically aimed at that investment. The Tribunal then considered that "[t]he requirement that the dispute arises directly from an investment is surely met when, as in the present case, the Claimant challenges some measures of the host State that affected directly the investment, in that they were applicable and were applied to such an investment. There is no doubt that the measures of Argentina described by the Claimant brought about, immediately and directly, an unfavorable change of the legal and economic regime applicable to the assets in Argentina that Continental indicates represented its investment in that country, in breach – according to Continental - to Argentina's obligations under the BIT."[16]

49. With respect to the requirement concerning the definition of the investment under the BIT (i.e. the *ius standi* of the Claimant), the Tribunal dismissed the objection of the Respondent according to which the Claimant had submitted an "indirect" claim as shareholder, for damages suffered by the company that represents its investment. The Tribunal acknowledged that "[t]he question whether under a BIT, such as the one at issue here, a controlling or even a minority foreign shareholder can bring a suit for the damages

15 Decision on Jurisdiction, paras. 66-69.

16 Decision on Jurisdiction, paras. 70-73.

suffered by the local company, in which it hold shares, caused by expropriation or other measures affecting directly the economic rights of the shareholders, is a key legal issue in many disputes brought under BITs." It then proceeded by interpreting the BIT provision containing the definition of the investments covered by the Treaty and came to the conclusion that "the treaty protection is not limited to the free enjoyment of the shares, […] It also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the investment." Moreover, "the specific listing" in the BIT provision at issue "of various 'associated activities', which typically pertain to FDI, indicates that in case of acquisition of a company established in the other country the scope of its application is not merely limited to the ownerships of the shares."

D. The Tribunal's conclusion on the objections to jurisdiction

50. The Tribunal concluded that the Claimant, as a corporate investor in an Argentinean company, enjoyed *ius standi* under the BIT, "even assuming that the measures taken by Argentina and challenged by Continental as having breached its treaty rights were addressed and affected primarily or essentially the assets, investments, activities of the wholly owned subsidiary of Continental in Argentina." In view of certain statements by the Claimant that the measures taken by Argentina "violated specific commitments in treaties, legislation and contracts" such as those "made by Argentina to CNA ART in GGLs and LETEs," the Tribunal recalled that "it is the concurrent denunciation of an alleged breach of a legal commitment stemming from the BIT that brings these actions or measures within the purview of our jurisdiction, not the alleged breach of contractual or legislative provisions *per se*."[17]

51. Finally, with respect to the alleged lack of jurisdiction because the claim was premature or "not ripe," the Tribunal rejected this objection as being without foundation for the following reasons: first of all, "[t]he claim of Continental cannot be considered to be without content because the measures challenged as being in breach of the BIT have not yet been enacted (so that they would be non-existent) or have not yet been applied. This is clearly not the case here." Then, "the possible uncertainty as to the final amount

17 Decision on Jurisdiction, paras. 76-86 and 90.

of the damages cannot represent a bar to jurisdiction, especially since the Claimant has petitioned for a declaratory judgment." Finally, the existence of ongoing negotiations with local companies or the foreign shareholders (which are however disputed by the Claimant) cannot represent a bar to the introduction or furtherance of an international claim such as the one at issue."[18]

III. The Procedure Leading to the Award on the Merits

52. Once the jurisdiction of the Tribunal had been affirmed, proceedings resumed on the merits in accordance with Procedural Order No. 1, issued on the same day as the Decision on Jurisdiction. Since the Claimant had already filed its Memorial on the merits (on April 27, 2004), the Respondent filed its Counter-Memorial on the merits on May 8, 2006.

A. Argentina's arguments

53. In its Counter-Memorial on the Merits of May 8, 2006, Argentina starts with the factual examination of the economic context in which the measures complained of by the Claimant were taken. In Argentina's view, the State "faced a terminal situation and had to forcibly change the economic plan of the country as a result of the devaluation of the local currency."[19] "The crisis became an emergency situation when it turned into an institutional, social and economic collapse of unprecedented seriousness and depth in the country's history."[20] "The financial system was on the verge of collapse. The Central Bank reserves had dropped significantly and, even if by the end of December 2001 the exchange rate in effect was formally still 1 peso = dollar 1, before the Emergency Law was passed, in practice the peso had already been devaluated."[21] "The sovereign debt service difficulties faced by the Government were also evident, and by the end of December 2001 the Argentine Republic had no choice but to suspend payment of its sovereign debt obligations with private holders."[22] "The social situation was dreadful and

18 Decision on Jurisdiction, paras. 91-93.

19 Argentina's Counter-Memorial on the Merits, para. 21. (hereinafter, Counter-Memorial).

20 Counter-Memorial, para. 23.

21 Counter-Memorial, para. 24.

22 Counter-Memorial, para. 25.

the unemployment rate was above twenty per cent (20%) of the active population."[23] Argentina maintains that "[t]he Emergency Law," passed on January 6, 2002, "is not the cause of the economic emergency but a regulatory consequence intended to cure through realistic measures the existing state of necessity;"[24] […] "The Emergency Law only provided the institutional framework for a situation already existing in practice: the 1 to 1 peso-dollar convertibility had disappeared."[25] Argentina then describes in turn the economic, the social, the political and the institutional aspects of what it defines as a "collapse" of the State.

54. In its Counter–Memorial on the merits, Argentina opposes the claims advanced by Continental. First of all, it maintains that it allowed, at all times, transfers in connection with investments in accordance with Article V of the BIT. In this respect, Argentina observed that "[d]uring a short period of time, BCRA authorization was required for that purpose, but neither CONTINENTAL nor CNA ART ever asked for such authorization." Moreover, according to the Respondent, "the actions brought into question by CONTINENTAL, which did not prevent them from transferring funds anyway, are expressly authorized by article XI of the BIT, which entitles a signatory State to take 'measures necessary for the maintenance of public order… or the protection of its own essential security interests'."[26]

55. Secondly, as far as the alleged violation of Article IV of the BIT concerning expropriation is concerned, Argentina considers the claim inadmissible since the measures complained of did not affect Continental's investment value. Argentina maintains that "[t]he existence of an expropriation regarding such investment is impossible, as long as, after the adoption of measures that CONTINENTAL qualifies as expropriation and in spite of the fact that the Argentine Republic underwent the most serious economic crisis in its history, such investment is nowadays worth three times its value before the crisis, in U.S. dollars."[27] In fact, "CONTINENTAL does not base its

23 Counter-Memorial, para. 26.

24 Counter-Memorial, para. 30.

25 Counter-Memorial, para. 33.

26 Counter-Memorial, para. 161.

27 Counter-Memorial, para. 271.

claim upon a reduction in its investment value, the shareholding in CNA, but on alleged reductions in the value of CNA investments and on measures that could have affected such investments."[28] Additionally, in Argentina's view, the Claimant "confusedly invokes a *de facto* expropriation of certain contractual rights pertaining to CNA […] Continental cannot make claims for alleged damages to CNA investments but only for damages to its investment, i.e. shareholding in CNA."[29] According to Argentina, this claim should be dismissed since, firstly, "neither CNA nor CONTINENTAL have ever claimed before Argentine courts a redress of their allegedly affected contractual rights;"[30] secondly, such rights or investments were not substantially affected in spite of the terminal crisis in the Argentine Republic, but "had a financial performance, on average, higher than the one they would have obtained provided they had been invested at a free from risk rate." Finally, Argentina describes the evolution of CNA Art throughout the crisis[31] and concludes as follows:

> 1. - In the hard road towards restoring the country's economic and financial situation to normal, different options were available to the holders of deposits made with financial institutions.
>
> 2. - The holders of deposits had to state whether they wanted to choose any of the options offered by the Argentine Government, which varied according to the progress of the recovery of the country's economic, financial and social situation.
>
> 3. - That being so, three options were available to CNA ART in order to get back its deposited amounts, and it decided to go for the third of them.
>
> 4. - Through the option chosen by CNA ART, it had access to the release of its rescheduled deposits receiving also "BODEN 2013" bonds for the difference between the original face value of the Rescheduled Deposit adjusted by CER as of April 1, 2003 and the value of the dollar in the exchange market as of the same date.
>
> 5. - CNA ART was able to recoup its deposited amounts thanks to the options offered by the Argentine State, as it prevented the financial system from falling apart […]

28 Counter-Memorial, para. 280.

29 Counter-Memorial, para. 301.

30 Counter-Memorial, para. 302.

31 Counter-Memorial, para. 321 ff.

> 6.- Notwithstanding the option exercised by CNA ART, it should be noted that financial institutions could offer enhancements on the conditions established for the return of rescheduled deposits, such as bringing forward the schedule of payments, prepayments or acknowledgement of higher interest rates. If the banks with which CNA ART made the deposits offered no enhancement, this is attributable only to those banks and ultimately to CNA ART, which is responsible for choosing the financial institutions with which the deposits were made.[32]

56. Thirdly, Argentina opposes the claim concerning the alleged violation of article II(2)(b) of the BIT according to which a foreign investment has to be accorded treatment in accordance with international law, including fair and equitable treatment and full protection and security. Argentina submits that "investments made by CONTINENTAL, as it happens with the remaining foreign investments, have been considered in accordance with international law."[33] According to Argentina, "the fair and equitable treatment standard (as well as the remaining treatment standards), in connection to which CONTINENTAL invokes its violation, must be compulsorily applied considering especially the circumstances under which such measures were adopted."[34] "Nobody can deny that the Argentine Republic experienced (and it still does) a 'dramatic economic situation'." No one can deny that when adopting the measures nowadays CONTINENTAL questions, the Argentine authorities had in mind the interests of almost 40 million inhabitants of the Argentine Republic, obviously including the interests of investors. Within such a context, the allegation made by CONTINENTAL should be considered inadmissible as regards the violation of the standards of treatment."[35] Argentina furnishes in any case its evaluation of the standards of treatment provided for by Art. II of the BIT and comes to the conclusion "that investments made by CONTINENTAL, as it happens with the remaining foreign investments, have been considered in accordance with international law."[36] Argentina therefore concludes that:

32 Counter-Memorial, para.369.

33 Counter-Memorial, para. 492.

34 Counter-Memorial, para. 494.

35 Counter-Memorial, para. 499.

36 Counter-Memorial, para. 501 ff.

a) At all times CONTINENTAL's investment was granted fair and equitable treatment in accordance with international law.

b) The fair and equitable treatment is the minimum international treatment, understanding that the latter is a standard which means reasonability, proportionality and no discrimination.

c) The measures alleged to be infringing are proportional to the situation in which they were passed, and they are reasonable. The reasonability of such measures was based on the re-establishment of a balance among all the economic agents of society. The measures were not inconsistent because not only did they take into account the whole society, but also they re-adapted the circumstances to the prevailing economic situation.[37]

57. Finally, Argentina opposes the alleged violation of Article II(2)(c) of the BIT regarding the requirement to observe "obligations entered into with regard to investments." In this respect, Argentina maintains not to have violated any commitment towards the Claimant. The Respondent gives its assessment of "umbrella clauses" under international law, especially in light of arbitral practice and then proposes its interpretation of the umbrella clause of the BIT between Argentina and the U.S. According to Argentina, the umbrella clause of the BIT "is intended to protect the commitments assumed by the Argentine Republic towards foreign investors protected by the BIT, not contractual obligations." Thus, according to Argentina, it would not apply to the dispute at issue since "it does not apply to contracts entered into between CNA ART and the Argentine Republic."[38]

58. In case the Tribunal should conclude for a violation of the articles of the BIT invoked by the Claimant, Argentina invokes Art. XI of the BIT in order to justify the measures it adopted to face the severe crisis, which affected the country.[39] In this context, Argentina also invokes Art. IV(3) of the BIT, which regards the protection of foreign investors suffering losses "owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events." This provision requires the contracting parties to apply a non-discriminatory treatment (according either to the Most Favored Nation or to the National Treatment principles) to

37 Counter-Memorial, para. 625.

38 Counter-Memorial, para. 689 ff.

39 Counter-Memorial, para. 737 ff.

the foreign investor "as regards any measures [they] adopt in relation to such losses."[40] As to Art. XI of the BIT, first of all Argentina claims that a "bona fide invocation of Article XI of the BIT should be sufficient for the Tribunal to dismiss the claims made by the Claimant under such BIT, as both parties to the Treaty accorded that each State had the exclusive right to decide whether its own measures were covered by such Article."[41] Argentina submits that since its measures were necessary "for the maintenance of public order" and also "for the protection of [its] own essential security interests" they "could never amount to a violation of the BIT or give rise to international liability on the part of the Argentine Republic."[42]

59. Argentina then asserts the "constitutionality of the state of necessity and emergency under Argentine law."[43] "In accordance with the provisions of Sections 76 and 99(3) of the Constitution, an economic emergency is one of the situations expressly contemplated in the Constitution."[44] "Subsidiarily," the Argentine Republic invokes the application of the state of necessity under international law to the present case "should the Tribunal consider that the provisions of articles IV(3) and XI of the BIT are not applicable to this controversy."[45] In this respect, Argentina claims that all the requirements associated with the customary rule on the State of Necessity, as codified by the ILC in its works on State responsibility and specifically in Art. 25 of its draft articles on the subject matter, were satisfied in the present dispute. Namely, that "the State did not contribute to the state of necessity;" that "[t]he actions taken were the only way to safeguard an essential interest from grave and impending danger;" and that "no essential interest has been affected of the State or States in connection with which the obligation exists, or the community as a whole."[46] Moreover, according to Argentina, "[w]ith respect to the treatment afforded by the Argentine Republic to foreign investors in the context of the state of emergency, […] such treatment was not less favorable than the one afforded to nationals (who stoically

40 Counter-Memorial, para. 739.

41 Counter-Memorial, para. 743.

42 Counter-Memorial, para. 744.

43 Counter-Memorial, para. 794.

44 Counter-Memorial, para. 801.

45 Counter-Memorial, paras. 817-829.

46 Counter-Memorial, paras. 829-847.

suffered the crisis) and other investors, regardless of their citizenship." Argentina refers to its arguments on the standards of treatment mentioned here above.[47]

60. In its Counter-Memorial, Argentina does not address the issue of the damage that Continental claims to have suffered as a consequence of Argentina's alleged breaches. Argentina filed, however, an evaluation Report dated March 20, 2006 by AGM Finanzas (signed by Daniel Marx and José M.Echagüe) according to which CNA ART, and hence Continental, has suffered no damages due to Argentina's measures. On the contrary, according to this Report, both in terms of pesos and in terms of U.S. dollars, the value of CNA had increased considerably from November 2001 to March 2006.

B. The Claimant's arguments

61. On July 26, 2006 the Tribunal issued Procedural Order No.2 to settle certain questions regarding the submission of evidence to the Tribunal. Thereupon, the Claimant filed its Reply on August 17, 2006 and the Respondent filed its Rejoinder on October 20, 2006.

62. In its Reply dated August 17, 2006, the Claimant furnishes a descriptive context of the policies enacted by Argentina in the period preceding the crisis in order to show the Respondent's contribution to the crisis itself. Specifically, the Claimant points out that "Argentina failed to adopt policies to support its currency board." "Prior to 2001, Argentina made a number of serious policy mistakes [...] In particular: the lack of fiscal discipline and the failure to address deep rooted labor market and trade restrictions "which in the end "created a lack of credibility." "Instead, Argentina could have implemented economic policies that would have supported the ability of the currency board to withstand an economic recession."[48]

63. The Claimant, moreover, contests Argentina's allegation that "this Tribunal should deny recovery on the grounds that CNA ART voluntarily maintained assets in a country with high sovereign risk."[49] The Claimant contests the behavior taken by the Respondent,

47 Counter-Memorial, paras. 848-850.

48 Claimant's Reply on the Merits, at paras. 32-36, (hereinafter, Continental Reply).

49 Continental Reply, para.50.

which "promised to refrain from interference with Bank Deposits, then froze and pesified them;"[50] "promised to honor its government debt, then defaulted on and pesified it."[51] According to the Claimant, "[t]hese measures impugned the BITs provisions on expropriation, fair and equitable treatment, contracts observance and transfers."[52]

64. The Claimant points out to a number of factual elements in order to contest the alleged necessity of the specific measures taken by Argentina to overcome the crisis.[53] The Claimant stresses that "in any event, the devaluation of the peso *per se* is not being challenged in this arbitration, only the subsequent pesification of U.S. dollars denominated contracts… an unusual and extraordinary measure." The Claimant adds that "[o]ther countries have pursued devaluation successfully without interfering with the property and contract rights of the holders of U.S. dollar-denominated contracts" by following alternative approaches.[54] The Claimant further submits that the impugned measures themselves "inflamed social unrest" and that "their stated rationale has long since disappeared." Since Argentina's economy has now fully recovered, the Claimant concludes in this respect that "deposit holders should be fully compensated for the confiscatory pesification of their deposits."[55]

65. As to the applicable legal standards under the BIT, the Claimant then refers back and elaborates further the arguments it had already developed in its Memorial on the Merits in order to establish the violation by Argentina of the various articles of the BIT that the Claimant had invoked in its previous submissions. Continental addresses first, its claims that Argentina breached Art. II(2)(c) of the BIT concerning the obligation to observe contractual obligations.[56] Furthermore, "[i]n the alternative, should this Tribunal determine that Article II(2)(c) applies only to obligations Argentina may have entered into with claimants (rather than 'with regard to investments')," the Claimant indicates

50 Continental Reply, para.53.

51 Continental Reply, para.70.

52 Continental Reply, para.81.

53 Continental Reply, paras. 84-109.

54 Continental Reply para. 92, 94.

55 Continental Reply para. 106.

56 Continental Reply, para. 137 ff.

that "then CNA ART directly makes an ancillary claim for breach of this obligation."[57] According to the Claimant, this ancillary claim would be allowed under the terms of Art. 25(2)(b) of the ICSID Convention, which "enables a locally incorporated company that is subject to foreign control to claim as if it were a national of the other contracting Party," provided that the contracting parties have so agreed. In the Claimant's view, the required agreement is to be found at Art. VII(8) of the BIT itself, which provides as follows:

> For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.[58]

66. As a matter of procedure, Continental claims that the Tribunal is empowered to add CNA ART as a claimant pursuant to Article 46 of the ICSID Convention.[59]

67. Secondly, Continental reasserted its claim about the violation of the obligation to compensate following an act of expropriation, provided for by Art. IV of the BIT. The Claimant argues that "CNA ART's assets are protected from expropriation;" that "legislation extinguishing intangible property rights is an expropriation;" and that "Argentine law continues to consider the measures as an expropriation." Continental points out to Argentina's Supreme Court decisions *Smith* and *San Luis* that declared "Decree 1570 to be unconstitutional on the grounds that it was an unreasonable measure, lacking in proportionality between the deprivation of property rights and the objective of averting the crisis;" and "the pesification of bank deposits through Decree 214 to be unconstitutional."[60] Those cases "were based on Article 17 of the Argentine Constitution which provides that:

57 Continental Reply, para.142.

58 Continental Reply, paras. 143-144.

59 Continental Reply, para. 147.

60 Continental Reply, para. 167.

> The right to property is inviolable and no inhabitant of the Nation can be deprived of it except by judicial decision founded in the law.[61]

68. The Claimant observes that "the Intangibility Law specifically declared that bank deposits were vested property rights entitled to the protections of Article 17."[62]

69. Thirdly, Continental reaffirms its claim about the violation of the obligation to treat the foreign investor according to the international law standard of treatment, provided for by Art. II(2)(a) of the BIT. This Article provides that:

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

70. According to the Claimant, the article obliges Argentina "to provide a stable legal and business environment"[63] and "to protect the investor's legitimate expectations."[64]

71. Finally, as to the obligation to permit free transfers, provided for by Art. V of the BIT, Continental asserts that "Article V Protects Transfers of CNA ART's Assets"[65] and that "Article V proscribes any interference with the transfer of CNA ART's Assets."[66]

72. According to the Claimant, in the light of what it considers to be the legal import of the BIT provisions it relies upon, Argentina breached its treaty obligations through Decree 1570 (*Corralito*);[67] by pesification of bank deposits through Decree 214;[68] by

61 Continental Reply, para. 168.

62 Continental Reply, para. 169.

63 Continental Reply, para. 181 ff.

64 Continental Reply, para. 188 ff.

65 Continental Reply, para. 193 ff.

66 Continental Reply, para. 199 ff.

67 Continental Reply, paras. 216-219. Breach of the freedom of transfers; obligation to pay compensation for expropriated investments; obligation to provide fair and equitable treatment and full protection and security.

68 Continental Reply, paras. 221-223. Breach of the obligation to pay compensation for expropriating investments.

pesification of government debt through Decree 471;[69] by the unilateral rescheduling of deposits and default on debt.[70]

73. The Claimant denies that Argentina could rely on the defense of necessity. On the one hand, the conditions required by the customary rule on the State of Necessity are not satisfied in the present case; on the other hand, it argues that Art. XI of the BIT cannot be applied. As to the customary international law defense of necessity, Continental argues that "Argentina has failed to satisfy any of the cumulative elements of the defense of necessity."[71] According to the Claimant, Argentina was not threatened by a grave and imminent peril to an essential interest, such as the existence of the State; Argentina's actions were not "the only means to safeguard itself from the grave and imminent peril to its essential interest," since other means consistent with the BIT were available to it; and Argentina contributed to the state of necessity. Finally Continental considers that "[e]ven if Argentina can successfully invoke the defense of necessity, Argentina must compensate the Claimant."[72]

74. As to Art. XI, Continental denies in the first place that the provision is self-judging, relying on the various means of interpretation of international treaties. Furthermore, Continental asserts that the requirements provided for by Art. XI have not been met: the correct interpretation of concepts like "essential security interests" and "public order" leads Continental to deny that such values were threatened when Argentina adopted the measures complained of by the Claimant.[73] Continental also denies that the measures adopted by Argentina in order to protect such values were "necessary" in light of the correct interpretation of Article XI.[74]

75. Continental concludes that, should the Tribunal find that Art. XI of the BIT is applicable in the present case, "Argentina must still compensate the investor."[75]

69 Continental Reply, para. 224. Breach of the obligation to provide fair and equitable treatment and full protection and security; breach of the expropriation obligations; breach of the obligation to observe its obligations.

70 Continental Reply, paras. 225-229. Breach of articles V, IV, II(2)(c) and II(2)(a) of the BIT.

71 Continental Reply, paras. 236-257.

72 Continental Reply, paras. 258-263.

73 Continental Reply, paras. 325-343.

74 Continental Reply, paras. 344-352.

75 Continental Reply, paras. 353-364.

Continental asserts further that Argentina cannot rely on Article IV(3) to avoid such compensation. "Regardless of whether Argentina faced circumstances falling within the scope of Article IV(3), the Investor does not claim Argentina has compensated foreigners and locals unequally and, therefore, Article IV(3) is irrelevant to this claim."[76]

76. In the last part of its Reply, the Claimant develops its arguments concerning the amount of damages it has suffered from Argentina's breaches of the Treaty. According to the Claimant, this "calculation … is straightforward. But for Argentina's actions in breach of the Treaty, the Claimant would have received the value of the principal and interest payable on CNA ART's financial securities in accordance with their terms. The Claimant would have received the value of its U.S. dollar deposits and the value of its government loans at the agreed rate of interest."[77] Instead, "[a]s a consequence of Argentina's breaches, the Claimant received a fraction of this value. The Claimant received financial securities pesified at a confiscatory exchange rate and certificates of deposit and government loans with unilaterally reduced rates of interest. In the case of the LETEs, the Claimant received nothing at all."[78] Continental challenges Argentina's claim that the Claimant suffered no damage. Based on the Reply Report of its expert Mr. Rosen, Continental argues that the "AGM's conclusion that the Claimant has suffered no damages" based "on the alleged growth of CNA ART's overall equity since Argentina took its measures in breach of the Treaty" is based on a "completely inappropriate" methodology.[79]

77. Quite to the contrary, the Claimant asserts it has suffered substantial losses / damages. It has included in its Reply the following table reproduced from the Rosen Reply Report, which summarizes the Investor's damages from Argentina's breaches of the BIT:

76 Continental Reply, paras. 365-368.

77 Continental Reply, para. 369.

78 Continental Reply, para. 370.

79 Continental Reply, para. 373.

	Losses Due to			
	Expropriation	Fair and Equitable Treatment	Contracts Observance	Transfers
Schedule 1				
Cash	$ 1,395,000	$ 449,000	$	$
Treasury Bills (Letes)	4,126,000	3,493,000	3,493,000	
Public Loans (GGLs)	12,193,000	11,937,000	11,937,000	
Certificates of Deposit	17,533,000	5,609,000		14,631,000
	35,247,000	21,488,000	15,430,000	14,631,000
Incremental Capital Taxes	11,165,000	11,165,000	4,904,000	n/a
Total Losses	$ 46,412,000	$ 32,653,000	$ 20,334,000	$ 14,631,000

C. Argentina's counter-arguments

78. In its Rejoinder of October 20, 2006, Argentina replies to the arguments that the Claimant has developed in its Reply. First of all, Argentina opposes the Claimant's attempt to introduce a new party into the arbitration (CNA ART), at this late stage of the proceedings and requests that it be rejected as inadmissible and contrary to Art. 36(2) of the ICSID Convention[80] and Arbitration Rules. "Argentina will not argue at this point whether CNA ART can invoke Article 25(2)(b) *in fine* of the ICSID Convention or whether it complies with the requirements expressed in Article VII(8) of the BIT," since "[t]hese are matters which affect the claim's admissibility and the Tribunal's competence (apart from other jurisdiction-related and/or preliminary issues that might come up in connection with CNA ART), which Argentina has the right to address as exceptions to the Centre's jurisdiction or the Tribunal's competence in view of Rule 41 of the Arbitration Rules. As to the merits, Argentina claims that introducing CNA ART at this point would also seriously violate Argentina's right of defense in various ways. The right

80 Argentina points out that Art. 36(2) of the ICSID Convention provides that the request to institute arbitration proceedings "shall contain information concerning" *inter alia* "the identity of the parties."

for a party to submit an additional claim under Art. 46 of the Convention does not include in Argentina's view the right to introduce additional parties into the proceedings.[81]

79. Secondly, Argentina insists on its description of the context "in which the measures applied during the collapse in 2001 were taken," reiterating that what the country suffered was a "collapse that goes beyond an economic crisis."[82] In particular, Argentina stresses that "measures taken were necessary to counteract the effects of the crisis" and that "the challenged measures were not the cause of the social unrest."[83]

80. Next, Argentina then resumes its arguments against the claims raised by the Claimant. Firstly, Argentina reiterates that it cannot have expropriated Continental's investment since "the value of CNA ART's equity increased by almost threefold- measured in U.S. dollars- than what it was worth before the crisis."[84] In fact, "the Claimant grounds its claim not in the decrease in the value of its investment (the interest in CNA ART) but alleged decreases in the value of CNA ART's investments and the measures that would have affected such investments."[85]

81. Secondly, "Argentina confirm[ed] the grounds presented in its Counter-Memorial and restates that it granted CONTINENTAL a treatment in conformity with the provisions of Article II.2(a) and (b) of the BIT at all times."[86] Argentina reiterates its position already stated in its Counter-Memorial according to which "the fair and equitable treatment standard should be applied taking special consideration of the special circumstances in which the challenged measures were adopted."[87] Argentina maintains that "at no time (had it) stopped meeting its treatment obligations during the course of the crisis."[88] According to Argentina "[t]he fair and equitable treatment standard does not have as an objective to guarantee an objective and immutable right to the stability of the juristic order where the investment is carried out. On the contrary it should be interpreted

81 Argentina's Rejoinder on the Merits, at paras. 12-21, (hereinafter Argentina Rejoinder).

82 Argentina Rejoinder, para. 30.

83 Argentina Rejoinder, para. 31 ff. and 83 ff.

84 Argentina Rejoinder, para. 115.

85 Argentina Rejoinder, para. 121.

86 Argentina Rejoinder, para. 213.

87 Argentina Rejoinder, para. 219.

88 Argentina Rejoinder, para. 221.

as including the basic powers of the States of maintaining public order and facing emergencies."[89] Argentina adds that "[a]nother interpretation would turn the BITs into an insurance policy that would make the State respond in light of any situation regardless of the external circumstances motivating the State's acts."

82. Thirdly, Argentina reiterates that it did not violate Art. V of the BIT in regard to transfers. First of all, Argentina claims that Art. V concerns only foreign investors and not local subsidiaries as CNA ART. Argentina draws support for this position from the Claimant's request to "legitimize CNA ART as a party in this controversy."[90] Argentina further argues that Art. V does not prevent "specific regulations for balance-of-payment difficulties" in view of Art. XI of the BIT and the "standards established in multilateral agreements which both Argentina and the United States –the parties involved in the BIT applicable in this arbitration- have signed," with specific mention of GATT, GATS and the IMF.[91] Argentina also claims that its regulations of monetary transfers conform with international customary law, as a manifestation of the exercise of monetary sovereignty by States, in view of the severe difficulties in its balance-of-payment.[92] Therefore Argentina adds that "if CONTINENTAL wanted to make transfers abroad of money derived from revenues and dividends, they could be made by previously requesting the authorization from the corresponding authority, i.e., the BCRA."[93] However, Argentina submits that Art. V(1)(e) "protects transfers of the proceeds of the sale or liquidation of all or any part of an investment" but that this was not the case since CNA ART and not "CONTINENTAL was the holder of the bank deposits."[94]

83. Next, Argentina opposes again the Claimant's argument about the alleged violation of Art. II(2)(c) of the BIT. Firstly, it maintains that it had never "adopted any commitment towards CONTINENTAL." According to Argentina, Continental "intends to 'turn' a claim of contractual nature which is not its own into a claim for violations of the

89 Argentina Rejoinder, para. 224.

90 Argentina Rejoinder, para. 294.

91 Argentina Rejoinder, para .295.

92 Argentina Rejoinder, para 297.

93 Argentina Rejoinder, para.306.

94 Argentina Rejoinder, para.308.

BIT."[95] Continental's claim on this ground should thus be considered inadmissible since "CONTINENTAL is acting on its own behalf, on the basis of an alleged violation of rights which are entitled to CNA ART. CONTINENTAL is not acting on behalf of CNA ART."[96] Argentina points out "the contractual nature of the claim," opposing "CONTINENTAL's extensive interpretation" of Art. II (2)(b) of the BIT.[97]

84. As to Art. XI of the BIT, Argentina points out that it "requested the Tribunal to apply Article XI of the BIT to this dispute…notwithstanding the fact that the measures under analysis did not violate any BIT standard."[98] Argentina submits that Art. XI of the BIT and the customary rule on the State of Necessity are two different rules since they come from "autonomous sources of international law," namely treaty and customary law respectively.[99] Argentina adds that, contrary to Continental's assertions, the Report by professors Slaughter and Burke White – submitted as expert's testimony by Argentina – does not support the opinion that "Article XI is *lex specialis* within the customary *lex generalis* of the state of necessity."[100]

85. Argentina then opposes the Claimant's interpretation of Art. XI of the BIT. With regard to the reference to the "essential security interests," Argentina contests the argument according to which it would "comprise only the external threats against the country."[101] On the contrary, according to Argentina, "the terms 'essential security interests' should be interpreted in a broad manner and they include crises as the one suffered by the Argentine Republic."[102] Argentina also opposes the Claimant's views that the term "public order" in Art. XI, has to be assimilated with the concept of public order [*ordre public*] under private international law.[103] According to Argentina, on the contrary, "within the concept of public order" are to be included "at least the protection of public

95 Argentina Rejoinder, para. 314.

96 Argentina Rejoinder, para. 317.

97 Argentina Rejoinder, para. 329-331.

98 Argentina Rejoinder, para. 365.

99 Argentina Rejoinder, para. 367.

100 Argentina Rejoinder, para. 376.

101 Argentina Rejoinder, para. 390.

102 Argentina Rejoinder, para. 396.

103 Argentina Rejoinder, para. 402.

security and other powers included within the State's police power."[104] Finally, Argentina submits that the term "necessary" contained in Art. XI of the BIT must be interpreted in line with the GATT-WTO case-law, under which "necessary" is not synonymous of "indispensable."[105]

86. As far as the issue of compensation is concerned, Argentina opposes Continental's allegation that "even if the requirements under Article XI were fulfilled with respect to this case, the Argentine Republic should compensate it." According to Argentina, on the contrary, if Art. XI is applicable to the dispute at issue no compensation is due since "there is no treaty violation."[106]

87. Argentina also reiterates its position that application of Art. XI of the BIT is self-judging. Finally, as to the invocation of the State of Necessity under customary international law, Argentina challenges Continental's reliance on the *CMS v. Argentina* ICSID award and invokes instead the decision in the *LG&E v. Argentina* case. Argentina reiterates that "the measures were the only means of safeguarding an essential interest from a serious and imminent peril."[107]

88. Argentina then specifies its defense based on the customary rule on the State of Necessity contended in its Counter-Memorial, in the alternative with respect to the one based on Art. XI of the BIT. Argentina concludes that all the requirements associated with the customary rule were satisfied in the present case, contrary to the Claimant's allegations.[108]

89. In the final pages of its Rejoinder, Argentina deals with Continental's request of compensation for the damage it has suffered, denying that the investor suffered any damage based on the Max & Echagüe Report.[109] Finally, Argentina denies Continental's argument that a forcible effect of pesification was to "trigger additional tax liabilities for

104 Argentina Rejoinder, para. 408.

105 Argentina Rejoinder, paras. 409-419.

106 Argentina Rejoinder, paras. 420-422.

107 Argentina Rejoinder, para. 481.

108 Argentina Rejoinder, paras. 454-465; 481-491.

109 Argentina Rejoinder, para. 498 ff.

CNA ART." According to Argentina, the income tax that was applied to all residents of Argentina does not constitute an expropriatory act and was not discriminatory, nor extraordinary or punitive.[110]

90. On November 13, 2006, the Tribunal issued Procedural Order No. 3 deciding the schedule for the Hearing to be held from November 27 to December 3, 2006; requiring to the disputing parties some additional information in order to fill a Chronological Table of the relevant events and measures at issue in the present dispute; asking the parties to send to the Secretary of the Tribunal a list of persons who would be attending the hearing as counsel, party representatives, witnesses and experts. The parties complied with those requests. The Hearing on the Merits took place from November 27 to December 3, 2006 at the seat of the Centre in Washington, D.C. At the hearing the Claimant was represented by: Messrs. Barry Appleton, Robert Wisner, Hernando Otero, Nick Gallus and Ms. Asha Kaushal of the law firm of Appleton & Associates International Lawyers. The Respondent was represented by the Office of the Procuración del Tesoro de la Nación Argentina, in person of the Procurador Mr. Oswaldo César Guglielmino assisted by: Mr. Jorge Barraguirre, Ms. Cintia Yaryura, Mr. Fabían Markaida, Mr. Gabriel Bottíni, Mr. Ignacio Torterola, Ms. María Victoria Vitali, Mr. Nicolás Duhalde, Ms. Veronica Lavista, Mr. Diego Brian Gosis, and Mr. Norberto Ariel Martins. The witnesses and experts presented by the Claimant's counsel for oral examination were: Gary J. Owcar; César Bunge; Kenneth Vandevelde; Howard Rosen; Sebastian Edwards. Mr. Samitier was also present as party representative for Continental. The following witnesses and experts testified on behalf of the Argentine Republic: Roberto Frenkel & Mario Damill; Eduardo Ratti; Federico Molina; Roberto Fortunati; Augusto Belluscio; A.M. Slaughter & B. White; Daniel Marx & José M. Echagüe. Each party cross-examined the witnesses and experts of the other party as far as they requested.

91. Pursuant to the Procedural Direction of the Tribunal dated December 12, 2006, the Claimant and the Respondent filed their Post-Hearing Briefs on January 22, 2007. Afterwards, the Claimant and the Respondent filed their Post-Hearing Replies on March 9, 2007. Both parties presented their Statements of Costs on April 10, 2007. In the above-

110 Argentina Rejoinder, para. 531 ff.

mentioned Procedural Direction the Tribunal also indicated that it would decide together with the merits the admissibility of the "ancillary claim" advanced by the Claimant in its Reply and opposed by Argentina concerning the addition of CNA ART as a claimant.

92. Thereafter, the Tribunal declared the file closed to the parties on May 11, 2007. On June 25, 2007 Argentina wrote to the Tribunal asking that the Tribunal take into account as "a decisive factor for the resolution of the present dispute" an attached letter of the U.S. Department of State to former Legal Advisor Abraham Soafer (filed by a Claimant against Argentina in another ICSID dispute against Argentina in a pending arbitration under the U.S.-Argentina BIT) where the U.S. Department of State states, *inter alia*, that "…the position of the U.S. Government is that the essential security language in our FCN treaties and Bilateral Investment treaties is self-judging […]." The Claimant asked the Tribunal "to ignore this untimely material" adding that "even if the Tribunal decides to consider the document, it sheds no greater light on the meaning of the essential security interests provision in the Argentina-U.S. treaty."

93. The Tribunal answered to the parties on July, 6, 2007 admitting the document (and allowing the Claimant to comment in writing on it) notwithstanding the file had been declared closed to the parties, stating various reasons justifying that it "represents a rare exception to the above mentioned ruling."[111] The Claimant duly filed its comments on July 16, 2007, restating its position that this standard "Employment Ethics Letter" by the Department of State was irrelevant, since it "is not a letter about the meaning of the Argentine-U.S. BIT," does not evidence any agreement between the Contracting Parties to the BIT that Article XI is self-judging, is irrelevant under the Vienna Convention on the Law of Treaties, and is generally far from a "decisive factor for the resolution of the dispute" contrary to Argentina's claim.[112]

94. The Tribunal declared the proceedings closed in accordance with ArbitrationRule 38 on April 24, 2008.

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111 Three reasons were given in the Tribunal's letter, namely "i. The document was not reasonably available to the Respondent until after the written and oral phases of these arbitration proceedings; ii. It addresses an issue in these proceedings on which both parties have submitted much material already; and iii. It is not a document which, as now introduced, can cause any material prejudice to the Claimant as a matter of procedure."

112 Among its supporting documents, the Claimant included the Award on the merits rendered in the case of *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, rendered on May 22, 2007 (ICSID Case No. ARB/01/3).

IV. Preliminary Issue

A. Continental's request to add CNA ART as a Claimant

95. In its Reply Continental has submitted that the "Umbrella Clause" of Art. II (2)(c) of the BIT also applies to obligations entered by the host State "with an investment" of the protected covered investor, thus here CNA. Continental has also submitted that "should this Tribunal determine that Article II (2)(c) applies only to obligations Argentina may have entered into with claimants (rather than "with regard to investments"), then CNA ART makes directly an ancillary claim for breach of this obligation."[113] According to Continental, this ancillary claim is permissible under Art. 25 (2)(b) of the ICSID Convention, which is referred to at Art. VII (8) of the BIT.[114] As a matter of procedure, Continental claims that the Tribunal "is empowered to add CNA ART as a claimant pursuant to Article 46 of the ICSID Convention" which establishes the competence of an ICSID Tribunal to "determine any incidental or ancillary claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

96. Argentina opposes the introduction of a new party mid-way through these pending arbitration proceedings, as being contrary to various provisions of the ICSID Convention and related procedural rules. Argentina also submits that the introduction of such a new party would adversely affect its position as a respondent and its rights of defense.[115]

B. Tribunal's Conclusion

97. The Tribunal recognizes that Art. VII (8) of the BIT could allow CNA to initiate separate arbitration proceedings against Argentina on the basis of Art. 25 (2)(b) of the ICSID Convention. It is also correct that Art. 46 of the ICSID Convention permits a tribunal to determine additional claims to be introduced in pending proceedings, subject

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113 Claimant's Reply, paras. 138 and 142.

114 "For the purpose of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or any political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention."

115 Argentina's Rejoinder, paras. 12-18.

to any agreement otherwise between the parties (of which none exists here). However these are two very different procedures. We fail to see how Art. 46 of the ICSID Convention allowing the introduction of an additional claim in a pending dispute between the same disputant parties could possibly justify the introduction into that arbitration of an additional third person with its own new claim, moreover at a late stage of the proceedings. An "incidental or additional claim" to the principal claim initially submitted clearly refers in Art. 46 to the relationship of this new claim with those claims already made in the pending proceedings by the same claimant; that is what "additional" and "incidental" signify in their ordinary meaning; and Art. 46 does not permit an extension of the dispute *ratione personae*. Moreover, as a further relevant factor in this case, the due process concerns raised by Argentina against the late introduction of a new claimant and a new claim are well founded in the view of the Tribunal.

98. We observe further that it is not CNA that has asked to be joined in the pending dispute; it was its parent Continental that purported to add it to the dispute as a co-claimant, an initiative that finds no support in the ICSID rules. Such an addition of CNA appears in any case unnecessary in the light of the objectives asserted by the Claimant. If a contract or other obligation entered into by the host State is found to be covered by Art. II (2)(c) of the BIT because it was entered into "in regard to investments," notwithstanding the fact that it was entered into with the local subsidiary of the foreign investor, it would be immaterial if, procedurally, the claim is brought by the foreign investor directly, or by its local subsidiary relying on Art. VII (8) of the BIT in conjunction with Art. 25 (2)(b) of the ICSID Convention.

99. The Tribunal, for these reasons, rejects the request of the Claimant in the above respect.

V. Factual Background

A. The economic evolution of Argentina from the introduction of the convertibility regime (1991) to the crisis (2001)

a) General overview

100. All measures (the "Measures"), which Continental challenges, were enacted by Argentina during the well-known economic, political and social crisis which the country experienced during 2001-2002,[116] as a response to that crisis and in attempts to control and overcome it. In different ways, all the Measures reflected, brought about, formalized or implemented the abrupt and traumatic abolition of the convertibility regime. The introduction of bank deposit freezes and of foreign exchange controls (*Corralito*, Decree 1570 of December 1, 2001) were the first Measures introduced. The Public Emergency Law 25.561 of January 6, 2002, and Measures adopted thereunder provided for the official abolition of the convertibility regime and of the connected pegging of the peso with the U.S. dollar, as well as the forced conversion into pesos of all dollar denominated financial instruments, indebtedness and contracts ("pesification"). A further set of Measures adopted under Law 25.561 acknowledged and formalized the default of Argentina on its internal and external debt and provided subsequently for that debt's restructuring with the aim of progressively restoring normal economic and financial conditions. Certain of these Measures affecting the Claimant have also been challenged by Continental as being in breach with BITs obligations.

101. Continental, on the one hand, relies on the convertibility regime as representing a standard of treatment to which it was entitled and the abolition of which, especially as to how it was carried out through the Measures, breached various BIT provisions to its financial detriment. On the other hand, Argentina claims that the Measures are justified because of the "economic, social and institutional crisis precipitated in the Argentine Republic, which was the gravest of the country's history," so to render the context within which the Argentina's Measures were adopted absolutely exceptional.[117]

116 The crisis materialized in 2001, but depending on the analysis its beginning has been set in 2000, and its origin even as early as 1998, see IMF, *Evaluation Report*, 8.

117 Argentina's Counter-Memorial, paras. 19-20.

102. It is therefore appropriate to summarize at the outset the economic evolution of Argentina following the introduction of the convertibility regime in 1991 up to the crisis, including the latter's causes, with a specific focus on the legal aspects of this regime as well as on the nature and effects of the various Measures. This part of the Award contains the factual basis for the Tribunal's consideration of Argentina's defense of necessity, including the availability of alternative measures.

103. In this summary the Tribunal has been much assisted by the Parties' Counsel and the Parties' expert witnesses and related materials. The subject is, of course, vast, difficult and complex. There is no single comprehensive study or chronology adequate for the task facing the Parties and the Tribunal in these proceedings. Moreover, each case addressing Argentina's crisis, with its different parties, claims and legal texts, raises its own special issues and particular considerations. Guided by the issues in the present case, this Tribunal has made its own analysis and arrived at its own decisions based upon the materials presented by the Parties in these proceedings. However, the Tribunal has confirmed such analysis and decisions by relying on authoritative and publicly available reports and studies of an economic and social-political nature, which assist in the narration of the crisis, its causes and responses. A distinction is made below, as appropriate, between objective facts and data, contemporary evaluation of the economic policy pursued by Argentina, and subsequent evaluation based on hindsight, made retrospectively.

104. As described by the IMF in 2004:

> The Convertibility Law, which pegged the Argentine currency to the U.S. dollar in April 1991, was a response to Argentina's dire economic situation at the beginning of the 1990s. Following more than a decade of high inflation and economic stagnation, and after several failed attempts to stabilize the economy, in late 1989 Argentina had fallen into hyperinflation and a virtual economic collapse […]. The new exchange rate regime, which operated like a currency board, was designated to stabilize the economy by establishing a hard nominal peg with credible assurances of non reversibility. The new peso

> (set equal to 10,000 australes) was fixed at par with the U.S. dollar and autonomous money creation by the central bank was severely constrained, though less rigidly than in a classical currency board. The exchange rate arrangement was part of a larger Convertibility Plan, which included a broader agenda of market-oriented structural reforms to promote efficiency and productivity in the economy. Various service sectors were deregulated, trade was liberalized, and anti-competitive price-fixing schemes were removed; privatization proceeded vigorously, notably in oil, power, and telecommunications, yielding large capital revenues. [footnotes omitted][118]

The investment made by Continental in Omega ART (later CNA ART) in 1997 and completed in 2000 was made in a newly privatized sector (in June 1996), that of workers' accident insurance.[119] In general, foreign direct investment inflows were sustained after the convertibility, representing more than 2-3% of GDP from 1995 to 2000 with a peak of 8.46% in the year 1999.[120]

105. In more precise legal terms, the convertibility regime entailed that the national currency (the peso that replaced the Austral at one peso for each 10,000 Australes on January 1, 1992) was freely convertible with the U.S. dollar at 1:1, and the external value of the peso being pegged to the dollar under a currency board type arrangement.[121] Transactions in convertible currencies were permitted. Authorized banks could open accounts in pesos or foreign currencies so that Argentines and foreigners in Argentina

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118 IMF, *Evaluation Report*, 11. As stated in the Preface to the Report, the Independent Evaluation Office of the IMF (IEO), which authored the report, "was created in 2001 to provide objective and independent evaluations on issues relevant to the IMF. It operates independently of IMF management and at arm's length from the IMF Executive Board." The *Evaluation Report* "evaluates the role of the IMF in Argentina during 1991-2001, focusing particularly on the period of crisis management from 2000 to early 2002," *ibid*. For an acknowledgment of the value of this independent report and including its criticism to the IMF management of the crisis, see *Blustein*, 213. As to the effects of the Convertibility Plan, *see* also World Bank, *From Insolvency to Growth*, (Country Study) 1993, Claimant's doc. C-389. Argentina puts in doubt in its Post-Hearing Reply, 20-21, the objectivity of the Report, pointing to the criticism contained in a subsequent "Report of the External Evaluation of the Independent Evaluation Office" of March 29, 2006 (Respondent's doc. R-294), at p.14. The Tribunal considers this criticism not relevant as to the present description of the evolution of Argentina's economy. See also footnote 353 hereunder.

119 ART stands for "Aseguratora de Riesgos del Trabajo" (Workers' Risks Insurer).

120 See Claimant's doc. C-392 drawn from the World Bank's World Development Indicators, various years.

121 A publication directed to foreign investors "Argentina Business," 259, summarized the arrangement as follows: "The Convertibility Law also transformed the Banco Central de la Republica Argentina (BCRA, the central bank) into a currency board, preventing it from issuing more currency than can be backed by foreign currency reserves. This prevents the government from creating unbacked currency, 'running the printing press,' or monetizing deficits and thus limits inflation, contributing to the stability and integrity of the monetary system."

were allowed to hold and use any currency. This possibility led in time to the "dollarization" of Argentina's economy to a notable degree: contracts, especially medium and long term contracts such as rents, loans, supply contracts were expressed in dollars, rather than in pesos, and bank deposits were opened and maintained in dollars. Specifically, a large proportion of the banking system's assets and liabilities were denominated in dollars. The level of dollarization, which had been growing steadily since 1991, increased substantially in the second half of 2000: more than 70% of the private sectors deposits and almost 70% of the banking system credit to private sector were denominated in dollars by the end of 2000.[122]

106. Another feature of the convertibility regime was that, in strict adherence with the nominalistic principle,[123] any indexation mechanism of debts was expressly prohibited, including in cases of delayed payment by the debtor (*mora del deudor*). This was in sharp contrast with the law and practice that had prevailed in Argentina under the previous monetary regime. In this connection Art. 11 of the Convertibility Law modified Art. 617 and 618 of the Civil Code to the effect that:

a. the obligation to pay a debt in a currency which is not legal tender in Argentina was considered to be a monetary obligation (new Art. 617);
b. the obligation to pay a sum in a specified type of currency is satisfied by paying in that type of currency.[124]

As a result, debts in dollars had to be repaid in dollars. However, as reported officially by the IMF, in legal terms "the currency of Argentina is the Argentine peso," and only the

122 Cf. *Lessons from the Crisis*, 21, showing indicators from 1990 to 2000. According to Claimant's doc. C-190 (National Bureau of Economic research Working Paper No.10015 of 2003), Argentina had a "very high" degree of dollarization, with a score of 20, preceded by smaller economies such as Ecuador (25), Bolivia (22) and Uruguay (21).

123 Art. 7 of the Convertibility Law N° 23928 of March 1991, which also provides that a debtor of a given amount in pesos, satisfies his obligation by remitting at the date due that nominal quantity. As is well-known, nominalism indicates that a given currency is legal tender by sovereign will and must be accepted to satisfy debts and as means of exchange for its face value, irrespective of its purchase power, notably over time, or its loss of exchange value in terms of foreign currencies (i.e. devaluation), without the sovereign incurring thereby an international responsibility. See *Mann*, 463; D. Carreau, *Souveraineté et coopération monétaire internationale*, 1970, 73.

124 The parties have disputed the exact import of those provisions as discussed hereafter. According to the Claimant, Art. 617 and 619 not only entitled the debtor to discharge its obligation in foreign currency in that currency but "gave creditors the right to refuse payment that was not in the agreed upon currency" (Post-Hearing Brief, para. 20). Argentina claims that those obligations could be discharged also in pesos at the current exchange rate.

peso. "Transactions in convertible currencies are permitted, and contracts in these currencies are legally enforceable, although the currencies are not legal tender."[125] Accordingly, companies' accounts, including those of CNA, were always expressed in pesos only.

107. There have been many descriptions of the evolution of Argentina's economy under the Convertibility Plan from what have been described as the "boom years," to the first deterioration of the country's performance in the second half of 1998, and thereafter to the intensification of Argentina's problems in 2000, ultimately leading to the crisis and the abandonment of the convertibility regime in early January 2002. The Tribunal considers that a useful overview of this evolution relevant for the subsequent legal analysis is set forth in the relevant pages of the "Overview of Economic Developments, 1991-2001," found in the IMF Independent Evaluation Office Report "The IMF and Argentina: 1991-2001" published in 2004, 11-13.[126]

> There was a marked improvement in Argentina's economic performance under the Convertibility Plan, particularly during its early years. Inflation, which was raging at a monthly rate of 27 percent in February 1991, declined to 2.8 percent in May 1991; on an annual basis, inflation fell to single digits in the summer of 1993 and remained low (or even negative) from 1994 to the end of the convertibility regime in early 2002. The overall fiscal balance of the federal government improved significantly from the previous years, with an average budgeted deficit of less than 1% of GDP during 1991-98.
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> Growth performance was impressive through early 1998, except for a brief set back in 1995 when Argentina was adversely affected by the Mexican crisis. For 1991-98, GDP growth averaged nearly 6 percent a year, vindicating the market-oriented reforms introduced in the early 1990s. Attracted by a more investment-friendly climate, there were large capital inflows in the form of portfolio and direct investments.[127] During 1992-99, Argentina received more than $100 billion in *net* capital inflows, including over $ 60 billion in *gross* foreign direct investments.

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125 IMF Argentina, Status Under IMF Articles of Agreements: Article VIII, Position as of January 31, 1999 (Claimant's doc. C-377) at p. 32; IMF Argentina, Status Under IMF Articles of Agreements: Article VIII, Position as of December 31, 1999 (Claimant's doc. C-378), at p.33; IMF Argentina, Status Under IMF Articles of Agreements: Article VIII, Position as of December 31, 2000 (Claimant's doc. C-379), at p.34.

126 See Claimant's doc. C-149 and Respondent's doc. R-207. References in the text to Tables and Boxes of the Report and footnotes have been omitted.

127 The conclusion of Bilateral Investment Treaties was part of this policy. Argentina signed its first three BITs in 1990. In 1992 the first BITs entered into force for Argentina. At the end of 2001 Argentina had signed 58 BITs in total, among which the one with the US at issue in the present case.

The resilience of the convertibility regime was severely tested by the Mexican crisis in 1995. In response, Argentina launched a rigorous adjustment program under IMF financial support consisting of strong fiscal action and structural reform. When the peg survived and a V-shaped recovery ensued, this was widely interpreted as evidence of the convertibility regime's robustness and credibility. Favorable external circumstances also contributed to this outcome. This was a period in which the U.S. dollar was relatively weak, so the peg did not entail a loss of competitiveness, particularly given the improvements in productivity. Tariff reductions achieved under MERCOSUR also helped promote exports, particularly to Brazil, Argentina's largest trading partner. Capital flows to emerging markets were strong in the mid-1990s and Argentina was a major beneficiary. Argentina was relatively unaffected by the outbreak of the East Asian crisis in 1997; it quickly returned to the international capital markets in December of that year.

In October 1998, the performance of Argentina received the attention of the world when President Carlos Menem shared the podium of the Annual Meetings with the IMF Managing Director, who characterized "the experience of Argentina in recent years" as "exemplary." The Managing Director further remarked: "Argentina has a story to tell the world: a story which is about the importance of fiscal discipline, of structural change, and of monetary policy rigorously maintained."

As it happened, Argentina's performance deteriorated from the second half of 1998, owing to adverse external shocks, including a reversal in capital flows to emerging markets following the Russian default in August 1998; weakening of demand in major trading partners, notably in Brazil; a fall in oil and other commodity prices; general strengthening of the U.S. dollar against the euro; and the 70 percent devaluation of the Brazilian real against the U.S. dollar in early 1999. Real GDP fell by over 3 percent in the second half of 1998, there was a mild pickup in economic activity in the second half of 1999, spurred by increasing government spending in the run-up of the October presidential elections, but this was not sustained and GDP declined by 3 ½ percent for 1999 as a whole. The economy never recovered through the end of the convertibility regime.

The economic slowdown, coupled with the election-driven surge in public spending in 1999, had important implications for fiscal solvency. Argentina's consolidated fiscal balance had been in deficit throughout the 1990s except in 1993, but the magnitude was not large. Consolidated public sector debt, however, increased more rapidly because of the periodic recognition of off-budget liabilities, including the court-ordered payments of past pension benefits, which averaged over 2 percent of GDP a year during 1993-99. Even so, the rise in the debt-to-GDP ratio was modest as long as growth remained high, and there was even a small decline in the ratio from 1996 to 1997. The situation changed in 1999, when growth decelerated and the public finances deteriorated sharply. The

debt-to-GDP ratio rose from 37.7 percent of GDP at end-1997, to 47.6 percent at end-1999, an increase of 10 percentage points in just two years. The ratio would eventually reach 62 percent at end of 2001.

Argentina's problems intensified in 2000, when growing solvency concerns over the cumulative increase in public debt was exacerbated by the continued appreciation of the U.S. dollar and a further drying up of capital flows to emerging market economies. These developments would normally require a smaller current account deficit and a depreciation of the real exchange rate, but the convertibility regime placed severe limitations on the ability of Argentina to achieve this adjustment in a manner that could avoid recession. Argentina initially sought to restore market confidence by negotiating a SBA with the IMF, which it indicated would be treated as precautionary.

Market confidence did not recover as expected and market access was effectively lost later in the year, leading Argentina to seek an augmentation of IMF support. From December 2000 to September 2001, the IMF made a series of decisions to provide exceptional financial support to Argentina, which ultimately amounted to SDR 17 billion, including the undrawn balance under the existing arrangement. However, stabilization proved elusive. The augmentation announced in December 2000 and formally approved in January 2001 had a favorable effect, but it was short-lived. Pressure built up again as it became evident that political support for the agreed measures was lacking and program targets were unlikely to be met.

From the spring of 2001, the authorities took a series of measures in quick succession, including: an announced plan to change the anchor of the convertibility regime from the U.S. dollar to an equally weighted basket of the dollar and the euro (the switch to take effect only when the two currencies reached parity); a series of heterodox industrial or protectionist policies (called "competitiveness plans") involving various tax-exemptions measures in sectors most adversely affected by the recession; and an exchange of outstanding government bonds totaling $30 billion in face value for longer maturity instruments (the so-called mega-swap). Many of these measures, which were taken without consultation with the IMF, were perceived by the markets as desperate or impractical and served to damage market confidence.

Despite these initiatives and the financial support of the IMF, market access could not be restored, and spreads on Argentine bonds rose sharply in the third quarter of 2001. Amid intensified capital flight and deposit runs, capital controls and a partial deposit freeze were introduced in December 2001. With Argentina failing to comply with the fiscal targets, the IMF indicated that it could not clear the disbursement scheduled for December. At the end of December, following the resignation of President Fernando De La Rùa the country partially defaulted on its international

obligations. In early January 2002, Argentina formally abandoned the convertibility regime and replaced it with a dual exchange rate system.

108. Argentina's crisis of 2001-2002 has been described both as "one of the worst economic crises in its history" and "among the most severe of recent economic crises" worldwide.[128] It resulted in a massive default of public debt both domestic and international, the latter involving U.S.$141 billion. "The immediate macroeconomic consequences of the crisis were severe. Real GDP fell by about 10% in 2002, bringing the cumulative decline since 1998 to almost 20%.[129] Inflation peaked at a monthly rate of about 10% in April 2002, driven by liquidity provisions from the central bank to banks experiencing deposit withdrawals, but then declined, averaging around 40% for the year as a whole.[130] More generally the crisis was characterized by severe deflation, a decline in domestic prices as a consequence of the peso overvaluation and the deterioration of the competitiveness of the economy.[131] The stock index of Buenos Aires lost more than 60% from 1998 to 2002.[132] More important than any of these economic indicators, the crisis lead to substantial social and personal hardship, including the youngest and most vulnerable members of the populations: the unemployment rate rose to above 20% in 2002; and per capita expenses fell off about 74%.[133] "The poverty level increased to 54.3% of the urban population of the country and the indigence level reached 24.7%. Between October 1998 and October 2002, the poverty level was doubled, whereas the

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128 See respectively *Lessons from the Crisis*, 1, and IMF, *Evaluation Report*, 8. Argentina's default on its $141 billion external default in late December 2001 was the largest sovereign default, *See* Scott, 575.

129 Cf. *Lessons from the Crisis,* 38. According to data supplied by Argentina (Argentina's Counter-Memorial, 63-65), not challenged by the Claimant, the GDP decrease was even worse, from US$300 billion in mid-98 to US$220 billion in the first quarter of 2002. Argentina observes further "[d]uring the first quarter of 2002 GDP fell 16,3% in relation to the same period of the previous year, which implies a fall worse than that suffered in the crack of the 30's in the United States" relying also on a statement by US Undersecretary of State for Latin American Affairs Otto Reich. (Argentina's Counter-Memorial, 64).

130 Cf. *Lessons from the Crisis*, 38, noting also that: "[r]eflecting the effects of the exchange rate depreciation on foreign-currency denominated debt, the issuance of debt to compensate banks for the asymmetric pesoization, and the accumulation of arrears, the public debt ratio more than doubled from 63% of GDP at the end of 2001 to about 135 % of GDP at end-2002."

131 Argentina points out that several economic observers had suggested, already in 1999 (Warburg Dillon Read and Paul Krugman), again in 2000 (Floyd Norris in the New York Times) and at the beginning of November 2001 (Paul Krugman, Michel Mussa, Argentina's Counter-Memorial p. 203) that in order to overcome this overvaluation and make Argentina's economy internationally competitive again, Argentina might have to abandon the fixed exchange rate and put an end to dollarization. According to Prof. S. Edwards Report filed by Claimant, however, by the year 2000, Argentina's terms of trade were back to their 1997 level, "The temporary decline between 1997 and 2000 was mild compared to other large Latin American countries (see Claimant's Reply, para. 38). According to the IMF, *Evaluation Report*, 66 , "a deeper and more systematic analysis of the conditions facing Argentina would have lead to the conclusion that, in 2000, Argentina fixed exchange rate could not be sustained for long."

132 Argentina's Counter-Memorial, para. 73.

133 Argentina's Counter-Memorial, para. 105.

indigence level increased 358%," most of the increase having taken place from May 2001 on.[134] Argentina also points out to other aspects of the social crisis due to the "impossibility of the State to provide the necessary conditions for harmonious development of society as set forth in the Argentine Constitution," due to the gradual deterioration of the State as regards fulfillment of security and health duties.[135] The political effects of this massive economic and social crisis, were "the political demonstrations, riots and looting in December 2001 which led to an abrupt end of De La Rúa's government" and the vacuum in the political power that followed his resignation.[136] Argentina has concluded from its recapitulation of those events that "the effective control of the government on the territory was seriously endangered, with presidents coming one after the other and riots causing tens [sic] of deaths throughout the country, which entails in turn that the existence of the Argentine Government[137] itself was at risk."[138] The Tribunal accepts this characterization of the gravity of the crisis confronting Argentina at this particular time.

b) The Deterioration of the financial and economic situation of Argentina in 2001 until Decree 1570 of December 1 (Corralito)

109. Having thus presented an overview of the developments of Argentina's economy from 1991 to 2001-2002 in general terms, we will here address more specifically the events of the year 2001-2002.[139]

134 Argentina's Counter-Memorial, para. 78-79 based on published labour market indicators.

135 Argentina's Counter-Memorial, para. 81 ff. Among other effects, medical services had to be interrupted to thousand of AIDS patients at the beginning of 2002; malnutrition especially in children increased and disease spread. A "sanitary emergency" until the end of 2002 was declared by Law 25590 on May 15, 2002. Two special social programs for the most needed were introduced in the course of 2002, the Plan for Unemployed Persons in charge of a Family (*Plan Jefas y Jefes de Hogar Desocupados*), and the Federal Food Emergency Program (*Programa de Emergencia Alimentaria Nacional*).

136 Argentina's Counter-Memorial, para. 132. A vivid personal account of this situation was given in the oral testimonies of Judge Belluscio (see para. 127) and of Mr. Eduardo A. Ratti who was Legal and Administrative Secretary of the Ministry of the Economy between the beginning of January and 6 May, 2002, in charge of the coordination of the Drafting Committee for the Emergency Law and of Decree 214/02 (see Transcript of the Hearing of November 30, 2006, at p. 809 ff).

137 In the original Spanish text: "la existencia misma del Estado Argentino."

138 Argentina's Counter-Memorial, para. 138.

139 This timeline is based on a chronological table of relevant events supplied by the Parties to the Tribunal prior to the hearing on the merits, pursuant to the Tribunal's request and to the Parties' documents referred therein; on Appendix II of *Lessons from the Crisis*, "Chronology of Key Developments in 2001-2002" (used as a source where no other indication is given), and on *Hornbeck*, (see Claimant's doc. C-189).

(i) The events and economic policy initiatives that punctuated the deterioration of the situation of Argentina

110. In March 2000 the IMF approved a Stand-By Arrangement with Argentina providing an amount equivalent to SDRs 5.4 billion. In its *First Review* and periodic consultation under Art. IV of the Fund's Articles of Agreement[140] released in December 2000, the IMF noted that the economy had slowed down again in 2000, that it continued to adjust to the external shocks it suffered in 1998-99 through domestic cost and price deflation, that competitiveness had improved, that there had been a further decline in nominal wages.[141] The Review underlined that the "fiscal program for 2000 was designed to comply with the Fiscal Responsibility Law approved by the Argentine Congress in September 1999, and aimed at reducing the deficit of the federal government… To this end, the authorities early in the year enacted a sizable tax package…, and budgeted a cut in non-interest expenditures equivalent to almost 1 percent of GDP[142]… The program envisaged a reduction of the overall public sector deficit (including the provinces)." The Review further mentioned that since the effects of the tax package had not materialized due to the sluggish recovery of the economy resulting in a growing shortfall in tax revenues, the authorities had announced in May [2000] "a sizable package of additional spending cuts including a 12-15 percent cut in salaries of civil servants earning more than Arg. $ 1,000 per month"… "The program also envisaged that the fiscal adjustment effort at the federal level would be complemented by improvements in the finance of the provinces, which are responsible for nearly half of total public sector expenditure."[143] The Review further noted "[p]rogress was made along a broad front in the structural reform area" pointing out to Labor Market Reform, Health Care, Tax Administration.[144]

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140 See IMF, *First Review* "[u]nder Art. IV of the IMF's Articles of Agreement, the IMF holds bilateral discussions with members, usually every year. A staff team visits the country, collects economic and financial information, and discusses with officials the country's economic development and policies," *ibid*, Annex to the *Rewiew* "Public Information Notice," footnote 1.

141 Ibid, 4-5.

142 See here original footnote 4: "It is difficult to make budget cuts without affecting the appropriation for socially important programs. During 1995-99, no less than ¾ of the federal public spending, net of interest payments and transfers to provinces was directed to broadly defined social programs including social security, health, education, and the social safety net."

143 Ibid, 8-9.

144 Ibid, 12-13.

111. Certain sentences are worth quoting from the "Public Information Notice" annexed to the IMF Report, reporting the conclusion of the IMF Executive Board of September 15, 2000:

> Executive Directors welcomed the authorities' strong ownership of, and demonstrated commitment to, their economic program, and the significant progress made so far in improving the fiscal position at both the federal and provincial level, despite cyclical adverse conditions, and in implementing structural reforms (…)
>
> While recognizing these concerns, Directors concurred with the authorities' view that, within the framework of the convertibility regime, the resumption of sustainable growth depended crucially on credible further progress in fiscal consolidation and structural reform. (…)
>
> Directors noted that the convertibility regime, together with a strong financial system, had served Argentina well in weathering the major external shocks that had affected it in recent years. They also noted the strong support of the population for the regime, its demonstrated success in anchoring inflation expectations, and the high degree of *de facto* dollarization in the economy…. Directors considered that, with an improved competitive position, both the current account and the public sector deficits on a declining path, and important structural reforms enacted or under way, the Argentine economy was now in a good underlying position to resume sustainable growth.[145]

112. In its *Second Review* of January 2001, the IMF staff noted that "the external environment worsened in the subsequent months, with external financing to emerging markets nearly drying up. This was compounded by domestic political uncertainties, which raised doubts about the political governability of the country.(…) The authorities have responded to these adverse developments by strengthening the growth orientation of their economic program, through measures aimed at promoting a recovery of investment, and an accelerated implementation of structural reforms…. "*In view of the staff, this*

145 Annex, 3-4.

strategy is appropriate, and deserves the increased financial support of the international community… A recovery of confidence hinges, in turn, not only on a relatively benign international environment, but perhaps more importantly, *on a demonstrated, unwavering commitment by the authorities to a rapid and full implementation of their announced policies.*"[146]

113. Based on the IMF staff recommendation, the IMF Executive Board approved on January 12, 2001 an augmentation of Argentina's Stand-By Arrangement to an equivalent of U.S.$14 billion, as part of a broader international support package of almost U.S.$40 billion.[147] "Financial markets initially responded positively to the revised program, but already by mid February it became evident that the fiscal deficit was about to exceed the agreed ceiling for the first quarter. Moreover, following the resignation of the finance minister, his successor was forced out of office in less than two weeks as his planned budgetary cuts and reform measures failed to find the necessary political backing. Doubts about the sustainability of the public debt dynamics and the currency board arrangement resurfaced quickly, evidenced by rising spreads and sizable deposit outflows."[148] Thus on March 28, 2001, Domingo Cavallo, the author of the Convertibility Plan of 1991, was appointed Minister of Economy and secured "emergency powers" from Congress. However, at the end of March 2001 risk-rating agencies lowered Argentina's long-term sovereign rating.[149] On April 26, 2001, the President of the Central Bank was replaced after a clash with the Minister.[150] On May 1, 2001 Minister Cavallo publicly reaffirmed that he would stick to convertibility.[151]

146 IMF, *Second Review*, 27-28.

147 "The proposed mix of resources exceeds the normal 300 per cent of the quota limit of financing under the credit tranches, and reflects the more protracted nature of Argentina's financing problem" *Ibid*, 26. "About $3 billion of IMF support was made available immediately and three additional tranches of about $1.3 billion were planned to be released during the remainder of 2001 in the context of subsequent reviews. The program sought to bolster the prospects for economic growth through gradual fiscal consolidation (…) and various structural measures," through among other things, elimination of tax disincentives, continued implementation of already approved labour market reforms and deregulation of key sectors, See *Lessons from the Crisis,* 35. The IMF support of January 2001 became known as the "blindaje," that is the "armour plating" of the peso against runs on the peso aimed at the devaluation or destabilization of Argentina's currency.

148 *Lessons from the Crisis*, 35.

149 S&P from BB to B+ and Moody's from B1 to B2, *ibid*, 48.

150 See *Blustein*, 123.

151 Continental has referred to this public statement as having been an element for CNA's decision not to transfer liquid funds out of Argentina. In April, Minister Cavallo had sent to Congress a bill proposing to include the euro in addition to the US dollar in the Convertibility Law.

114. On May 21, 2001, the IMF completed its planned *Third Review* of Argentina's Stand-By Arrangement, at a point when the Fund had an outstanding credit of nearly SDR 5.8 billion and another SDR 6.8 billion scheduled purchase under the arrangement in place, making Argentina the third largest debtor to the IMF.[152] The Review contained both favorable and critical evaluations. The IMF underlined "the favorable developments that followed the agreement on the program and financing package in January" which were however interrupted in early March by a new crisis. The principal catalyst was evidence of a major deterioration in the fiscal performance, but internal political disagreements and increased uncertainty in international markets were contributing factors.[153] Amongst the negative developments, the Report mentioned the increase of the spread on Argentine bonds, the decline in economic activity and the significance of the deterioration in the federal government finances.[154] Positive developments mentioned included the fact that the provincial government deficit for 2000 was slightly lower than expected, and the improvement of the trade balance in 2000 and in the first quarter of 2001. The Review highlighted the revised economic program of Minister Cavallo, praised the fact that "[t]he government re-affirmed its commitment to the fiscal targets of the economic program for 2001;" noted the introduction in April 2001 of a financial transaction tax "[t]o correct for the prospective large deviation and bring the fiscal program back on track."[155] The Review estimated that the new fiscal package has started to show results, and that the new fiscal measures under the Fiscal Responsibility Law "will contribute substantially to strengthen fiscal performance in 2002," also in view of the fact that the authorities attach great importance to improving the province's finance and "are continuing to work with provincial governments to secure a sustained adjustment of their fiscal position, as contemplated in the federal fiscal pact signed last November."[156]

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152 IMF, *Third Review*, 20.

153 IMF, *Third Review*, 3. "Two thirds of the deviation resulted from a revenue shortfall, in turn explained about evenly by weaker than expected economic activity and a deterioration in tax compliance," *ibid*, 5.

154 The tables included in the IMF, *Third Review*, at 9, showed the substantive decrease of peso bank deposits, especially after January 2001 against the continuous increase of US dollar denominated deposits from the beginning of 2000 to January 2001, followed by a modest decrease thereafter.

155 *Ibid*, 12.

156 *Ibid*, 15-16. The Review mentions that in December 2000, "with technical support of the Fund, a strategy was laid out to strengthen tax collection," and the reform of the pension and health insurance systems that had been hampered by judicial challenges.

115. The Review also praised the initiatives taken by the Argentinean Government within the Competitiveness Law. The IMF Staff's concluding appraisal was that "[t]he government has responded to this latest crisis with an effort commensurate with the gravity of the situation" and regarded "this strategy – consistent with the objectives of the program supported by the Stand-By Arrangement."[157] The News Brief of May 21, 2001 announcing the positive completion of the Fund's Third Argentina Review ended with the following paragraph: "'[i]n adopting the new measures, the Argentine authorities have responded promptly and effectively in difficult circumstances. The strengthened program deserves the strong support of the international community" Köhler said.[158]

116. At the beginning of June 2001 Argentina's authorities announced the completion of the "mega-swap" entailing the voluntary exchange of external Governmental bonds of a face value of U.S.$29.5 million for longer-term instruments.[159] In July 2001, Minister Cavallo announced a drastic program of fiscal adjustment (zero-deficit plan), which was promptly approved by Congress. "But by the time the law was approved by Congress at the end of July, spreads between the peso and U.S. dollar-denominated interest rates had reached 1,500-2,000 basis points,"[160] while the Government was paying a yield of 14.1% to place U.S.$827 million of 90-day paper.[161] Risk agencies further lowered Argentina's debt rate. A likely U.S.$8 billion increase of the Stand-By was announced by the IMF in

157 Specifically praised at p. 21 are the authorities' initiatives "to put in place a package of significant revenue and expenditure measures to bring the public finance back to a path consistent with the program targets" and the fact that they "have introduced a number of tax incentives and regulatory changes aimed at promoting a recovery of investment and sustainable output growth." It is perhaps striking that *ex post facto* the IMF, *Evaluation Report*, at 5, criticizes "the weak implementation of the program in early 2001 and the adoption – without consultation with the Fund – of a series of controversial and market-shaking measures by the authorities after March 2001."

158 Horst Köhler, currently President of the Federal Republic of Germany, was at the time the Director General of the IMF. In retrospect, the IMF Study *Lessons from the Crisis,* Appendix II, dismisses the *Third Review* as "reprofiling the path for the federal government deficit target during 2001 to accommodate the deviations observed during the first quarter."

159 Despite the high turnover of bondholders who participated, the "mega-swap" did not reassure the market and was criticized, especially *ex post facto*, for not having helped Argentina to improve its ability to service its debt, while having burdened it with the costs of such an operation, see *Blustein*, 125 ff; *Lessons from the Crisis*, 36. Also in June 2001 a package of tax and trade measures, including a trade compensation mechanism for exporters and importers of non-energy goods was announced by Minister Cavallo. "This was part of 'a number of measures aimed at improving competitiveness, with little effect other than to erode confidence and widen spread further'," *Lessons from Crisis*, 35.

160 Cf. *Lessons from the Crisis*, 36. However, according to a paper of March 25, 2002 by M. Mussa of the Institute for International Economics (and former high official of the IMF), *Argentina and the Fund: From Triumph to Tragedy*, 29 (Claimant's doc. C-153) "With the Argentine economy already in deep recession and spiralling downwards under the pressure of crushingly high interest rates, the massive additional fiscal tightening needed to achieve a zero deficit was neither politically acceptable nor economically sensible. By the summer of 2001, the Argentine government was clearly trapped with no viable avenue of escape."

161 This corresponds to a spread of about 1,000 basis point (or 10%) in respect of the U.S. dollar, see *Lessons from the Crisis*, 36, while the even greater spread between the peso rate and the U.S. dollar rate, notwithstanding convertibility, evidenced the perceived country risk for Argentina, *Blustein*, 136.

August and approved on September 7, 2001, augmenting the total to U.S.$21.6 billion, while the IMF positively completed its *Fourth Review*, which entailed a commitment to disburse further funds in November 2001.

117. As mentioned above, from the end of 2000 and in the course of 2001, Argentina passed several laws aimed at adopting the structural reforms that the IMF had asked Argentina to undertake in accordance with the Stand-By conditions. These related to budgetary discipline against the deficit,[162] increases in taxation, fiscal discipline (including the provinces), labor market flexibility (i.e. reducing employees' protection under labor legislation in place), reforming social security and controlling the pensions' costs, increasing the competitiveness of enterprises and helping exporters. Many of these provisions were not or could not be carried out effectively, or did not yield the expected results. Thus tax revenues continued to fall, due also to the economic crisis, while the promised reform of the central governments revenue-sharing agreement with the provinces was not concluded.[163] The planed labor market reform which entailed addressing labor market rigidities through "the adjustment of real wages"[164] was not completed; on the other hand widespread strikes had taken place specifically to protest against harsh spending cuts. Many of these reforms, recommended by the Fund consistent with a market-oriented approach to the structural changes deemed appropriate for a country like Argentina, met with widespread social opposition, to the point that some reforms were blocked by the courts.[165] The domestic economy of Argentina - which was in a state of recession since early 2000 - and hence the population of Argentina, had to

162 On July 29, the Congress passed the "Zero Deficit Law" requiring a balanced budget by the forth quarter of 2001; see *Hornbeck*, 3 (Claimant's doc. C-189).

163 However under the zero-deficit law Minister Cavallo had cut federal payments to the provinces, leaving them without funds to make necessary payments and leading some of them to issue their own currency, the patacon, "a disturbing sign of economic anarchism," *Blustein*, 161. After the crisis, as to the IMF policies towards Argentina, *Lessons from the Crisis,* 39, comments that "[t]he most glaring omission was in the fiscal area, where the IMF condoned repeated slippages of debt and deficit targets." Other commentators point out however that the Average Public Revenue – GDP Ratios for Argentina in 1990-2002 (a little more than 20%), although lower than the ratio for industrialized countries, was higher than Brazil's, IMF, *World Economic Outlook*, September 2003.

164 This is the terminology used by *Lessons from the Crisis*, 32, hinting at wage reduction. In any case, the zero-deficit plan entailed cuts in governmental salaries and pensions of up to 13%.

165 See the successful judicial challenges to the reforms of the pension and health insurance system mentioned in the IMF *Third Review*, 17.

bear the increasingly heavy burden of adjustment to the maintenance of the exchange rate and convertibility.[166]

118. In fact, throughout this period, the Government of Argentina showed and declared a staunch commitment to maintaining the convertibility regime in all its features (as was expected by the international financial community). This was a fundamental element of the policy of stability pursued by the IMF in agreement with Argentina.[167]

119. As decided and announced in August 2001, "[d]espite concerns about the lack of political support for the measures that would be needed to achieve the zero-deficit target, the IMF agreed in early September of 2001 to support the new program," increasing the support by U.S.$8 billion, disbursing U.S.$5 billion immediately (pledging another U.S.$3 billion in support of prospective debt restructuring).[168]

120. It was in this context that Argentina's Congress passed the "Intangibility Law," promulgated on September 24, 2001, providing, as described concisely by the Claimant, that "the government would not alter terms of deposits in the banking system." In emphatic terms, the law proclaimed in Art. 1 that all deposits in pesos or in foreign currency were considered "intangible," that is, the State was prohibited, in all cases, from changing the terms agreed between the depositors and the financial institution, exchange them with public debt instruments or other public assets, extend their terms, modify the agreed interest rate, change the currency of the debt. Art. 3 declared the law to be "of

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166 See P. Krugman, Editorial, *Reckonings; A Cross of Dollars*, New York Times, November 7, 2001: "[u]nfortunately, that old-time economic religion, with its narrow-minded insistence on monetary rectitude at the expense of every other consideration … more than anything else, is responsible for Argentina's looming catastrophe … But austerity has not brought recovery. On the contrary it has worsened the recession, increased social tension and further reduced confidence. The natural answer is to remove the straitjacket: let the peso float…" (Argentina's doc. RA-54). See also Mussa, 49, "it is my view that the Argentine's government basic decision to combine efforts at macroeconomic stabilization with market-oriented reforms that reversed decades of interventionist policies and protectionism was the right policy approach … and the spectacular collapse in 2001 is due to the failure of implementing this strategy sufficiently vigorously … Others, however, may be inclined to the view that the policies of the so-called Washington Consensus are fundamentally wrong and were doomed from the start to produce a disaster in Argentina."

167 The IMF *Evaluation Report*, 21, notes: "repeated public statements by the IMF supportive of Argentina's convertibility regime." *Blustein*, 136, considers that it was thanks to the official visit by U.S. Undersecretary Taylor to Buenos Aires on 3, August 2001, when he visited Argentina's President at Casa Rosada, that "[t]he stage was being set for another IMF rescue that would attempt to preserve convertibility and keep Argentina from violating its obligations to creditors."

168 See IMF *Evaluation Report*, 9. According to Mussa, 30, "[n]ot only was the procedure unusual, the outcome – a Fund disbursement of over $ 6 billion … with a pledge of $3 billion more to support an unspecified debt restructuring – was extraordinary both in its size and in the lack of reasonable justification."

public order;" the private rights covered by its Art. 1 "shall be considered acquired rights and protected under Art. 17 of the Nation's Constitution."[169]

121. In the mid-term congressional elections held on October14, 2001 the ruling coalition obtained less than 25% of the votes; and the opposition Peronist party won control of both Chambers. In the same month the rating agencies downgraded Argentina's debt twice. On October 28, 2001, Minister Cavallo announced that he would seek voluntary restructuring of all government debt, which was in part carried out throughout November 2001.[170]

122. Withdrawal of deposits from the banks developed however at a growing pace and capital flight increased.[171] While there had been a sustained inflow of foreign direct investment into Argentina in the years from 1997 to 2000, with a peak in 1999, the flow almost halted in 2001.[172] The fall in official reserves continued downwards to a level barely enough to cover domestic currency in circulation.[173] In the meantime the dollarization of the economy amplified even more,[174] since the public sought refuge in dollar denominated deposits, savings and financial assets. The spread between "on-shore dollar" and peso interest rate, which was no more than 1½ to 2 percentage points on

169 See Law 25.466 "*Intangibilidad de los Depositos*." It is interesting to note that this legal enactment, on which the Claimant relies and which was put at as the basis of Argentina's Supreme Court decisions of 2002 and 2003 (holding the *Corralito* and the *Corralon* as unconstitutional encroachments on private property, see footnote 410 hereunder) is nowhere mentioned in the economic literature as having had any relevance or impact within the management of the economic crisis. Nor is there any mention that the confidence of the public had been thereby reinforced. The continuing flight of capital out of Argentina would rather point to the contrary.

170 This was carried out by Decree 1387 of November 1, which among various measures to stimulate economic activity and employment and to reduce the cost of the public debt, provided (at Art. 17 ff.) for the voluntary conversion (swap) of instruments of public debt (bonds) for Guaranteed Loans (GGL) and/or Guaranteed Bonds (in which Continental participated). At the end of November 2001, the authorities announced the completion of domestic debt swaps involving $41 millions (face value) of government bonds and $10 billions at the provincial level.

171 Already in July 2001, US$5 billion, or 7% of the total deposits had flown out from the banks, *Blustein*, 136.

172 U.S. $ mil 23988 in 1999, 10418 in 2000, 2166 in 2001 (Claimant's doc. C-392).

173 *Mussa*, 34. Already at the time of the visit to Argentina of U.S. Undersecretary of the Treasury for international affairs to Buenos Aires on August 3, 2001, "reserves totalled $20.4 billion, down from $28.8 billion at the beginning of July. At that rate of decline, convertibility was facing a serious threat, because the system required an ample cushion of reserves to cover the supply of pesos ," *Blustein*, 136. "On November 16, following a steady decline that gained momentum in late October, the reserves dropped at $18.44 billion, almost exactly the same level as immediately before the IMF replenished the central banks reserves with a disbursement of nearly $5 billion in early September … the inescapable conclusion is that most of the depletion could be attributed to the steadily increasing demand for dollars in October and November by people and firms exchanging pesos for greenbacks, many of whom were shipping the money abroad." *Ibid*, 171.

174 The degree of dollarization (percentage in dollars of the total banks deposits) went up from 64.3% to 73.6% between the end of 2000 and the end of 2001: see data on percentage of Argentine pesos in U.S. dollars, taken from Eduardo Levy Yeyati, *Financial Dollarization: Evaluating the Consequences* (2006) (Claimant's doc. C-382).

average prior to 2001 jumped to 40 points in the first part of 2001 while the sovereign debt spread skyrocketed.[175]

123. The general economic situation deteriorated notwithstanding the IMF's assistance: actual GDP declined 4.5% in 2001 while the IMF program had forecasted an increase;[176] unemployment rate grew at 18.3%. By the end of 2001 "both the economy and the public finances were in deep crisis."[177] The GDP would have dropped 4.5%; the primary and overall fiscal position ended up 3% weaker than anticipated in September; the debt-to-GDP ratio rose above 60%.[178]

124. On November 6, 2001, S&P lowered Argentina's long-term sovereign debt from CC to SD (Selective Default), thereby implying that the Government was already not in the condition to meet some of its financial obligations.[179] A growing number of commentators outside Argentina, notably in the international financial press,[180] hinted at the impossibility for Argentina to maintain the convertibility regime. At the end of this month the peso started to devalue in the free market of Montevideo. Facing a substantial run on deposits,[181] on December 1, 2001 the Government enacted Decree 1570 (*Corralito*), freezing deposits in the banking system (only pesos 250 withdrawals per week were admitted) and prohibiting transfers out of the country.

125. This was the first of a series of Measures that Argentina took while the crisis was developing, culminating in the devaluation of the peso, the pesification of dollar-denominated assets in Argentina and the default on public debt and its rescheduling, all of which impacted adversely on the Claimant's assets, and which it has challenged as being in breach of the BIT (with the exclusion of the devaluation *per se*).

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175 *See Lessons from the Crisis*, table at 25.

176 See *Lessons from the Crisis*, table at 27.

177 See *Lessons from the Crisis*, 37.

178 See *Lessons from the Crisis*, 36-37.

179 See *Hornbeck*, "November 6: Argentina conducts a second debt swap, exchanging $60 billion of bonds with an average interest rate of 11-12% for extended maturity notes carrying only 7% interest rate. International bond rating agencies considered it an effective default." This is the restructuring in which CNA participated exchanging its bonds for GGL.

180 See for instance *Krugman*, quoted at footnote 166.

181 On November 30 "A run on the banks begins, with central bank reserves falling by $2 billion in one day," *Hornbeck,* CRS-4. According to *Lessons from the Crisis*, 36, "[t]he crisis broke with a run of private sectors deposits, which fell by more than $3.6 million (6 per cent of the deposit base) during November 28-30."

126. The *Corralito* brought about immediate and severe hardship in the general population which relied largely on cash for every day transactions, as is the practice in Argentina's economy. The crisis worsened also in the social and political dimension. On December 13, 2001, the Government announced that the unemployment rate had reached a record level of 18%; trade unions called for nationwide strikes. Supermarket looting began in various locations; and rioting spread to major cities. The Government declared a state of siege; and Minister Cavallo resigned. Finally, on December 20, 2001 President de La Rúa "resigns in the wake of continuous rioting, leaving 28 people dead."[182]

127. It is worth here recording the personal accounts of Judge Augusto Belluscio who lived through this turbulent period of Argentina's crisis and appeared as a witness before the Tribunal. Judge Belluscio was and remains one of the most distinguished and respected jurists in Argentina. He was an impressive expert witness at the hearing. As a law professor, he was first appointed a judge in 1965 and served on the Supreme Court of Argentina from 1983 until his retirement in 2005. In early January 2002, Judge Belluscio was on leave; but he was called back to the Supreme Court for urgent judicial meetings in litigation associated with the crisis. It is best to give his account in his own words, as recorded in the hearing's transcript in English translation:

> In the middle of the meeting I received a phone call from the city of Cordoba, where my in-laws lived, to inform me that a horde or a mob had attacked my in-laws' home thinking that I was there. There were shouts, "The judge should come out, the judge should come out," so my father-in-law went out to see what was happening, and they thought I was him [i.e. Judge Belluscio], and they began to throw pieces of stone which didn't hit him, but which did do harm to the facade of the house. He was with - one of his sons was with him, one of my brothers-in-law. My brother-in-law went out. He tried a dialogue with the mob and get them to see that it wasn't the judge who was in the house because evidently they wanted to

182 See *Hornbeck*, CRS-4.

> attack me, and the response was that he was attacked, he was beaten, and he suffered a fracture in one finger. Well, this obviously upset me a great deal [...].[183]

128. It requires very little imagination to see that if Judge Belluscio had in fact been present at the family home, this incident could have produced much more serious consequences for one of Argentina's most senior judicial figures.

(ii) The actions undertaken by CNA / Continental as to its investments in 2001

129. Continental and CNA did not stand idle while the crisis unrolled and the likelihood of some kind of exchange and financial restriction increased in the course of 2001. Before addressing the steps undertaken by CNA and Continental, it is useful to describe the activity carried out by CNA and the nature of its investments and other funds that it intended to protect against the associated risks.

130. As explained by the Claimant,[184] CNA ART, like other insurance companies, maintains a portfolio of invested securities in order to earn a return on its capital, reserves and other funds. CNA has a history of making conservative investments, so that its "portfolio consists mainly of low-risk assets, such as cash deposits, treasury bills and government bonds." These investments derive from its business activity, its capital, reserves and undistributed profits. The proceeds of its insurance business drive from the underwriting of its policies; the clients of CNA are business companies that satisfy their statutory and contractual obligations to cover their employees against worker's risks. CNA's insurance operations are regulated by two Argentine state agencies: the Superintendent of Insurance (SSN), which regulates the financial aspects of the business, while the handling of workers' compensation claims and services (such as medical treatment, etc.) is regulated by the Superintendent of Workers Compensation of the Ministry of Labor (SRT). More specifically, SSN lays down criteria for insurance companies such as CNA concerning the ratio of reserves they have to hold and the types of investment they may make.

183 See Transcript of the Hearing of December 1, 2006, p. 1082.

184 Claimant's Memorial, para.15 ff.

131. The business of CNA was successful. As explained by Claimant, its premiums "have consistently been among the highest in the market. CNA ART also maintained the highest reserves and investments per insured worker in the market."[185] Furthermore, "[p]rior to March 2001, CNA ART's investment portfolio was primarily in assets denominated in Argentinean pesos. At the time, pesos were fully convertible to U.S. dollars at a one to one exchange rate. However, CNA ART's management was concerned about the risk of devaluation. As a result, CNA ART's senior management prepared an analysis of the options available to CNA ART to hedge the risk of devaluation. These options consisted of:

i) maintaining the portfolio in peso denominated assets, which were earning a much higher return than comparable dollar denominated assets;

ii) transferring all of CNA ART's assets in excess of minimum capital requirements out of Argentina to be held by CNA; and

iii) moving CNA ART's investment portfolio to lower return U.S. dollar assets with greater credit worthiness."[186]

132. As to the option of moving capital out of Argentina, "CNA ART's management made a recommendation to its American controlling shareholder that it should not transfer assets out of Argentina at that time, but that it should choose to invest assets within Argentina in low risk U.S. dollar denominated assets."[187] CNA management accepted this recommendation so that its investment agent CADISA (*Citicorp Administradora de Inversiones S.A.*) "was then instructed to liquidate peso denominated cash deposits, treasury bills and bonds as they matured and to reinvest the proceeds in U.S. dollar denominated assets."[188] Thus, "CNA ART's policy of shifting its portfolio to U.S. dollar denominated assets involved a deliberate choice to forego the higher yields of

185 Claimant's Post-Hearing Brief, para. 16, footnote 33.

186 Claimant's Memorial, paras. 19-20.

187 Claimant's Memorial, para. 21.

188 Claimant's Memorial, para. 22. The Claimant explains further that, in addition, CADISA was instructed to move cash deposits out of Argentinian owned banks and into either the local subsidiaries of international banks or, preferably, into full branches of international banks. These steps were meant to improve the credit worthiness of its investment portfolio and to protect it from currency risk and credit risk. Cash deposits at full branch banks earned a lower return than at other banks but there was little credit risk associated with them (Claimant's Memorial, paras. 22-24).

peso-denominated assets in favor of the greater capital security of U.S. dollar assets." [189] As against capital flight, this was of course a socially responsible policy by Continental and CNA.

133. As already mentioned, on November 1, 2001, through Decree 1387, Argentina announced an offer to restructure part of its debt by, amongst other things, offering certain bondholders the opportunity to exchange their bonds for Government Guaranteed Loans or "GGLs" (*prestamos garantizados*).[190]

134. As explained by the Claimant,[191] "[a]lthough the GGLs had longer maturities and lower interest rates than the Argentine government bonds held by CNA ART, there were a number of advantages associated with entering into a "swap" whereby bonds would be exchanged for GGLs. These advantages included the following:

i) the GGLs had lower credit risk as they were secured by revenue from a specific federal tax on financial transactions that was not shared with Argentina's provincial governments;

ii) in the event of default by Argentina, unpaid tax obligations could be set off against amounts owing by Argentina for its failure to pay capital and interest on the loans;

iii) in the event of default by Argentina, GGL holders could re-swap their GGLs for the original bonds exchanged in the swap;

iv) the face value of the GGLs could be used to satisfy minimum capital requirements whereas only the market value could be considered for other securities. This feature would allow CNA ART to liquidate its other securities and use the proceeds elsewhere; and

189 Claimant's Memorial, para. 24.

190 For details see *Lessons from the Crisis*, 36.

191 Claimant's Memorial, para. 26 ff.

v) Argentina provided various tax incentives including the ability to write off losses associated with the original bonds, exempting any capital gains from taxes and exempting interest payments on the GGLs from taxes."[192]

135. CNA decided to take advantage of this offer. "On November 29, 2001, CNA instructed CADISA to effect the swap of the following Argentine government bonds for GGLs:

Bond	**Face Value (U.S.$)**	**Guaranteed Loan**
Global 2017	6,240,000	Tasa Fija GLI7
Bonte 2	6,317,000	Tasa Fija Bonte 02
Bonte 3	7,900,000	Tasa Fija Bonte 03
FRB	11,368,000	Tasa Variable FRB

The GGLs were denominated in U.S. dollars and their governing law was Argentinean law. This debt swap allowed CNA ART to maintain its portfolio in the same U.S. currency while increasing its legal security.[193] By early December 2001, CADISA had largely completed the re-balancing of CNA ART investment portfolio. The investment portfolio at that time included the following assets denominated in U.S. dollars:

i) Argentine Government Guaranteed Loans contracts totaling U.S.$17, 295, 320 at market value. CNA ART held four contracts as follows:[194]

Guaranteed Loan Contract (GGL)	Market Value
GGL Tasa Fija Global 2017	2,966,080

192 This was provided by Decree 1646 of December 12, 2001 (see particualrly Annex II "*Contrato de prestamo garantizado*" Claimant's doc. C-19. Witness Statement of Cristian Samitier at para. 22).

193 See Claimant's Memorial, paras. 27-28.

194 GGL official name in Spanish is "*Prestamos Garantizados del Gobierno*." These GGLs carried an interest rate of approximately 7%, (see Claimant Post-Hearing Brief, 33).

GGL Tasa Fija Bonte 02	4,417,294
GGL Tasa Fija Bonte 03	4,385,322
GGL Tasa Variable FRB	5,526,624

ii) Argentine Government Treasury Bills (LETEs) totaling U.S.$2,805,000 at market value. LETEs had much shorter maturities than the GGL contracts.[195]

iii) Term Deposits ("CDs") totaling U.S.$ 63,510,278: these deposits were held at a range of full branch international banks and subsidiaries of international banks; and

iv) A U.S. dollar cash account at Citibank also used for operational purposes."

136. The Claimant points out that it thus held a "conservative portfolio of investments," 92% of which was expressed in U.S. dollar-denominated assets. [196]

c) *The Measures adopted by Argentina during the crisis, specifically those challenged by the Claimant*

137. In view of the distinct nature and effect of the various Measures, as well as their separate impact on the assets of CNA, the different allegations of breach of the BIT that the Claimant raises in respect of each of them and the defense of necessity raised by Argentina, it is useful for the subsequent legal analysis to distinguish the Measures according to their nature, features and effects. To that end, it is necessary to distinguish between:

i) Measures that blocked deposits (temporary bank freeze), severely curtailing the right to withdraw money (namely Decree 1570 of December 1, 2001, *Corralito*);

ii) Measures that prohibited the transfer of funds abroad and their exchange in freely convertible and transferable currencies (same Decree 1570);

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195 More specifically CNA bought the first LETEs (Letra del Tesoro 90 Vto 15/03/02, that is Treasury Bills 90 due March 15, 2002) on September 25, 2001 and the second one on October 18, 2001 see Claimant's Memorial, para. 45. LETEs had been issued under Resolution 4/5 of January 2001.

196 Claimant's Post-Hearing Brief, para. 33. In contrast 21% of CNA's portfolio was in dollars in July 2001 (see Claimant's doc. C-24).

iii) Measures that terminated the peso convertibility and its pegging to the U.S. dollar at the fixed exchange rate 1:1 (Emergency Law 25,561 of January 6, 2002 and Decree 260/02);

iv) Measures that rescheduled term deposits and reduced interest rates (Resolution 6 of January 9, "*Corralon*");

v) Pesification (that is forced conversion) of outstanding dollar-denominated contracts and private or governmental debt, at a rate of 1.40 peso for each nominal U.S. dollar as to the latter and financial deposits, while in all other cases conversion occurred at par (Decree 214 of February 3, Decree 471 of March 8, Decree 644 of April 18, 2002);

vi) Default on and unilateral rescheduling of governmental debt, made official by Res. 73 of April 25, 2002.

138. Decree 1570 of December 1, 2001 (*Corralito*), limited by Art. 2(a) cash withdrawals from bank accounts to pesos 250 or U.S.$250 a week. The Decree, which was declared to be "of public order," also prohibited by Art. 2(b) any transfers of funds out of Argentina with the exception of certain current transactions.[197] The Decree was presented as a short term "emergency measure" until the conversion of the public debt under Decree 1387 would be completed, both in order to avoid any instability in the level of deposits in the financial system "that could imperil its intangibility recognized by Law 25,466" (the Intangibility Law), and to react to "the fall in the total level of bank deposits that has manifested itself since February of the current year." In fact, the blocking was still in force when devaluation and pesification intervened.

139. Transactions between banks were not prevented by the *Corralito*. Moreover, the Central Bank was empowered to issue general and specific derogations; and several were in fact issued both as to cash withdrawals and foreign exchange transactions. A number

197 The Central Bank (BCRA) was empowered to authorize certain other transactions with the exterior and did so in the following months. From September 2002 onwards, exports of funds under certain ceilings have been gradually admitted (Claimant's Memorial, para. 34).

of derogations concerned commercial transactions, including transfers for insurance companies, in order to allow the carrying on of normal business transactions.[198]

140. The aim of the *Corralito* was to prevent further withdrawals from banks and thus to preserve the stability of the banking system. It was also meant to avoid further runs on the foreign exchange reserves of the Central Bank. This did not prevent Argentina - which had become unable to access international credit markets, especially after the withdrawal of the IMF's support – from announcing on December 7, 2001 that it could not guarantee payment of foreign debt, thereby evidencing Argentina's *de facto* default.[199] While the pesos were *de facto* inconvertible and were devaluated on exchange markets outside Argentina, the Ministry of the Economy announced the suspension of all payments on the external debt on December 24, 2001.[200]

141. After the resignation of President De La Rúa on December 20, 2001 and the unsuccessful appointment by Congress of three successive presidents between December 20 and December 30, Senator E. Duhalde was elected President by the Congress to complete the presidential term, and assumed formal power on January 1, 2002. On January 6, 2002, "Public Emergency and Reform of the Exchange Regime" Law 25.561 was enacted. The law proclaimed a public emergency in conformity with Art. 76 of the National Constitution "with respect to social, economic, administrative, financial and exchange matters," terminated the peso convertibility system and granted extensive extraordinary powers in the above matters to the Government. [201] The application of the Intangibility Law 25,466 was expressly suspended. Articles 617, 619 and 623 of the Civil Code on monetary obligations were expressly maintained in the text of the Convertibility Law but "with the exceptions and objectives established in the present law." Art. 19 of

198 See Argentina's doc. RA-117 (see also footnote 223 and 305). Based on the "*Corralon*," by Res. 28, 580 of February 11, 2002 the Superintendent of Insurance (SSN) authorized insurance companies in the workmen's compensation sector to withdraw up to one million pesos monthly from their cash deposits for use in their business operations. (Claimant's Memorial, para. 41, Claimant's doc. C-26). As to derogations from the prohibition of transfers abroad, contrary to Argentina's position, the Claimant considers that the evidence "demonstrate that the Central Bank did not authorize transfers of any kind between December 1, 2001 and the end of January 2002," while thereafter authorizations "were limited to transfers related to foreign trade or other irrelevant categories," Post-Hearing Reply, para. 33.

199 See *Hornbeck*, 4.

200 Comunicado de Prensa (*see* Argentina's doc. RA 119).

201Those powers were granted until December 10, 2003 but the Law and the emergency regime has been extended several times, last time on December 10, 2007.

the Law stated: "[t]he present law is of public order. Nobody can invoke against it irrevocably acquired rights. Any contrary provision to its content is hereby derogated."

142. The convertibility regime was initially replaced by a dual exchange system based on an official exchange rate of 1.4 pesos per dollar for public sector and most trade-related transactions; all other transactions would take place at prevailing market rates. Effective February 11, 2002, the dual system was abolished (Decree 260/02). When the market opened for the first time under a unified regime on February 11, 2002, the exchange rate depreciated to 1.8 peso per dollar. The peak devaluation was reached on June 25, 2002 (almost 4 pesos to a dollar). Later, the exchange rate stabilized around three pesos for one U.S. dollar.[202]

143. Three days after the enactment of the Emergency Law,[203] Resolution 6 of January 9, 2002 ("*Corralon*") affected all demand term deposits within the banking system, both in pesos and dollars, rescheduling maturity dates and reducing interest rates. [204] CNA's term deposits with various banks were subject to this Measure.

144. On February 3, 2002, Decree 214 provided that "all obligations to pay money expressed in dollars are hereby converted into pesos at one to one" (i.e. compulsory pesification). However, whilst this applied to contracts between private persons and to debts owed to financial institutions, dollar deposits within the banking system were converted at the rate of 1.40 peso for each dollar (i.e. "asymmetric" pesification), plus the granting of an indexation to compensate for future inflation ("CER").[205] This concerned also CNA's cash deposits with its banks. The Government intervened massively to

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202 See *Lessons from the Crisis*, 38. See the Table of exchange rates (Claimant's doc. C-52).

203 Based on Art. 9 of the Emergency Law, the Government issued on January 24, 2002 a Decree freezing utility tariffs, a Measure which is at issue in several ICSID arbitrations brought against Argentina under various BITs.

204 According to the Claimant "[p]ursuant to Resolution 6, the maturities of CNA's deposits would be extended to September 23, 2003 and thereafter be paid out in 24 monthly instalments. In addition, the rescheduling also eliminated the interest rates on the deposits and imposed an annual interest rate of 2% to be paid monthly," (see Claimant's Memorial, par. 36). This "freezing" was eventually lifted in part starting from 2003. As to the authorization to insurance companies to use their liquid funds for business operations, see footnote 198 above.

205 According to *Lessons from the Crisis*, 38, "[t]he measure was intended to protect firms and households with foreign-currency-denominated debt, but it merely shifted the burden of the devaluation to the banking system – and ultimately to the taxpayer as banks would need to be issued compensation bonds." See also Mussa, 36: "[t]he exchange rate for the conversion of dollar-denominated bank deposits, however, set a significantly higher value for such deposits than the market exchange rate applied for the conversion of dollar-denominated bank loans – implying huge capital losses and deep insolvency for Argentine banks."

support the banks in the asymmetric pesification. This scheme would have brought the banks otherwise to bankruptcy, since they had to "pay back" to depositors 1.40 pesos for each dollar, while their credits were converted at 1:1. [206]

145. On March 8, 2002, Decree 471 converted also all U.S.-dollar denominated government debt, "the law applicable to which is only Argentine law," into pesos (pesification) at the above-mentioned rate of 1 U.S. dollar to 1.4 pesos. The U.S. dollar denominated LETEs and GGLs held by CNA were thereby converted into pesos. The pesified instruments were to be indexed at the CER rate and would earn a reduced interest.[207] One effect of this pesification at 1:1.40 on financial holdings was that, since the peso value of these holdings had increased by 40%, the balance sheet of CNA showed a capital gain, as was the case of all companies in the same situation. Continental complains that, although "the value of assets which had been converted was actually less in real U.S. dollars terms," this capital gain was taxed at the statutory rate. [208]

146. Decree 644 of April 18, 2002 requested the holders of GGLs to accept their conversion in pesos and a reduction in their original security in order to receive payment.[209] Holders that did not accept these conditions would receive back the bonds they had handed in for the swap.[210] These bonds, being in default, CNA did not accept

206 The Government issued bonds to banks amounting to about 9 billion pesos, contributing to the increase in public debt from 63% of GDP at end-2001 to about 135% at end-2002, *Lessons from the Crisis,* 38. According to *Blustein*, 192, the 1.40 rate was the result of an understanding between the Government and Argentina's business sectors, striking a balance between the latter's interests and the expectations of depositors, "in order to appease savers."

207 See Claimant's Memorial, para. 44. The Claimant points out that "Argentina failed to pay even these reduced amounts when the LETE became due … The LETEs matured on March 15, 2002, but CNA ART did not receive payment on that day. The default on these LETEs continues on this day" (Claimant's Memorial, para. 45).

208 See Claimant's Memorial, paras. 42-43. Continental submits that: "[t]his additional tax was caused directly by Argentina's actions and would not have been exigible but for Argentina's actions" (see particularly Claimant's Memorial, para. 43).

209 The preamble states i.a. that "[c]ertain powers were delegated to the Executive Branch by Law N° 25,561, among other things to proceed to reorganize the financial, bank and foreign exchange system to create the conditions towards a sustainable economic growth compatible with the restructuring of the obligation in the course of execution, affected by the new foreign exchange system in place" (English translation supplied by Claimant, Claimant's doc. C-31). Law 25.570 of February 27, 2002 had reorganized the financial relations between the Government and the Provinces, by agreement between them, thus eliminating according to the Claimant the guarantee for the payment of the GGLs consisting of certain fiscal revenues from the "financial transaction tax" (Claimant's Post-Hearing Brief, para. 35).

210 This choice was provided under the original terms of the GGLs in case of default.

this option; rather it instructed on May 20, CADISA to continue to hold the GGLs on behalf of CNA. [211]

147. On April 25, 2002, Resolution 73 made the default of Argentina on its public debt (with some exceptions) official, in that payment of the public debt of the national government was thereby deferred to December 31, 2002 "or until financing thereof has been completed if the latter is completed before that date." [212] Although GGLs were not subject to the deferral, interest payments due in April, May, June and July 2002 were only made on August 8, 2002.[213]

B. Subsequent measures by Argentina in 2002-2003 relevant to the present dispute

148. Starting in the spring of 2002 the Government enacted various Measures aimed at reestablishing normal conditions in the financial market. None of these Measures reinstated the "status quo ante," whilst nonetheless mitigating in some cases losses for those concerned and representing some steps toward the reinstatement of an orderly economic, monetary and financial situation on a new basis. These Measures failed to give any sufficient satisfaction to CNA or Continental; on the contrary, certain of these Measures are challenged by the Claimant as having caused further damage to its subsidiary in breach of the BIT.

149. Decree 905 of May 31, 2002 offered dollar denominated bonds (BODEN 2012) in exchange for the term deposit dollars that had been pesified by Decree 214. It also provided a choice as to the receipt of BODEN 2012[214] for depositors in financial institutions in distress, such as Scotiabank where CNA held term deposits. CNA opted for converting these deposits into U.S.$ 4,470,900 worth of BODEN 2012. [215]

150. CNA accepted instead "under protest" the terms of Decree 739 of March 28, 2003 that provided for an elaborate scheme of "partial thawing" of the bank freeze, after a

211 Claimant's Memorial, para. 46.

212 Claimant's Memorial, para. 51, Claimant's doc. C-32.

213 Claimant's Memorial, para. 53.

214 BODEN 2012 stands for "*Bonos de Gobierno Nacional en Dollares Estadounitenses Libor 2012*."

215 See Claimant's Memorial, para. 53 . At the same time the Claimant explains that it refused the opportunities offered to depositors to access their deposits under Decrees 905 of May 31, 2002 and Decree 1836 of September 16, 2002, since this entailed in exchange to accept "unreasonably long-term bonds" (Claimant's Memorial, para. 55).

further rescheduling of 120 days, earning 2% interest, and the distribution of a BODEN 2013 "to compensate for the difference between the market exchange rate at the date of the enactment of the Decree and the government imposed rate of 1.4 pesos to the dollar adjusted by CER."[216] Continental complains that these bonds were not issued on the due dates and that payments of the initial interest were delayed. It was only on February 11, 2004 that "the government issued BODENs for deposits at ten of the twelve banks at which CNA had originally held its certificated of deposits" and paid interest in arrears.[217]

151. As to the LETEs, Argentina offered to restructure them through Decree 1735/04 in December 2004 by offering a swap of these securities, as well as of several others also in default, against newly issued securities, specifically GDP-linked derivative instruments.[218] CNA did not accept this conversion, since it would have received in exchange "only U.S.$ 0.30 per dollar and would have been required to waive its rights" and to accept long maturities on bonds from a Government "that had demonstrated its willingness to repeatedly default on its debt."[219]

C. Relevant economic, financial and political developments in Argentina after the crisis

152. As mentioned above,[220] the social and economic crisis reached its apogee in the second half of 2002, when more than half of the population where forced to live below the poverty line. The situation improved slowly but progressively from the end of that year onwards. Even two years later, in 2004, per capita GDP, adjusted for inflation, remained about 13% below the 1998 level; and in dollar terms it was equivalent to minus 55%.[221]

153. It is worth noting that ultimately the crisis did not affect the functioning of the democratic constitutional order of Argentina beyond emergency measures enacted on the basis of the Constitution. Civil liberties were not restricted, nor constitutional guarantees

216 Claimant's Memorial, para. 58.

217 Claimant's Memorial, para. 64.

218 Argentina's Counter-Memorial, paras. 717, 414; *see* Claimant's Reply, para. 78.

219 Claimant's Reply, para. 78. Argentina indicates that 76.15 % of the holders of eligible securities took part to the swap (Counter Memorial, par. 415). According to Claimant (Claimant's Reply, para. 386) it has suffered as to LETEs losses of US$0.7 million due to pesification and of US$2.8 million "due to the further default and revocation of contractual rights."

220 See above para. 107.

221 See *Blustein*, 204.

suspended.[222] This is apparent now; but it certainly could not be assumed in late 2001 and 2002.

154. On the other hand, while the crisis affected heavily the financial sector, inflicting losses on depositors and effecting radical changes to binding contractual relations resulting from devaluation, pesification, defaults and restructuring, it is also worth noting that business activity went on without interference from the State, and that it progressively adjusted to the new conditions, including import-export operations. Major bankruptcies that had characterized previous economic crises in Argentina, notably those affecting banks, did not take place after the Government supported the financial system in the asymmetric pesification.

155. The above finding holds true for the insurance business and specifically for CNA.[223] CNA's Annual Report as to June 30, 2003 [224] states:

> CNA ART has come out very reinforced both economically and financially from the severe economic crisis that the country has suffered during the last years. CNA ART enjoys a very solvable economic situation and a very comfortable financial situation, with an extraordinary degree of liquidity. CNA ART has an average investment of almost P. 850 for each insured. This amount is almost four times the average for the other insurers of workmen risks. Moreover only 30% of CNA ART investments are represented by public debt instruments, while the market average as to this indicator amounts to almost 50% of the investment papers. As to the average level of reserves per insured, CNA ART has about P. 270 that is more than the double than the other companies in the market. The net assets of the Company at the closing of the financial amounts to P. 106,004,253, so as to allow the company to present a substantial excess (superavit) in respect to

222 Notwithstanding its political and public order consequences, the emergency situation proclaimed in Law 25,561 was limited to "social, economic, administrative and financial matters."

223 On the basis of the authorization for withdrawals by insurance companies (Res. 28,580 of February 11, 2002), from April 2002 to March 2003 "CNA was able to withdraw 10.5 million pesos in total from funds that were originally held by CNA ART in dollar-denominated CDs" (Claimant's Memorial, para. 41).

224 CNA ART Financial Statement, June 30, 2003, at pages 2212-2213 (English translation by the Tribunal). As to the evolution of CNA's earnings through the crisis see also footnote 393.

the minimum capital, which amounts at said date to 102,626,233, after having the company obtained during the business year an after taxes profit of P. 39.531.719. The level of investments of the Company at the closing of the financial year amounts to P. 195.602.044. The level of reserves and of technical commitments amounts to P.62.283.313.

156. Towards the end of 2002, Argentina also fell in arrears with its obligations owed to multilateral financial institutions. Notwithstanding the criticism previously addressed by the IMF to Argentina after the collapse of the Stand-By, in mid-January 2003 the IMF resumed its assistance and announced an interim Stand-By Arrangement. The Fund rolled over obligations due to it and provided liquidity so as to permit Argentina to pay arrears due to the World Bank and the Inter-American Bank and to service debt becoming due in the next months.[225]

157. The regular functioning of the democratic institutions was reestablished with the general elections held on May 25, 2003 when Nestor Kirchner was duly elected president of Argentina. The country's economy recovered progressively from the crisis from about the end of 2002 onwards. GNP grew by more than 8% in 2003, compared to 2002. Fears of resurgent inflation did not materialize: consumer prices rose less than 4% in 2003 compared with a 40% increase in the previous year. The peso improved against the dollar from 3.36 at the end of 2002 to less than 3 pesos per dollar at the end of 2003; and it has remained relatively stable against the U.S. dollar since.

158. The turn-around and the subsequent recovery of Argentina's economy, its public finances and its balance-of-payments (leading to a robust rebuilding of its foreign exchange reserves starting from 2003) have been attributed to a mix of endogenous and exogenous factors. In variable proportions different observers have pointed to the effect of Argentina's own policies and measures (including the unilateral reduction of domestic

225 In January 2002 the IMF had granted a one-year extension of US$936 million repayment obligation of Argentina to avoid it falling into arrears with the Fund. While Argentina had initially continued to service its debt to other multilateral agencies, this changed in November 2002 when it fell in arrears with the World Bank and the IDB (*Hornbeck*, 5). According to *Scott*, 577, the Government explained that it could not service such a large amount due until it had IMF help, which was received in mid-January 2003 when the IMF announced the interim Stand-By Arrangement for Argentina shortly before the elections (*Scott*, 577). The Fund justified its decision of January 24, 2003 on the ground that "an extension can be granted if repayment would cause undue hardship and provided borrower is taking actions to strengthen its balance of payment" .

and external debt by 70% as to some securities[226]), and external causes, such as the strength of world commodity markets and the increase of prices for Argentina's main exports (grain and soybeans), coupled with the effect of the 70% devaluation of the peso, rendering Argentina's economy more competitive. [227]

159. In May 2004, Argentina made an offer to its foreign bondholders to pay about 25 cents to the dollar on such debt, leading to partial acceptance (but leading also to international litigation by creditors not accepting the offer). The settlement of the swap operation of bonds in default, both domestic and issued abroad was completed in June 2005, with a participation of about 75% of the bondholders, notwithstanding the fact that the new instruments offered in exchange were worth only about 30% of the original securities in dollar terms.[228] In September 2004 Argentina re-entered the international financial market by filing a prospectus concerning the future issuance of debt securities up to more than U.S.$12 billion.[229] By February 2005 Argentina had completed its various restructuring procedures.[230] Finally, the improved balance of payment situation enabled Argentina to repay in a short time-span all of the sizeable amounts outstanding to the IMF, in 2005 (SDR 2,417 billion) and January 2006 (SDR 6,655 billion).[231]

226 At the end of 2003 of a total gross debt of US $ 178 billion, 101 billion were in default.

227 While Argentina considers that its various Measures were instrumental in its recovery, the Claimant's view is that recovery occurred "in spite of, rather than as a result of, Argentina's measures," Post Hearing Brief, para. 75. The contrast of views is apparent also among qualified economists. Thus *Lesson of the Crisis*, 38, considers that many of the initial measures of the Government "not only failed to stabilize the situation but complicated any eventual resolution of the crisis," and considers the "asymmetric pesoization" as "especially damaging." On the other hand *Calomiris*, 2, is of the view that "the decision to redominate debts, and other dollar-denominated or dollar-indexed contracts, during the devaluation of the peso at the beginning of 2002, was successful in reversing the downward trend in economic activity." The paper by Prof. Calomiris was handed out to the parties at the first day of the hearing in the merits and discussed at the second day of the hearing in the merits (see Transcript of the Hearing of November 28, 2006, at p. 406).

228 Cf. Argentina's Counter-Memorial, paras. 414-419; see Claimant's Reply, para. 78. Argentina underlines the complexity of the restructuring of its defaulted debt comprising 152 government securities, involving many jurisdictions, various currencies "in the hands of institutional creditors and hundreds of thousands of individual creditors, both local and international." (Argentina's Counter-Memorial, para. 419.7). This could be viewed as the natural consequence of Argentina having tapped a variety of sources of credit to finance itself in previous years.

229 See Claimant's doc. C-89.

230 CNA's Annual Report as of March 31, 2005 states that Argentina had ceased to be in default on its debt after the completion of the restructuring of its bonds on February 25, 2005 (Claimant's doc. C-91, at p. 12).

231 This has been contrasted with the fact that the swap finally offered to foreign bondholders entailed a "haircut," that is a reduction of the face value of their bonds, of about 70%, if not more.

VI. Necessity: Argentina's Defence based on Article XI of the BIT and on State of Necessity under International Law

160. While Argentina denies primarily having committed any breach of the BIT through its various Measures challenged by the Claimant, Argentina also relies subsidiarily on two defenses of a general character that would in its view render in any event its action entirely lawful. The first such defense is based on Art. XI of the BIT;[232] and the second on the doctrine of "state of necessity" in customary international law (as codified by the ILC), "as an exception from illegality and in certain cases even as an exception from responsibility." [233]

161. The pervasive nature of these general exceptions, which Argentina raises against all claims of Continental, might be such as to absolve Argentina, in whole or in part, from the alleged breaches and from the ensuing responsibility to pay damages. This causes the Tribunal to deal first with these general exceptions rather than starting by examining the individual claims of breach of specific articles of the BIT submitted by the Claimant.

A. Differences between the two Defences

162. The Tribunal will deal with the arguments based on Art. XI first, both because Argentina raises it as its first defense, and also because the application of Art. XI in the present case (if warranted) may be such as to render superfluous a detailed examination of the defense of necessity under general international law applied to the particular facts of the present dispute. This is also true with regard to Argentina's defense based on Art. IV(3) and its relevancy as to the claims submitted by Continental.

163. Moreover, the content of the two defenses is different. Under Art. XI the obligations that either Party have undertaken under the Treaty as to the treatment of investments and investors of the other Party "shall not preclude" the application of "measures necessary" for the pursuit of three types of national interest listed therein, namely for:

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232 Art. XI states that: "[t]is Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or the restoration of international peace or security, or the protection of its own essential security interests."

233 Argentina's Counter-Memorial, para. 817.

a. the maintenance of public order;

b. the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security;[234]

c. the protection of its own essential security interests.

164. The ordinary meaning of the language used, together with the object and purpose of the provision (as here highlighted and interpreted under Article 31 of the Vienna Convention on the Law of Treaties) clearly indicates that either party would not be in breach of its BIT obligations if any measure has been properly taken because it was necessary, as far as relevant here, either "for the maintenance of the public order" or for "the protection of essential security interests" of the party adopting such measures. The consequence would be that, under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision. A private investor of the other party could therefore not succeed in its claim for responsibility and damages in such an instance, because the respondent party would not have acted against its BIT obligations since these would not be applicable, provided of course that the conditions for the application of Art. XI are met.[235] In other words, Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met.[236] In fact, Art. XI has been defined as a safeguard clause; it has been said that it recognizes "reserved rights," or that it contemplates "non-precluded" measures to which a contracting state party can resort.[237]

234 According to the Protocol to the BIT "[t]he Parties understand that, with respect to rights reserved in Art. XI" this refers to obligations under the UN Charter. This item is thus irrelevant in the context of the present arbitration.

235 As Argentina puts it (Argentina's Counter-Memorial, para. 744) "[t]herefore, this type of measures could never amount to a violation of the BIT or give rise to international responsibility."

236 This Tribunal is thus minded to accept the position of the *Ad Hoc* Annulment Committee in the ICSID case *CMS v. Argentina*, where it states: "Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations" (*CMS Annulment Decision*, para. 129). On the one hand, if Art. XI is applicable because the measure at issue was necessary in order to safeguard essential security interest, then the treaty is inapplicable to such measure. On the other hand, if a State is forced by necessity to resort to a measure in breach of an international obligation but complying with the requirements listed in Art. 25 ILC, the State escapes from the responsibility that would otherwise derive from that breach.

237 See *Vandevelde*, 220.

165. Art. 25 of the ILC Articles on State Responsibility, assuming it to be reflective of customary international law,[238] envisages and regulates a different situation:[239]

> Art. 25: 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.

166. Necessity is there taken into account as a "ground for precluding the wrongfulness of an act not in conformity with an international obligation," under certain strict conditions. "The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin. It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population."[240]

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238 The Parties do not dispute that Art. 25 codifies customary international law in the matter. In fact the ICJ has acknowledged that "the state of necessity is a ground recognized by customary international law, for precluding the wrongfulness of a fact not in conformity with an international obligation," ICJ, *Gabcikovo-Nagymaros Project*, para. 51. However, the ILC text is not a provision of a multilateral treaty, agreed by signatories States in its exact formulation but a work of codification, having the nature of a restatement. Thus the ILC articles should not be considered per se as a source of international law. The General Assembly of the United Nations, in taking note of the Articles presented to it by the ILC, "commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate actions" (Resolution 56/83 of December 12, 2001, the annex to which contains the text of the ILC articles). See also *Sempra* Award, 344.

239 See *CMS Annulment Decision*, para. 130.

240 ILC Commentary to Art. 25, para. 14.

Thus an act otherwise in breach of an international obligation ("not in conformity" with it) is not considered wrongful, and does not therefore entail the secondary obligations attached to an illicit act, thank to the "exceptional" presence of one of the conditions that under international law preclude wrongfulness, here necessity.[241]

167. In view of these differences between the situation regulated under Art. 25 ILC Articles and that addressed by Art. XI of the BIT, the conditions of application are not the same.[242] The strict conditions to which the ILC text subjects the invocation of the defence of necessity by a State is explained by the fact that it can be invoked in any context against any international obligation.[243] Therefore "it can only be accepted on an exceptional basis."[244] This is not necessarily the case under Art. XI according to its language and purpose under the BIT. This leads the Tribunal to the conclusion that invocation of Art. XI under this BIT, as a specific provision limiting the general investment protection obligations (of a "primary" nature) bilaterally agreed by the Contracting Parties, is not necessarily subject to the same conditions of application as the plea of necessity under general international law.[245]

168. There is a link, however, between the two types of regulation. First of all, they both intend to provide flexibility in the application of international obligations, recognizing that necessity to protect national interests of a paramount importance may justify setting aside or suspending an obligation, or preventing liability from its breach. Moreover, the practical result of applying the carve-out of Art. XI, rather than the defense of necessity, may be the same: condoning conduct that would otherwise be unlawful and thus removing the responsibility of the State. This would also be so if Art. XI is viewed

241 See Crawford, Special Rapporteur of the ILC, Second Report on State Responsibility, U.N.A.G., ILC, 51st Session, Geneva July 23, 1999, A/CN.4/498/Add. 2, 27-28 "when a State invokes the state of necessity, it has full knowledge of the fact that it deliberately chooses a procedure that does not abide an international obligation." This is an argument that would not be applicable to the invocation of Art. XI.

242 The Tribunal accepts in this respect the *CMS Annulment Decision*, paras. 129-134. We do not share the different position apparently taken by the *Ad Hoc* Annulment Committee in the ICSID case *Mitchell v. Congo*. In that Committee's view, the identical clause in Art. X(1) of the US – Congo BIT "is a provision relating to the causes for exemption from liability or, in other words, a provision that precludes the wrongfulness of the behaviour of the State in certain exceptional circumstances, and not a provision that delimits that scope of application of the Treaty" (*Mitchell Annulment Decision*, para. 55).

243 Except those "arising under a peremptory norm of general international law," as stated in Art 26 ILC Articles.

244 See ICJ, *Gabcìkovo-Nagymaros Project*, para. 51. The ILC Commentary to Art. 25, para. 14, notes "to emphasize the exceptional nature of necessity and concerns about its possible abuse article 25 is cast in negative language."

245 See ILC Commentary to Art. 25, par. 21: "[a]s embodied in Art. 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations."

as a specific bilateral regulation of necessity for purposes of the BIT (thus a kind of *lex specialis*), pre-empting recourse to the more restrictive customary exception of necessity.[246] These connections may be relevant as to the interpretation of the bilateral provision in Art XI, in that the customary concept of necessity may be relevant in this respect. The Tribunal will therefore focus on the analysis of Art. XI and the conditions of its application, referring to the customary rule on State of Necessity (as enshrined in Art. 25 of the ILC test) only insofar as the concept there used assist in the interpretation of Art. XI itself.[247]

169. As to Art. XI, the Parties have expressed different views as to various fundamental elements relating to its application:

a. Whether the economic political and social crisis, with its specific aspects, in Argentina during 2001-2002 qualify under Art. XI in that they involved the "maintenance of public order" and/or the protection of Argentina's "essential security interests;"

b. Whether the invocation of Art. XI is "self-judging," in the sense that the Party relying on it has absolute discretion to invoke it;

c. Whether the Measures challenged were "necessary" in order to maintain the Argentine public order and protect the essential security interests of Argentina that were at stake;

d. The effect of the application of Art. XI to the evaluation by the Tribunal of the lawfulness under the BIT of Argentina's Measures challenged by Claimant.

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246 This view is consistent with that expressed by the *CMS Annulment Decision*, para. 133.

247 Since we are not applying here the customary principle of necessity, we do not have to, nor do we express any view as to whether the necessity invoked by Argentina in respect of the Measures at issue (except as to the restructuring of the LETEs. see paras. 221-222) would also qualify under Art. 25 ILC.

B. Whether Argentina's crisis in 2001-2002 qualifies under Article XI in that it involved the "maintenance of public order" and/or the protection of Argentina's "essential security interests"

170. The Claimant submits that the crisis that Argentina encountered in 2001-2002 does not qualify under Art. XI, first of all because "the ordinary meaning of 'security' is safety from external threats."[248] The Claimant considers the adjective "essential" as meaning nothing less than indispensable, and it concludes "[t]he essential security interest of a country are, therefore, interest indispensable to keeping the country safe from external threats."[249] Argentina was obviously never exposed to such an external threat, nor did Argentina ever suggest it in these proceedings.

171. As to "public order," the Claimant submits that it is the equivalent of the French term "*ordre public*" "which is the civil law equivalent of the common law concept of 'public policy'." The Claimant further submits that this is a "special meaning" of the term public order[250] that refers, more narrowly, "to measures necessary to maintain the public policies, laws and morals that define the country's society."[251] The Claimant concludes that the Measures it has challenged were obviously not aimed at protecting these values, which were not threatened by Argentina's crisis.

172. In contrast, Argentina contends that under Art. XI "the measures necessary for the maintenance of public order … include the measures aimed at ensuring internal security in the face of events such as violent internal upheavals, disturbances, looting and crimes, extended social tension, or the likelihood of the fundamental order falling apart and the government loosing actual control over the territory of the State." Argentina submits that was exactly the situation prevailing in Argentina when the Measures challenged by the Claimant were adopted so that this situation "constitutes a national emergency sufficient to invoke the protections of Art. XI."[252]

248 Claimant's Reply, para. 326.

249 Claimant's Reply, para. 327

250 In the sense of Art. 31 (4) VCLT, which directs the interpreter to give effect to such special meaning if it is established that the parties so intended.

251 Claimant's Reply, para. 338.

252 Argentina's Counter-Memorial, para. 745.

173. The Tribunal is thus confronted by a narrow interpretation by the Claimant and a broader definition by Argentina of the terms "public order" and "essential security interests." The Tribunal's view is that the interpretation submitted by the Claimant is far too narrow and that the emergency situation at issue qualifies in general under Art. XI for the following reasons.

174. The interpretation offered by the Claimant would in substance exclude an economic crisis, however serious, from the application of Art. XI. As indicated above, it submits that "public order" relates to fundamental societal value, such as morality, while security interest refers to the international security of the State in relation of external threats. The expression "maintenance of public order" indicates however rather clearly that "public order" is intended as a broad synonym for "public peace," which can be threatened by actual or potential insurrections, riots and violent disturbances of the peace. This is the ordinary and principal meaning of "*orden púrblico*" in the Spanish text of the BIT, corresponding to the same meaning in the French legal concept of "*ordre public*" in public and criminal law. Thus, in the Tribunal's view, actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society (especially of a democratic society such that of Argentina), to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties, and therefore to cope with and aim at removing these difficulties, do fall within the application under Art. XI.

175. As to "essential security interests," it is necessary to recall that international law is not blind to the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order. It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population.[253] The Preamble to the Charter of the United Nations[254] and, even

253 See the famous speech of US President Franklin D. Roosevelt of January 11, 1944, pointing out that a just and durable system of international peace requires freedom from fear, from hunger and from want, and "a decent standard of living for all individual men and women and children in all nations."

more relevant for the present case, that of the International Monetary Fund support this approach.[255] As noted by the International Law Commission, States have invoked necessity "to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population."[256]

176. It has been submitted in this case that since Art. XI derives from the Model BIT of the U.S., which in turn derives from the United States' Friendship Commerce and Navigation (FCN) standard treaties, special attention should be addressed to this historical context in interpreting the expressions found in Art. XI and its object and purpose in general. This appears to be correct; and the Tribunal will therefore assume that the interpretation based on those antecedents conforming to the plain texts, and the legislative history of the Model BIT was well known and taken into account when the parties concluded this BIT.

177. In this respect the Tribunal notes that the Parties' inquiries into the origin of these antecedent texts do not support the restrictive view advanced by the Claimant. An authoritative commentary, whose distinguished author was involved in the drafting of the U.S. BITs for many years, takes the following view:[257]

> United States treaty practice since the Second World War has acknowledged that the interest in protecting United States investment overseas may be subordinate to certain other national interests, primarily the interest in protecting the national security and the health, safety and welfare of the people. Investment-related

254 See UN Charter Art. 1 (3) that includes amongst the purposes of UN "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character (…)." Moreover see UN Charter Art. 55 "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; (…)."

255 See Art. 1 (ii) Articles of Agreement of the International Monetary Fund which includes amongst the purposes of the IMF "to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy."

256 See ILC, Commentary, at Art. 25, para. 14.

257 See *Vandelvelde*, 222. During the period 1982 to 1988 the author served as an attorney-adviser in the Office of the Legal Adviser of the US Department of State in charge of BIT negotiations. Prof. Vandevelde supplied an expert opinion in the present dispute on behalf of the Claimant and rendered oral testimony (subject to cross-examination) before the Tribunal.

> treaties thus have had provisions which permit the United States to deny protection to foreign investment in its territory where necessary to these other interests. The price paid by the United States for reserving the right to derogate from investment-related treaties on these grounds has been the recognition of a corresponding right in its treaty partners.[258]

178. A severe economic crisis may thus qualify under Art. XI as affecting an essential security interest, in the broad sense described by the Tribunal above. The Tribunal is comforted in this approach by previous ICSID awards in other arbitrations brought against Argentina (although perhaps their discussion of the issue does not as clearly distinguish between the requirements of Art. XI and Art. 25 of the ILC text). Those ICSID tribunals have recognized, in general terms, that "there is nothing in the context of customary international law or the object and purpose of the treaty that could on its own exclude major economic crises from the scope of Art. XI,"[259] even if they have taken a different evaluation *in concreto* as to the gravity of the Argentine economic crisis.

179. The review carried out above of basic features of the crisis which Argentina faced in the latter part of 2001, and which continued into 2002, causes the Tribunal to decide that such a crisis is covered by the application of Art. XI. Measures that would have been otherwise in breach of the Treaty could be lawfully implemented by Argentina in that crisis, provided that all other requirements are respected, first of all that of actual "necessity."

180. It is impossible to deny, in the Tribunal's view, that a crisis that brought about the sudden and chaotic abandonment of the cardinal tenet of the country's economic life, such as the fixed convertibility rate which had been steadfastly recommended and

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258 See also ibid at 223 as to the "reservations of rights involved in the clause": "United States negotiators sought to draft BITs which provided rigorous protection for investors. At the same time, the practical reality is that the United States increasingly has relied upon various forms of economic sanctions to effect other foreign policy goals. The inclusion of a non-precluded measures provision preserved the flexibility to use economic sanctions .At the same time, however, it provided a textual justification for actions by BIT partners against United States investors in violation of BIT provisions" (emphasis added).

259 See *CMS* Award, para. 359. See also *LG&E* Award, para. 238; *Enron* Award, para. 332. See also ILA, Resolution on International Monetary Law, Report of the Warsaw Conference 1988, 20-22, dealing with the inability of a State debtor to pay a foreign debt that "will normally have to be considered under the rule of necessity": "It would appear that the organization of domestic peace, the provision for external security, the maintenance of services essential for the well-being of the population and the preservation of the environment are essential interests."

supported for more than a decade by the IMF and the international community; the near-collapse of the domestic economy; the soaring inflation; the leap in unemployment; the social hardships bringing down more than half of the population below the poverty line; the immediate threats to the health of young children, the sick and the most vulnerable members of the population, the widespread unrest and disorders; the real risk of insurrection and extreme political disturbances, the abrupt resignations of successive Presidents[260] and the collapse of the Government, together with a partial breakdown of the political institutions and an extended vacuum of power; the resort to emergency legislation granting extraordinary legislative powers to the executive branch, that all of this, taken together, does not qualify as a situation where the maintenance of public order and the protection of essential security interest of Argentina as a state and as a country was vitally at stake.[261] The fact that Argentina's Congress declared a "public emergency" in economic, financial, exchange, social and administrative matters in conformity with Art. 76 of its Constitution, and enacted a specific "Public Emergency Law" to cope with the crisis,[262] is powerful evidence of its gravity such as that could not be addressed by ordinary measures.[263] The protection of essential security interests recognized by Art. XI does not require that "total collapse" of the country or that a "catastrophic situation" has already occurred before responsible national authorities may have recourse to its protection.[264] The invocation of the clause does not require that the situation has already degenerated into one that calls for the suspension of constitutional guarantees and

260 *Blustein*, 1, notes the "tragic spectacle of a succession of five presidents taking office over a mere ten days."

261 See *LG&E* Decision on Liability, para. 257: "[t]he 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."

262 Argentina's Counter-Memorial, para. 799 ff.

263 In this context, it should not be forgotten that democracy and the rule of law had been re-established in Argentina only twenty years before after the fall of a brutal military dictatorship which had lasted for more than a decade.

264 In this respect this Tribunal takes a different view than that expressed in the *CMS* Award, para. 354. We note that Art. 25 of the ILC Articles, which is more restrictive than Art. XI, admits recourse to necessity at para. 1(a) "to safeguard an essential interest against a grave and imminent peril." See also ILC, Report on the 32° Session, Commentary on draft Art. 33 (State of Necessity), R. Ago, Special Rapporteur, ILC Yearbook 1980, II, (1980), para. 12: "[t]he extent to which a given interest is "essential" naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interests enters, rather than be predetermined in the abstract."

fundamental liberties.[265] There is no point in having such protection if there is nothing left to protect.

181. It may well be that in drafting the model text for Art. XI, the U.S. intended to protect first of all its own security interests in the light of geopolitical, strategic and defense concerns, typical of a world power, so as to be able to reserve the right to freeze assets of foreigners in the U.S. and to resort to unilateral economic sanctions that may conflict with its BIT obligations. This intention would not exclude from the protection provided by Art. XI different measures taken by the other Contracting Party in relation to emergency situations affecting essential security interests of a different nature of such other Contracting Party.[266] These interests such as "ensuring internal security in the face of a severe economic crisis with social, political and public order implications"[267] may well raise for such a party, notably for a developing country like Argentina,[268] issues of public order and essential security interest objectively capable of being covered under Art. XI.[269] An interpretation of a bilateral reciprocal treaty that accommodates the different interests and concerns of the parties in conformity with its terms accords with an effective interpretation of the treaty. Moreover, in the Tribunal's view, this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight.[270]

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265 Notwithstanding its political and public order effects, the emergency situation proclaimed in Law 25,561 was limited to "social, economic, administrative and financial matter."

266 Even if invocation of Art. XI is not self-judging so that the propriety of its invocation is not carved out from the competence of an arbitral tribunal established under Art. VII, the expression "its own security interests" implies that a margin of appreciation must be afforded to the Party that claims in good faith that the interests addressed by the measure are essential security interests or that its public order is at stake.

267 See Argentina's Counter Memorial, para. 745.

268 The U.S. policy is to enter into BITs only with developing countries, see *Vandevelde*, 21.

269 See Iran-US Claims Tribunal, *Sea-Land Service, Inc.*, at page 11 (Argentina's doc. AL-100) with reference to measures taken in time of civil unrest: "it is well recognized that, in comparable situations of crisis, governmental authorities are entitled to have recourse to very broad powers without incurring international responsibility."

270 Argentina (Counter-Memorial, para. 497) points to the case law of the European Court of Human Rights in this respect: "because of their direct knowledge of their society and of its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest..' … the national authorities, accordingly, enjoy a certain margin of appreciation" (ECHR, *Jahn and others v. Germany,* June 30, 2005). A certain deference to such a discretion when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary, fair and equitable, may well be by now a general feature of international law also in respect of the protection of foreign investors under BITs, see Yuval Shany, *Towards a General Margin of Appreciation Doctrine in International Law?*,16 EJIL, 907-940 (2005).

C. Whether the Invocation of Article XI is "self-judging"

182. Having concluded that the crisis of Argentina (in the context of which the Measures challenged by the Claimant were adopted) qualifies under Art. XI, the Tribunal is still faced with the conflicting position of the Parties as to the alleged self-judging nature of the provision. If Art. XI granted unfettered discretion to a party to invoke it, in good faith, in order to exempt a particular measure which the investor claims has breached its treaty rights from any scrutiny by a tribunal, then that tribunal would be prevented from entering further into the merits, after having recognized that an economic crisis such as the one experienced by Argentina in 2001-2002 qualified under Art. XI.

183. Argentina claims that "[t]he Argentine Republic's bona fides invocation of Art. XI of the BIT should be sufficient for the Tribunal to dismiss the claim made by the Claimant under such BIT, as both parties to the Treaty accorded that each State had the exclusive right to decide whether its own measures were covered by such Article.[271] The United States stated its position expressly, and the Argentine Republic gave its consent to such statements."[272]

184. The Claimant rejects this submission. The Claimant notes that the text of Art. XI does not explicitly include such a restriction (as Argentina itself admits), and that there is no negotiating record (or at least none presented or known to this Tribunal) that would evidence an understanding of the Contracting Parties to this effect. To the contrary, the Claimant points out that the formulation of Art. XI follows closely the FCN model of the U.S.A, which in terms did not follow the language of Art. XXI of GATT 1947 (although the content is in part similar). Art. XXI of GATT 1947 specifies that "[n]othing in this Agreement shall be construed (b) to prevent any contracting party to take action which it considers necessary for the protection of its essential security interests…."

271 Argentina suggests that, even if the application of Art. XI is self-judging, a tribunal would be empowered to check that recourse to the exception was made in good faith and claims that it is self evident that in the present case the measures were adopted in good faith. As a result, the control by a tribunal would be substantially more limited than if the provision is found not to be self-judging.

272 See Argentina's Counter Memorial, para. 743. Besides relying on the position allegedly taken by the U.S., which we discuss below, Argentina also relies on a statement by the PCIJ, *The Wimbledon*, 37 that "[t]he right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it."

185. The Parties have argued the point extensively, relying on the expert opinions of Prof. Kenneth J. Vandevelde for the Claimant and of Prof. Anne-Marie Slaughter for Argentina, who also testified at the final hearing. Both were impressive experts. Their basic difference derives from the lack of documentation as to whether the U.S. had taken the position at the time of the negotiation and signature of the BIT that it considered its invocation and application as self-judging and therefore not reviewable by an arbitral tribunal established under Art. VII of the BIT.

186. The position of Argentina is that this was indeed the case: that the U.S. had informed Argentina of its position and that Argentina had shared it. The position of the Claimant is that the U.S. had not taken nor expressed such a position at that time. On the contrary, after the International Court of Justice had rejected in the *Nicaragua* case the claim by the U.S. that Art. XXI of the FCN Treaty between the U.S. and Nicaragua (including identical expressions to those of the BIT) was self-judging,[273] the U.S. abandoned, in any case *de facto*, such a position. That position was only later resumed by the U.S. when Russia had asked and obtained during the negotiations of the U.S.-Russia BIT that the self-judging nature of the exception be inserted into this BIT (Art. 8 Protocol of U.S.-Russia BIT of 1992).[274] Thereafter, the U.S. adopted this interpretation and finally changed the text of its Model BIT to such effect, but only in 2004.[275]

187. The Tribunal considers that the Claimant's position is supported by the limited evidence available to the Tribunal and conforms to legal principles applicable to treaty interpretation, applied by the Vienna Convention. The International Court of Justice has twice interpreted provisions substantially identical (from which the text of Art. XI derives), as not restricting the ability of a tribunal empowered by the parties to resolve disputes under the treaty to determine whether the conditions of the "limitation" were met.[276] This Tribunal finds at most inconclusive the evidence relied upon by Argentina to support its claim that the U.S. had taken and conveyed to other BIT partners at the time,

273 See ICJ, *Nicaragua* Case, Merits, 222.

274 This occurred during the negotiations of the US-Russia BIT signed on June 17, 1992 after the conclusion of the negotiations of the US – Argentina BIT signed on November 14, 1991.

275 See Art. 18 (1) US 2004 model BIT.

276 Besides the Nicaragua case, cited above footnote 273, see ICJ, *Oil Platform Case*, Merits, 43. In the latter case the U.S. did not argue that the provision was not justiciable, but rather that the Court should grant the U.S. "a measure of discretion."

specifically to Argentina,[277] its position that recourse to the clause was self-judging.[278] The Tribunal has in any case not been given any evidence of the Argentina's acceptance of such a communication.[279] Although a provision such as Art. XI, as earlier indicated, involves naturally a margin of appreciation by a party invoking it,[280] caution must be exercised in allowing a party unilaterally to escape from its treaty obligations in the absence of clear textual or contextual indications.[281] This is especially so if the party invoking the allegedly self-judging nature of the exemption can thereby remove the issue, and hence the claim of a treaty breach by the investor against the host state, from arbitral review. This would conflict in principle with the agreement of the parties to have disputes under the BIT settled compulsorily by arbitration, both between an investor and the host State or between the Contracting Parties, as the case may be.

188. The Tribunal notes finally that the same conclusion, as to the non-self-judging nature of the recourse to Art. XI, has been reached by the other ICSID arbitral tribunals to which Argentina has submitted the same defense.[282] It has however, like all other decisions in this Award, first reached its own decisions independently of any such ICSID awards.

277 This additional requirement, if met, could have complied with the conditions of Art. 31 VCLT for finding an agreement on a special meaning to a term (31.4), a subsequent agreement (31.3.a), or a subsequent practice establishing an agreement (31.3.b).

278 The Tribunal has received no evidence supporting the statement by the US State Department, contained in the description of the US model BIT of February 1992 (in any case approved three months after the signing of the US-Argentina BIT in November 2001) submitted to the US Senate on July 30, 1992 that "[w]e are careful to note, in each negotiation, the self-judging nature of the protection of a Party's essential security interests." (See documentation concerning the hearing before the Committee on Foreign Relations of the US Senate, August 4, 1992 supplied to the Tribunal by the Claimant, Claimant's doc. C-230, at p. 65). Moreover the Letter of Submittal of the US-Argentina of January 13, 1993 is silent about the self-judging nature of the essential security interests clause asserted by the Respondent. As to the view expressed by the Department of State in its letter to the former Legal Advisor A. Sofer in 2006 submitted by Argentina to the Tribunal after the file had been declared closed to the Parties (see paras. 92-93), the statement "…the position of the U.S. Government is that the essential security language in our FCN treaties and Bilateral Investment treaties is self-judging" is too generic (also because of the absence of any timing) to be considered relevant.

279 The Tribunal notes that no preparatory work or documentation as to the negotiating history of the Argentina-US BIT had been supplied in this dispute. It should also be recorded that neither Party wished the Tribunal to invite the U.S. to state its position formally for the purpose of these arbitration proceedings, one way or the other.

280 This was one of the objects of several contacts between the U.S. Department of State and the U.S. Senate at various points in time according to the documentation concerning the hearing before the Committee on Foreign Relations of the US Senate of August 4, 1992, supplied to the Tribunal by the Claimant, cited above footnote 278.

281 "Context" may include circumstantial elements relating to the conclusion of the treaty, see WTO Appellate Body, *EC-Chicken Cuts*, 289.

282 See specifically *CMS* Award, paras. 359 and 370; *LG&E* Award, paras. 212-213; *Enron Award*, para. 339.

D. Whether the measures challenged were "necessary" in order maintain public order and protect essential security interests of Argentina

a) The applicable standard

189. At this point the Tribunal has to evaluate whether the impugned measures were "necessary" for the maintenance of public order and the protection of the essential security interests of Argentina within the meaning of the BIT. Argentina claims that the actions taken were the only way to safeguard an essential interest from grave and impending danger.[283] Argentina submits that "[a]n international tribunal should analyze this issue with the highest deference and should not arrogate itself the power to establish what other measures could have been taken instead."[284] In any event, Argentina submits that "[i]f the measures now brought into question by Continental had not been adopted, the accelerated drain of deposits and loss of reserves of the Argentine financial system evidenced since early 2001 would have brought about a widespread collapse of the Argentine economy, even bigger than the one actually experienced."[285]

190. Continental, in contrast, submits that "[t]he ordinary meaning of 'necessary' is that which 'cannot be dispensed with or done without,' or, in other words, indispensable. Under the ordinary meaning of Article XI, Argentina must demonstrate that its measures were indispensable to the protection of its essential security interests or maintenance of public order."[286] Thus, it is the Claimant's opinion that "Argentina must meet a high threshold in demonstrating that its measures were necessary," taking into account the Treaty's objects to provide a stable framework for investment and to encourage and protect investment.[287]

191. To support this conclusion the Claimant relies also on the ILC commentary on Art. 25 (1)(a) stating that the "plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient" (ILC commentary para. 15). This ought to be considered not only as a more precise explanation of the term

283 Argentina's Counter-Memorial, at p. 217.

284 Argentina's Counter-Memorial, para. 838.

285 Argentina's Counter-Memorial, para. 840.

286 Claimant's Reply, para. 344.

287 Claimant's Reply, para. 346.

‘necessary’ with regard to invocation of the defense of necessity under customary international law, but also as a standard applicable in interpreting Art. XI of the BIT. In the Claimant’s view “if a measure is indispensable to the protection of its essential security interests or maintenance of public order then it must be the only means to protect those essential security interests or maintain the public order.”[288] The Claimant submits that it has shown to the Tribunal that alternative measures (irrespective of their costs) were available to Argentina for addressing the national emergency in 2001. It concludes that “the existence of these alternate measures demonstrates that the measures Argentina did take were not necessary for the purposes of Article XI of the BIT.”[289]

192. The Tribunal is thus faced with the task of determining the content of the concept of necessity in Art. XI, in order to decide whether the various Measures challenged by the Claimant were indeed necessary, as a matter of causation. With regard to the necessity test required for the application of the BIT, for the reasons stated above relating to the different role of Art. XI and of the defense of necessity in customary international law, the Tribunal does not share the opinion that “the treaty thus becomes inseparable from the customary law standard insofar as to the conditions for the operation of the state of necessity are concerned,” as stated in the *Enron Case* and submitted also by the Claimant.[290] Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947,[291] the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.[292]

193. With regard to the necessity test for the purposes of application of the general exception of Article XX of GATT, it is well established that:

288 Claimant’s Reply, para. 350.

289 Claimant’s Reply, para. 352.

290 Enron Award, para. 334.

291 Art. XX GATT (and similarly Art. XIV GATS) provides that “…nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures : (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or heath; (d) necessary to secure compliance with laws or regulations….”

292 The Claimant has also referred to the case law under Art. XX of GATT 1947 (Claimant’s Reply, para. 348).

> […] the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable." Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill the requirements of Article XX (d). But other measures, too, may fall within the ambit of this exception. As used in Article XX (d), the term "necessary" refers in our view to a range of degrees of necessity. At a one end of this continuum lies "necessary" understood as "indispensable;" at the other, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to."[293]

194. In order to determine whether a measure which is not indispensable, may nevertheless be "necessary":

> The necessity of a measure should be determined through "a process of weighing and balancing of factors" which usually includes the assessment of the following three factors: the relative importance of interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.[294]

195. Within the WTO a measure is not necessary if another treaty consistent, or less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ is available:

> […] an alternative measure may be found not to be "reasonable available," however, where it is merely theoretical in nature, for instance, where the

293 WTO Appellate Body, *Korea-Beef*, para. 161. See also ICJ, *Nicaragua* Case, Merits, 282: "the Court emphasizes the importance of the word "necessary" in Art. XXI: the measures taken must not merely be such as tend to protect the essential security interest of the party taking them, but must be 'necessary' for that purpose."

294 Panel Report, *EC Tyres*, para. 7.104, summing up the Appellate Body case law in *Korea-Beef*, para. 164; *EC- Asbestos*, para. 172; *US-Gambling*, para. 306; *Dominican Republic-Cigarettes*, para. 70. Within this weighing and balancing of those various factors, the WTO case law stresses the assessment of the importance of the interests or values furthered by the challenged measure.

> Responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover a "reasonable available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.[295]

b) Application of the standard

196. According to these principles, the next step for us is to assess whether the Measures contributed materially to the realization of their legitimate aims under Art. XI of the BIT, namely the protection of the essential security interests of Argentina in the economic and social crisis it was facing. More specifically, whether the Measures were apt to and did make such a material or a decisive contribution to this end.[296]

197. In light of the analysis we have carried out above, we believe that this was the case. In general terms[297], within the economic and financial situation of Argentina towards the end of 2001, the Measures at issue (the *Corralito*, the *Corralon*, the pesification, the default and the subsequent restructuring of those debt instruments involved here) were in part inevitable, or unavoidable, in part indispensable and in any case material or decisive in order to react positively to the crisis, to prevent the complete break-down of the financial system, the implosion of the economy and the growing threat to the fabric of Argentinean society and generally to assist in overcoming the crisis. In the Tribunal's view, there was undoubtedly "a genuine relationship of end and means in this respect."[298]

198. The Tribunal is also guided by the principles highlighted above in its analysis of whether Argentina had reasonably available alternatives, less in conflict or more

295 WTO Appellate Body, *US-Gambling*, 308, referring to Art. XIV GATS. See also WTO Panel *EC-Tyres*, 7.211 "[w]e do not exclude however that there may be circumstances in which a highly restrictive measure is necessary, if no other less trade restrictive alternative is reasonably available to the member concerned to achieve its objectives."

296 See WTO Appellate Body, *EC-Tyres*, 150.

297 That is without prejudice for the analysis of individual measures developed in the next paragraphs.

298 *Ibid*. 145. This report has highlighted, at para. 151, the importance of the temporal perspective in the evaluation of necessity: "the results obtained from certain actions…can only be evaluated with the benefit of time."

compliant with its international obligations, "while providing an equivalent contribution to the achievement of the objective pursued,"[299] to the Measures challenged by Continental as inconsistent with the BIT. If so, the Measures adopted would be deprived of a fundamental element underpinning their alleged necessity. The Tribunal will look accordingly both to:

i) alternatives to the Measures, not in breach of the BIT, that might have been available when the Measures challenged were taken (thus from November 2001 onwards) and that would have yielded equivalent results/relief; and

ii) whether Argentina could have adopted at some earlier time different policies, that would have avoided or prevented the situation that brought about the adoption of the measures challenged.

If the result of such additional analysis shows that such alternatives would not have been reasonably available or would have been impracticable or speculative as to their effects, the conclusion that the measures were necessary under Art. XI of the BIT would be confirmed.

199. In evaluating whether these alternatives were in fact reasonably available and would have avoided the adoption of the challenged Measures, the Tribunal is mindful that it is not its mandate to pass judgment upon Argentina's economic policy during 2001-2002, nor to censure Argentina's sovereign choices as an independent state. Our task is more modestly to evaluate only if the plea of necessity by Argentina is well-founded, in that Argentina had no other reasonable choice available, in order to protect its essential interests at the time, than to adopt these Measures. If the conclusion upholds this defence, then Argentina will escape any liability since necessity would exclude a breach of the BIT's obligations to the detriment of the Claimant, and/or would exempt Argentina from responsibility. If not, Argentina would have to face the consequences of its breaches in as far as Continental's claims are otherwise upheld. In either case, the Tribunal is not called upon to make any political or economic judgment on Argentina's policies and of the Measures adopted to pursue them. Nor does this entail, retrospectively, a judgment on

299 See WTO Appellate Body, *EC-Tyres*, para 156.

those same grounds that Argentina should not have enacted the Measures that it did adopt.

(i) Alternatives that might have been available when the challenged measures were taken (thus at the outbreak and at the height of the crisis in November 2001 – February 2002)

200. The Claimant submits that there were alternatives that Argentina could have adopted in lieu of: a) the *Corralito* (the imposition of the bank freeze in December 2001); b) the devaluation of the peso; c) the pesification of the U.S. dollar denominated contracts and deposits; and d) the suspension of payments (default) and rescheduling of the governmental financial instruments held by CNA.

(a) In respect of the Corralito (the imposition of the bank freeze in December 2001)

201. In particular, Continental submits that the *Corralito*, instead of qualifying as a necessary reaction to a sudden extraneous fall in bank deposits, aggravated the crisis because it inevitably caused a deep loss of public confidence. In the Claimant's words "[t]he social discontent triggered by this measure put an end to any further negotiations between federal authorities and the Provinces and the multilateral institutions,"[300] which would have represented an alternate available measure to avoid the sharp fall in the bank deposits.

202. The Tribunal recalls the evidence as to the massive falls in bank deposits and the capital flight out of the country that had occurred in the preceding months and had amplified in the weeks and days before the imposition of the *Corralito*, very significantly depleting Argentina's reserves.[301] The Tribunal notes that the imposition of the bank freeze is a typical short-term measure used by monetary authorities in order to block withdrawals from banks and block capital flight. These events occur when the public loses confidence in the economy and in the ability of the state to maintain freedom of exchange; bank-runs must then be stopped lest the banks and the country go bankrupt.[302]

300 Claimant's Reply, para. 87.

301 See para 122 above.

302 See UNCTAD, *Transfer of Funds*, 7: "[l]arge surges of capital outflows can exacerbate a country's balance-of-payment problems by making it more difficult for the country to implement adjustment policies that are designed to correct the underlying problems;" *ibid*, 11: "while restrictions on transfers will generally not be the preferred means of addressing balance-of-payment crises, in certain circumstances they may be necessary."

In the situation of Argentina in the autumn of 2001, the impossibility for Argentina to maintain convertibility was reasonably foreseeable and was even widely expected; the need to take strict remedial actions against massive withdrawals from the banks, widespread requests of exchange of pesos for dollars and capital flight was inevitable.[303]

203. Thus the *Corralito* has to be viewed in connection with the abandonment of the conversion of the peso to U.S. dollar at 1:1, which entailed floating of currency and market-driven devaluation. This was also widely considered inevitable once the IMF had withdrawn its further support for the reasons highlighted above. It is true that the imposition of severe restrictions on withdrawals from bank accounts entailed further hardship, especially as to individuals, families and small businesses. However, the block affected CNA's business activity only marginally[304] because intra-bank operations were allowed and special authorisations were soon thereafter granted to insurance companies.[305] There was indeed no difference between the position of a local subsidiary of an American investor, such as CNA, and the position of any other Argentine insurance company.

204. The evidence does not permit the Tribunal to conclude that "further negotiations between federal authorities and the Provinces and the multilateral institutions" could have formed the basis for Argentina obtaining additional external support.[306] First of all, the *ex post facto* evaluation indicates that a restructuring of Argentina's debt without sacrificing in part creditors' rights in breach of same (as was finally the case in 2002-2003) was probably already impossible by 2000.[307] In late 2001, Argentina had already carried out various restructurings of its debt, both external (through the mega-swap) and domestic (through the issuance of GGLs), but had not obtained any meaningful relief. The country

303 As mentioned, their need had been anticipated by commentators and institutions outside Argentina; see for instance R. Dornbush, *The Last Tango*, August 2001, (Claimant's doc. C-114).

304 See footnote 393 infra.

305 See. "Resolucion" 28, 580 of February 11, 2002 (see also footnote 198 and 223).

306 See also Scott, 576: "[c]ritics of the IMF said that it should have led a bailout like that for Mexico, infusing $50 billion that would jump start the economy. The Bush administration, far from allowing this, had prevented the IMF in December 2001 from advancing the stand-by funds, once again trying to get tough on the expansion of official and multilateral debt and its contribution to creditor moral hazard."

307 See infra para. 208. *Lessons from the Crisis*, 34, indicates that already in 2000 a large depreciation should have been accompanied by "a preventive sovereign debt restructuring which would have provided both sufficient liquidity and net present value relief; this would have necessarily entailed a sovereign default. Even more so an involuntary debt restructuring, with reduction in the present value of the debt" in 2001, *Lessons from the Crisis*, 36.

was precluded from further voluntary restructuring by its loss of credibility in the world financial markets and the withdrawal of the Fund's support. Consultations and negotiations cannot be considered *per se* an alternative measure to urgent legislative or administrative action of general application such as a bank freeze. This is even more true when taking account of the level of public order protection and protection of its own essential security interests that a State manages to achieve with such prohibitions. Moreover, in this regard it can even be questioned whether consultations and negotiations can be considered as "measures" at all, due to their uncertain results.[308] In any case, when the Government was able to strike a financial and fiscal deal with the provinces, in the midst of the crisis towards the end of February 2002, this entailed leaving to the provinces about 30% of the proceeds of the financial tax. These proceeds had been specifically earmarked as a guarantee to GGLs holders in case of default, a measure complained of by Continental as having affected its own rights, at least indirectly by rendering recourse to this guarantee impossible.[309]

205. To conclude, for the Tribunal the *Corralito* was justified by necessity within the meaning of this BIT, in any case as far as a company like CNA was affected by it. The block was adequate and effective in respect of its legitimate aims to prevent further fall in bank deposits that would have brought about the banks' bankruptcy, as well as the exhaustion of the country's reserves. Continental also complains mostly of the *Corralito* because it prevented CNA from transferring out of the country funds available in Argentina to CNA. This raises a different point. We will address later the issue whether such international transfers of funds are and would have been guaranteed by Art. V of the BIT. Subject to that, we conclude here that the *Corralito* was necessary to prevent exactly that outflow of funds to which Continental would have contributed, according to its own

308 See WTO Appellate Body, *US-Gambling*, para. 317.

309 "Federal State-Provinces Agreement on the Financial Relation and Basis for the Federal Revenue Sharing System" of February 27, 2002, referred to in Decree 644/2002 on the restructuring of GGLs, (Argentina's doc. R-31).

statements, an outflow that would have undermined Argentina's essential security interests.[310]

(b) In respect of the devaluation of the peso

206. With regard to the devaluation of the peso that Argentina claims was necessary, together with the pesification, in order to cope with the economic public emergency, the Claimant submits that: "[t]his argument is doubly flawed. First, devaluation was not inevitable. Second, Argentina could have devaluated the peso without unilaterally altering the terms of contracts denominated in U.S. dollars."[311] The Claimant dealt extensively with these arguments, relying on the written opinion and the testimony of its expert witness, Prof. S. Edwards.

207. Continental does not challenge devaluation *per se* and recognizes that the BIT does not guarantee foreign investors and their investments against devaluation, nor does it claim that devaluation breached *per se* its treaty rights.[312] There was however a close connection between the devaluation of the peso and the decision to pesify bank deposits and government debt. The pesification was an integral part of the scheme of abandoning convertibility and letting the peso float, i.e. to devalue against the US dollar. The Claimant when challenging the necessity of the pesification suggests alternatives that would have avoided in its view the very need for devaluing the peso.

208. In the Claimant's submission, Argentina could have avoided devaluation either through (a) a voluntary debt exchange or (b) "full dollarization" of the economy.[313] The Tribunal has not received evidence that would sustain either argument. As to voluntary debt exchange (alternative (a)), we have recalled that Argentina had already pursued this policy: Argentina had entered into swaps both as to its foreign debt ("megaswap" of Spring 2001) and domestic debentures, namely through the restructuring of part of the government's debt by issuing in November 2001 GGLs in exchange, a swap in which

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310 See Nussbaum, *Money in the Law, National and International*, 1950, 476, "[r]estrictions to safeguard a country's balance of payment, however, constitute acts of self-preservation" legitimate even in the teeth of a MFN clause. The situation is otherwise where the differentiation is not justified by economic necessity."

311 Claimant's Reply, para. 89.

312 Claimant's Reply, para. 92.

313 Claimant's Reply, para. 91.

also CNA took part.[314] Both operations were ineffective in lessening the burden on Argentina's finances and in restoring the public's confidence. With the Fund refusing further support to Argentina, there was no realistic possibility for the Government at a later date, towards the end of 2001, to conclude a voluntary exchange that would have fully respected the depositors' rights in dollar terms, while also avoiding devaluation.

209. As to "full dollarization" (alternative (b)), that is, replacing physically the pesos in circulation with dollar bills and adopting the U.S. dollar as legal tender, the overwhelming evidence before us indicates that this was a purely theoretically and thoroughly impractical solution, never really envisaged by the various relevant actors, considering that Argentina alone would not have been in the position to pursue it. Such a full dollarization had never been tried before for a large economy, such as that of Argentina, and that would have required massive financial and logistical support by the U.S. Government.[315] That support was not available. Commentators have also considered that, even if implemented, full dollarization would not have solved Argentina's problems, nor restored confidence in its debt sustainability.[316]

210. Thus neither solution can be considered as an alternative to devaluation that could have been reasonably pursued by Argentina with any probable chances of success. For the purpose of the present legal evaluation, devaluation has thus to be considered inevitable in view of the economic unsustainability of the parity with the U.S. dollar, and because of the run on deposits and the flight from the peso which had made the *Corralito* necessary.[317]

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314 In order to make Argentina's debt sustainable, a debt reduction of 30% to 40% was considered to be necessary within the Fund in Autumn 2001, *Blustein*, 167; see also *Lessons from the Crisis*, 36, "[a]t this stage, serious consideration should already have been given to an involuntary debt restructuring…."

315 This was conceded by Prof. S. Edwards who supported this full dollarization in his oral testimony. See also J. Sachs, "*Duhalde's Wrong Turn*," Financial Times, USA Edition, Jan. 11, 2002 (according to whom dollarization should have been accompanied by massive devaluation), Claimant's doc. C-115; *Scott*, 576, cited. footnote 306 above (as to the refusal of the US Government to approve further financial support to Argentina at the end of 2001); *Lessons from the Crisis*, 34, excluding that full dollarization might have been a solution in Argentina's situation of recession already in 2000.

316 Against the support expressed by Prof. S. Edwards for this solution as an expert witness for the Claimant, Argentina referred to the same expert's article "The false promise of dollarization," Financial Times May 11, 2001 (Argentina's doc. RA-262). See also *Lessons from the Crisis*, 30.

317 See *Calomiris*, 1: "[t]he inconsistency between persistent fiscal deficits and recession, on the one hand, and the inflexible currency regime of 'convertibility,' on the other hand, became increasingly apparent to market observers from 1999 through 2001. By the end of 2001, given the political

(c) In respect of the pesification of the U.S. dollar-denominated contracts and deposits

211. The main argument of the Claimant is that Argentina could have let the peso devalue and terminate convertibility, whilst leaving unaffected the denomination in dollar of the deposits and especially of the financial instrument issued in dollars within Argentina. The Claimant submits that many countries had similar levels of "dollarization" during similar currency crisis, but that "[o]nly Argentina chose the highly unusual route of mandatory de-dollarization, i.e. pesification of contracts – deposits, debt and utility tariffs."[318]

212. Argentina in turn submits that, in view of the level of dollarization of the financial sector, it would have been impossible after the devaluation of the peso of more than 300% to satisfy claims denominated in dollars by converting them at the market rate. The debtor would have gone bankrupt and a massive bail-out of the banks would have been required far beyond the possibilities of Argentina's strained public finances. Moreover, this would have caused widespread imbalances and unjustified discrimination between those depositors which had converted their peso in dollars, possibly just before the *Corralito*, and those who had maintained their assets in pesos. The solution which was put in place distributed more evenly and equitably the burden of the country's new financial situation between all those affected, while recognizing through the asymetric pesification the expectations of those who had made deposits in dollars.

213. According to one of the most specific economic studies devoted to the issue, and discussed by the Parties at the hearing, "[r]edenomination of dollar debts implied a substantial reduction of the real debt service burdens of dollar-denominated debtors. It was inspired by the realization that without redenomination Argentina would have to find a way to address massive economy-wide insolvency of dollar-denominated debtors, as well as huge relative price increases for energy and transport costs that were fixed by

infeasibility of fiscal reform (a fact illustrated by the brief tenure and abrupt demise of officials who suggested the desirability of fiscal reform), sovereign default and devaluation became inevitable toward the end of 2001."

318 The Claimant mentions the cases of Indonesia in 1997, Ecuador and Bolivia in 1999 and Uruguay in 2002 (Claimant's Reply, 93-94). It further points to various strategies in debt restructuring adopted by these and other countries in a situation of crisis; all of them however presuppose that the crisis brings borrowers into distress and that companies in distress can be saved through various debt restructuring, a form of solution that cannot be (by definition) fully compliant with depositors' rights.

concession contracts in dollar terms."[319] Furthermore "Argentina was in an unusually vulnerable macro-economic position as the result of the large fraction of domestic debts and transportation and utility concession contracts that were denominated in or indexed to the dollar, and the small fraction of its economy devoted to exports."[320] Thus de-dollarization seems to have represented, according to qualified observers,[321] as almost a "must" for Argentina, in order to devaluate effectively, avoid unbearable asymmetries in the allocation of the burden that devaluation entails and to stimulate the recovery.[322] Finally, contrary to the Claimant's allegations, the de-dollarization of 2002 by Argentina was not without precedents in recent financial crises.[323]

214. The Tribunal finds that de-dollarization was inevitable in the situation facing Argentina, in order to achieve a balanced distribution of the burden of the devaluation and of the abandonment of the convertibility at par with the dollar, once the fiction that pesos and dollars were equivalent had been discredited by the massive flight from peso to dollar (which had become a cause for the unsustainability of the very convertibility at par). The asymmetry of the exchange rates adopted reflected as far as possible, although only partially, the expectations of depositors in dollars within Argentina that they would

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319 *Calomiris,* 1 ff.

320 *Calomiris*, 3, the author further explains, at 12, that "Argentine private sector debt was much more heavily dollarized than those of the other four countries with similar of higher dollarization score." See also IMF, *Evaluation Report*, 20.

321 *Calomiris*, 8, reports, among others, the opinion of the Nobel Prize winner Joseph Stiglitz who "argued that devaluation would produce financial distress for borrowers with dollar-denominated claims, and that a redenomination of debts or some other economy-wide plan to reduce the value of the dollar-denominated debt would soften the blow of devaluation." As to the need of de-dollarization together with the large scale depreciation of the pesos see also *Lessons from the Crisis*, 32, and IMF, *Evaluation Report*, 66.

322 See Krugman's Editorial, quoted footnote 166 above: "[a]dmittedly, the fact that much private debt in Argentina is indexed to the dollar means that a peso devaluation might create financial problems … Simply issue a decree canceling the indexation. It's a radical solution, but the situation is desperate, and there is a precedent: it's more or less what President Roosevelt did in 1933." According to *Calomiris*, 8, "[t]he Argentine government had observed the consequences of devaluation without debt redenomination in Mexico post-1994 crisis and in East Asia post-1997, and was keenly aware of the severe adverse consequences of not combining devaluation with debt redenomination." *Calomiris*, 13-15, concludes that devaluation with debt redenomination had salutary effects on the investment behaviour of debtor firm and "was a positive surprise at the time it was enacted."

323 According to *Calomiris*, 10, Mexico's devaluation of 1982 had included "a similar debt-relief policy of reducing the dollar value of its dollar-denominated bank loans and dollar denominated deposits in 1982." Notably: "[t]he real value of loans was reduced through the conversion of foreign currency loans to pesos at an exchange rate that overstated the value of the peso relative to the dollar." Indeed, as *Mann*, 471, recalls this operation led to litigation in the U.S. by affected investors unsuccessfully claiming that they had been partially expropriated by the forced conversion of their dollar-denominated deposits into pesos at an artificial rate, *West v. Multibanco Comermex S.A.* (C.A. 9th Cir.), 807 F. 2d 820 (1987).

be more secure than holders in pesos in case of crisis.[324] That burden was charged to the entire economy.[325]

(d) In respect of the suspension of payments, default and rescheduling of the governmental financial instruments held by CNA

215. First of all, the Claimant complains that Argentina defaulted at the end of 2001 and the beginning of 2002 on various financial instruments issued by the Government and held by CNA. Moreover it also complains that interest payments due to CNA under these financial instruments were delayed substantially in 2002, even in respect of the new terms that Argentina had unilaterally set. Argentina submits that in the first months of 2002 its financial administration was in such a state of disarray and the public finances in such a shortage of funds due to the crisis (and specifically due to the lack of access to international capital markets) that both forms of conducts, namely as to default and as to lack of punctual payment of interest, appear to have been inevitable. Overdue payments were in any case made when, where and as far as payments restarted on a regular basis in the second half of 2002.[326]

216. The other complaints of Continental relate to specific aspects of the conditions of the restructuring process of the various obligations and similar instruments on which Argentina had defaulted at the end of 2001 and at the beginning of 2002. As described by Argentina itself, under the restructuring process, which ended in June 2005, "the Argentine Government offered to swap all Argentine government debt securities issued before December 31, 2001, on default, for new securities with an extended term and for a minor principal and/or interested value but adjusted to Argentina's capacity payment."[327]

217. Specifically as to the GGLs, the evidence shows that they were pesified and indexed to the CER and that they were to earn a reduced interest rate in accordance with

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324 The expectation that dollars could be immune from a financial and exchange crisis of the magnitude of the one which occurred was legally misplaced. Dollar denominated deposits and secured were not "real" dollars, backed by the U.S. Treasury. They were the result of conversions of pesos within Argentina's economic and financial system and were backed by the foreign exchange reserves of Argentina.

325 According to *Calomiris*, 10, the ultimate result of the asymetric pesification, adopted as "an attempt to placate depositors, who complained of the loss of value of their deposits," and which entailed the government issuing bonds to the banks to cover the losses the latter suffered as a consequence, was that "citizens as taxpayers paid for the cost of the relative subsidy received by citizens as depositors."

326 Claimant's Memorial at p. 15.

327 Argentina's Counter-Memorial, paras. 722-723.

Decree 471/02. The guarantee that had initially been provided for the case of default (consisting in the proceeds of the financial transaction tax) was thereafter withdrawn by Decree 644/02 specifically dealing with GGLs: within the restructuring of Argentina's public finances the proceeds of this tax were now to be shared by the Government with the provinces. Since there was no interest for a holder to opt for the return of the securities which had been swapped for the GGLs (since these were also in default), CNA opted to accept the new terms. In view of the situation of the public finances of Argentina in the crisis of 2002, we conclude that these Measures can be considered reasonably necessary within the pesification of the economy. The treatment of GGLs compares with that of other financial instruments held by the public. The special guarantees (that had been provided in the original conditions, in order to induce depositors to accept a swap intended to avert the risk of an impending crisis), once the crisis had arrived, had either lost their value or could not escape being subjected to the same necessity and hence to the need of being restructured.[328]

218. As to dollar-denominated Term Deposits (CD), the evidence shows that they had been first frozen under the *Corralito*, then "reprogrammed" (so-called CEDROS) under Res. 6/2002, thereafter pesified at 1.4 plus CER adjustment (Decree 471/2002), and further frozen under Res. 73. Short term deposits were thus frozen for a considerable length of time, except for the possibility of withdrawals as introduced for insurance companies. As Continental explains, it opted in July 2002 for a dollar denominated bond (BODEN 2012) in exchange of deposits held with the bankrupt Scotiabank.[329] As to the rest of its deposits, Continental preferred not to accept the Government's offers in May and July 2002 (Decree 905 and 1836) to exchange them against long terms bonds in dollars.[330] The Claimant accepted instead the conditions of the repeal of the *Corralon*, that is the subsequent de-freezing, or thawing provided by Decree 739 of March 28, 2003: this entailed a further rescheduling of 120 days with a 2% annual interest and receiving a dollar bond (BODEN 2013) "to compensate for the difference between the

328 See particularly Argentina's Counter Memorial, paras. 589-600 and paras. 705 ff. According to Argentina (Counter Memorial, para. 710) "[t]he manner of servicing the PGNs offered to the creditors was the only way that the Federal State was able to meet, allowing making payments in line with the resources available with considerable fiscal effort and under distressful economic and social conditions."

329 Argentina's Counter-Memorial, para. 54.

330 Argentina's Counter-Memorial, para. 617.

market exchange rate at the date of the enactment of the Decree and the government imposed rate of 1.4 pesos to the dollar as adjusted by CER."[331] According to Argentina, thanks to this mechanism a holder like CNA was able through indexation and the dollar bond to recover a substantial amount of the initial capital loss.

219. We are of the view that in the state of necessity faced by Argentina the elaborate mechanism described above was appropriate and reasonable to cope with the need urgently to stabilize the financial markets and the banks, reinstating progressively the rights of depositors. The burden that depositors had to bear initially was alleviated *pari passu* with the improvement of the conditions of the economic and financial system: this entailed also a partial "re-dollarization" of their claims through the dollar-denominated BODEN.

220. As to the Treasury Bills (LETE)[332], the evidence shows[333] that Argentina offered to restructure them through Decree 1735/04 of December 9, 2004 by offering a swap of these securities, as well as of several other securities also in default, against newly issued securities, specifically GDP-linked derivative instruments.[334] CNA did not accept this conversion, since it would have received in exchange "only U.S.$0.30 per dollar and would have been required to waive its rights. It would have also been required to accept long maturities on bonds from a government that had demonstrated its willingness to repeatedly default on its debt."[335]

221. In respect of this restructuring the Tribunal rejects the defense of necessity by Argentina based on Art. XI of the BIT, in the light of the following factors:

331 Argentina's Counter-Memorial, para. 58.

332 Claimant's Reply, para. 78; Argentina's Counter-Memorial, para 717 ff.

333 See above para. 151.

334 Argentina's Counter-Memorial, paras. 717, 414; Claimant's Reply, para 78.

335 Claimant's Reply, para. 78. Argentina indicates that 76,15 % of the holders of eligible securities took part to the swap (Counter-Memorial, para. 415). According to Claimant (Claimant's Reply, para. 386) it has suffered as to LETEs losses of 0.7 million due to pesification and of 2.8 million "due to the further default and revocation of contractual rights."

(a) the late date in which the swap was offered, when Argentina's financial conditions were evolving towards normality;[336]

(b) the reduced percentage of the original value of the debt that Argentina unilaterally offered to recognize;

(c) the condition that any other rights would be waived, which entailed also waiving the protection of the BIT.[337]

222. Since, as stated above under (a), Argentina's financial situation was evolving towards normality when the LETEs were restructured, Argentina cannot avail itself in this respect of the alternative defense based on state of necessity in customary international law. The fundamental requirement that the conduct be "the only way for a State to safeguard an essential interest against a grave and imminent peril" (Art. 25 (1) (i) ILC Articles) was lacking for the reasons stated hereabove under (a). The Tribunal rejects, therefore, also this alternative defense by Argentina as to the restructuring of the LETEs. We consider separately below the consequences of this adverse decision for Argentina.

(ii) Whether Argentina could have adopted at an earlier time different policies that would have avoided or prevented the situation that brought about the adoption of the challenged measures

223. The Claimant developed a further argument in order to reject Argentina's plea of necessity. In the Claimant's submission, Argentina could have avoided the devaluation and the pesification if it had adopted a different economic policy, specifically if it had implemented in a timely manner those accompanying policies and measures (especially relating to budgetary and fiscal discipline) required for the sustainability of the parity arrangement, convertibility and the currency board. This argument points also to a contribution by Argentina itself to the crisis and hence to the impugned Measures:

336 We recall that Argentina had returned to the U.S. capital market with an issuance of securities in September 2004, see above para. 159.

337 We note in this respect that Argentina has justified the waiver requirement imposed for the participation to the restructuring of the GGLs at a much earlier date, in the midst of the crisis (Decree 471 of March 8, 2002) with the need to avoid that creditors might obtain a kind of double recovery by petitioning domestic courts: these had at the time often disregarded the emergency legislation, and had ordered the Government to respect the original conditions (including the dollar denomination) of various instruments (see Argentina's Counter Memorial, para. 598). This "danger" no longer existed in 2004 after the *Bustos* decision by the Supreme Court which fully recognized the validity of the emergency legislation.

"Argentina could have implemented economic policies that would have supported the ability of the currency board to withstand an economic recession." [338]

224. In this respect too, the analysis by the Tribunal is circumscribed in drawing appropriate conclusions in respect of the necessity for Argentina's impugned measures under the BIT. States are basically free to adopt economic and monetary policies of their choice; and this Tribunal is not subjecting past economic policies to any judicial, administrative or political review. It is a fact that economic observers and institutions, looking retrospectively at the causes of Argentina's crisis, have pointed out that Argentina had not carried out, fully or adequately, the various policies that the Fund had recommended, especially as to fiscal balance (in order to sustain the currency board system) and as to cost of labour (in order to maintain the economy's competitiveness). It is also a fact that, at the time, the IMF recognized favourably Argentina's efforts towards the implementation of the recommended policies, even if they had not been enacted fully and had not obtained the expected results. Thus the IMF had continued supporting Argentina all along. It is also a fact that the IMF had recognized the negative impact of various exogenous factors in this failure.[339] Even *ex post facto*, however, qualified observers remain in disagreement as to the exact causes of the crisis and the mix of measures that might have avoided it.[340]

225. We have highlighted above, based on the chronology of relevant facts, contemporary accounts and later analyze, that Argentina's authorities made serious efforts in 2000-2001 to take a number of measures and policies in order to implement the Fund's advice (as part of the IMF Stand-By conditions) and to redress the economic and financial situation under the convertibility regime. These efforts culminated with the zero-deficit law in the summer of 2001, with the IMF recognising these efforts by continuing to extend its support.

226. It is a fact that the results were not those expected. The harsh measures recommended were met by public resistance (notably the labour force), could not be

338 Claimant's Reply, para. 36.

339 See specifically the various IMF *Reviews* of the Stand-By Arrangement of March 2000 highlighted above.

340 See IMF, *Evaluation Report*, at p. 14.

successful in the short time span that was available, and could not be realistically implemented as such in view of the organizational shortcomings of Argentina's administrative apparatus. Nor does it appear to the Tribunal that the Argentinean Government can be faulted for not having more energetically pursued these policies. The lenient and benevolent attitude of the Fund which acknowledged in 2001 the difficulties that Argentina had encountered in implementing the conditions of the Stand-By arrangement has also to be taken into account.[341] Significantly, even retrospectively, some analysts have expressed the opinion that those measures would have been ineffective to avoid the crisis in any event. [342]

227. For the purpose of this Award, we conclude that Argentina made reasonable efforts to take measures that would have, or might have maintained convertibility thus respecting its international obligations connected thereto. In conformity with the concept of "necessity" discussed above, we consider that the Government's efforts struck an appropriate balance between that aim and the responsibility of any government towards the country's population: it is self-evident that not every sacrifice can properly be imposed on a country's people in order to safeguard a certain policy that would ensure full respect towards international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under this BIT. The standard of reasonableness and proportionality do not require as much.[343]

228. In exploring alternative policies that Argentina might have pursued in the preceding months that would have made resort to the impugned Measures unnecessary, an early abandonment of the currency board system and of convertibility at par must be considered. In fact several observers, retrospectively, have criticized Argentina and the Fund not for having failed to implement those accompanying policies envisaged by the

341 See *Lessons from the Crisis*, 40: "[t]he IMF's decision to continue its support during the pre-crisis period, including through its endorsement of policies under the its precautionary arrangement, despite repeated policy slippages, must be evaluated in the context of available alternatives. There was an evident fear among the IMF's shareholders, and the international community at large, that policies would quickly deteriorate in the absence of IMF oversight."

342 See *Lessons from the Crisis*, 32: "[t]hus, once the depression was under way, there was no easy way out, as the authorities had no policy instruments that could have enabled them to stimulate the economy without compromising debt sustainability" (with reference to 1998).

343 We recall as to the cost factor that in the GATT-WTO case law an alternative is not to be considered reasonably available if it imposes an "undue burden" or "prohibitive costs."

Stand-By Arrangement that had been recommended at the time, but rather for not having abandoned convertibility earlier, once the sustainability of convertibility appeared to be unlikely under realistic conditions.[344]

229. Such an exit from convertibility could be considered a reasonable alternative if it could have been carried out in an orderly fashion, without forcing upon holders a reduction of the value of their security, by unilateral restructuring below par or by pesification. However, contrary to the Claimant's position, the dominant view in retrospect is that a voluntary restructuring, respectful of holders' rights, within an abandonment of the currency board would not have been viable from at least early 1998[345] or 1999.[346] Any abandonment of the convertibility in 2000[347] or by mid-2001 would have entailed an even more significant reduction of the value of the debt for the creditors in order to avert a general crisis as the one that materialized at the end of the year.[348] In legal terms, such a debt forced restructuring would have represented a breach of the terms of the debt instruments being restructured, exactly as was the case for the relevant Measures enacted by Argentina at the end of 2001 – beginning of 2002. Such a pre-emptive or anticipatory default could have been more easily challengeable as to the absence of any "necessity" under the BIT.

230. Even if practicable, these "alternatives" cannot however be invoked fruitfully by the Claimant as measures that would have respected its dollar-denominated investments in Argentina whilst being sufficient to avoid the crisis. If Argentina had abandoned the

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344 According to *Mussa*, 35, "[i]t is impossible to know at what point sovereign default and a likely collapse of the Convertibility Plan became unavoidable. Perhaps it was already too late by the autumn of 2000."

345 See IMF, *Evaluation Report*, 20: "[i]n retrospect, the years 1996-97 may well have been the last opportunity for Argentina to exit from the peg without facing very high costs … It should be noted however that exit was never an easy option, either politically or economically. The legal consequences of an exit would have been just as significant, given the extensive dollarization of contracts and that it would have meant the breach of a social contract between the state and the public."

346 With reference to 1998-1999, according to *Lessons from the Crisis*, 34, "[a] possible alternative approach, at this stage, would have been a pre-emptive sovereign debt restructuring, which would have provided both sufficient liquidity and net present value relief, combined with a strategy to limit the adverse repercussion on banks' balance sheets (…) However, at that stage, the authorities were understandably reluctant to adopt such a drastic approach, as a sovereign default was regarded as a last resort that should be taken only after all other policy options were exhausted." See also IMF, *Evaluation Report*, 66.

347 According to *Mussa*, 19-20, in late autumn 2000 "[n]ecessarily, this rescheduling of private credits could not be entirely voluntarily, as private creditors would be required to accept significant modifications of their existing claims that would reduce their market value ... would be viewed as a *de facto* sovereign default and would likely to be very messy."

348 *Lesson from the Crisis*, 36, 40.

parity and convertibility at 1:1 before 2000, Continental could not have made those U.S. dollars denominated investments exchanging at par CNA's income made in peso that it complains have been affected by Argentina devaluation/pesification. If the convertibility board system had been abandoned later, the probability is, as indicated above, that the Claimant would have been subject to the same losses that it challenges here. Therefore the alternative would not have put it in any better situation.

E. The effect of the applicability of Article XI

(i) In general

231. Concluding that the measures taken by Argentina were necessary to address, through painful means and by retreating from a number of commitments to the public as to the stability and convertibility of the national currency, an impending situation of complete breaking down of the economy, does not imply that the crisis was inevitable. If a different economic and exchange policy had been introduced years before this could have avoided the crisis of 2001-2002. While we have examined this scenario, the causative link between these "pre-emptive" policies and the Measures at issue would have been possibly too tenuous to consider them as alternatives that would have rendered these measures unnecessary under Art. XI. In any case, for the reasons just stated, the Claimant would not have profited in respect of its dollar-denominated investments that it made in 2001 on the basis of the fix parity/free convertibility system in place that was soon thereafter to become unsustainable. At the stage when the Measures were adopted it does not appear to the Tribunal that Argentina had the choice to resort generally to alternatives that would have been economically and legally less disruptive.

232. The measures were sufficient in their design to address the crisis and were applied in a reasonable and proportionate way at the end of 2001 – 2002.[349] They have led to recovery in a context favorable to Argentina's exports. We also note that the relevant Measures were basically limited to the economic and financial aspects of the economic crisis. They did not interfere otherwise with the ordinary conduct of private business activities; they did not entail (re)nationalization of private owned business, nor otherwise

349 Cf. WTO Appellate Body, *EC-Asbestos*, 168, for relying on the aptitude of the design of a measure to reach its objectives as one of the yardsticks in order to uphold its admissibility.

interfere with private contracts, including insurance companies (nor does the Claimant complain of any such measure). None of the impugned Measures differentiated between national or companies of Argentina, on the one hand, and foreign or foreign owned companies and businessmen, be they investors or not, on the other hand. CNA was in all respect treated as any other Argentine (insurance) company.

233. In sum, based on the evidence adduced by the Parties in these proceedings, we consider that Argentina's conduct in the face of the economic and social crisis conformed, by and large,[350] with the conditions required for derogating from its obligations under Art. XI of the BIT as to the Measures challenged in the present dispute. The examination of the Claimant's challenges under the various BIT provisions it has invoked will have therefore to take into account Art. XI, evaluating in more detail whether and how far the defense based on necessity under that provision is relevant and available as to the specific claims of breach and with what effects.[351]

(ii) Has Argentina contributed to necessity?

234. Before concluding our decisions on necessity, the Tribunal must also deal with the argument that necessity is unavailable to Argentina "because Argentina contributed" itself to the state of necessity it invokes. Art. 25 ILC, which excludes the plea of necessity in such a case at para. 2(b), and on which the Claimant relies, cannot be the yardstick as to the application of Art. XI of the BIT for the reasons stated above. Arguably, under Art. XI a Contracting Party may invoke necessity even if the need to protect its essential security interest has materialized as a consequence of a deliberate but still legitimate policy of that very State.[352] On the other hand, if a Contracting Party to the BIT has contributed to endangering its essential security interest, for the protection of

350 We have stated at para. 220 ff. that the restructuring of the LETEs, as concerns CNA, does not appear having met the requirements that would have made it "necessary."

351 The concept and evaluation of necessity does not require nor allow the Tribunal to go into the merits in detail and to substitute its own judgment to that of the national authorities, such as considering whether a conversion rate of, let us say, 1.50 would have been more appropriate than the one chosen of 1.40. As already indicated, a margin of discretion and appreciation is generally recognized to national authorities in this respect whenever their conduct is tested under international standards.

352 One could imagine that country A, which has a BIT in force with country B, adopts an unfriendly attitude or policy towards the latter. Country B reacts in a way that country A considers endangers some of its essential security interests. In order to protect those interests, country A then considers it "necessary" to adopt measures limiting movements of funds to country B, or prohibiting investors from country B from engaging senior managerial personnel of nationality B against provisions granting such rights as those found in the Argentina – USA BIT.

which it has then adopted the challenged measures, those measures may fail to qualify as "necessary" under Art. XI, since that Party could have pursued some other policy that would have rendered them unnecessary.

235. It cannot be denied that a country is always ultimately responsible of its economic policy and of its consequences, at least politically and economically.[353] The conduct of economic affairs, as any other affairs, pertains to the Government, so that the state bears the ultimate responsibility for any failure. The Claimant points out that Argentina's own senior authorities did in fact recognize this responsibility.[354] Legal evaluation is based however on different parameters. Our analysis in the preceding paragraphs shows that the economic and exchange policies whose ultimate unsustainability led to the crisis were regarded as sound economic policies which had been beneficial for years to Argentina's economy. The fixed parity/convertibility/currency board system was praised by the international financial community and by many qualified observers. It had been recommended by the IMF and received its massive financial assistance, as well as the political support of the United States.[355]

236. It is argued that Argentina could have changed course and rejected the advice it was receiving, or on the contrary, that it might have tried to enforce with more determination those supporting policies that had been recommend to it. In either scenario conflicting qualified views have been expressed retrospectively on the soundness and feasibility of those policies or of the alternatives.[356] In the light of the analysis available

353 The IMF *Evaluation Report*, 64, summing up its "Major Findings" states the following: "[t]he catastrophic collapse of the Argentine economy in 2001-2002 represents the failure of Argentine policy makers to take necessary corrective measures at a sufficiently early stage. The IMF on its part, supported by its major shareholders, also erred in failing to call an earlier halt to support for a strategy that, as implemented, was not sustainable." The subsequent (2006) External Evaluation of the IEO Report of 2004, 14, (Argentina's doc. R-294) has criticized this text, as a rearrangement in its final version in order to reduce the Fund's role in the ultimate failure of its program of assistance to Argentina: "[t]he IEO draft summary of missteps leading up to Argentina's currency collapse focuses on misjudgement by IMF staff and management; the final version of the paragraph focuses on misjudgements by Argentine authorities."

354 This had been recognized by President Duhalde in the Financial Times, US Edition of February 7, 2002 ("in the case of Argentina, no one bears more of the blame for the crisis than Argentina itself"), as the Claimant emphasises, see Claimant's doc. C-111 and Claimant's Reply, para. 13.

355 See *Scott*, 576: "[d]uring the two years leading up to the crisis, the IMF repeatedly loaned Argentina funds. US government officials were involved in each IMF decision." This is confirmed in more detailed journalistic terms by *Blustein*, 145 ff, focusing on the support of the US administration in summer 2001 to the IMF policy of assistance to Argentina.

356 In economic matters, the analysis of causation, that is the determination of which facts caused a certain other fact, or whether a certain fact was among the contributory causes of that certain other fact and whether its impact was material, does not lend itself to the same scientific analysis as in the domain of the so-called exact sciences and of natural phenomena. The IMF *Evaluation Report*, dealing with "Factors Contributing to the Crisis" at p. 14,

and of the evidence submitted to us we have come to the conclusion that the most likely means to avoid the crisis and the measures adopted to face and overcome it, would have been to adopt different policies years before, against the advice and support that Argentina was receiving from the outside. In this context we do not consider that Argentina because of its own conduct is barred from invoking Art. XI of the BIT.

VII. Specific Claims of Breaches

A. Claim of breach of Article V (Freedom of Transfer)

237. The Claimant complains that CNA was prevented from transferring to the U.S. at par free funds amounting to U.S.$19,000,000 by Decree 1570 of 2001 (*Corralito*) which forbade withdrawals from banks and transfers of funds (which CNA had converted in dollars) out of Argentina. The amount of damages it claims as the loss from devaluation of those funds equivalent to U.S.$14,631,000.[357] Continental claims that this prohibition breached its right as an investor to effect "all transfers related to an investment" provided for by Art. V of the BIT.[358] According to Continental, the proposed transfer concerned "proceeds from the sale or liquidation of all or any part of an investment" (Art. V(1) (e)), based on the following reasoning: "Continental's shares in CNA ART are definitely an investment protected under the BIT. The transfer of the asset of an investment is a transfer related to an investment. Transfers of U.S. dollar term deposits on maturity are also 'proceeds from the liquidation of…part of an investment.'"[359]

238. As mentioned above at para. 82, Argentina denies having breached Art. V of the BIT in regards to transfers. First of all, Argentina claims that Art. V concerns only foreign investors and not local subsidiaries as CNA ART. Argentina indicates that Art. V(1)(e) is not applicable here, because it "protects transfers of the proceeds of the sale or liquidation of all or any part of an investment," that is by the parent company

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notes that "[t]here is a general agreement that a combination of domestic and external factors contributed to the crisis, but different authors have emphasised different factors as relatively more important," such as the weak fiscal policy, the rigid exchange rate regime and adverse external shocks. The Report also distinguishes between "the underlying factors that generated vulnerability and the immediate factors that triggered the crisis."

357 This amount corresponds to the difference between the original amount calculated in dollars plus interests it would had earn if it would have remained in dollars, minus the pesified amount increased by the interest earned thereon, reconverted in dollar at the current exchange rate at March 2006. See Schedule 8 of the Reply Report of Mr. H. Rosen, expert witness for the Claimant at page 43.

358 Claimant's Reply, para. 193 ff.

359 Claimant's Reply, para. 195.

(Continental), while here the bank deposits were held by CNA. Argentina further argues that Art. V does not prevent "specific regulations for balance-of-payment difficulties" in view of Art. XI of the BIT and of the "standards established in multilateral agreements which both Argentina and the United States … have signed," with specific mention of the GATT, the GATS and the IMF.[360] Argentina also claims that its regulation of monetary transfers conforms with international customary law, as a manifestation of the exercise of monetary sovereignty by States, in view of the severe difficulties in its balance-of-payment.[361] Argentina claims that "if CONTINENTAL wanted to make transfers abroad of money derived from revenues and dividends, they could be made by previously requesting the authorization from the corresponding authority, i.e., 'the BCRA,' a request that neither CNA nor Claimant ever made." [362]

239. The first issue here is to determine whether the transfer that Continental claims it would have made if the *Corralito* had not prevented it, falls within those "transfers related to an investment" which the Parties to the BIT undertook in Art. V to permit "freely and without delay into or out of its territory." This type of provision is a standard feature of BITs: the guarantee that a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain, in case of sale or liquidation, is fundamental to the freedom to make a foreign investment and an essential element of the promotional role of BITs.[363] This explains moreover the detailed list of permitted transfers that most BITs set forth.[364] On the other hand, the Treaty terms show that such freedom is not without limit.

240. The first issue is to determine which transfers are "related to the investment." This is important since in respect of those transfers the U.S. BITs "prohibit virtually all restrictions," thus limiting the Parties' prerogatives under customary international law to

360 Argentina's Rejoinder, para. 295.

361 Argentina's Rejoinder, para. 297.

362 Argentina's Rejoinder, para. 306.

363 UNCTAD, *Transfer of Funds*, Executive Summary, sums up the point as follows: "[...] a transfer provision ensures that at the end of the day, a foreign investor will be able to enjoy the financial benefits of a successful investment."

364 For a systematic review of clauses see UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 1998, 75; *Dolzer*, *Stevens,* 85.

impose currency exchange restrictions.[365] Guidance is to be found in the detailed (though non-exclusive) list in Art. V(1) and the purpose identified above of this kind of provision. Protected transfers are those essential for, or typical to the making, controlling, maintenance, disposition of investments, especially in the form of companies; or in the form of debt, service and investment contracts, including the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds, including intellectual and industrial property rights; and the borrowing of funds, to name the kind of investments and associated activities mentioned in Art. I of the BIT more relevant to this issue.

241. The type of transfer at issue here does not fall into any of these categories, nor specifically does it represent the "proceeds from the sale or liquidation of all or any part of an investment." It was merely a change of type, location and currency of part of an investor's existing investment, namely a part of the freely disposable funds, held short term at its banks by CNA, in order to protect them from the impending devaluation, by transferring them to bank accounts outside Argentina.

242. The transfer did not correspond to, nor was it required to satisfy any payment obligation of CNA, commercial, financial or other; nor would it involve the transfer of ownership of the funds involved to some different entity. It was clearly a legitimate operation from a business point of view, permissible under the convertibility regime of Argentina until the *Corralito*. This does not mean that it would fall within the "transfers related to an investment" under Art. V. The fact that the BIT does not limit these transfers to those made by the foreign investor itself and that these transfers may be made by the local subsidiary, in favor of its parent company as well of other entities (thus in case of payment of royalties, payments related to loans received etc.), does not mean that any trans-border movement of funds by such subsidiary is "related to an investment."

243. Both parties have relied also on the IMF provisions and the connected principles of the multilateral regulation of international payments in support of their position. As is well known, the IMF distinguishes between current transactions and capital movements.

365 See *Vandevelde*, 139-141.

The "avoidance of restrictions on current payments" (Art. VIII), except with the approval of the Fund, is a "general obligation" of IMF members, adhered to by their vast majority that do not avail themselves of the transitional regime of Art. XIV. It reflects one of the key purposes of the Fund, "to assist in the establishment of a multilateral system of payments in respect of current transactions" as stated in Art. I (iv), as was the case of Argentina when its currency was freely convertible. On the other hand, capital movements may be subject to exchange controls by individual members, *inter alia* in view of their possible speculative nature and destabilizing effects on national economies.

244. The above distinction is of limited assistance here, because transfers "related to an investment" listed in and allowed by Art. V of the BIT includes both current transactions and capital movements: Art. V may be considered a *lex specialis* in respect of the IMF regime and more liberal than the latter. In any case, capital movements are defined *a contrario* by the definition of "current transactions" in Art. XXX of the Fund. Not all capital movements are in themselves "investments," such as direct investments or portfolio investments listed in Art. V of the BIT. In the IMF terminology and classification, widely accepted beyond the Fund's ambit, the movement of capital at issue here was or would have been more specifically a short-term deposit abroad, a transaction which may be subject to tighter controls than direct or portfolio investment transactions.[366] This confirms the Tribunal in its conclusion that the transfer which the Claimant complains it could not carry out because of the *Corralito*, namely a short-term placement out of Argentina of the equivalent of $19,000,000, was not a transfer related to an investment protected by Art. V of the BIT.

245. As a consequence Argentina has committed no breach of Art. V of the BIT to the detriment of the Claimant, so that the latter's claim in this respect must be and is rejected by the Tribunal. This conclusion makes it unnecessary for the Tribunal to examine the subordinate arguments of the Parties: namely (a) whether in view of the acute foreign exchange crisis Argentina was encountering, Argentina was allowed, notwithstanding its

366 See IMF, *Balance of Payments Manual*, 5° edition, 1993, Chapters XV and XX. When States commit themselves to allow capital movements, they focus especially on direct investments and reserve the right not to liberalize short term monetary placements abroad of the type discussed here; see OECD *Code of Liberalization of Capital Movements*, and its List B-XI; European Community, *Directives on Capital Movements*, May 11, 1960 and December 18, 1962 (not in force any more), Annex I, List D, and Annex II- IX.

obligations under Art. V BIT to introduce the exchange restrictions of Decree 1570, based on Art. XI of the BIT, on the IMF Agreement or under customary international law; (b) whether the Claimant cannot invoke Art. V because neither itself (Continental) nor CNA ever decided to make, or asked to be authorized to effect the transfers at issue;[367] and (c) whether the derogations allowed under the *Corralito* would have made those transfers possible.[368]

B. Claim of breach of Article II (2)(a) (Fair and Equitable Treatment)

a) In general

246. The Claimant has severely criticized the behavior of Argentina towards its investments during the crisis; in its view Argentina "promised to refrain from interference with Bank Deposits, then froze and pesified them;"[369] "promised to honor its government debt, then defaulted on and pesified it."[370] The Claimant submits that these Measures breached the BIT's obligation to treat it, as a U.S. investor, in a fair and equitable manner and according to the international law standard of treatment, contrary to Art. II (2)(a) of the BIT. This Article provides that: "[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law." Specifically according to the Claimant, this article obliges Argentina "to provide a stable legal and business environment"[371] and "to protect investors' legitimate expectations."[372]

247. According to the Claimant, in the light of what it considers to be the legal import of these Treaty standards and in view of the commitments Argentina had undertaken in respect of its monetary system, of the protection of private investments and of the terms of the debt instruments it had issued, Argentina has breached the standards of Art. II

367 As Argentina correctly points out, there is no cogent evidence in the evidential record that the Claimant intended actually to shift its funds out of Argentina at the time of the *Corralito*. Up to then, the Claimant had made the deliberate choice of keeping its funds in Argentina (see above para. 132), converting them from pesos into dollar-denominated instruments.. CNA thus acted as "a good corporate citizen" of Argentina and did not participate in the capital flight of the second part of 2001 which lead to the imposition of the *Corralito.*

368 See above footnote 197.

369 Claimant's Reply, para. 53.

370 Claimant's Reply, para. 70.

371 Claimant's Reply, para. 181 ff.

372 Claimant's Reply, para. 188 ff.

(2)(a) BIT: through Decree 1570 (*Corralito*); by pesification of bank deposits through Decree 214; by pesification of government debt through Decree 471; by the unilateral rescheduling of deposits and default on debt.[373]

248. Argentina opposes the Claimant's claim concerning the alleged violation of Art. II (2)(a) of the BIT.[374] According to Argentina, the fair and equitable treatment standard (as well as the other treatment standards mentioned in the same paragraph) must be applied considering especially the circumstances under which such measures were adopted, namely the "dramatic economic situation" that Argentina was experiencing when the challenged Measures were enacted. According to Argentina, the traditional "minimum standard" of treatment of aliens is the one relevant under Art. II(2)(a), so that "investments made by Continental, as it happens with the remaining foreign investments, have been considered in accordance with international law."[375] Argentina then explains why in its view the Measures it had adopted since December 2001 are in accordance with the principle of fair and equitable treatment: "[t]hese measures constituted a reasonable, good faith and non discriminatory answer to the most serious crisis that the country had ever suffered which, over time, had a positive effect on the country in general and on the investments of Continental and CNA ART in particular."[376] Argentina opposes the reliance by the Claimant on the alleged respect required for the Claimant's "legitimate expectations," submitting that the standard at issue does not justify the foreign investor expecting that regulation will never change; specifically it does not prevent re-adaptation in an exceptional situation of emergency. In any case, as already indicated Argentina claims that the Measures challenged were necessary to counteract the crisis and are thus covered by its invocation of Art. XI of the BIT.[377]

249. The Parties disagree on the legal content of the "fair and equitable" standard of treatment in Art. II (2)(a) of the BIT. They especially disagree as to whether, factually, the abrupt radical change of the legal setting concerning Argentina's currency, exchange

373 Claimant's Reply, paras. 216-229.

374 Argentina's Counter-Memorial, para. 492.

375 Argentina's Counter-Memorial, para. 501 ff.

376 Argentina's Counter-Memorial, paras. 571 and 625.

377 Argentina's Reply, paras. 22-23, 56, 71, 80 and 365 ff.

mechanism, and the regime of financial instruments in circulation in the crisis period, as it affected the Claimant's investments, was a breach of such standard.

250. One of Claimant's central arguments is that this standard requires as an essential element "a stable legal and business environment,"[378] an obligation that (in its view) is also entailed by the undertaking of the host State to provide full protection and security.[379] The Claimant submits that since such a stable environment must be granted by a host State acting in good faith, an investor such as Continental has a "legitimate expectation" that this will be the case.

251. Thus the Claimant had "legitimate expectations" that the convertibility regime of Argentina would not be changed, so that free transfer would be maintained, existing dollar-denominated securities and deposits would not be compulsory transformed in pesos at a below-market rate and their terms would be respected (all of which did not happen in Argentina's crisis). The Claimant concludes that since Argentina subverted the business environment it failed to respect the Claimant's rights.

252. The Claimant relies as a basis for its alleged legitimate expectations on a series of acts and pronouncements by Argentina's authorities from different sources and having unequal legal value. Thus, the Claimant invokes the Intangibility Law of September 24, 2001 by which "Argentina assured investors that Argentina would not interfere with bank deposits. The Investor relied on Argentina's representations to keep its money in Argentina. Argentina's subsequent asset freeze failed to fulfill the Investor's legitimate expectation that Argentina would not interfere with its deposits."[380] Also the pesification in itself is claimed to be contrary to this standard in conjunction with the Intangibility Law.[381] The Claimant also relies on certain public statements by Minister Cavallo,

378 See *CMS* Award, paras. 274-280; *Occidental Exploration and Product Company* Award, paras. 183-186; *Tecmed* Award, paras. 153-156 which the Claimant refers to. See Claimant's Reply, para. 182 ff.

379 Claimant relies on *Azurix* Award, para. 408. See Claimant's Reply, para. 186.

380 Claimant's Reply, para. 219.

381 Claimant's Reply, para. 223 with reference to the *CMS* Award, paras. 275 and 281.

undertaking not to abandon the convertibility regime, as well as on the terms of the GGLs[382] and of the LETEs.[383]

253. Argentina on the other hand submits that the fair and equitable treatment standard does not oblige further treatment or treatments beyond what is required by virtue of the minimum standard of international customary law. This standard is related to notions such as natural justice or lack of discrimination and does not refer, as results also by the more recent agreements amongst states, to the legal and business framework stability, or the expectations or "basic assumptions" of foreign investors. Argentina relies on the NAFTA arbitral awards concerning the application of fair and equitable treatment standard. Quoting the NAFTA Tribunal in the *Waste Management II* case, Argentina submits that the minimum standard of fair and equitable treatment is breached if the State's conduct is "arbitrary, grossly unfair unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offense judicial propriety- as might be the case with the manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process."[384] Argentina relies also on the position recently taken by several states, including the United States of America, with regard to the content of this standard, as expressed in the context of the NAFTA, the FTA with Chile, and the U.S. Model BIT of 2004.[385] In summary, according to Argentina, "to determine whether the Argentine Republic acted in accordance with the principle of good faith it is necessary to evaluate whether allegedly offensive measures invoked adopted by the Argentine Republic were dishonest, unreasonable or unfair."[386] Applying the abovementioned criteria, the challenged measures appear honest, reasonable and fair, so Argentina submits that that it did not act in bad faith.

254. It is generally accepted that the "fair and equitable" standard of treatment has an important role in the protection of foreign investments, which explains the inclusion of

382 Claimant's Reply, para. 228.

383 Claimant's Reply, para. 230.

384 Argentina's Counter-Memorial, paras. 538-543.

385 Argentina's Counter-Memorial, paras. 501-516.

386 Argentina's Counter-Memorial, para. 567.

this standard in BITs and other international instruments dealing with foreign investment. It is especially important for direct investments which are usually made for a considerable duration and whose profitability and economic contribution to the host country's economy are dependent on them being treated by local authorities in a way which is coherent with the ordinary conduct of business activity. While the requirements of a lawful expropriation focuses on the preservation of the value of the investment when the host State precludes its further operation for some public reasons, the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities. However, in every case, it is first necessary to interpret the wording of the particular Fair and Equitable Treatment standard incorporated in the BIT at issue. It does not follow that, whatever that wording, the Fair and Equitable Treatment standard should always be the lower minimum standard under customary international law.

255. Moreover, the content of the obligation incumbent upon the host state to treat a foreign investor in a fair and equitable manner, even when applicable "at all times" as specified in Art. II(2)(a) of the BIT, varies in part depending on the circumstances in which the standard is invoked: the concept of fairness being inherently related to keeping justice in variable factual contexts.[387] This explains the considerable debate surrounding the main features of the Fair and Equitable Treatment standard generally as well as its relations, especially in the context of BITs and similar instruments, with others standards that are often spelled out in conjunction with it, such as "full protection and security" and, of course, the minimum international standard.[388]

256. It is not necessary for us here to go more into that debate. The issue here is relatively straightforward: whether certain abrupt and fundamental changes made by Argentina to its exchange and currency regime because of the 2001-2002 economic and financial crisis, with the aim of resolving it, including the traumatic blocking of bank

387 *Noble Ventures* Award, para. 181.

388 See generally OECD, *International Investment Law, A Changing Landscape,* 2005, Chapter 3 "Fair and Equitable Treatment Standard in International Investment Law," 73-125.

accounts, the pesification of deposits and financial instruments, the default and subsequent restructuring of the same, made the treatment of the Claimant's investment not "fair and equitable."

257. The Claimant has framed its claim in terms of "legitimate expectations." It submits that it was entitled to rely legally under the BIT on the existing exchange and currency regime which existed when it made its investment in the insurance sector of Argentina, so that when this was changed to its detriment, it was entitled to claim indemnification. The Claimant does not rely on the convertibility regime of 1991 *per se*. It rather points out to certain specific legislative enactments and contractual undertakings of Argentina (the Intangibility Law and the terms of issuance of the GGL's respectively) in order to support its claim that its expectations of stability were "legitimate." In respect of GGLs, the Claimant also points to the circumstances that the complete subversion of the monetary regime happened just weeks after the solemn and formal statements contained in those instruments.

258. Stability of the legal framework for investments is mentioned in the Preamble of the BIT. It is not a legal obligation in itself for the Contracting Parties, nor can it be properly defined as an object of the Treaty. It is rather a precondition for one of the two basic objects of the Treaty, namely the promotion of the investment flow, rather than being related to its other objective, that of granting protection for investments on a reciprocal basis. Stability of the legal framework is undoubtedly conducive to attracting foreign investments, especially direct investments where business plans can extend over a number of years; and even more so in respect of those where initial investments are substantial and are recouped only over a long period of time. On the other hand, it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT's Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable. In any case, it is uncontested that the legal and regulatory regime for CNA's insurance business in general remained stable throughout the crisis.

259. The situation of the foreign investor at issue here is therefore different from that raised in other cases relied upon by the Claimant, many of them concerning different Measures that Argentina adopted in the crisis. In the present case, general pronouncements are mostly at issue, predominantly of a legislative type. Moreover, the features of the legal or contractual regime at issue here were applicable or addressed either to the generality of Argentina's public, or to a wide range of depositors and subscribers of certain financial instruments. Moreover, the general legislative "assurances" were not the basis on which Continental had relied in making its investment in Argentina, since it had entered in that market before such assurances.

260. By contrast, in most cases invoked by Continental as "precedents,"[389] specific undertakings were at issue, legislative, administrative or contractual (some of them by local authorities) directed or agreed with the investor, on the basis of which and in reliance upon the aggrieved investor had actually made its investment and committed long term resources. Without here entering into an evaluation of those cases, there are significant factual and contextual differences with the present case as to the application of the abstract concept of "reasonable legitimate expectations."

261. In summary, in order to evaluate the relevance of that concept applied within Fair and Equitable Treatment standard and whether a breach has occurred, relevant factors include:

i) the specificity of the undertaking allegedly relied upon[390] which is mostly absent here, considering moreover that political statements have the least legal value, regrettably but notoriously so;

ii) general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is

389 Contrary to the case before this Tribunal, the *CMS* Tribunal evaluated the pesification as a breach of the BIT not *per se* but in connection with Argentina's obligations under the Gas sector special legal regime (i.e. the tariff regime calculated in dollars and the US PPI adjustment of the gas tariffs). The pesification was adjudged there to be contrary to the BIT's obligations in its relationship with those specific guarantees that were addressed by Argentina to foreign investors under the Gas sector legal regime and "were crucial for the investment decision" (*CMS* Award, para. 275).

390 Such as those inherent in contractual obligations undertaken by Argentina abroad subject to foreign law, such as bond issuances on international financial markets.

high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*;

iii) unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve clearly more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance;

iv) centrality to the protected investment and impact of the changes on the operation of the foreign owned business in general including its profitability is also relevant; - good faith, absence of discrimination (generality of the measures challenged under the standard), relevance of the public interest pursued by the State, accompanying measures aimed at reducing the negative impact are also to be considered in order to ascertain fairness.

262. In light of the above criteria the Tribunal concludes on the facts of this case that:

i) Continental cannot invoke legitimate expectations as to the change of the convertibility regime of 1991, notwithstanding political declarations by various authorities that convertibility would not be abandoned.

ii) Continental should have maintained a reduced trust in the Intangibility Law of September 2001, since this was enacted when the worsening of the crisis was evident and indeed made in order to try to support dwindling confidence in the sustainability of the convertibility. (Even more so since Continental and CNA were professional operators in the financial sector).

iii) As far as the de-dollarization and its specific modalities could be considered contrary to any fair and equitable treatment in the light of previous assurances by

Argentina (including the Intangibility Law),[391] the Tribunal considers that the necessity defense under Art. XI is available to Argentina for the reasons explained above.

iv) The Measures were not discriminatory;[392] they were general, affecting all sectors of the national economy and all classes of depositors and investors, nor did they affect the carrying-on of the insurance business of Continental in respect of which the reliance on stability of the legal environment could have been properly focused.[393]

263. As to Measures which directly affected the investor in subverting certain contractual obligations, the Claimant impugns them for having been taken shortly after investors such as CNA had been induced to accept those obligations (namely the GGLs). In this respect the Tribunal considers that the plea of necessity by Argentina under Art. XI of the BIT precludes any further analysis aimed at evaluating their compatibility with Art. II (2)(a). The Tribunal recalls that it has signaled above that in any case the impugned Measures, including the subsequent restructuring of the GGLs, comply with the requirements of non discrimination, correspondence to their objective, and good faith.

264. As to the LETEs, on the contrary, we have already decided that the defence of necessity, both under Art. XI of the BIT and under the principles of customary international law, is not available to Argentina as to the conditions of their restructuring in December 2004 and that the terms of the unilateral restructuring were by then unreasonable;[394] notably where they implied a waiver of all rights by the holders, who were being subjected to a substantial loss of their investment, in addition to having been previously subjected to losses due to pesification.

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391 The Intangibility Law was explicitly suspended for the duration of the public emergency by Art. 15 of the Public Emergency Law 25,561 of January 6, 2002.

392 On the contrary, Argentina did consider the special position of depositors and their expectations where it converted only these US dollar denominated deposits at the different rate of 1.4:1, at the cost of the Nation's Treasury.

393 As it results from the Annual Reports and accounts of CNA, its pre-tax earnings amounted to pesos 2,083,067 at June 30, 2000; pesos 1,706,399 at June 30, 2001 (Claimant's doc. C-354); pesos 17.596.761 at June 30, 2002; pesos 51.761.466 at June 30, 2003 (Claimant's doc. C-355); pesos 28,610,648 at March 31, 2004; pesos 25,286,027 at March 31, 2005; pesos 17.596.761 at June 30, 2002 (Claimant's docs. C-355), (Claimant's doc. C-90 and C-91).

394 See above paras. 220-222.

265. The breach of the Fair and Equitable Treatment concerns the restructuring (not the pesification of the LETEs), since we have found that the pesification generally is covered by the defense of necessity. The loss sustained by the Claimant to be made good by Argentina because of its breach of the Fair and Equitable standard in the BIT amounts, therefore, to the dollar equivalent of the pesified amount of the LETEs in November-December 2004, as indicated by the Claimant in U.S.$2.8 million, plus interest as determined hereunder. [395]

266. In conclusion, save for the LETEs, the Tribunal considers that the invocation of necessity by Argentina under Art. XI of the BIT is applicable to all other claims by the Claimant for breach of the Fair and Equitable Treatment standard by Argentina's Measures. The Tribunal decides accordingly that Argentina has not breached its obligations under Art. II (2) (a), by these Measures, except as to the LETEs.

b) Capital gain tax

267. Continental complains of the capital tax that was imposed in accordance of existing tax legislation on the gain allegedly made by CNA, when its investments in dollar-denominated financial assets up to then accounted for at one peso for one dollar, were converted in pesos at 1.4:1. Continental submits that the increase of the peso value was purely nominal: through the pesification it had suffered a substantial loss in the real value of its investment which amounted also to a partial expropriation. In any case the imposition of the tax on such a non-existent profit amounts to unfair treatment.[396]

268. Argentina denies any wrongdoing under the BIT. It points out that CNA's accounts were in pesos (as were all corporate accounts in the country) and that the tax is a general pre-existing fiscal measure applicable to capital gains by companies. It was thus properly due by CNA since its accounts showed a capital value increase due only to the conversion of dollar-denominated assets at 1.4:1, thanks to the preferential rate of the pesification applied, while before they had be valued under the convertibility / par regime at 1:1.

395 As to the calculation of interest see hereunder para. 303 ff.

396 Claimant's Memorial, paras. 216-218.

269. We recognize that, at first glance, it seems odd that a company holding dollar-denominated assets which by effect of the forceful conversion is left with a peso amount much inferior to the peso equivalent resulting had a market rate been applied, must also pay a capital gain tax on such a nominal increase of value. However, such a tax regime is far from unusual. Moreover, it has to be kept in mind that, in conformity with the nominalistic principle, the currency of Argentina was the peso; CNA's corporate accounts were naturally expressed in pesos, as were both its revenues from its insurance activity and its costs. Thus, during the convertibility regime any of CNA's assets (and income) denominated in dollars was necessarily recorded in its accounts in pesos at the rate of 1:1. When these assets held in Argentina were converted in pesos at 1.4:1, CNA realized an "exchange gain," to be recorded in the assets part of the balance sheet and which was not balanced by any corresponding item in the liability side. As a result, this gain was properly considered a capital gain, subject to the general applicable tax regime. The reduced external value of all peso assets of CNA was not something that could be recorded and have an effect within those accounts governed by Argentina's legislation. The reduced net value of CNA, as an effect of the devaluation of the peso vis-à-vis the dollar, diminished the value of any Argentina-based assets in term of any other stable currency. This was material for the U.S. parent company and was properly registered in its accounts. However, from an accounting perspective within Argentina it was neutral and irrelevant.

270. In the Tribunal's view, the claim of Continental concerning the application of the capital gain tax has therefore no basis under Art. II (2)(a) of the BIT, nor for the same reasons does it constitute an expropriation under Art. IV of the BIT. It is therefore rejected by the Tribunal.

C. Claim of breach of Article IV (Prohibition of Direct and Indirect Expropriation)

271. The Claimant has also impugned several of Argentina's Measures as representing an indirect, creeping or partial expropriation of CNA's investments in breach of Art. IV(1) of the BIT. According to this provision:

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

272. More specifically Claimant considers that such an expropriation has resulted from:

i) the pesification of CAN's dollar-denominated deposits and securities at a much "below market exchange rate;"

ii) the restructuring of the GGLs at terms that did not reflect their acquisition value; and

iii) the fact that the LETEs have been deprived of their value after CNA had not accepted the "unreasonable" terms of their restructuring offered by Argentina on May 31 and September 16 of 2002.[397]

273. Argentina opposes this claim as being groundless.[398] Argentina invokes the principle that each state is sovereign as to the management of the exchange rate of its currency, so that devaluation does not give rise to a claim of damages by those affected neither under general international law nor under the BIT. Argentina further claims that the pesification consisted in a new regulation of the pegging of the peso to the dollar, in respect to domestic deposits and financial instruments which had until then benefited from the convertibility-at-par regime. Argentina claims that it was within its prerogatives to put an end to convertibility, compulsorily reconverting the domestic dollar-denominated instruments in pesos at the same rate of 1:1, especially in view of the serious reasons that had led it to abandon convertibility at par.[399] The fact that as a result the peso devaluated so much more on the free market, so that the real value of the formerly dollar-denominated instruments decreased at the same rate as the peso vis-à-vis

397 Claimant's Memorial, para. 55.

398 Counter-Memorial, paras. 321-326, 571 ff.

399 Argentina refers as a relevant precedent to the prohibition of the gold-indexation of obligations in the USA in 1933. See U.S. Supreme Court, *Perry v. United States*, 249 U.S. 330 (1935), 294 U.S. 330, also referred to extensively in the *Bustos* decision of the Supreme Court. See also in this respect *Nussbaum*, 415, pointing out that "[a]lmost all the of the gold dollar bonds floated after World War I by foreign debtors in the United States are uncontestedly subject to American law."

the U.S. dollar is for Argentina immaterial. Argentina also points out that depositors such as CNA received a preferential treatment in that their holdings were converted at 1:1.4.

274. Argentina in any case invokes the defense of necessity, both under Art. XI of the BIT and under the principles of customary international law. It points out that, in view of the economic emergency the country was facing, the Emergency Law expressly suspended the application of the Intangibility Law which had declared deposits "intangible." It also points out that Argentina's Supreme Court, reversing its initial position, has recognized since the *Bustos* decision of October 26, 2004, that the emergency situation in which the country had fallen at the end of 2001 justified for public purposes a restriction on the right of private property such as those introduced by the emergency legislation. The Supreme Court had considered that this was a general regulation that had been applied fairly and reasonably and that therefore did not give rise to indemnification under Argentina's Constitution, which in that respect reflects an approach shared by most democratic constitutions and by international law.[400]

275. The Tribunal notes that most of the allegations brought by the Claimant under the heading of expropriation (breach of Art. IV of the BIT) are substantially the same and are addressed to the same Measures impugned as breaches of the fair and equitable standard of Art. (II)(2)(a) of the BIT. We have already found that the defense of necessity under the BIT is available to Argentina as concerns most claims of breach that Continental has raised against the Measures, namely the pesification of dollar-denominated deposits and the restructuring of GGL's.[401] The same defense based on Art. XI, leading to the non-applicability of the various BIT substantive obligations, is available in respect of Art. IV of the BIT. We do not need therefore to go further into the claims for breach of Art. IV than is required for our decision.

276. It is appropriate to distinguish those Measures adopted by Argentina that appear to be legitimate under the BIT, from those which are carved out because of the application of Art. XI. As a starting point we refer to the distinction generally accepted in

400 Counter-Memorial, para. 366.

401 In fact the Claimant agreed that should the Tribunal find a breach of the BIT in its favour under both accounts, the damages claimed should not be duplicated. See Claimant's Reply, para. 380.

international law and spelled out in some treaties,[402] notably in recent BITs,[403] between two types of encroachments by public authorities on private property: (i) On the one hand, there are certain types of measures or state conduct that are considered a form of expropriation because of their material impact on property, and which are legitimate only if adopted for public purpose, without discrimination, and against the payment of compensation according to the general or specific applicable standards. One may distinguish between: (a) outright suppression or deprivation of the right of ownership, usually by its forced transfer to public entities; (b) limitations and hampering with property, short of outright suppression or deprivation, interfering with one or more key features, such as management, enjoyment, transferability, which are considered as tantamount to expropriation, because of their substantial impact on the effective right of property. Both of these types of measures entail indemnification under relevant international treaties, as well as under most constitutions which respect fundamental human rights. [404] (ii) On the other hand, there are limitations to the use of property in the public interest that fall within typical government regulations of property entailing mostly inevitable limitations imposed in order to ensure the rights of others or of the general public (being ultimately beneficial also to the property affected). These restrictions do not impede the basic, typical use of a given asset and do not impose an unreasonable burden on the owner as compared with other similarly situated property owners.[405] These restrictions are not therefore considered a form of expropriation and do not require indemnification, provided however that they do not affect property in an intolerable, discriminatory or disproportionate manner.[406]

277. It is well known that the distinction is not always easy, that in different historical and social contexts the line has been drawn differently and that different international

402 Notably Art. 1, Protocol I European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR).

403 See US Model BIT 2004, Annex B [Expropriation].

404 See generally R. Higgins, *The Taking of Property under International Law*, RC (1982), vol. III, 268; C. Leben, *La liberté normative de l'État et la question de l'expropriation indirecte*, C. Leben (Ed.), *Le contentieux arbitral transnational relatif à l'investissement*, 2006, 163 ff.; *Feldman* Award, para. 112.

405 These limitations should not burden without good reason certain owners only, which would otherwise be made to bear the burden of an advantage that benefits instead a wider group.

406 See Art. 1, First Protocol to the ECHR; US Model BIT 2004, Annex B [Expropriation]; Third Restatement of Foreign Relations Law of the United States (1987), 712 (g). For an overview see OECD, *International Investment Law, A Changing Landscape*, 2005, Chapter 2 "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, 43-72.

tribunals, including arbitration tribunals under various BITs, have relied on different criteria and have given different weight to them, such as those recognizing the public interest on the one side and those protecting the integrity of property rights on the other. Different tribunals have come to different evaluations as to the definition of a specific measure brought forward for their decision and its classification in the first or second category. [407]

278. The fixing of an exchange rate and deciding the mechanism by which the national currency may be exchanged for foreign currency and its conditions, including the possibility of maintaining accounts and deposits denominated in a foreign currency within the country, pertain to the monetary sovereignty of each State. These policies fall under the second above-mentioned category (ii); they do not render the State liable for the burden or losses that may be suffered by those affected, provided there is no discrimination or unfairness in their application. The above-mentioned and related prerogatives may be of course limited by international obligations, such as those applying to the members of the IMF. The Argentina-U.S. BIT does not contain specific limitations in this respect, except for the "freedom of transfer" provision of Art. V. Other Treaty provisions may have, however, an impact, such as the MFN commitment and the fair and equitable treatment obligations, if breached by a Contracting Party in the management of its exchange policy. The Claimant itself recognizes that the BIT does not afford protection against devaluation, nor was it subject to discrimination in that respect.

279. As to the pesification of existing dollar denominated financial assets within Argentina, subject to its domestic law, there is no basis in our view for the Claimant's case that any compulsory conversion in peso has to be measured against the floating market value of the peso against the dollar at the time of the conversion, to the effect that the difference amounts to an expropriation that Argentina has to make good in damages.[408] The issue is rather whether Argentina had given a commitment to the foreign

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407 Thus the *Saluka* and *Methanex* Tribunals have emphasized the different qualitative nature of the regulation at issue in those cases (see also *Olguin* and *LG&E*), while other Tribunals, such as *Vivendi*, have relied on the criterion of the intensity of the encroachment on property (the effect-doctrine).

408 The Tribunal notes that other international tribunals have also denied that in most instances of devaluation an expropriation of private property under international standards is present, except in extreme situations of improper conduct by the State. This is the consistent jurisprudence of the ECHR under Protocol 1 to the ECHR protecting private property. See its presentation by former ECHR President Wildhaber, 253 ff. See also for the absence of any

investor that those assets would be linked to the U.S. dollar, thereby meaning the convertible currency of the U.S. under U.S. law, and would be immune from any evolution of the currency regime within Argentina. We cannot detect from the evidence any such specific commitment. Any commitment in this respect would relate, as we have already mentioned, to the fair and equitable treatment standard; namely whether Argentina had given rise to some specific "legitimate expectations" addressed to and relied upon by the foreign investor that its dollar denominated domestic deposits would be immune from any encroachment. We have already discussed this issue under the fair and equitable standard above, denying generally the Claimant's claim of breach. We came there also to the conclusion that, as far as these expectations might have had a basis, the proper invocation of Art. XI of the BIT by Argentina does not allow us to analyze the matter further under Art. II(2)(a) of the BIT (except in respect of the LETEs restructuring).

280. The Tribunal has noted the invocation by the Claimant of the Intangibility Law also under Art. IV of the BIT protecting U.S. investors in case of expropriation. The argument is to the effect that since Argentina itself has declared the dollar deposits as protected property in their "real dollar value" under the Constitution, thus precluding the Government from affecting their value by pesification, the contrary action by the Government during the crisis must result in an expropriation of private property under Art. IV since assets defined as property in Art. I (a) of the BIT were thereby materially affected.

281. We recall that the claims before us are brought under the BIT and not Argentina's law and that breaches of a treaty standard and breach of similar protection in domestic law are not necessarily interconnected. A given act or conduct by public authorities that constitute a breach of domestic law does not necessarily represent also a breach of international law.[409] The law of Argentina is therefore of limited relevance for us,

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such duty under international law as to obligations in domestic currency subject to the nominalistic principle *Mann*, 465 ff; Geneviève Burdeau, *L'exercice des compétences monétaires par les Etats*, RC 1988-V, 261 (except for "des conditions totalement arbitraires.")

409 ICJ, *Elsi*, para. 73.

including Supreme Court's decisions interpreting the Constitution.[410] On the other hand, if some of the Measures at issue here had been found finally unconstitutional by the highest judicial authority of Argentina because in breach of the basic protection to property rights that Argentina's Constitution grants in line with principles generally accepted, it would appear awkward that the same measure would not be in breach of the BIT standards.

282. In this respect the Supreme Court of Argentina has always relied on generally accepted principles, recognized beyond the legal system of Argentina. They had been spelled out and applied most recently before the 2001-2002 crisis in the leading *Peralta* case of 1990. At issue was one of the restrictive measures taken in Argentina to cope with the inflation of the 1980s, namely that providing the reimbursement of deposits in part with long term bonds.[411] The Supreme Court held in that case that in a situation of emergency there is no violation of fundamental property rights "when for reasons of necessity a regulation is enacted that does not deprive individuals of their economic rights recognized by law nor denies their property, but restraints temporally the enjoyment of those benefits or the use that may be made of that property." As to the crisis of 2001-2002, the decisions *Smith* of 2002 and *San Luis* of 2003 had adhered to that standard, but had concluded that the Measures challenged (pesification and postponement of due dates of deposits) had restricted unreasonably the substance of the right of property of those affected. In the *Bustos* decision of 2004 instead, the Supreme Court (consistently followed thereafter) held that in a situation of generalized necessity, duly determined by the legislative power, non-discriminatory Measures such as the forced conversion of deposits in foreign currency were lawful under Art. 17 of the Constitution, in that they were reasonable limitations to private property in face of the severe emergency of 2001-2002. In its 2004 decision the Court balanced differently the compression of individual economic rights against the need to preserve society in a state

410 The parties have argued at length the issue of the constitutionality of certain Measures at issue (especially the *Corralito* and the pesification) under Argentina's Constitution. The parties have drawn opposite conclusions from the fact that initially the Supreme Court decided against the constitutionality (*Smith* and *San Luis* decisions of February 1, 2002 and March 5, 2003 respectively, Claimant's doc. C-80 and C-81) while it thereafter reversed its stance in 2004 after a majority of judges had been replaced by the executive power (*Bustos* decision of October 26, 2004, Argentina's doc. RA-33).

411 Decision of December 27, 1990, Claimant's doc. C-276.

of adversity and of serious perturbation of physical, economic or other nature.[412] It is the acute crisis, and possibly only the acute nature of the crisis, that ultimately has justified the judicial upholding of the "suspension," or rather the revocation of the legislative pronouncement contained in the Intangibility Law, by which just a few months before Argentina's Parliament had aimed to reassure the citizens of the country of the stability of the convertibility regime also for the future.[413]

283. We reject therefore Continental's claims of breach of Art. IV, as far as the matter is not excluded from our scrutiny by the application of Art. XI.

284. Expropriation, even indirect, requires a certain level of sacrifice of private property in order to be found. Minor losses that are an incidental consequence to a general regulation of the economy adopted in the public interest are not considered to be expropriation giving rise to indemnification as highlighted before. This is applicable to the delays in payments of interest (that were subsequently made) and in the issuance of certain bonds (that were in any case delivered later to CNA) of which Continental complains. In the disarray Argentina was facing in 2002, these non compliances are covered in any case by the plea of necessity under the BIT.

285. Before concluding, we recall that we have found above that the restructuring of the LETEs held by CNA was not covered by the defense of necessity both under the BIT and the principles of customary international law and caused substantial loss to the Claimant. This has led the Tribunal to hold that the restructuring as concerns CNA was in breach of the Fair and Equitable Treatment of Art. II (2)(a) of the BIT and that Claimant is entitled to indemnification for that loss in the form of damages. Continental has claimed that the restructuring and its implementation constitute at the same time an expropriation and has

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412 See at p. 4496: *"[e]l derecho positivo argentino es particularmente explícito en lo que concierne a la legitimidad de la suspensión de los derechos personales como recurso propio del poder de policía, a fin de proteger el interés público en presencia de desastres o graves perturbaciones de carácter físico, económico, o de otra índole, siempre que no se altere la sustancia de tales derechos." See also at p. 4497: "[p]ara superar el estado de aversidad que implica una situaciòn de emergencia, todos los sectores deben deponer sus intereses individuales en pos del bienestar general y, con tal fin, la medidas no se limitaron a convertir a pesos los depositos constituidos en monedas extranjeras, sino que previeron mecanismos de compensation para morigerar la pérdida de valor que necessariamente trae aparejado el abandono del sistema de convertibilitad, decision de politica economica sobre cuyo acierto no pueden pronunciarse los jueces."*

413 In evaluating the nature of Argentina's crisis and in holding reasonable the Measures adopted to cope with it the *Bustos* decision appears to have benefited also from the temporal perspective that was absent in the earlier decisions; see. for the relevance of this perspective WTO Appellate Body, *EC-Tyres* on necessity, supra at footnote 294.

asked indemnification under either provision of the BIT in an amount corresponding to the original dollar nominal value of those LETEs. Having already decided the same issue under Art. II(2)(a) BIT, we do not need to pronounce further on the alternative claim of violation of Art. IV submitted by the Claimant.

D. Claim of Breach of Article II (2)(c) ("Umbrella clause")

286. Continental claims that a) the obligations observance clause of Art. II (2)(c) requires Argentina to observe contractual obligations entered into with American investors, including the ones given to their Argentinean subsidiaries; and b) that forum selection clauses do not bar claims for a breach of the obligations observance clause. Art. II (2)(c) BIT states that: "[e]ach Party shall observe any obligation it may have entered into with regard to investments." This form of clause is often known and described as an "umbrella clause."

287. Relying principally on the *CMS* Award, Continental claims that, "when the investment is a local company, the ordinary meaning of obligations entered into 'with regard to investments' includes obligations entered into with that investment. An obligation entered into with an investment is an obligation entered into with regard to the investment."[414] In other words, the Claimant considers that the object of the BIT is to encourage and protect investment and that CNA is a Continental investment protected under the BIT. Therefore the so—called umbrella clause in the BIT has to be interpreted as covering not only the obligations Argentina entered into directly with the Claimant investor as a U.S. company, but also those Argentina entered into with Continental's investment (namely the local subsidiary of the foreign investor), thus CNA.

288. The Claimant submits accordingly that "Argentina breached its obligations under Art. II (2)(c) by not observing its contractual obligations to CNA ART" under the following debt contacts: the GGLs (Guaranted Loan contracts), the LETEs (Treasury Bills contracts) and the BODEN 2013 bond contracts. [415]

414 Claimant's Reply, para. 138.

415 Claimant's Memorial, para. 122.

289. More specifically, with regard to the GGLs[416] the Claimant submits that "the government breached the contractual term requiring payment in U.S. dollars": a) "by forcefully converting the dollar-denominated GGL into pesos through Decree 471 on March 8, 2002; and b) by diminishing the security interest underlying the GGLs through Decree 644 of April 18, 2002."[417]

290. As to the LETE's, the Claimant submits further that Argentina breached the US dollar denominated LETE contracts by enacting Decree 471, converting them into pesos. Furthermore, on March 15, 2002 "Argentina breached its contractual obligation to pay CNA ART its principal and interest." Finally, on April 25, 2002, Resolution 73 made the default of Argentina on its public debt (with some exceptions) official, in that payment of the public debt of the national government was thereby deferred through December 31, 2002 "or until financing thereof has been completed if the latter is completed before that date." As a result, "to date CNA ART has not received payment as required by the contract."[418]

291. In respect of its dollar denominated deposits, Continental recalled that in 2003 CNA accepted "under protest" the terms of Decree 739 of March 28, 2003 that provided for an elaborate scheme of "partial thawing of the bank freeze," after a further rescheduling of 120 days, earning 2% p.a. interest, and the distribution of a BODEN 2013 (State Bond) "to compensate for the difference between the market exchange rate at the date of issuance of the Decree and the government imposed rate of 1.4 pesos to the dollar adjusted by CER."[419]

292. According to the Claimant, Argentina also failed to perform according to its terms the BODEN 2013 contract when, upon the expiry of the 120 day period in late August of 2003, it failed to deliver in a timely manner the instruments themselves or credit them in

416 As to the issuance of the GGLs in swap for others governmental securities held by CNA see above para. 133 ff.

417 Claimant's Memorial, para. 124.

418 Claimant's Memorial, para. 128.

419 Claimant's Memorial, para 58.

CNA ART's favor.[420] Besides complaining that these bonds were not issued at the due dates, Continental also complains that the payments of the initial interests were delayed from April 30 and September 30 of 2003 to February 11, 2004, when the interest in arrears was paid. [421]

293. Argentina opposes the Claimant's arguments. First, Argentina contends that in accordance with the principle of *pacta tertiis nec nocent nec prosunt*, Continental cannot invoke any "commitment" allegedly assumed with CNA, because the latter would have been entered with "legal entities which are evidently independent, and which have different rights, even though they are interconnected…." According to Argentina, Continental cannot invoke the following commitments, because they were entered into with CNA and not with Continental: "1) the bank deposit agreement was executed between CNA ART and those banks in which Argentine citizens had placed their deposits; 2) the guaranteed loans that CNA ART received from the Argentine Government as the first measure of the so-called local phase of restructuring program of the obligations assumed by the latter; 3) the offer and subsequent purchase of LETEs by CNA ART; and 4) the BODEN 2013 Agreements."[422]

294. Second, relying on the *El Paso* Decision, Argentina submits that umbrella clauses cover only a particular type of contract: an "investment agreement" that host States conclude with foreign investors. In such a case, "not applicable to this dispute, the violations that the Claimant could allege would be due to rights that it actually exercises and which are contemplated in a legal document governed by international law." [423]

295. The umbrella clause is intended to protect the commitments assumed by the Argentine Republic towards foreign investors protected by the BIT, not contractual obligations,[424] and "… does not apply to contracts entered into between CNA ART and

420 Continental claims also that "to date, two financial institutions have not credited the BODENs in CNA ART's favor." See Claimant's Memorial, paras. 130-131. Claimant has not reiterated this complaint in subsequent proceedings so that the Tribunal assumes that this failure has been by now cured as it was indeed incumbent upon Argentina to do.

421 Claimant's Memorial, para. 64.

422 Counter-Memorial, paras. 628-630.

423 Counter-Memorial, paras. 643-644.

424 Counter-Memorial, para. 689.

the Argentine Republic."[425] In fact, even accepting that the observing obligations clause includes contractual obligations, "everything relating to the existence and extent of the commitments that may be invoked under the umbrella clause is governed by domestic law."[426] Therefore because the GGLs, the LETEs and BODEN 2013 are exclusively governed by the laws of Argentina, "in order to evaluate performance by the Argentine Republic of the obligations contained in such contracts, the tribunal will necessarily [have] to consider the contracts as well as the Argentine laws that set the conditions under which the contracts could be executed and amended." [427]

296. The preliminary task of the Tribunal is thus to determine the scope of the umbrella clause in the BIT. The Tribunal is conscious that the interpretation of umbrella clauses, such as the one found in Art. II (2)(c) of the BIT, remains controversial and that there is a lack of consistency in the practice of investment arbitral tribunals on the matter.

297. For the purpose of determining the type of obligations that Argentina must observe under this umbrella clause, it is necessary to begin with the analysis of the text of Art. II (2)(c). The covered obligations must have been entered "with regard to" investments. Thus they must concern one or more investments and, moreover, must address them with some degree of specificity. They are not limited to obligations based on a contract. Finally, provided that these obligations have been entered "with regard" to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary such as CNA is not in principle excluded.

298. Furthermore, the fact that the obligation at issue arises under a contract or a unilateral commitment and is governed by local law does not exclude the operation of the umbrella clause, although the determination of the content of the obligation under the applicable national law may be a pre-requisite. It is well established that "compliance with municipal law and compliance with the provisions of a treaty are different questions.

425 Counter-Memorial, para. 690.

426 Counter-Memorial, para. 694.

427 Counter-Memorial, para. 701.

What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision."[428]

299. The Parties provided in the BIT, however, for an additional guarantee to their investors, that is "to observe any obligation" that they have assumed specifically with regard to investments, irrespective of the law applicable to them. As stated by the LG&E tribunal, "the umbrella clause is a general provision included in a fairly large number of bilateral treaties that creates a requirement for the host State to meet its obligations towards foreign investors, including those that derive from a contract. Hence such obligations receive extra protection by virtue of their consideration under the bilateral treaty."[429]

300. In light of the above it should be clear that this umbrella clause does not come into play when the breach complained of concerns general obligations arising from the law of the host State.[430] This interpretation of the BIT's Art. II (2)(c) by the Tribunal is also supported by the conclusions on the scope of the same wording reached by other tribunals. As decided in the *CMS Annulment Decision*, "it seems clear that Article II (2)(c) is concerned with consensual obligations arising independently of the BIT itself (*i.e.* under the law of the host State or possibly under international law). Further they must be specific obligations concerning investment. They do not cover general requirements imposed by the law of the Host State."[431]

301. The obligation that a State must observe under an umbrella clause "will often be a bilateral obligation," such as a contractual obligation, "or will be intrinsically linked to obligations of the investment company."[432] This can include the unilateral commitments arising from provisions of the law of the host State regulating a particular business sector

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428 ICJ, *Elsi*, para. 73.

429 See *LG&E* Decision, para. 170.

430 See F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BYIL, 241, 246 (1981), "the provision only covers an obligation arising from a particular commitment either of the Contracting Parties may have entered into… Such obligations may arise from contract with the State or from the terms of the licence granted by it. It may be express or implied, it may be in writing or oral. But it must clearly be ascertainable as an obligation of the State itself arising from its own commitments." It follows therefore that "where the contract is made with a private person, then the provision only applies if and in so far as an obligation of the State arising from its own particular commitment (as opposed to existing general legislation) may be discerned."

431 *CMS* Annulment Decision, para. 95(a).

432 *Ibid* para. 95(d).

and addressed specifically to the foreign investors in relation to their investments therein. For example, according to the award of the *LG&E* tribunal,[433] this was the case of the obligations that were made by Argentina to foreign investors under the Gas Law and its implementing regulations because they were the basis on which the original investors relied to make investments in the gas sector.

302. Therefore, the provisions of the Convertibility Law and those of the Intangibility Law cannot be a source of obligations that Argentina has assumed specifically with regard to the Claimant's investment company[434] and which are protected under the BIT's umbrella clause. Moreover, the provisions of the legislative regime that were changed were addressed either to the generality of Argentina's public or to a wide range of depositors and subscribers of a number of financial instruments.[435] As to the GGLs, they were undoubtedly more specific and of a contractual nature. They could therefore be considered as guaranteed by the umbrella clause, subject to the caveat that they were not directed to foreign investors nor specifically addressed to their investments. In any case we have already recognized necessity under Art. XI, while as to the LETEs, we have instead found a breach of the Fair and Equitable Treatment[436] and therefore we do not need to investigate the matter any further.

303. To summarize, a number of obligations that the Claimant alleges to have been breached by Argentina are not covered by the BIT's umbrella clause, while, as to the GGLs, in as far as they may have been covered by this clause, the defense of necessity under Art. XI is upheld. The claim of Continental that Argentina has breached Art. II (2)(c) is, therefore, dismissed.

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433 *LG&E* Decision at para. 175: "[a]s such, Argentina's abrogation of the guarantees under the statutory framework – calculation of the tariffs in dollars before conversion to pesos, semi-annual tariff adjustments by the PPI and no price controls without indemnification – violated its obligations to Claimants' investments. Argentina made these specific obligations to foreign investors, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees in the Offering Memorandum to induce the entry of foreign capital to fund the privatization program in its public service sector. These laws and regulations became obligations within the meaning of Article II(2)(c), by virtue of targeting foreign investors and applying specifically to their investments, that gave rise to liability under the umbrella clause."

434 See Claimant's Post-Hearing Brief, paras. 18-22.

435 Moreover those "general legislative assurances" were not the basis on which the private parties or investors involved had relied to make investments, since they were already present in Argentina.

436 See above para. 264 ff.

VIII. Conclusions of the Tribunal

304. Summing up, Continental fails entirely on its claims based on Art. V (Freedom of transfer), on those based on Art. II (2)(c) (Umbrella Clause) relating to non-contractual instruments. The Tribunal's rejection of those based on Fair and Equitable Treatment (except for the claim concerning the LETEs) and on those based on the Umbrella Clause (as they relate to contractual instruments such as the GGLs) is the result of the Tribunal having decided that Argentina is entitled to avail itself of the defense based on necessity under Art. XI of the BIT. For the above reasons, the only claim of breach of the BIT on which the Claimant prevails is that of the breach of the Fair and Equitable Treatment obligation of Art. II (2)(a) concerning the restructuring of the LETEs.

305. The Claimant submits it has suffered as to LETEs losses amounting to U.S$700,000 due to pesification and to U.S$2,800,000 "due to the further default and revocation of contractual rights."[437] For the reason stated above, the Claimant is entitled to be compensated only for the latter amount that corresponds to its capital loss. The Claimant is accordingly entitled to payment of compensation in the principal sum of U.S.$2,800,000.

A. Calculation of Interest

306. The Claimant also claims interest. The Claimant has not expressly specified whether such interest is simple or compound interest or at what rates.[438] Argentina has made no submissions on these matters.

307. In the Tribunal's view, the claim for interest covers both simple and compound interest. Accordingly, the first issue to be decided by the Tribunal is whether to award simple or compound interest.

308. As a general principle, almost invariably, justice requires that the wrongdoer who has deliberately failed to pay compensation should pay interest for the period during it has withheld that compensation unlawfully. The claimant, in addition to suffering from

437 See Claimant's Reply, para. 386.

438 In the final paragraph of its Memorial, the Claimant asks a compensation "including interest on such amounts computed at a commercial interest rate from the date of loss to the date of payment of the award, compounded on an annual basis, plus costs of this arbitration."

the wrongdoing giving rise to compensation, has suffered a further loss from non-payment of that compensation when it should have been paid by the wrongdoer. Moreover, a wrongdoer withholding payment may be unjustly enriched by its deliberate non-payment of such compensation, at the expense of the claimant. In these circumstances, therefore, full reparation will include an order for interest. However, there has been until recent times a controversy attaching to compound interest, as distinct from simple interest, in international law.

309. In Professor Crawford's Third Report on State Responsibility, the summary records:[439]

> "[...] although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation. Care is however needed since allowing compound interest could result in an inflated and disproportionate award, with the amount of interest greatly exceeding the principal amount owed."

This caution is perhaps surprising: compound interest reflects economic reality in modern times, and the hesitation may be directed more at extreme rates and rests rather than compound interest in principle. The time value of money in free market economies is measured in compound interest; simple interest cannot be relied upon to produce full reparation for a claimant's loss occasioned by delay in payment; and under many national laws recently enacted, an arbitration tribunal is now expressly empowered to award compound interest.[440]

310. Under international law, the Tribunal concludes that it may order compound interest if it is necessary to ensure full reparation. There is nothing in the BIT, the ICSID Convention and Arbitration Rules, that restricts the Tribunal's power to award compound interest under international law for breach of the Respondent's obligations under the BIT. In reaching this general conclusion, the Tribunal has considered, in particular, Article 38

439 Professor James Crawford, *Third Report on State Responsibility*, August 4, 2000, (ILC 2000).

440 For example, Section 49(3) of the English Arbitration Act 1996 grants arbitrators the power to award compound interest on any principal amount awarded.

of the ILC Articles on State Responsibility; Dr. F. A. Mann's Article "Compound Interest as an Item of Damage in International Law," in "Further Studies in International Law,"[441] and Judge Schwebel's Article "Compound Interest in International Law."[442]

311. There is a significant convergence between the views of these experienced jurists. Dr. Mann concluded: "on the basis of compelling evidence, compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals." Judge Schwebel likewise concluded, more than a decade later: "[i]t is plain that the contemporary disposition of international law accords with that found in the national law of States that are commercially advanced, namely, it permits the award of compound interest where the facts of the case support the conclusion that it is appropriate to render just compensation."

312. It is unnecessary to recite here other well-known legal materials (many of which are considered in these two articles), save to record the position succinctly expressed in the ICSID award in *Santa Elena v. Costa Rica* (2000).[443]

> No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of Interest is a product of the exercise of judgment, taking into account all the circumstances of the case at hand and especially consideration of fairness which must form part of the law to be applied by this Tribunal.
>
> In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the

441 F. A. Mann, *Further Studies in International Law*, (Oxford 1990) pp. 377 ff; see also Mann, "*Compound Interest as an Item of Damage in International Law*," 21 U.C.Davis Law Review, 557 ff (1988).

442 Stephen M. Schwebel, "*Compound Interest in International Law*," TDM Volume 2, Issue 5, November 2005.

443 C*ompañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of February 17, 2000, 15 ICSID Rev. - F.I.L.J. 169 (2000), 39 ILM 1317 (2000) at paras. 103-104.

> purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.

This discretionary approach to the award of compound interest under international law may now represent a form of "*jurisprudence constante*" in ICSID awards. A recent study of 45 ICSID arbitrations resulting in 14 awards of compensation demonstrates that, of the latter, 8 ordered compound interest, 3 simple interest, and 1 no interest (the remaining 2 did not disclose whether compound or simple interest was ordered).[444]

313. In the present case, the Tribunal considers that full reparation to Continental should include compound interest on the compensation due from but unpaid by Argentina. The Tribunal bears much in mind that Continental's loss consists of the deprivation of an interest-bearing financial instrument, measurable by reference only to compound interest. It would be unjust in these circumstances to order simple interest, because it would fall significantly short of such full reparation.

314. As regards the rate of compound interest, the Tribunal exercises its discretion to select the rates for U.S.$ 6 months Libor (as published in the Financial Times) plus 2 per cent compounded annually until payment.

315. As regards the commencement date for compound interest, since Decree 1735/04 restructuring the LETEs was issued in December 2004, the Tribunal fixes January 1, 2005 as the initial date to this purpose.

316. The Tribunal has taken note of Argentina's submission that unrestructured LETEs have a market price. Accordingly, the Tribunal's orders for payment of principal and interest by Argentina are subject to Continental first procuring the surrender of all LETEs held by CNA not previously tendered pursuant to Argentina's restructuring offer.

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444 James Gray, Jason Cain and Wayne Wilson, "*ICSID Arbitration Awards and Cost*," TDM Volume 3, Issue 5, December 2006.

B. Apportionment of the arbitral costs

317. As to costs, each party has asked the Tribunal that its expenses in connection with these proceedings, including the amount of the deposits made to ICSID for the Centre's charges and the expenses and fees of the arbitrators (Art. 59 and 60 of the ICSID Convention), be reimbursed to it by the other party. To this effect each party has submitted detailed calculations.[445] This is an issue that the Tribunal has to decide as part of the award pursuant to Art. 61 of the ICSID Convention.

318. The Convention and the attendant Rules and Regulations give ICSID tribunals' broad discretion in awarding costs and offer little guidance on how this discretion is to be exercised. Moreover, the practice of ICSID tribunals in apportioning costs "is neither clear nor uniform."[446] In a number of cases the principle "the loser pays," commonly applied in international commercial arbitration, has been followed; in many others the tribunals decided that the parties were to bear equal shares of the fees and expenses of the arbitrators and of the charges for the use of Centre's facilities and services. In their decisions on awarding costs, besides assessing them against the unsuccessful party, arbitral tribunals have often taken into account the nature of the dispute, the novelty of the legal issues, and the conduct of the parties in the proceedings.

319. As to this case, the Tribunal notes that the Claimant is succeeding in only one of the many claims of breaches of the BIT it has put forward, namely only in relation to the restructuring of the LETEs. As to the other claims, most of them (except the one under Art. V (Freedom of Transfer) and in part those under the Umbrella Clause, (which are being rejected as groundless in the merits)) are being dismissed because the Tribunal has accepted the preliminary exception raised by Argentina that Art. XI of the BIT removes the Measures challenged by the Claimant from the Treaty's coverage. This leads the Tribunal to conclude that there are good reasons to decide, as it is hereby decided, that each party shall bear any and all of its own expenses in connection with the presentation

445 The Claimant has quantified its costs in the amount of US$ 3,323,849.91 besides ICSID fees. Respondent has quantified its own costs, net of ICSID fees, in the amount of US$ 844,776.43.

446 See *Schreuer*, 1225, 1230.

and preparation of the case, as well as half of the fees and expenses of the arbitrators and the charges for the use of the Centre's facilities and services.

IX. Decision of the Tribunal

320. For these reasons, the Tribunal finally decides as follows:

(A) Save for the Claimant's claim relating to the LETEs, all substantive claims made by the Claimant are dismissed;

(B) As regards the claim relating to the LETEs, the Respondent is liable to pay compensation to the Claimant in the principal sum of U.S. $2,800,000 (United States dollars two million eight hundred thousand) and compound interest thereon at the rates for U.S.$ 6 month Libor (as published in the Financial Times) plus 2 per cent compounded annually from January 1, 2005 until payment, subject to the Claimant first procuring the surrender of all LETEs held by its subsidiary, not previously tendered to and accepted by Argentina;

(C) The Parties shall bear all their own legal costs and expenses, without recourse to each other; and

(D) The Parties shall bear equally the costs and expenses of the Tribunal and ICSID.

Giorgio Sacerdoti

President of the Tribunal

27 August 2008

Michell Nader

Arbitrator

August 11, 2008

V.V.Veeder

Arbitrator

19.viii.2008

X. Index of Cases[447]

Azurix Award	ICSID Award, July 14, 2006, *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12
CMS Annulment Decision	ICSID Decision on Annulment, September 25, 2007, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8
CMS Award	ICSID Award, May 12, 2005, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8
Compañía de Santa Elena Award	ICSID Award, February 17, 2000, *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1
Dominican Republic-Cigarettes	WTO Appellate Body, *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted May 19, 2005
EC-Asbestos	WTO Appellate Body, *European Community-Measures Affecting Asbestos and Asbestos-Contained Products*, WT/DS135/AB/R, adopted April 5, 2001
EC-Chicken Cuts	WTO Appellate Body, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, adopted September 27, 2005
EC-Tyres (Apellate Body)	WTO Appellate Body, *Brazil Measures Affecting Imports of Retreated Tyres*, WT/DS332/AB/R, adopted December 17, 2007
EC-Tyres (Panel)	Panel Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R

447 With regard to the cases quoted in the award numbers refer to paragraphs.

Elsi (United States of America v. Italy)	International Court of Justice, July 20, 1989, *Case concerning Elettronica Sicula S.p.a. (ELSI) (United States of America v. Italy)*
Enron Award	ICSID Award, May 22, 2007, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3
Gabcìkovo-Nagymaros Project (Slovakia – Hungary)	International Court of Justice, September 25, 1997, *Gabcìkovo-Nagymaros Project (Slovakia – Hungary)*
Korea- Beef (WT/DS/AB/R; WT/DS/AB/R)	WTO Appellate Body*, Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (WT/DS169/AB/R), adopted June 7, 2001
LG&E Decision	ICSID Decision on Liability, October 3, 2006, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1
Mitchell Annulment Decision	ICSID Decision on Annulment, November 1, 2006, *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7
Nicaragua (Merits)	International Court of Justice, June 27, 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States Of America)*, Merits
Noble Ventures Award	ICSID Award, October 12, 2005, *Noble Ventures, Inc. v. Romania*
Occidental Exploration and Product Company Award	LCIA Award, July 1, 2004, *Occidental Exploration and Product Company v The Republic of Ecuador, Case No. 3467*
Oil Platforms (Merits)	International Court of Justice, November 6, 2003, *Oil Platforms*

	(Islamic Republic of Iran v. United States of America), Merits
Oil Platforms (Preliminary Objection)	International Court of Justice, December 12, 1996, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection
Sea-Land Service, Inc. v. The Islamic Republic of Iran, Ports and Shipping Organization of Iran (Case No. 135)	Iran-U.S. Claims Tribunal, Award No. 135-33-1, June 20, 1984, *Sea-Land Service, Inc. v. The Islamic Republic of Iran, Ports and Shipping Organization of Iran*, VI Iran-US CTR 149, page 1 ff.
Sempra Award	ICSID Award, September 28, 2007, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16
SGS v. Philippines Decision on Jurisdiction	ICSID Decision on Jurisdiction, January 29, 2004, *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*
The SS. Wimbledon	Permanent Court of International Justice, August 17, 1923, *Case of The S.S. Wimbledon*
Tecmed Award	ICSID Award, May 29, 2003, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2
U.S.-Gambling (WT/DS/AB/R)	WTO Appellate Body, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted April 20, 2005

XI. Abbreviations[448]

Argentina Business	Nolan J.L., Hinkelman E.G., Woznick A., Shippey K. C., *Argentina Business*, *The Portable Encyclopaedia For Doing Business with Argentina*, World Trade Press, 1996, California, U.S.A.
BCRA	Banco Central de la Republica Argentina
Blustein	Blustein, *And the Money Kept Rolling in (and out): Wall Street, the IMF, and the bankrupting of Argentina*, 2005, New York (C-145)
Calomiris	Calomiris C., *Devaluation with Contract Redenomination in Argentina*, National Bureau of Economic Research Working Paper No. 12644
Dolzer, Stevens	Dolzer, Stevens, *Bilateral Investment Treaties*, The Hague, Kluwer Law International, 1995
FCN Treaty	Treaty of Friendship, Commerce and Navigation
GATS	General Agreement on Trade in Service
GATT 1947	General Agreement on Tariffs and Trade
Hornbeck	Hornbeck J.H., *The Argentine Financial Crisis: A Chronology of Events*, CRS Report for Congress, January 31, 2002 (C-189)
ICSID	International Centre for the Settlement of Investment Disputes

448 With regard to these abbreviations numbers refer to pages.

ILA	International Law Association
ILC	International Law Commission
ILC Articles	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001
IMF, Evaluation Report	IMF, *The IMF and Argentina, 1991-2001*, [Washington, D.C.]: International Monetary Fund, Independent Evaluation Office, 2004 (C-149, R-207)
IMF, *First Review*	IMF, *Argentina: 2000 Article IV Consultation and First Review Under the Stand-By Arrangement, and Request for Modification of Performance Criteria-Staff Report and Public Information Notice Following Consultation*, IMF Staff Country Report No. 00/164, December 2000 (C-137)
IMF, *Second Review*	IMF, *Argentina: Second Review Under the Stand-By Arrangement, Request for Waivers and Modification of the Program-Staff Report and News Brief on the Executive Board Discussion*, IMF Country Report No. 01/26, January 2001 (C-396, R-209)
IMF, *Third Review*	IMF, *Argentina: Third Review Under the Stand-By Arrangement, Request for Waivers and Modification of the Program-Staff Report and News Brief on the Executive Board Discussion*, IMF Country Report No. 01/90, June 2001 (C-397, R-110)
IMF-Fund	International Monetary Fund
Iran-U.S. CTR	Iran-United States Claims Tribunal Reports

Krugman	Krugman P., Editorial, *Reckonings; A cross of Dollars*, N.Y. Times, November 7, 2001 (R-54)
Lessons from the Crisis	Daseking C., Ghosh A., Lane T., and Thomas A., *Lessons from the Crisis in Argentina*, IMF Occasional Paper No. 236, Washington DC, 2005
Mann	Mann F.A., *The Legal Aspect of Money*, Fifth Edition, 1992, Oxford
Mussa	Mussa M., *Argentina and the Fund: From Triumph to Tragedy*, 2002, Washington D.C.(C-153, R-208)
Nussbaum	Nussbaum A., *Money in the Law National and International*, The Foundation Press Inc.: Brooklyn, 1950
Scott	Scott H.S., *International Finance: Law and Regulation*, Thomson Sweet & Maxwell, 13 ed., 2006
UNCTAD	United Nations Conference on Trade and Development, *International Investment Agreements,* Key Issues Vol. I, 2004
U.S. 2004 Model BIT	United States of America's Model Bilateral Investment Treaty of 2004
U.S.-Argentine BIT or BIT	Treaty between United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment
U.S.-Congo BIT	Treaty between United States of America and the Republic of Zaire concerning the reciprocal encouragement and protection of investment

U.S.-Russia BIT	Treaty between United States of America and the Russian Federation concerning the reciprocal encouragement and protection of investment
Vandevelde	Vandevelde K. J., *United States Investment Treaties, Policy and Practice*, 1992, Deventer, Boston
VCLT	Vienna Convention on the Law of Treaties
Wildhaber	Luzius Wildhaber, *The Protection of Legitimate Expectations in European Human Rights Law*; *Economic Law and Justice in Times of Globalisation*, *Festschrift for Carl Baudenbacher*, 2007
The World Bank	International Bank for Reconstruction and Development
WTO	World Trade Organization