

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

Impregilo S.p.A.

v.

Argentine Republic

(ICSID Case No. ARB/07/17)

Award

Members of the Tribunal

Judge Hans Danelius, President

Judge Charles N. Brower, Arbitrator

Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal:

Mr. Gonzalo Flores

Representing Impregilo S.p.A.:

Mr. R. Doak Bishop
Mr. Craig S. Miles
Mr. Roberto Aguirre Luzi
Ms. Silvia Marchilli
Mr. David Weiss
Mr. Joost Pauwelyn
King & Spalding LLP

Representing the Argentine Republic:

Dra. Angelina María Esther Abbona
Procuradora del Tesoro de la Nación
Procuración del Tesoro de la Nación
Posadas 1641
Buenos Aires, Argentina

Date of Dispatch to the Parties: June 21, 2011

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I. PROCEDURAL HISTORY

1. On July 25, 2007, the Secretary-General of ICSID registered a Request for arbitration submitted by Impregilo S.p.A., a company incorporated in Italy, against the Argentine Republic. The dispute concerns a concession of water and sewage services under a Concession Contract (hereinafter called the “*Concession Contract*”) concluded on December 7, 1999 by Aguas del Gran Buenos Aires (“*AGBA*”), an Argentine company in which Impregilo had a dominating interest, and the Province of Buenos Aires, and terminated on July 11, 2006 by the Province.

2. On August 28, 2007, the Claimant appointed Judge Charles N. Brower, a U.S. national, as arbitrator. On October 23, 2007, the Respondent appointed Professor Brigitte Stern, a French national, as arbitrator. On May 22, 2008, the Chairman of the ICSID Administrative Council appointed Judge Hans Danelius, a Swedish national, as President of the Tribunal.

3. By letter of May 27, 2008, the Parties were notified by the Centre that, in accordance with ICSID Arbitration Rule 6(1), the Tribunal was deemed to have been constituted and the proceeding to have begun on that date. The Parties were also notified that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Tribunal. He was subsequently succeeded in this capacity by Dr. Sergio Puig de la Parra, Counsel, ICSID. Following Dr. Puig de la Parra’s departure from the ICSID Secretariat, Mr. Flores was reappointed as Secretary of the Tribunal.

4. A First Session of the Tribunal and the Parties was held via telephone conference call on July 16, 2008. During the Session the Tribunal and the Parties discussed a number of procedural matters, including the schedule for the written pleadings. Alternative timetables were agreed depending on whether or not the Argentine Republic would raise jurisdictional objections. It was also agreed that, even if such objections were raised, there would be no separate Award or Decision on the jurisdictional matters.

5. On October 16, 2008, the Claimant, in accordance with the agreed schedule, filed its Memorial on the Merits in which the Claimant alleged that the Respondent had violated the Agreement between Italy and the Argentine Republic for the Promotion and Protection of Investments (the “*Argentina-Italy BIT*”) and international law with respect to the Claimant’s investments and in which the Claimant also requested compensation for damages. On January 16, 2009, the Respondent submitted a Memorial containing objections to the jurisdiction of the Centre and to the competence of the Tribunal. On March 16, 2009, the Claimant submitted a Counter-Memorial on jurisdiction.

6. On May 4-6, 2009, the Tribunal held a hearing at the seat of the Centre in Washington, D.C. on the jurisdictional issues.

7. On August 18, 2009, the Respondent filed a Counter-Memorial on the Merits. A Reply on the Merits was submitted by the Claimant on November 2, 2009 and a Rejoinder on the Merits by the Respondent on January 22, 2010.

8. On March 9-18, 2010, the Tribunal held a hearing on the merits in Paris. The following people attended the hearing on behalf of Claimant: Mr. R. Doak Bishop, Mr. Craig S. Miles, Mr. Roberto Aguirre Luzi, Prof. Joost Paulwelyn, Ms. Silvia Marchili, Mr. David Weiss, Mr. Louis Alexis Bret, Mr. Esteban Sanchez and Ms. Carol D. Tamez of the law firm of King & Spalding LLP, and Mr. Eduardo Albarracín of Impregilo S.p.A. The following people attended the hearing on behalf of Respondent: Mr. Adolfo Gustavo Scrinzi, Mr. Gabriel Bottini, Mr. Ignacio Pérez Cortés, Mr. Ignacio Torterola, Ms. Alejandra Mackluf, Mr. Javier Pargament, Ms. Soledad Romero Caporale, Ms. María Alejandra Etchegorry, Mr. Nicolás Grosse, Mr. Patricio Arnedo Barreiro and Ms. Cristina Otegui, of Argentina's *Procuración del Tesoro de la Nación*.

9. On April 26, 2010, each Party submitted a chronological summary of the main documents in the case.

10. Cost claims were submitted by the Parties on May 10 and 11, 2010.

11. A further submission was made by the Claimant on October 11, 2010 to which the Respondent replied on November 19, 2010. The proceedings were closed, in accordance with Rule 38(1) of the ICSID Arbitration Rules, on April 15, 2011.

II. THE INVESTMENT PROTECTION TREATY

12. The Argentina-Italy BIT was signed on May 22, 1990 and entered into force on October 14, 1993. It is drafted in Spanish and Italian and contains, *inter alia*, the following provisions (in translation into English):

“ARTICLE 1 Definitions

For the purposes of this Agreement:

1.”Investment” means, in accordance with the host country laws and irrespective of the selected legal form or any other related laws, any kind of asset invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party, in conformity with the laws and regulations of the latter.

Within this general framework, it includes, in particular though not exclusively:

b) shares of stock, interests or any other form of participation, including minority or indirect interest, in a company established in the territory of each Contracting Party;

ARTICLE 2 Promotion and Protection of Investments

1. Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall accept such investments in accordance with its laws.

2. Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment. Neither Party shall impair by arbitrary or discriminatory measures the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other Contracting Party's investors.

ARTICLE 3

National Treatment and Most-Favored Nation Provisions

1. Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.

2. The provisions set forth in paragraph 1 of this Article shall not apply to advantages and privileges accorded by either Contracting Party to any third country by virtue of that Party's binding obligations that derive from its membership in a customs or economic union, common market, or free trade area, or as a result of regional or subregional agreements, multilateral international agreements or double taxation agreements, or any other tax-related arrangements or agreements to facilitate cross border trade.

ARTICLE 4

Damages

Investors of one Contracting Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, a state of national emergency, or other similar political economic events shall be accorded, by such other Party in whose territory the investment was made, treatment no less favorable than that accorded to its own nationals or legal entities or to investors of any third country as regards damages.

ARTICLE 5

Nationalization or Expropriation

1. (a) Neither Contracting Party may adopt any measure that restricts, whether for a definite or indefinite period of time, the right to property, possession, control or enjoyment in relation to the investments made by investors of the other Contracting Party, except upon specific provisions laid down by law, judgments, or decisions rendered by a competent court and other general non-discriminatory provisions intended to regulate economic activities.

(b) Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with:

- the measures are for a public purpose, of national interest or security;
- they are taken in accordance with due process of law;
- they are non-discriminatory or contrary to the commitments undertaken;
- they are accompanied by provisions for the payment of prompt, adequate and effective compensation.

(c) The compensation shall be equivalent to the actual market value of the investment immediately before the expropriation or nationalization decision was announced or became public and shall be determined in accordance with internationally accepted technical standards. Where the market value cannot be readily ascertained, the compensation shall be determined based on a fair assessment of the constituent and distinctive elements of the company as well as the components and results of the business activities involved.

The compensation shall include interest accrued until the date of payment at a normal commercial rate of interest. In the event an agreement is not reached between the investor and the Contracting Party that has taken such measure, the compensation shall be determined in accordance with the dispute settlement procedures set out in Article 8 hereof. Once it is

determined, the compensation shall be paid without delay in the currency in which the investment was made or in a freely convertible currency accepted by the investor, and its repatriation shall be authorized.

2. The provisions laid out in paragraph 1 hereof shall also apply to the returns from an investment as well as, in the event of liquidation, the proceeds thereof.

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Article 8 Settlement of Disputes between Investors and Contracting Parties

1. Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, arising out of or relating to this Agreement, shall, to the extent possible, be settled through friendly consultation between the parties to the dispute.

2. If the dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is made.

3. Where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.

4. From the time arbitration proceedings are commenced, each party to the dispute shall take any such measures as may be necessary to dismiss any pending court proceedings.

5. Where the dispute is submitted to international arbitration, the investor may choose to refer the dispute either to:

a) The International Centre for the Settlement of Investment Disputes (ICSID) established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18, 1985, provided that each Party to this Agreement is a signatory State to such Convention. Where such condition is not met, each Contracting Party hereby consents to submit the dispute to arbitration in accordance with the ICSID Additional Facility Rules regarding conciliation and arbitration, or

b) An *ad hoc* arbitration tribunal is established for each particular case. The arbitration shall be conducted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) contained in Resolution No. 31/98 adopted by the United Nations General Assembly on December 15, 1976. The panel shall consist of three arbitrators. If the arbitrators are not nationals of the Contracting Parties, they shall be nationals of States having diplomatic relations with them.

6. Neither Contracting Party shall, at any stage of the arbitral proceedings or the enforcement of the arbitral award, assert, as a defense, counterclaim, right of set-off or otherwise, that the investor concerned has received, pursuant to an insurance policy or guarantee contract as indicated in Article 7 hereof, indemnification or compensation for all or part of any alleged loss.

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

8. The arbitral award shall be final and binding on the parties to the dispute. Each Party undertakes to comply with any such award in accordance with its domestic laws and the relevant international conventions in force for both Contracting Parties.

9. The Contracting Parties shall refrain from pursuing, through diplomatic channels, any matter related to any pending court proceedings or the arbitration until the relevant proceedings have

been concluded, unless either party to the dispute has failed to comply with the arbitral award or court decision, in accordance with the terms of compliance set forth in such award or decision.

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ARTICLE 10

Application of other Rules

1. Where a particular matter is governed by this Agreement as well as by another International Agreement between both Contracting Parties or by International Law, such provisions or rules shall, to the extent they are more favorable, prevail over this Agreement.

2. If, under any law, regulation, provision, or specific contract, either Contracting Party has adopted rules entitling investors of the other Contracting Party to a more favorable treatment than that provided for by this Agreement, such rules shall prevail over the provisions of this Agreement.”

III. FACTUAL BACKGROUND

13. In the 1990s, water and sewerage services in the Province of Buenos Aires were provided by the public utility *Administración General de Obras Sanitarias de la Provincia de Buenos Aires* (“AGOSBA”). In 1996, the Province decided to privatize these services and adopted for this purpose Law No. 11,820 (the “*Regulatory Framework*”) and set up as regulator the *Organismo Regulador de Aguas Bonaerense* (“ORAB”). It also organized a bidding process for the concessions to be issued for the various parts of the Province.

14. Impregilo formed a consortium with other international companies (Sideco Americana S.A. and Aguas de Bilbao Bizkaia), and, by Provincial Decree No. 2907/99 of October 18, 1999, was awarded one of the concession areas into which the Province’s territory had been divided. Pursuant to the bidding rules, Impregilo and its partners incorporated and funded AGBA, an Argentine company. On December 7, 1999, the Province and AGBA executed the Concession Contract to provide water and sewerage services in an area covering seven municipalities.

15. The Concession Contract contained, *inter alia*, the following clauses (in translation into English):

“1.4 PURPOSE OF THE CONVENTION

The purpose of the Concession is to perform, within the Concession Area, the following activities: collection, treatment, transportation, distribution and commercialization of Drinking Water, collection, treatment, disposal and potential reuse or commercialization of Sewage, including Industrial Sewage, pursuant to the provisions set forth in Article 3.14. In all cases, the Service shall include maintenance, project design, construction, rehabilitation and expansion of all works required for service provision.

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1.6 EXCLUSIVE RIGHTS. NON INTERCONNECTED SYSTEMS WITHIN THE CONCESSION AREA

The Concessionaire shall enjoy an exclusive right to provide the Service within the Concession Area, subject to the Regulatory Framework and the provisions of Article 5.6 and the remaining provisions hereof.

1.7 TERM

The term of the Concession shall be thirty (30) years from Takeover.

1.8 CONDITIONS OF THE CONCESSION

The Concession is granted in consideration of the payment by the Concessionaire of an initial canon of US\$ 1,260,000 (one million two hundred and sixty thousand United States Dollars). Such amount was effectively paid by the Concessionaire to the Province at the time of execution of the Contract, and is equal to the price offered by the Successful Bidder in the Bidding Process for the Concession Area. Without prejudice to that, the Concessionaire undertakes to make all the investments required to implement the POES,¹ as described in Annex F, and guarantee the adequate protection of the Service subject to the terms of the Contract, provided that the tariff adjustments established in Annex N shall be conditioned upon the fulfillment of such undertaking.

1.9 REGULATORY AGENCY

The Concessionaire, the Service and any other aspect related to the performance of the Contract shall be subject to the control and regulation of the Regulatory Agency.

1.10 APPLICABLE LAWS

The Concession shall be governed by the laws and regulations listed below, in the following order of prevalence:

1.10.1 The Regulatory Framework

1.10.2 The Terms of Reference

1.10.3 The Bid

1.10.4 The Contract and the Decree approving such Contract

1.10.5 The rules and regulations issued by the Regulatory Agency. Any regulations currently applicable to the Service shall continue to apply, except where they are in conflict with the rest of the rules and regulations listed above.

3.2 RIGHTS AND DUTIES OF THE CONCESSIONAIRE

In connection with Service provision, the Concessionaire shall have the rights and duties established in the Regulatory Framework, this Contract and any regulations established from time to time by the Regulatory Agency. Especially, the Concessionaire shall perform all tasks related to Service provision required under the applicable laws to guarantee effective supply to Users, the protection of public health and the rational use of resources. The Service shall be supplied subject to the principles of continuity, regularity, quality and generality.

¹ The POES (Service Optimization and Expansion Program) establishes the quantitative and qualitative goals to be attained by the Concessionaire and includes the Five-Year Plans pursuant to Chapter 5 and in Annex F.

3.3 SERVICE COVERAGE

The Drinking Water Supply through Connections to the Mains shall be expanded to guarantee availability to all persons residing in urban areas within the Concession Area, pursuant to the POES and Five-Year Plans. The Concessionaire must efficiently meet the demand for Drinking Water, by providing a Service compliant with the quality standards established in the Regulatory Framework and the Contract.

In turn, the Sewage Service through Connections to the Mains shall be expanded to all urban population to fulfill the goals established in the POES and Five-Year Plans. The Concessionaire must ensure the adequate capacity of the facilities allocated to the collection and transportation of liquid waste so as to effectively meet Service demand and guarantee the proper operation of the systems.

The areas eligible as urban areas shall be determined pursuant to Law 8912.

3.4 DUTY TO PROVIDE THE SERVICE

The Concessionaire shall maintain and renew all civil and electromechanical facilities and shall expand, renew and/or recondition the external networks for the distribution of Drinking Water and Sewage in such a way as to guarantee regular Service supply to all premises within the Service Area and Expansion Area, pursuant to the provisions of the POES and Five-Year Plans.

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3.5 DUTY TO CONNECT AND PAY THE SERVICE

Owners, owners' associations created pursuant to Law 13,512, persons in possession of or using real property located in urban areas within the Service Area shall be under a duty to connect to the network by paying the applicable fee for Connection to the Mains to the Concessionaire. Moreover, they shall be under a duty to connect and install, at their own cost and expense, residential Water and Sewage services and maintain said facilities in good condition.

In turn, owners, owners' associations, usufruct holders, and persons in possession or use of real property located in an area serviced by a Drinking Water distribution main or a Sewage main shall be under a duty to pay the Service pursuant to the applicable Tariff Regime even if the property has no connection to external Service networks. Nonetheless, this provision shall not apply to vacant properties if there has been a request for non-connection or Service disconnection, which shall be subject to the charges established in the Tariff Regime for those special cases.

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5 SERVICE EXPANSION AND OPTIMIZATION PROGRAM (POES)

5.1 CONCEPT

The POES to be performed by the Concessionaire during the Concession is included in Annex F and covers Service expansion, Service goals and action plans, the works required to attain quantitative, qualitative and Service efficiency goals and commitments, and to comply with the requirements regarding geographic coverage to be fulfilled and performed by the Concessionaire pursuant to the terms established therein, in accordance with the provisions set forth in the Regulatory Framework and the Contract.

The POES consists of six (6) consecutive Five-Year Plans, pursuant to Article 5.3. Moreover, it includes updates, adjustments, and changes incorporated through the POES progress annual report established in Article 6.5 upon approval by the Regulatory Agency.

Failure to comply with the POES shall be considered a serious fault, pursuant to Article 13.2.5.5.

5.2 PURPOSE

The purpose of the POES is to promote expansion in the Concession Area and to guarantee maintenance and improvement of the systems required for Service provision, enabling efficient administration and operation in such a way as to fulfill Service Standards and the obligations established in the Regulatory Framework and the Contract.

5.3 FIVE-YEAR PLANS

For each of the five-year periods covered by the term of the POES, the Concessionaire shall present to the Regulatory Agency draft Five-Year Plans explaining, adjusting and providing the necessary updates to fulfill the coverage goals and Service goals established in the POES, with indication of the districts where the POES is to be executed.

The project for the first Five-Year Plan shall be submitted within three (3) months since Contract execution. The draft for each subsequent Five-Year Plan must be presented at least one year in advance of the end date of the applicable five-year period. The Regulatory Agency must request any changes and clarification deemed necessary. Upon approval of the draft presented by the Concessionaire, it shall become a Five-Year Plan and shall become an integral part of the POES, and its fulfillment shall be mandatory. The drafts submitted by the Concessionaire shall be certified by Auditors.

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12.1 TARIFF REGIME

The Tariff Regime applicable to the Service provision is attached hereto as Annex Ñ.

12.1.1 TARIFFS

The calculation of applicable tariffs pursuant to Article 28.II of Law 11,820 shall be based on the general principle that tariffs shall cover all operating expenses, maintenance expenses and service amortization and provide a reasonable return on the Concessionaire's investment subject to efficient management and operation by the Concessionaire and strict compliance with the applicable service quality and expansion goals.

12.2 TARIFFS AND PRICES

Tariffs and prices applied to Service provision after Takeover arise from the application of the provisions established in the Tariff Regime.

12.3 ADJUSTMENT OF TARIFFS AND PRICES

12.3.1 GENERAL PRINCIPLES

Without prejudice to the provisions established in the Tariff Regime, Service tariffs and prices shall remain in force throughout the term of the Concession unless modified pursuant to the review procedures established in this section.

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12.3.4 ORDINARY FIVE-YEAR REVIEWS

Ordinary reviews shall be the reviews carried out every five years due to changes in the goals established in the POES based on the Five-Year Plan applicable to the second five-year term.

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12.3.5 EXTRAORDINARY REVIEWS DUE TO CHANGES IN COST INDICES

12.3.5.1 Concept

These are extraordinary reviews that may be carried out when the Concessionaire or the Regulatory Agency claims an increase in the cost indices associated to the Concession in excess of three percent (3%) in absolute value terms, pursuant to the provisions established in Article 23.3.5.2.

The Concessionaire cannot request an extraordinary review due to modifications in cost indices until twelve (12) months have elapsed since the last review; the foregoing notwithstanding, the accumulated change in cost indices shall be taken into consideration at the time of calculating the applicable tariff review.

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12.4 CHANGES TO THE TARIFF REGIME

12.4.1 General Principles

The Tariff Regime may be modified once the third year of the Concession has concluded.

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12.4.2 Grounds for Adjustment at the Request of the Concessionaire

The Tariff Regime may only be modified at the request of the Concessionaire if the Concessionaire proves that:

- a) it has been impossible to balance service supply and demand due to reasons attributable to the current Tariff Regime in spite of taking all necessary steps for that purpose and having operated efficiently,
- b) the Tariff Regime in force does not promote rational use of the assets and resources applied to Service provision or is unsuited to attain the sanitary goals directly related to Service provision,
- c) a modification of the Tariff regime in force will result in a significant reduction of operating expenses with the resulting benefits to Users.

13. DUTIES AND SANCTIONS

13.1 DUTIES OF THE CONCESSIONAIRE

The Concessionaire assumes the responsibility for the Concession and all legal, technical, economic and financial risks associated thereto, and shall be liable to the Province, Users and third parties for the fulfillment of the duties and requirements necessary to provide the Service as from Takeover. Under no circumstances will the Province, the granting authority, the Regulatory Agency or OSBA² be liable to Users or third parties in connection with the duties assumed by the Concessionaire.

² The OSBA is equivalent to the AGOSBA.

13.2 SANCTIONS

Without prejudice to the provisions established in Chapter 14, if the Concessionaire fails to fulfill its duties it shall be subject to the following sanctions: warning, fine and provisional state takeover pursuant to the following terms and conditions.

13.2.5.5 Delays in the POES

Any delay in fulfilling the POES shall be sanctioned pursuant to the provisions below:

- a) A fine in the amount of one hundred thousand US Dollars (US\$ 100,000) shall be applied for non-essential delays in fulfilling an approved Service goal or completing a work committed - - -
- b) A fine in the amount of one million US Dollars (US\$ 1,000,000) - - - shall be applied for essential delays in fulfilling an approved Service goal or completing a work committed. - - -

14 TERMINATION OF THE CONCESSION

14.1 GROUNDS FOR TERMINATION

The Concession shall terminate upon expiration of the term, upon the occurrence of an act of God or *force majeure*, due to the Concessionaire's or the Granting Authority's fault, and repossession of the Service by the Granting Authority.

14.1.3 TERMINATION DUE TO THE CONCESSIONAIRE'S FAULT

The Granting Authority may terminate the Contract due to the Concessionaire's fault on the following grounds:

- a) Serious non-compliance with legal, contractual or regulatory provisions applicable to the Service.
- b) Repeated and unjustified delays in fulfilling the coverage goals set forth in the POES.

h) Repeated violation of the User regulations provided for in Article 13-II of the Regulatory Framework.

i) Repeatedly withholding or concealing information from the Regulatory Agency.

k) Failure to furnish, renew or refurnish the Contract guaranty as provided for in Article 11.1, and the Operator guaranty provided for in Article 11.2.

If any non-compliance or violation can be cured, the Regulatory Agency shall demand that the Concessionaire correct its actions, cure the breach in any suitable way and submit the relevant response, in the period fixed according to the circumstances of the situation, the nature of the violation and in view of the public interest, which shall never be shorter than thirty (30) days. Upon expiration of the period accorded to the Concessionaire, the Regulatory Agency shall give

notice to the Granting Authority of the subsistence of the non-compliance or breach if it has been duly proved, and the Granting Authority may terminate the Contract due to the Concessionaire's fault.

Notwithstanding the foregoing, the Regulatory Authority shall take part in the termination proceedings, and shall submit its justified conclusions to the Granting Authority.

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16.7 JURISDICTION

Any dispute arising between the Granting Authority and the Concessionaire related to the interpretation and performance of the Contract shall be resolved by the administrative courts of competent jurisdiction in and for the city of La Plata, and such parties waive any other applicable jurisdiction or venue."

16. Annex F to the Concession Contract contains details about the Service Expansion and Optimization Program (the "POES") mentioned in Article 5 of the Concession Contract.

17. Article 1 of Annex F, which concerns "Managements Indexes", specifies the goals related to Service quality and business management permitting values to be accomplished within the time frames in Table 1 in the Annex – minimum values for micro-metering efficiency (from 75% in year 3 to 98% in year 30), maximum values for water not accounted for (from 40% in year 3 to 25% in year 30) and minimum values for Service continuity (from 96% in year 3 to 100% in year 30).

18. Article 2 of the Annex indicates goals for the Service expansion in respect of drinking water and sewerage (minimum number of new connections per year), the installation of individual metering devices for water and the revamping and/or reconditioning of pipes.

19. Annex Ñ concerns the Tariff System applicable to the Concessionaire's provision of the Service. It defines in Article 2 the persons obliged to pay for the Service and in Article 4 the tariffs applicable to Non-metered and Metered Service. Article 10 deals with the work fees to be paid by the users when the public service for the drinking water supply and sewage services is connected. Article 19 provides that the Concessionaire shall have the right to bill and collect all of the Services it provides. Article 29 deals with Service interruption in cases where users are late in paying their bills. Article 20 deals with Billing Currency and provides as follows:

"Tariffs are stated in US Dollars; however, users shall receive bills stated in pesos. The applicable conversion shall be performed on the basis of the 1 Dollar = 1 Peso parity established in the Convertibility Law or any other exchange rate from time to time established by law to replace such parity in force at bill cut-off date."

20. On January 3, 2000, AGBA took possession of the concession, and on March 21, 2000, AGBA presented its first Five-Year Plan to ORAB. On July 21, 2000, ORAB requested amendments to the Five-Year Plan, and on November 8, 2000, AGBA acquiesced by presenting a revised Five-Year Plan. The revised Plan was approved by ORAB on January 31, 2001.

21. In a letter of May 17, 2001 to the Minister of Public Works and Services of the Province of Buenos Aires, AGBA stated that, despite AGBA's efforts, there were considerable difficulties in receiving payment for its services from customers. The non-collection rates within the Concession Area had reached spectral figures of around 60%, and this had affected AGBA's capacity to make the investments required under the expansion program. Consequently, AGBA was facing a significant alteration of the economic and financial equilibrium of the concession and was experiencing considerable difficulties in obtaining bank loans. As a result, it had also been impossible to achieve the goals of the current Five-Year Plan. By way of conclusion, AGBA requested that a work commission be created in order to jointly analyze appropriate solutions and alternatives and that, as a provisional measure, the expansion goals be temporarily suspended until the said commission had made a decision.

22. On May 30, 2001, the Undersecretary of Public Services of the Province of Buenos Aires replied that the issue of non-collection rates was a business risk which AGBA had to bear in accordance with the terms of the Concession Contract. Nevertheless, the Ministry agreed to set up a working commission whose work could lead to contractual modifications that would harmonize the objectives of the Regulatory Framework and the Concession Contract with the interests of the users in the relevant area.

23. In a letter of July 17, 2001, AGBA, with reference to the severe economic crisis in Argentina, asked ORAB to suspend temporarily the execution of the POES. The request was repeated in a letter of August 15, 2001.

24. On August 7, 2001, ORAB requested that AGBA should refrain in certain areas from billing work charges on the basis of Article 10 of Annex Ñ to the Concession Contract.

25. On August 27, 2001, ORAB's Technical Department found that AGBA's performance during the first year of the concession had shown an acceptable degree of compliance with the POES. The Technical Department also supported the request for a suspension of the POES in view of the economic hardship facing the province and the country. A favorable opinion was also expressed by ORAB's Economic Regulation Department on November 23, 2001 and by ORAB's Law and Resolution Department on December 3, 2001.

26. In a letter of September 13, 2001, AGBA asked the Governor of the Province of Buenos Aires to intervene and arrange a meeting to discuss the serious situation that had arisen in regard to the implementation of the Concession Contract. On December 27, 2001, AGBA asked the Province Governor to arrange immediately bilateral negotiations in order to decide on the most suitable mechanisms to restore the equilibrium of the economic and financial equation of the Concession Contract, which had been disrupted by various events.

27. In an internal letter of October 10, 2001, ORAB's Technical Department noted that, despite AGBA's efforts, neither the goals set forth in the Concession Contract nor those specified in the POES had been attained. In view hereof, ORAB decided, on

October 17, 2001, not to allow AGBA to increase tariffs according to a coefficient indicated in Annex Ñ to the Concession Contract.

28. On January 6, 2002, the Federal Argentine Government enacted Law No. 25,561 on Public Emergency and Exchange Regime Reform in which utilities contracts were “pesified” at parity level and tariffs were frozen. The Government was also authorized to renegotiate public utilities contracts.

29. In a letter of January 9, 2002 to the Province Governor, AGBA pointed out that the latest economic and social developments had further worsened AGBA’s situation. AGBA requested a meeting at which AGBA could apprise the Governor of the many factors that were putting the concession on the brink of collapse.

30. On January 11, 2002, ORAB “pesified” AGBA’s tariffs at parity rate. On January 24, 2002, AGBA demanded the reversal of this decision as being contrary not only to the Concession Contract but also to the law and the Argentine Constitution.

31. On February 18, 2002, ORAB issued Resolution No. 14/02 which prevented AGBA from billing work charges.

32. On February 19, 2002, AGBA requested the renegotiation of the Concession Contract. The request was repeated in a letter of April 17, 2002 to the Province Governor.

33. On February 28, 2002, Law No. 12,858 was enacted by the Province. According to this law, the Executive was authorized to create a New Regulatory Framework for water services.

34. By Decree 517/02 of March 13, 2002, the Province approved the statutes of the company Aguas Bonaerenses S.A. (“*ABSÁ*”), which was to take over a concession for other areas in the Province of Buenos Aires, which had until then been held by the company Azurix.

35. By Decree No. 1175/02 of May 13, 2002, the Province set up a Special Commission for the Evaluation of the Impact of the Crisis on the Tariffs and Contracts of Public Service. The task of the Special Commission was to examine the problems in the area of public utilities and to propose solutions.

36. In a letter of June 11, 2002 to ORAB, AGBA referred to changes in tax laws which had created further difficulties for AGBA and asked for a review of the Concession Contract. The need for a renegotiation of the Concession Contract was further explained in AGBA’s letter of June 28, 2002 to the Province Governor.

37. On July 23, 2002, the Undersecretary of Public Services of the Province, in a letter to ORAB, pointed out that AGBA had undertaken by contract to fulfill the obligations in the POES and obtain itself the necessary funds for this purpose. The Undersecretary did not find it reasonable to make adjustments in favor of AGBA as this would have negative effects for the customers whose economic interests required protection.

38. In a letter of August 14, 2002 to the Undersecretary, AGBA referred to a meeting in his office that had taken place on August 2, 2002, and again emphasized the need for contract renegotiation. AGBA repeated its request for renegotiation in letters of September 30 and October, 24, 2002 to the Province Governor, and also in a letter of October 8, 2002 to the President of the Commission for the Evaluation of the Impact of the Crisis on the Tariffs and Contracts of Public Service as well as in a letter of October 30, 2002 to ORAB.

39. On August 27, 2002, ORAB, in Resolution No. 56/02, suspended AGBA's right to interrupt water service to customers who had not paid their bills.

40. In a report of December 2, 2002 to the President of ORAB, the Technical Department of ORAB found that AGBA had essentially satisfied the goals established for the first concession year 2000. In Resolution No. 69/02 of December 5, 2002, ORAB resolved that AGBA had met the service expansion and quality goals of the first year of the concession (year 2000), as provided in Annex F to the Concession Contract and incorporated into the first Five-Year Plan which was an integral part of the POES.

41. On December 30, 2002, in Resolution No. 77/02, ORAB also granted AGBA's request for a suspension of the POES obligations in the second concession year 2002 with the effect that measures which had not been accomplished during that year should not lead to penalties according to Article 13.2.5.5 of the Concession Contract.

42. On June 9, 2003, the Province issued Decree No. 878/03 which contained a New Regulatory Framework for the Provision of the Drinking Water and Wastewater Public Services in the Province. According to the Decree, the Control Agency would be the *Organismo de Control del Agua de Buenos Aires* ("OCABA"). On July 17, 2003, AGBA challenged the Decree. AGBA also repeatedly – on August 27, September 22 and December 2, 2003 and on January 13, 2004 – asked for renegotiation of the Concession Contract. On June 30, 2004, the Province Governor rejected AGBA's request for revocation of the Decree issuing the New Regulatory Framework.

43. On April 26, 2005, the Province adopted Decree No. 757/05 in which an Agreement with ABSA was approved. ABSA was permitted to make gradual increases of tariffs and was granted certain subsidies. In its letter of July 15, 2005 to the competent Minister and Undersecretary, AGBA argued that AGBA was discriminated against in comparison with ABSA and demanded similar treatment.

44. A request by AGBA to be allowed to make tariff increases was rejected in a letter from the Undersecretary of Public Services on August 25, 2005.

45. On March 10, 2006, Resolution No. 84/06 was adopted by which the Ministry of Public Services ordered OCABA to gather information about AGBA's performance as concession holder. OCABA issued its report on April 21, 2006 in which it concluded that AGBA had violated in several ways its obligations under the Concession Contract and the POES.

46. In a letter of June 14, 2006 to the Minister and the Undersecretary of Public Services and also to the President of ORAB, AGBA accused the Province of violating its obligations under the Concession Contract and declared that, unless this was corrected within 45 days, AGBA would find it necessary to rescind the Concession Contract.

47. On July 10, 2006, OCABA, in Resolution No. 36/06, fined AGBA for having failed to handle certain complaints in a timely fashion.

48. Finally, on July 11, 2006, the Province Governor, by Decree No. 1666/06, terminated the Concession Agreement due to AGBA's fault pursuant to Article 14.1.3 (a), (b), (h), (i) and (k) of the Concession Contract. By Decree No. 1677/06, the Province Governor, on July 13, 2006, transferred AGBA's water and sewage service concession to ABSA.

IV. ISSUES OF JURISDICTION

49. The Argentine Republic requests the Arbitral Tribunal to issue an award finding under ICSID Arbitration Rule 41(4) the lack of jurisdiction of ICSID and the lack of competence of the Tribunal to hear the case:

(a) the lack of jurisdiction of ICSID and the lack of competence of the Tribunal since Impregilo failed to meet the requirements established in Article 8 of the Argentina-Italy BIT;

(b) in the alternative, the lack of jurisdiction of ICSID and the lack of competence of the Tribunal since Impregilo's claim is an indirect claim;

(c) in the alternative, the lack of jurisdiction of ICSID and the lack of competence of the Tribunal since the claim refers to contractual issues on which the ICSID has no jurisdiction; and

The Argentine Republic also requests that Impregilo must pay all the court expenses and professional fees that Argentina will have incurred under Arbitration Rule 47(1) j.

50. Impregilo requests:

(a) a declaration that the dispute is within the jurisdiction of the Centre and within the competence of the Arbitral Tribunal, and

(b) an order dismissing all of Argentina's objections to the jurisdiction of ICSID and the competence of the Tribunal.

A. First objection: Impregilo has not complied with the requirements set forth in Article 8 of the Argentina-Italy BIT

The Argentine Republic:

51. The dispute resolution clause contained in Article 8(2) and (3) of the Argentina-Italy BIT requires investors to submit their dispute to domestic courts for 18 months before filing international arbitration proceedings. The use of the permissive verb

“may” (“*podrá*” in Spanish and “*potrá*” in Italian) indicates that an investor is not required to submit the dispute to a binding resolution system but may continue with the amicable consultations for as long as he wishes or even leave the dispute dormant for an indefinite term. It does not mean, however, that the investor, if he wishes to initiate international arbitration proceedings, is exempted from first submitting the dispute to domestic courts and from then waiting for 18 months before proceeding to international arbitration.

52. In fact, if amicable negotiations fail, then, pursuant to Article 8(3), an investor may submit the dispute to international arbitration only if it was previously submitted to the jurisdiction of the competent administrative or judicial bodies for at least 18 months. A different interpretation would deprive the first half of Article 8(3) of any purpose and effect, in violation of the canons of treaty interpretation of *effet utile* (useful effect) or *ut res magis valeat quam pereat* (the matter must have effect rather than not).

53. As Impregilo failed to meet the requirement contained in the Argentina-Italy BIT to submit the dispute to the jurisdiction of the competent administrative or judicial bodies of the Argentine Republic for 18 months before filing the arbitration proceedings, this claim must be rejected. The awards rendered by the tribunals in the ICSID cases *Wintershall Aktiengesellschaft v. Argentine Republic*³ and *TSA v. Argentine Republic*⁴ support the Argentine Republic’s position in this regard.

54. In fact, Impregilo did not submit the dispute to the “competent administrative or judicial bodies” and can therefore in no case be deemed to have fulfilled the condition in Article 8(3) of the Argentina-Italy BIT with respect to its consent to international arbitration.

55. Moreover, Impregilo cannot rely upon the most-favored-nation (“*MFN*”) clause in Article 3(1) of the Argentina-Italy BIT for the purpose of avoiding the obligation to resort to the local courts for 18 months. This clause cannot be used to circumvent the obligation to resort to the competent administrative or judicial bodies for 18 months. There are at least four arguments for rejecting the position that Article VII of the Argentina-US BIT should be imported into the Argentina-Italy BIT by application of the MFN clause: (i) it does not give proper effect to the terms of the MFN clause; (ii) the MFN clause refers to treatment “in the territory”, whereas arbitration takes place outside Argentina and beyond its sovereign powers; (iii) resorting to domestic courts cannot be deemed as unfavorable for investors; and (iv) the 18-month clause is an essential clause of the BIT and, therefore, Impregilo cannot invoke the MFN clause in order not to abide by it.

56. The subjects of the MFN clause, contained in Article 3(1) of the Argentina-Italy BIT, are “investments made by the investors of the other Contracting Party, income and activities related to such investments and all other matters regulated by this Agreement”. There are two specific items listed – “investments” and “income and

³ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (“*Wintershall*”), Award, Dec. 8, 2008, paras. 114-22.

⁴ *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5 (“*TSA*”), Award, Dec. 19, 2008, paras. 98, 107 and 110-12.

activities related to such investments” – followed, in the same clause without separation by a comma, by a third general term: “all other matters regulated by this Agreement”. Under the *ejusdem generis* principle, the general term applies only to the subject-matter of the specific items, *i.e.* investments. Thus, when the MFN clause requires “a treatment that is no less favorable” for “all other matters regulated by this Agreement”, it is referring to matters related to investments. Arbitration and its preconditions under Article 8, including the 18-month judicial recourse requirement, do not concern investments, but instead a dispute settlement procedure under the BIT. Moreover, ICSID arbitration is not “a treatment” which Argentina affords the investor, but instead a procedure to which Argentina is subjected on the initiative of the investor. Accordingly, the MFN clause does not apply to Article 8.

57. The *effet utile* principle provides the basis for such conclusion. If the final, general term of the MFN clause, “all other matters”, encompassed everything mentioned in the BIT, including Article 8, it would render the first two specific terms meaningless – the BIT could have stated only the final, general term and it would have had the same meaning.

58. Furthermore, while precedents interpreting whether an MFN clause applies to a dispute settlement clause are divided, the awards universally agree that, under Article 31 of the Vienna Convention on the Law of Treaties, each case depends on the exact language and context of the MFN clause at issue.

59. The MFN clause is also limited in its territorial application. Each State is only required to accord no less favorable treatment “within its own territory” (“*en el ámbito de su territorio*” in Spanish; “*nel proprio territorio*” in Italian). It does not require most favorable treatment outside the State’s territory. Under the Argentina-Italy BIT, the Argentine Republic’s territory is defined physically and is considered to include its “land and ocean boundaries” and “maritime zones”. This territorial limitation excludes the conditions for participation in an ICSID arbitration from the scope of the MFN clause, because ICSID is genuinely transnational arbitration that is governed by a multilateral treaty and is totally detached from any national jurisdiction, whether of ICSID’s seat or of the location where the arbitration is conducted, much less that of the respondent State. Accordingly, there is no basis for invoking the MFN clause with respect to the conditions for recourse to an international arbitration, including the 18-month local judicial recourse prerequisite to that international arbitration under Article 8.

60. Finally, Article 3(1) requires host States to accord “a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries”. Even if the Tribunal were to apply the MFN clause to Article 8 (which it should not), in order to make use of the dispute resolution provisions of the Argentina-US BIT, Impregilo has the burden of establishing that it provides “more favorable” treatment than the Argentina-Italy BIT. However, Impregilo has not done so, nor will it be able to do so.

61. Impregilo was not prevented by any obstacle from filing judicial claims. Impregilo does not – nor could it – maintain that it was deprived of the right of access to the courts or of the guarantees of due process. This is evidenced by the various decisions rendered by the Argentine courts in less than 18 months, many of which are final.

Measures such as the ones at issue in this case may be, and have been, analyzed by the Argentine courts and, in many cases, decisions on the merits have been issued within less than a year. This proves that there are resources in the Argentine Republic for the judiciary to pass decisions swiftly.

62. Article 8 of the Argentina-Italy BIT articulates a multi-layered, sequential dispute settlement mechanism ultimately leading, if still needed, to a limited consent to arbitration by both sovereigns. The Parties designed and negotiated this process as a whole, and obviously thought the provisions had a meaning. Impregilo should not be allowed to re-assemble the negotiated “package” by picking and choosing bits and pieces from the dozens of BITs that Argentina has entered into.

63. The purpose of such 18-month clauses is to give States the possibility of settling the dispute through their courts and potentially solving any violation of international law. This is the reason why this requirement has been specially negotiated by Argentina with certain States and why capital-exporting States even have similar clauses with longer terms.

64. Impregilo may not avoid the provisions of Article 8(2) of the Argentina-Italy BIT by invoking the MFN clause, given that the 18-month clause was specially negotiated, not only with Italy, but also with all other States in whose BITs such clauses were included. This clause is not present in all BITs entered into by Argentina, which evidences that the States negotiating the treaty intended to include it as a special, binding provision just as the rest of the provisions in those instruments. The fact that, after entering into treaties not including an 18-month clause, Argentina in certain cases continued to sign treaties with 18-month clauses is proof of this.

65. Reference may also be made to the analysis in the *Vladimir Berschader v. Russian Federation*⁵ case regarding the phrase “all matters relating to” contained in many BITs and similar to the phrase “all other matters regulated by this Agreement” contained in Article 3(1) of the Argentina-Italy Treaty. The awards in the ICSID cases *Salini*,⁶ *Plama*,⁷ *Telenor*⁸ and *Wintershall*⁹ also support the Argentine Republic’s position on this issue.

Impregilo:

66. Article 8(2) of the BIT provides that the dispute *may* be submitted to competent judicial or administrative courts of the State of investment. Unlike some other BITs, it does not provide that it *shall* be submitted to the domestic courts or authorities. It can

⁵ *Vladimir Berschader and Moise Berschader v. Russian Federation*, SCC Case No. 080/2004 (“*Berschader*”), Award, April 21, 2006, paras. 183-208.

⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (“*Salini*”), Decision on Jurisdiction, Nov. 9, 2004, paras. 116-19.

⁷ *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24 (“*Plama*”), Decision on Jurisdiction, Feb. 8, 2005, paras. 183-227.

⁸ *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15 (“*Telenor*”), Award, Sept. 13, 2006, paras. 83-101.

⁹ *Wintershall*, *supra* n. 3, paras. 161-68.

therefore be concluded that the submission of the dispute to the domestic courts is an option and not a mandatory requirement.

67. For several years Impregilo tried in good faith to settle the dispute with Argentina, but the dispute only worsened and culminated in the Province's unlawful termination of the Concession Contract in mid-2006.

68. In addition, AGBA consistently resorted to local administrative and judicial courts in the hope that they would undo the Province's decisions, but this never occurred. The Argentine courts have had, and still have, the opportunity to decide on the facts that have led to this arbitration, but have either failed to do so or supported the Executive Branch's position.

69. In the present proceedings, the Argentine Republic – more than eight years after the first facts giving rise to this dispute occurred – alleges that the Tribunal lacks jurisdiction. Argentina argues (i) that Impregilo failed to comply with the “amicable consultations” period, (ii) that Impregilo failed to comply with the 18-month period of submission of the dispute before local courts, and (iii) that Impregilo's interpretation of the scope of the MFN clause is flawed.

70. The Argentine Republic's objection disregards the fact that Argentine administrative and judicial courts have had the opportunity to decide on the facts involved in the present case. Nonetheless, they have either failed to render a decision or supported the measures. These claims were based exclusively on contractual issues – although they had the same factual background as the BIT claims in the present case – and Argentine tribunals have had much more than 18 months to decide on this factual background.

71. The tribunal in *TSA v. Argentina* understood that the aim of periods before local administrative or judicial courts was to have “a fair chance of obtaining satisfaction at the national level within the said time frame”.¹⁰ The ICJ held in the *Interhandel* case – with respect to the requirement of exhaustion of local remedies under customary international law – that “the respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual”.¹¹ Argentine courts have had plenty of time and have failed to redress the situation. The fact that AGBA – and not Impregilo – was the claimant in those cases is irrelevant for the purposes of the submission of the dispute before local courts.

72. Thus, Argentina's argument that the 18-month period was not observed disregards that the main purpose of the 18-month period – that Argentine courts shall have the opportunity to undo the measures giving rise to this dispute – has been satisfied and would even meet the requirements under customary international law requiring the exhaustion of local remedies.

73. Impregilo emphasizes the futility of pursuing relief in the Argentine legal system. Argentine administrative and judicial courts have had the opportunity to undo the

¹⁰ *TSA*, *supra* n. 4, para. 110.

¹¹ *Interhandel Case (Switzerland v. U.S.)*, Judgment of Mar. 21, 1959, 1959 ICJ Rep. 5, 27.

Argentine Government measures that resulted in this BIT arbitration. The mere act of Impregilo submitting its dispute to this Tribunal is evidence of that fact. But the futility of the submission of this dispute for 18 months is also supported by the fact that it could not lead to a decision on the merits within that period. In other words, resorting for 18 months to local courts would be ineffective and would involve disproportionate expenses for Impregilo.

74. If the provision establishing the 18-month submission before local courts was construed as a mandatory requirement – which it is not – Impregilo invokes in the alternative the MFN clause in Article 3(1) of the BIT. The scope of this provision is extremely broad, since it actually sets forth that the MFN treatment shall be extended to *all* of the matters regulated by the BIT. Such a broad scope clearly includes the dispute settlement provision of the BIT. Impregilo therefore requests the application of the dispute resolution clause of the Argentina-US BIT. This possibility has been unanimously approved by various tribunals, in cases in which Argentina was a party, and in disputes also involving concession contracts similar to the one at issue. Reference is made to the cases of *Maffezini v. Spain*,¹² *Ambatielos*,¹³ *Siemens v. Argentina*,¹⁴ *Gas Natural v. Argentina*,¹⁵ *Suez v. Argentina*,¹⁶ *National Grid v. Argentina*¹⁷ and *Camuzzi v. Argentina*.¹⁸

75. The cases invoked by the Respondent, i.e. *Salini, Plama, Berschader, Telenor* and *Wintershall*, are easily distinguished from the present case.

76. On the basis of the MFN clause, Impregilo invokes the dispute resolution clause in the Argentina-US BIT, which does not foresee the procedure of waiting for 18 months for local courts to decide on the dispute before the investor may resort to international arbitration. The Argentina-US BIT only provides for a six-month period of consultations to try to amicably resolve the dispute. The six-month period provided for by the dispute resolution clause in the Argentina-US BIT constitutes a more favorable treatment, since it would allow Impregilo to bypass a formalistic, futile and excessively onerous step provided by the BIT.

77. Impregilo has submitted this dispute neither to the courts nor to the administrative tribunals of the Argentine Republic, nor to any other applicable, previously agreed

¹² *Emilio Agustín Maffezini v. Spain*. ICSID Case No. ARB/97/7 (“*Maffezini*”), Decision on Jurisdiction, Jan. 25, 2000.

¹³ *The Ambatielos Claim (Greece v. United Kingdom of Great Britain and Northern Ireland)*, Award, Mar. 6, 1956, UNRIAA, Vol. XII, 83.

¹⁴ *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8 (“*Siemens*”), Decision on Jurisdiction, Aug. 3, 2004.

¹⁵ *Gas Natural SDG, S.A. v. Argentina*, ICSID Case No. ARB/03/10 (“*Gas Natural*”), Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005.

¹⁶ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No ARB/03/17 (“*Suez*”), Decision on Jurisdiction, May 16, 2006.

¹⁷ *National Grid Plc v. Argentina*, UNCITRAL (“*National Grid*”), Decision on Jurisdiction, June 20, 2006.

¹⁸ *Camuzzi Int’l S.A. v. Argentina*. ICSID Case No. ARB/03/7 (“*Camuzzi II*”), Decision on Jurisdiction, June 10, 2005.

dispute settlement procedure. Therefore, the first requirement of the Argentina-US BIT has been met.

78. On January 24, 2006, Impregilo delivered a letter to the Federal Government of Argentina formally notifying it of the dispute in question, seeking to resolve the matter by consultation and negotiation, and notifying the Argentine Republic that Impregilo would seek international arbitration under the terms of the BIT, if the matter could not be resolved by consultation and negotiation. The six month period since this letter was delivered ended on July 24, 2006, and the dispute remains unresolved. Therefore, the second requirement of the Argentina-US BIT has also been met.

The Arbitral Tribunal:

(i) Article 8(2) and (3) of the BIT

79. Article 8(2) of the Argentina-Italy BIT provides that, if a dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is located. It does not provide that the party “shall” or “must” submit the case to a local court.

80. However, there is a close connection between Article 8(2) and Article 8(3) which provides that international arbitration may be initiated where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in Article 8(2), the dispute between the investor and the Contracting Party has not been resolved.

81. There is thus, on the one hand, a clause providing that domestic court proceedings *may* be instituted and, on the other hand, another provision providing, *as a condition for arbitration*, that there have been such proceedings and that these proceedings have been going on for 18 months.

82. There could thus appear to be a certain ambiguity in the text of the BIT, and the following two interpretations of the two paragraphs, when read together, would seem to be arguable:

(a) The first interpretation (*Alternative 1*) would place the emphasis on the word “may” (“*podrá*”, “*potrá*”) and thus on the optional character of Article 8(2) and lead to the conclusion that, as Article 8(2) provides that the investor *may* submit the dispute to the domestic courts, Article 8(3) should be understood to mean that the condition of previous domestic proceedings in Article 8(3) only applies if the investor has used the option and actually brought proceedings before the domestic courts, whereas, if he has not done so, he would be free to proceed at once to international arbitration.

(b) The second interpretation (*Alternative 2*) would be that, although Article 8(2) provides that the investor *may* submit the dispute to the domestic courts, it follows from Article 8(3) that, if the investor wishes to submit a dispute to international arbitration, he must first bring proceedings before the domestic courts and observe the waiting period of 18 months.

83. The Arbitral Tribunal notes that, whatever interpretation is chosen, the term “may” in Article 8(2) is justified in the sense that the investor is not obliged to bring the dispute to the domestic courts. The only question that arises in regard to the wording in Article 8(2) is what legal consequences, if any, follow from the investor’s failure to bring the dispute before these courts.

84. It may be observed that the word “may” is also used in Article 8(3) in regard to the initiation of arbitral proceedings. Here too, there is of course no obligation to submit the dispute to international arbitration.

85. On the other hand, it should also be noted that there are other BITs which provide that the investor *shall* bring a dispute before the domestic courts or authorities.

86. In the Arbitral Tribunal’s opinion, the terminological differences between BITs do not necessarily mean that any substantive difference was intended. The ambiguity to which they may give rise must be resolved by reading the provisions not only according to their wording but also in their context (cf. Article 31 of the Vienna Convention on the Law of Treaties). The immediate context of Article 8(2) is Article 8(3), and these two provisions, when read together, have to be given a reasonable meaning.

87. Alternative 1 above would mean that, if the investor does not bring the dispute before the domestic courts, the condition in Article 8(3) of the BIT is not applicable. In other words, the investor would always have a free choice between immediate international arbitration and such arbitration preceded by domestic proceedings during a period of at least 18 months.

88. The Arbitral Tribunal finds it unlikely that this is what the parties to the BIT had in mind. For the Argentine Government, it must have been desirable to give its courts a first opportunity to resolve disputes with foreign investors. This benefit would of course not materialize if Article 8(3) were interpreted according to Alternative 1.

89. Moreover, the wording of Article 8(3) indicates that it contains a general condition for international arbitration, and there is no exception for the situation where there had been no domestic proceedings. If the intention had been to provide for such an exception, the wording would most probably have been different. An appropriate wording would then have been, for instance: “If the dispute has not been submitted to the competent judicial or administrative courts in accordance with paragraph 2 above, or if the dispute, after having been submitted to these courts, has remained unresolved eighteen months after the commencement of proceedings before them, it may be submitted to international arbitration - - -”.

90. As the text now reads, the Tribunal considers that Article 8(3) should be interpreted according to Alternative 2, or, in other words, that it should be considered to set out a general condition that must be complied with by the investor who wishes to submit the dispute to international arbitration. The condition to be complied with is a double one: first bringing the dispute before the domestic courts and then waiting for 18 months before proceeding to international arbitration. This condition has not been complied with by Impregilo.

91. This conclusion, according to which Article 8(3) provides a mandatory – but limited in time – jurisdictional requirement before a right to bring a case to ICSID can be exercised, is further supported by other decisions arriving at the same conclusion in regard to similarly worded clauses.

92. The *Maffezini* tribunal held that going first to the local courts was a jurisdictional requirement that had to be respected:

“35. ... the Contracting Parties to the BIT—Argentina and Spain—wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken. Had this been the Claimant’s sole argument on the issue, the Tribunal would have had to conclude that because the Claimant failed to submit the instant case to Spanish courts as required by Article X(2) of the BIT, the Centre lacked jurisdiction and the Tribunal lacked competence to hear the case.”¹⁹

93. *Wintershall* stands for the same approach:

“155. Undoubtedly, the promotion and protection of investment is an object or purpose of the BIT but that promotion and protection in the Argentina-Germany BIT is to be “on the basis of an agreement” (i.e. on the basis of the terms of the Treaty – the BIT): which could not possibly exclude the provisions of Article 10(2). If the object and purpose had been to have an immediate unrestricted direct access to ICSID arbitration, then inclusion of Article 10(2) would have been otiose and superfluous. Therefore, the assumption and assertion made in this proceeding (and in some decisions of ICSID Tribunals as well), that since the object and purpose of a BIT is to protect and promote investments, unrestricted direct access to ICSID must be presumed, is contrary to the text (and context) of this BIT, i.e., the Argentina-Germany BIT.”

4. Conclusion on the first aspect of Argentina’s first Preliminary Objection to Jurisdiction

156. To conclude – for the reasons mentioned above, the Tribunal’s decision on this first part of Argentina’s first Preliminary Objection to Jurisdiction is that *Wintershall* (the Claimant) could not avoid prior compliance with Article 10(2) of the Argentina-Germany BIT before initiating arbitration proceedings. Not having so complied with Article 10(2), the Tribunal has no competence to entertain the claim and to proceed with it on merits.”

94. In sum, Article 8(3) contains a jurisdictional requirement that has to be fulfilled before an ICSID tribunal can assert jurisdiction. This decision is in accordance with the decision in *Wintershall*, where it was found for a very similar clause in the Argentina-Germany BIT, that “Article 10(2) contains a time-bound prior-recourse-to-local-courts-clause, which mandates (not merely permits) litigation by the investor (for a definite period) in the domestic forum”²⁰, before the right to ICSID can even materialize. Impregilo not having fulfilled this requirement, the Tribunal cannot find jurisdiction on the basis of Article 8(3) of the Argentina-Italy BIT.

(b) *The MFN clause*

95. However, Impregilo has also invoked the MFN clause in Article 3(1) of the Argentina-Italy BIT and has argued that, *via* that clause, the more generous rules in the Argentine-US BIT should be applied to the dispute. According to the dispute settlement clause in Article VII of that BIT, the investor may choose to submit the

¹⁹ *Maffezini*, *supra* n.12, para. 35.

²⁰ *Wintershall*, *supra* n. 3 para. 118.

dispute for resolution to the domestic courts or administrative tribunals, or to deal with it in accordance with previously agreed dispute settlement procedures, or, after six months from the date on which the dispute arose, to submit it to international arbitration.

96. Article 3(1) of the Argentina-Italy BIT provides that “[e]ach Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries”.

97. In support of its contention that the MFN clause cannot be applied, the Argentine Republic has invoked:

(a) that Impregilo’s interpretation does not give proper effect to the terms of the MFN clause,

(b) that the MFN clause refers to treatment by the Contracting Party “within its own territory”, whereas arbitration takes place outside Argentina and beyond its sovereign powers,

(c) that resorting to domestic courts cannot be deemed as something unfavorable for investors, and

(d) that the 18-month clause is an essential clause of the BIT and, therefore, cannot be set aside by the MFN clause.

98. On point (a) the Argentine Republic relies on the wording of the MFN clause in Article 3(1) which applies to “treatment” and which, before referring to “all other matters”, enumerates “investments” and “income and activities related to such investments”.

99. The Arbitral Tribunal is of the opinion that the term “treatment” is in itself wide enough to be applicable also to procedural matters such as dispute settlement. Moreover, the wording “all other matters regulated by this Agreement” is certainly also wide enough to cover the dispute settlement rules. The argument that the *ejusdem generis* principle would limit its application to matters similar to “investments” and “income and activities related to such investments” is not convincing, since the wording does not allow “all other matters” to be read as “all similar matters” or “all other matters of the same kind”. Nor is the argument that an all-embracing concept like “all other matters” would make the previously mentioned terms “investments” and “income and activities related to such investments” superfluous, since it is indeed not unusual in legal drafting to indicate typical examples even in provisions which are intended to be of general application.

100. As regards point (b), the Arbitral Tribunal accepts that the words “within its own territory” limit the scope of the MFN clause. In the present case, however, the question as to what legal protection Argentina shall give to foreign investors is in no way an issue over which Argentina has no power to decide, nor is it tied to any

particular territory. The Tribunal therefore considers that the wording “within its own territory” does not exclude the application of the MFN clause to dispute settlement.

101. As regards point (c), the Arbitral Tribunal finds that the relevant question is not whether resorting to domestic courts is more or less favorable to investors than international arbitration. Instead, what should be considered is whether a *choice* between domestic proceedings and international arbitration, as in the Argentina-US BIT, is more favorable to the investor than compulsory domestic proceedings before access is opened to arbitration. The answer to this question is in general, and certainly in this case, evident: a system that gives a choice is more favorable to the investor than a system that gives no choice.

102. Finally, point (d) presents a more difficult issue. In this respect, the Argentine Republic has pointed out, *inter alia*, that Argentina has included in several of its BITs, even those concluded after the Argentina-US BIT, a clause about domestic proceedings and an 18-month waiting period. This could be seen as an indication that Argentina did not intend these clauses to be replaced, via MFN clauses in the same BITs, by the rules of the Argentina-US BIT as being more favorable to the investor. However, the argument becomes less persuasive in the present case, because the Italy-Argentina BIT (signed on 22 May 1990) preceded the Argentina-US BIT (signed on 14 November 1991).

103. The Arbitral Tribunal must also attach special weight to the wording of the MFN clause, which extends its scope to “all other matters regulated by this Agreement”. Given the breadth of the this language, the clause must be considered to encompass dispute settlement provisions.

104. The Arbitral Tribunal further notes that there is a massive volume of case-law which indicates that, at least when there is an MFN clause applying to “all matters” regulated in the BIT, more favorable dispute settlement clauses in other BITs will be incorporated. Relevant cases are *Maffezini*,²¹ *Gas Natural*,²² *Suez*,²³ *Suez*²⁴ and *Camuzzi*.²⁵

105. Even in some – but not all – cases where the MFN clauses were less comprehensive and only provided for MFN treatment of investors and investments, the tribunals found this to be sufficient to cover dispute settlement. Cases in point are *Siemens*,²⁶ *National Grid*²⁷ and *RosInvest*.²⁸

²¹ *Maffezini*, *supra* n. 12, paras. 38-64.

²² *Gas Natural*, *supra* n. 15, paras. 41-49.

²³ *Suez*, *supra* n. 16, paras. 52-66.

²⁴ *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19 (“*Suez II*”), Decision on Jurisdiction, Aug. 3, 2006, paras. 52-68.

²⁵ *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2 (“*Camuzzi I*”), Decision on Objections to Jurisdiction, May 11, 2005, paras. 120-21.

²⁶ *Siemens*, *supra* n. 14, paras. 87-90.

²⁷ *National Grid*, *supra* n. 17, paras. 79-94.

²⁸ *RosInvest v. Russian Federation*, SCC Case No. V079/2005 (“*RosInvest*”), Award on Jurisdiction, Oct. 2007, paras. 124-39.

106. However, the case law is not fully consistent in so far as there is at least one case in which the tribunal, despite the fact that the MFN clause covered “all matters”, found this insufficient to make the clause applicable to dispute settlement. The case is *Berschader*, but it should be noted that one of the arbitrators strongly dissented on this point and that there were also some special elements which contributed to the outcome.²⁹

107. In other cases where dispute settlement rules in other BITs were not considered to have been incorporated as a result of MFN clauses, these clauses were not, according to their wording, applicable to “all matters”, but provided for MFN treatment of investors or investments. The Arbitral Tribunal refers in this respect to the cases of *Salini*,³⁰ *Plama*,³¹ *Telenor*³² and *Wintershall*.³³ It appears from these awards that some tribunals have had rather strong reservations about the general development of the case law in this area. It is therefore clear that these issues remain controversial and that the predominating jurisprudence which has developed is in no way universally accepted.

108. Nevertheless, the Arbitral Tribunal finds it unfortunate if the assessment of these issues would in each case be dependent on the personal opinions of individual arbitrators. The best way to avoid such a result is to make the determination on the basis of case law whenever a clear case law can be discerned. It is true that, as stated above, the jurisprudence regarding the application of MFN clauses to settlement of disputes provisions is not fully consistent. Nevertheless, in cases where the MFN clause has referred to “all matters” or “any matter” regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. On this basis, the majority of the Tribunal reaches the conclusion that Impregilo is entitled to rely, in this respect, on the dispute settlement rules in the Argentina-US BIT and that the case cannot be dismissed for non-observance of the requirements in Article 8(2) and (3) of the Argentina-Italy BIT.

²⁹ *Berschader*, Separate Opinion of Prof. Todd Weiler, paras. 15-25; *Berschader*, Award on Jurisdiction, paras. 185 – 208. Notably, the MFN clause at issue in *Berschader* stated that it would apply “particularly to Articles 4, 5 and 6”, *i.e.*, fair and equitable treatment, non-expropriation and free transfer of funds, but did not include within this list Article 10 of the BIT, which addressed dispute resolution, and accordingly, the tribunal concluded that the ordinary meaning of “all matters covered by the present Treaty” was not really that the MFN provision extends to all matters covered by the Treaty. *Id.* para. 194. In addition, the tribunal noted that there had been no clarity in the jurisprudence at the time the BIT had been concluded as to whether arbitration clauses could be encompassed by MFN clauses, and thus, the Parties simply may not have contemplated this outcome. *Id.* para. 202. Finally, the tribunal considered evidence of BIT practice from the Soviet Union which demonstrated that it pursued a policy of never consenting to arbitration in BITs concerning questions whether an act of expropriation had occurred, which stemmed from that State’s particular views on sovereignty. In the tribunal’s view, this “strongly suggest[ed]” that the Soviet Union did not intend for the MFN clause to extend to dispute resolution issues. *Id.* para. 204.

³⁰ *Salini*, *supra* n. 6, paras. 116-19.

³¹ *Plama*, *supra* n. 7, paras. 183-227.

³² *Telenor*, *supra* n. 8, paras. 83-101.

³³ *Wintershall*, *supra* n. 3, paras. 161-68.

109. Arbitrator Stern disagrees with the application of the MFN clause to dispute settlement. Her views are elaborated in the appended dissenting opinion.

B. Second objection: ICSID lacks the jurisdiction and the Tribunal lacks the competence to hear indirect and derivative claims filed by shareholders

The Argentine Republic:

110. Impregilo argues that it directly and indirectly holds 42.58% of AGBA's shares of stock and invokes that shareholding and a capital contribution made in its capacity as shareholder of AGBA as its investment in Argentina. Impregilo's case is based upon the alleged harm caused by Argentina's measures to certain guarantees and protections provided by both the Regulatory Framework and the Concession Contract, which harm in turn allegedly resulted from Argentina's failure to comply with the Treaty.

111. Impregilo does not allege any harm to its rights as a shareholder but bases all its claims on measures exclusively affecting the Concession Contract and the Regulatory Framework, under which instruments Impregilo does not have or invoke any right whatsoever. It is, then, a typical indirect or derivative claim – where a shareholder claims damages due to measures taken in relation to the corporation in which it holds shares – in respect of which ICSID has no jurisdiction and the Tribunal has no competence.

112. There is no doubt that a corporation is a legal entity separate from its shareholders, with rights and liabilities entirely distinct from theirs. Likewise, it is well established that a shareholder does not have an individual cause of action against third parties for wrongs or injuries to the corporation in which he or she holds stock, even if he or she suffers harm from the damage to the corporation, such as a reduction in the value of his or her stock. The BIT does not modify the rule that shareholders are not entitled to bring claims for damages suffered by the company in which they have shares. Reference is made in this regard to the *Barcelona Traction* case.³⁴ A central question in that case was how to transplant the domestic legal institution of shareholders in a corporation into the realm of international law. The answer given by the International Court of Justice was that the essential features of this institution must be preserved when it is the object of an international claim. Precisely the same answer must be given by investment treaty tribunals.

113. Claims related to investment disputes may be subject to the jurisdiction of ICSID provided that the requirements set forth in the ICSID Convention and the BIT are met. The jurisdictional boundaries of an ICSID tribunal are defined by the objective criteria set out in Article 25 of the ICSID Convention. At the time of drafting of the ICSID Convention, the drafters considered the possibility of allowing controlling shareholders of local corporations to file direct actions. The reason was simple: many investors operate through a local company (either because it is required by the host State or because it is the company's own choice), and the local company itself would be excluded from the coverage of the ICSID Convention, since it would be a national

³⁴ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, Feb. 5, 1970, 1970 ICJ Rep. 3 (“*Barcelona Traction*”).

of the State receiving the investment. However, the possibility of granting controlling shareholders of local corporations direct access to the ICSID system in respect of rights of the local corporation was entirely rejected. The possibility prescribed by Article 25(2)(b) *in fine* of the ICSID Convention was included instead: the possibility that a local company, controlled by a foreign owner, be given the right to sue its own State, provided that the parties had agreed that the local company should be treated as a national of the host State due to its foreign control. This Article was inserted by the drafters precisely to avoid the problems associated with indirect claims by foreign shareholders in locally incorporated investment companies.

114. However, following *CMS v. Argentina*,³⁵ a number of tribunals have adopted the same approach as in that case, allowing shareholders to bring indirect claims in respect of the reduction in the value of their shares. They have done so by completely ignoring the basic contours of the rights attaching to shares in all domestic legal systems and by turning a blind eye to the ramifications of a “solution” that allows any shareholder to bring any claim in respect of any prejudice caused to the company. This solution is perverse as a matter of legal principle.

115. The *CMS* tribunal and its followers have failed to address the ramifications of a blanket rule that would allow any type of derivative claim by the shareholders. The decision of jurisdiction in *Pan American Energy v. Argentina*³⁶ is typical in its ambivalence in regard to these issues.

116. In contrast, it was precisely these types of factors that led the tribunal in *GAMI v. Mexico* to dismiss GAMI’s claims.³⁷ There are signs that some tribunals are beginning to recognize that the *CMS* approach to derivative claims is unsustainable. At least some tribunals now raise the problem of potentially unlimited claims in relation to the same injury. For instance, in *Enron v. Argentina*,³⁸ the tribunal proposed that the test of an “invitation” be adopted, inquiring whether the investor was “invited” to invest in the host State. This test only needs to be stated to demonstrate that it is wholly subjective and patently unworkable.

117. Other tribunals faced up to the problem but failed to provide a solution.³⁹

118. Indeed, the admission of derivative claims poses several problems, one of the most acute being double (or even multiple) recovery. Many tribunals in cases

³⁵ *CMS v. Argentina*, ICSID Case No. ARB/01/8 (“*CMS*”), Decision on Jurisdiction, July 17, 2003, paras. 36-65.

³⁶ *Pan American Energy LLC, BP Argentina Exploration Company, BP America Production Company, Pan American Sur S.R.L. and Pan American Continental, S.R.L. v. Argentine Republic*, ICSID Cases No. ARB/03/13 and ARB/04/8 (“*Pan American/BP*”), Decision on Preliminary Objections, July 27, 2006, paras. 209-22.

³⁷ *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Award, Nov. 15, 2004, paras. 26-43.

³⁸ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (“*Enron*”), Jan. 14, 2004, paras. 54-57.

³⁹ *Camuzzi I*, Decision on Objections to Jurisdiction, para. 37, and *Noble Energy Inc. and MachalaPower Cia Ltda. v. República del Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12 (“*Noble*”), Decision on Jurisdiction of Mar. 5, 2008, paras. 77-83.

involving Argentina have recognized this danger,⁴⁰ but none has advanced a solution for it. The *Sempra* tribunal specifically addressed the possible double recovery “resulting from, on the one hand, the compensation which the investor would receive as a result of arbitration and, on the other hand, the compensation which the company would receive in the context of a renegotiated adjustment of tariffs or some other mechanism”.⁴¹ In the tribunal’s view, double recovery was not likely. However, double recovery has to be avoided through legal considerations (such as who is the holder of the affected rights who is entitled to compensation, etc.), and by means of proper interpretation of the applicable instruments.

119. In the present case, AGBA has filed legal actions against the measures which Impregilo also challenges in this arbitration. Thus, it is clear that there is a very concrete risk of double recovery in this case. No tribunal acting according to law and justice can accept an action that not only is inadmissible, but opens the door to the actual possibility of the respondent having to pay twice for the same damage, or even more.

120. Summing up, the Centre has no jurisdiction and the Tribunal has no competence to hear derivative claims as those presented by Impregilo in the current proceeding.

Impregilo:

121. Impregilo is not pursuing the rights of AGBA but is bringing claims on its own behalf as an Italian investor with qualifying investments under the Argentina-Italy BIT. International law and investment arbitration tribunals have recognized claims by shareholders in the position of Impregilo.

122. Impregilo submits this dispute before the Tribunal because Argentina:

- (a) directly nationalized Impregilo’s investment in AGBA without any compensation;
- (b) failed to treat Impregilo’s investment in AGBA fairly and equitably;
- (c) impaired by unjustified and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of Impregilo’s investment in AGBA;
- (d) failed to provide full protection and security to Impregilo’s investment in AGBA; and
- (e) violated specific obligations entered into with respect to Impregilo’s investment in AGBA.

123. The inclusion of shareholders is confirmed by Article 1(1)(b) of the BIT, which

⁴⁰ See *Enron*, Decision on Jurisdiction, paras. 54-57; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (“*Sempra*”), Decision on Objections to Jurisdiction, May 11, 2005, para. 102; *Sempra*, Award, Sept. 28, 2007, para. 395; *Suez*, Decision on Jurisdiction, para. 51; *Pan American/BP*, Decision on Preliminary Objections, paras. 209-22.

⁴¹ *Sempra*, Award, para. 395.

defines investments as “any kind of asset invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party”, such as “shares of stock, interests or any other form of participation, including minority or indirect interest, in a company incorporated in the territory of either Contracting Party”. Thus, Impregilo’s shareholding in AGBA is a covered investment and Impregilo is entitled to bring a claim in respect of it.

124. The protection of shareholders is further confirmed by the Preamble of the BIT, which provides that the BIT shall contribute to the encouragement of business initiatives conducive to the prosperity of both Contracting Parties. Italian investors who create or own shares in Argentine companies contribute “to the prosperity of” Argentina. Thus, the very object and purpose of the BIT encompasses shareholders. It makes no distinction between shareholders and other types of investors.

125. Moreover, claims by shareholders are well recognized in international law and in investment arbitration in particular. This is a natural consequence of the fact that the objective of BITs is to encourage foreign investors to acquire shares in a local company in the host State, often because the host State requires it. In the present case, the Government of Argentina required the consortium which won the bid for the water concession in the Province of Buenos Aires to incorporate a local company. If the BIT did not protect investors in Impregilo’s position, it would become irrelevant and meaningless.

126. Impregilo is not pursuing claims that can only be submitted by AGBA, and its claims are therefore not indirect. Impregilo filed these BIT claims in its own capacity as an Italian investor in Argentina and its claims arise directly from its rights under the BIT. That the characterization of an action as one arising under a BIT is independent of whether it also raises local issues or causes of action finds abundant support in investment arbitration case-law. The *Vivendi v. Argentina* case is particularly relevant to the present case. The claims in that case mainly involved acts of Argentine authorities interfering with the operation of a concession contract. The Annulment Committee had no doubt that the foreign shareholder could bring its own claims under the Argentina-France BIT.⁴² Accordingly, Impregilo is entitled to claim that Argentina’s conduct was in breach of the BIT, even if that conduct may also amount to a breach of AGBA’s rights. Impregilo’s claims are BIT claims, and cannot in any way be regarded as a purported exercise of contractual legal rights.

127. The Argentine Government has consistently raised the same objection which has been repeatedly rejected in numerous decisions. In light of the decisions in *CMS*, *Azurix*, both *Enron* cases, *LG&E*, *AES*, *Suez*, *BG*, *El Paso*, *PanAmerican/BP*, both cases filed by *Camuzzi*, *Continental Casualty*, *Gas Natural*, *Siemens* and *Noble Energy*, Argentina’s objection on alleged “indirect” or “derivative” claims is groundless.⁴³ In addition, shareholders’ claims have also been affirmed by the

⁴² *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (“*Vivendi*”), Decision on Annulment, July 3, 2002, para. 73.

⁴³ See generally, *CMS v. Argentina*, Decision on Jurisdiction; *Azurix Corp. v. Argentina*. ICSID Case No. ARB/01/12 (“*Azurix*”), Decision on Jurisdiction, Dec. 8, 2003; *Enron*, Decision on Jurisdiction; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentina*. ICSID Case No. ARB/02/1 (“*LG&E*”), Decision on Jurisdiction, Apr. 30, 2004; *AES Corp. v. Argentina*. ICSID Case No. ARB/02/17 (“*AES*”), Decision on Jurisdiction, Apr. 26, 2005; see also *Suez* supra n. 16,

Annulment Committee in *CMS*.⁴⁴

128. Claims by shareholders are well recognized in ICSID case-law, even before *CMS v. Argentina*. Reference is made to *AAPL v. Sri Lanka*⁴⁵, *AMT v. Zaire*⁴⁶, *Goetz v. Burundi*⁴⁷, *Maffezini v. Spain*⁴⁸ and *Genin v. Estonia*.⁴⁹ The Annulment Committee in the *Vivendi* case was faced with the question of whether the French investor, CGE, could have brought the claim on behalf of the local company, CAA, in its capacity as a controlling shareholder of CAA. The Committee considered the question irrelevant because in any event CGE could have brought the claim for its shareholding in CAA, which was an investment protected under the Treaty.⁵⁰

129. Impregilo owns shares in a local company – AGBA – and, thus, owns protected investments in AGBA’s contractual rights and other rights. As decided by many previous tribunals, there is a direct right of action for shareholders like Impregilo in such circumstances.

130. The *Barcelona Traction* case does not support Argentina’s position. In that case, the issue before the International Court of Justice was whether, under customary international law, Belgium could exercise diplomatic protection with respect to losses incurred by Belgian shareholders in a Canadian company as a result of the acts of Spanish authorities affecting the company. The Court held that Belgium had no *jus standi* and did not examine whether international law provided an independent source of rights and protections for shareholders. Moreover, the Court in *Barcelona Traction* explicitly recognized the direct protection of shareholders in BITs.⁵¹

131. Impregilo refers to another decision by the International Court of Justice, *i.e.* the *ELSI* case. In that case, the US brought an action against Italy under the Treaty of Friendship, Commerce and Navigation between the two countries for damage caused

Decision on Jurisdiction; *BG Group Plc v. Argentina*, Final Award, Dec. 24, 2007; *El Paso v. Argentina*. ICSID Case No. ARB/03/15, Decision on Jurisdiction, Apr. 27, 2006; *Pan American/BP*. Decision on Preliminary Objections, July 27, 2006; *Camuzzi II*, Decision on Jurisdiction, June 10, 2005; *Continental Casualty Company v. Argentina*. ICSID Case No. ARB/03/9 (“*Continental Casualty*”), Decision on Jurisdiction, Feb. 22, 2006; *Gas Natural*, Decision of the Tribunal on Preliminary Questions on Jurisdiction; *Siemens*, Decision on Jurisdiction; *Noble*, Decision on Jurisdiction.

⁴⁴ *CMS*, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, Sep. 1, 2006, paras. 75-76.

⁴⁵ *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, paras. 20-21.

⁴⁶ *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, Feb. 21, 1997, para. 5.15. The applicable BIT defined investments as *inter alia* “a company or shares of stock or other interests in a company or interests in the assets thereof”.

⁴⁷ *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, *Sentence*, Feb. 10, 1999, para. 35.

⁴⁸ *Maffezini*, *supra* n.12, para. 68.

⁴⁹ *Alex Genin and others v. Republic of Estonia*. ICSID Case No. ARB/99/2, Award, June 25, 2001, paras. 324-25.

⁵⁰ *Vivendi*, *supra* n. 42, paras. 112-13.

⁵¹ *Barcelona Traction*, *supra* n. 34, para. 90.

to US shareholders in an Italian company.⁵² In its judgment, the Court did not even address the question of whether the substantive provisions of the treaty (*inter alia*, the guarantees of full protection and security and no expropriation of property belonging to US nationals without compensation) granted protection to the US shareholders in relation to acts of the Italian authorities aimed at the company. By examining the merits of the claims, the Court clearly considered that the treaty protected the shareholders.

132. The *ELSI* case is a much more relevant precedent for this arbitration than *Barcelona Traction*. The proliferation of shareholders' protection in BITs and other investment treaties means that international law now recognizes that corporate personality does not preclude the international protection of shareholders affected by host-state measures injuring both the company and the shareholders.

133. Coursing through Argentina's objection is a policy argument implying an atomization of interests, which could theoretically result in a multitude of BIT claims against Argentina.

134. First, this hypothetical argument is irrelevant. Argentina's apparent displeasure with the potential ramifications of its conduct in violation of the BIT does not authorize ICSID tribunals to ignore or re-write the treaty to assuage Argentina's belated objection to the very instrument that it signed and ratified specifically to induce foreign investment.

135. Moreover, the Argentine Republic's argument regarding a potential double recovery by both the shareholders and the local company is an issue that concerns the merits. But in addition, and perhaps more importantly, Argentina goes as far as to allege that the Tribunal should not find jurisdiction because there is a potential risk of double recovery when Argentina has taken measures to the detriment of Impregilo's investment since the early years of AGBA's concession and unlawfully nationalized the concession without granting any compensation. Furthermore, local courts have had plenty of time and opportunities to grant compensation but have not done so.

136. Argentina also misinterprets Article 25(2)(b) of the ICSID Convention. In part, Article 25(2)(b) allows consenting parties to agree that a company incorporated in the host State and controlled by the foreign investor will be regarded as a foreign investor for purposes of the ICSID Convention and thereby be permitted to pursue a claim before ICSID in its own name. But Article 25(2)(b) is irrelevant to the Tribunal's jurisdiction over Impregilo's claims. Article 25(2)(b) merely provides an option and does not have any effect on claims that separately qualify under Article 25(1). It does not affect a foreign investor's right to stand before ICSID in its own name.

The Arbitral Tribunal:

137. The Arbitral Tribunal notes that Impregilo was one of the parties in the consortium that was granted the concession for water and sewage services for a certain area within the Province of Buenos Aires. In accordance with the applicable

⁵² *Case concerning the Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, July 20, 1989, 1989 ICJ Rep. 15.

requirements, the consortium formed an Argentine company, AGBA, with which the Concession Contract was concluded.

138. It follows from Article 1(1)(b) of the Argentina-Italy BIT that Impregilo's shares in AGBA were protected under the BIT. If AGBA was subjected to expropriation or unfair treatment with respect to its concession – an issue to be determined on the merits of the case – such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT.

139. The question of double compensation being granted would seem to the Arbitral Tribunal to be a theoretical rather than a real practical problem. It seems obvious that if compensation were granted to AGBA at domestic level, this would affect the claims that Impregilo could make under the BIT, and conversely, any compensation granted to Impregilo at international level would affect the claims that could be presented by AGBA before Argentine courts.

140. In any case, there is, as the Argentine Republic itself admits, a substantial case-law showing that claims such as those presented by Impregilo enjoy protection under the applicable BITs. The Arbitral Tribunal finds no reason to depart from that case-law.

C. Third objection: The claims address contractual matters over which the Tribunal has no jurisdiction

The Argentine Republic:

141. All the claims made by Impregilo are contract claims over which the Tribunal has no jurisdiction. As the Annulment Committee expressed in the *Vivendi* case, “where ‘the fundamental basis of the claim’” is the contract it will be a contract claim and not a treaty claim.⁵³

142. In the case *Impregilo v. Pakistan*, the tribunal, following the analysis of the Annulment Committee of the *Vivendi* case, made a distinction between a breach of contract and a violation of the treaty, and recalled that the threshold to establish a breach of the treaty was a high one.⁵⁴

143. The claims made by Impregilo in the present case relate to decisions made in the implementation and development of the AGBA concession. They are related to the interpretation and application of the Regulatory Framework and the Concession Contract. All the claims are contract claims that, paraphrasing the tribunal of the *TSA v. Argentina* case, have no relation with the “rights and obligations of a different and more fundamental nature” provided for in the BIT.⁵⁵

144. Although Impregilo presents a controversy with multiple issues, wishing to give the impression that there is a behavioral pattern that will tie together the different

⁵³ *Vivendi*, *supra* n. 42, para. 101.

⁵⁴ *Impregilo S.p.A.v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of Apr. 22, 2005, paras. 260 and 267.

⁵⁵ *TSA*, *supra* n. 4, para. 60.

measures that have been challenged, this does not change the fact that all the issues are eminently contractual and require an interpretation of very specific and detailed contractual clauses.

145. Impregilo's claims essentially relate to the following issues: (i) the failure to build three sewage treatment plants (the UNIREC plants) in the concession area, (ii) the failure to update the database of AGBA's users, the non-application of the "concession extra charges", "works costs" and "sewage coefficient", the non-application of contractual provisions on tax stabilization, the promotion of client payment delay, the obligation to install meters at clients' request and the delay in responding to clients by AGBA, (iii) the modification twice of the Regulatory Framework, (iv) the lack of support to AGBA in its attempts to obtain funding, (v) the alleged discrimination against AGBA, and (vi) the termination of the Concession Contract.

146. In none of these claims does the alleged violation resulting from the BIT stand on its own, but Impregilo brings forth a contractual breach as the fundamental element or premise of the claims.

147. In January 1999, the Province approved the concession's bidding conditions. The consortium formed by Impregilo decided to participate in this process. The consortium was made aware of the scope of these conditions before making its offer, in spite of which it continued to be interested in the bidding process and made its offer. Having presented its offer, the consortium accepted the scope of the bidding conditions and their clarifying circulars. The fact that Impregilo waived all other jurisdictions prior to the filing of this claim makes the consent to the arbitration invalid.

148. On October 18, 1999, the concession over the relevant area was awarded to the consortium formed by Impregilo. On December 7, 1999, the Province and AGBA signed the Concession Contract. The AGBA Concession Contract expressly provided that disputes should be submitted to the competent contentious administrative forum in the City of La Plata, with express waiver of any other forum or jurisdiction that may be applicable for any reason whatsoever.

149. In spite of the clarity of the above-mentioned clauses, Impregilo attempts to frame its claims within the Argentina-Italy BIT, when it is clear that those claims are exclusively contractual in nature and, therefore, the clauses of those contractual documents are the clauses that should be taken into account to analyze the jurisdictional issue.

150. The clauses are totally clear as to the fact that if the parties considered there to be a controversy, all claims in that regard should be made through the forum therein established, to the exclusion of any other forum. The validity of such clause is corroborated by the proceedings initiated by AGBA before the local courts.

151. It is true that many of the same clauses were addressed by the tribunal in the *Azurix v. Argentine Republic* case and that the tribunal in that case considered that the waiver did not cover the respondent's claim because "the State is not a party to any of the Contract Documents, and there was no waiver commitment made by the Claimant

in favour of Argentina”.⁵⁶ Argentina respectfully considers that the opinion of the tribunal was wrong and that the reasons outlined in its decision were not convincing.

152. In addition to the fact that all claims filed by Impregilo are contract-based claims and that, therefore, the Tribunal is not competent as the Treaty only upholds the Tribunal’s competence “with regard to matters governed by the [Treaty]”, AGBA, of which Impregilo is a shareholder, brought an action before the courts of the Province of Buenos Aires with respect to the same claims being asserted by Impregilo in the instant proceeding. AGBA challenged not only administrative acts related to the concession, but also the main decisions of the authorities in the Province of Buenos Aires on which Impregilo bases its claims.

153. It follows that the Tribunal should dismiss Impregilo’s claims as they deal wholly with matters on which ICSID does not have jurisdiction. For these same claims, AGBA has resorted to the courts in the Province of Buenos Aires. Allowing Impregilo’s claims would entail running the risk that Impregilo may obtain compensation in this forum and through the instant proceeding, with the consequent danger that, if these same claims are analyzed by an international tribunal, there would be contradictory decisions and possibly even situations involving “double compensation”.

154. Moreover, the Tribunal cannot base its competence on an umbrella clause in Article II(2)(c) of the BIT between Argentina and the US. Article 8 of the Argentina-Italy BIT is limited to “matters regulated by this Agreement”. The umbrella clause in the Argentina-US BIT is not a matter that is governed by the Argentina-Italy BIT, which contains no umbrella clause whatsoever. Consequently, an umbrella clause cannot be incorporated via the MFN clause. In fact, Article 3(1) of the Argentina-Italy BIT does not include any express reference to jurisdiction. The wording of Article 3(1) does not cover clearly and unequivocally the scope of Argentina’s agreement to the arbitration under Article 8 of the Argentina-Italy BIT. Moreover, the reference to “all other matters” does not expressly refer to the scope of the agreement from the host country to submit an issue to arbitration. Argentina argues that the Tribunal lacks any competence with respect to the claims based on the MFN clause in Article 3(1) of the BIT Argentina-Italy regarding the umbrella clause under Article II(2)(c) of the Argentina-US BIT. The latter is not a protection standard governed by the Argentina-Italy BIT.

155. In any case, notwithstanding the purely jurisdictional issue, the MFN clause in the Argentina-Italy BIT does not incorporate the umbrella clause of the Argentina-US BIT. The umbrella clause is not within the purpose covered by the MFN clause or within the territorial scope of the latter and any attempt to extend it would be against the express purposes of the Parties to the Argentina-Italy BIT.

156. Moreover, compliance with Argentina’s obligations is not treatment “within [Argentine] territory” under the terms of Article 3(1) of the Argentina-Italy BIT. Also, the MFN clause in the Argentina-Italy BIT may not prevail on core issues which, owing to their significance and importance, should be negotiated by the parties specifically. An umbrella clause concerns such a core issue. General international law

⁵⁶ *Azurix, supra* n. 43, para. 85.

does not guarantee compliance with contractual commitments or local law. The umbrella clause introduces an exception to the general separation of obligations under domestic law and international public law. Although the parties may agree to depart from this general international law basic principle, such departure is a core issue that must be specifically negotiated.

Impregilo:

157. Regardless of whether Impregilo's claims could also raise questions relating to the Concession Contract, Impregilo is asserting a cause of action under the BIT. From the mere fact that Impregilo's claims relate in some manner to the Concession Contract, Argentina reaches the conclusion that all claims are contract claims over which the Tribunal has no jurisdiction. Although Argentina certainly breached and then abrogated the Concession Contract in multiple respects, that is not the dispute that Impregilo has put before the Tribunal. Instead, Impregilo claims that Argentina violated the BIT when it (i) confiscated Impregilo's investment; (ii) failed to treat Impregilo's investment fairly and equitably; (iii) impaired by unjustified and discriminatory measures Impregilo's investment; (iv) failed to observe the obligations entered into with regard to Impregilo's investment; and (v) failed to provide full protection and security to Impregilo's investment.

158. Significant arbitral decisions establish that the mere fact that certain elements of an investment dispute also involve (or can be characterized as) breaches of contract does not suffice to transform a BIT dispute into a non-international contract claim or to divest ICSID of jurisdiction. In *Vivendi*, the Annulment Committee clarified that BIT claims often involve taking into account the terms of a contract in determining whether there has been a breach of the BIT. This does not prevent the claims from being treaty claims for which arbitration under the BIT is available. The Annulment Committee found that the tribunal was wrong in holding that it could not consider any allegation of breach of treaty that required it to interpret or apply the Concession Contract.⁵⁷

159. Under comparable circumstances, ICSID decisions on jurisdiction have uniformly rejected the argument that the existence of claims based on an underlying concession, contract or license divests a BIT tribunal of jurisdiction. For example, the *Azurix* tribunal rejected Argentina's objection that Azurix's claim was a contractual claim arising out of its concession agreement with the Province of Buenos Aires.⁵⁸ Reference is also made to *LG&E*,⁵⁹ *Total v. Argentina*⁶⁰ and *IBM v. Ecuador*.⁶¹

160. Argentina seems to overlook the fact that this dispute involves some of the most flagrant sovereign acts of a State: the imposition of new regulatory rules, the

⁵⁷ *Vivendi*, *supra* n. 42, paras. 112-13.

⁵⁸ *Azurix*, *supra* n. 43, para. 76.

⁵⁹ *LG&E*, *supra* n. , para. 62.

⁶⁰ *Total S.A. v. Argentina*. ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction, Aug. 25, 2006.

⁶¹ *IBM World Trade Corporation v. Ecuador*. ICSID Case No. ARB/02/10, Decision on Jurisdiction, Dec. 22, 2003.

unilateral alteration of the conditions under which a business was to operate and, most importantly, the actual nationalization of Impregilo's investment without compensation.

161. Moreover, even if Impregilo's claims were exclusively contractual, that would not necessarily divest ICSID of jurisdiction, for "[i]t is clear from the general language of Article 25(1) that ICSID jurisdiction may extend to disputes which are purely contractual in character".⁶² At the jurisdictional stage, the question is only whether the "essential basis" of the factual allegations about the host state's actions, however they are characterized, could constitute violations of obligations incumbent on that State by virtue of a BIT or other relevant international law instrument. Therefore, even if reference must be made to the underlying contracts, this does not convert the BIT claims into mere breach of contract claims.

162. Impregilo claims for specific violations of the BIT relative to the investments made by it in Argentina. Assuming the truth of the factual allegations made by Impregilo in this case, it is quite clear that those allegations could establish violations of the BIT. It is against this test that the Tribunal must consider the jurisdictional merit of Impregilo's claims.

163. Impregilo's right of action under the BIT is not precluded by the forum-selection clauses in the bidding terms or the Concession Contract, because, regardless of whether Impregilo's claims raise questions relating to the Concession Contract, Impregilo is asserting a cause of action under the BIT. In addition, the forum-selection clauses mentioned by the Argentine Government have no effect on the jurisdiction of the Tribunal. The same objection based on virtually the same clauses was rejected by the *Azurix* tribunal.⁶³

164. In so far as the Argentine Republic refers to the bidding terms, it should be noted that there is a lack of mutuality between the claims contemplated in the bidding terms and claims arising out of the BIT. In addition, as noted by the express language of the choice-of-forum provision found in the bidding terms, the nature and scope of the parties' agreement to submit to the jurisdiction of the courts of the Province is limited to "bidding disputes".

165. The Argentine Republic also misinterprets the scope of the Concession Contract. Using the same line of argumentation as that applied to the bidding terms, Argentina makes note of the choice-of-forum provision found in the Concession Contract, as it has previously done unsuccessfully in a myriad of cases before ICSID tribunals. This proposition, however, fails for the same reasons as the corresponding proposition regarding the bidding terms. Principally, the scope of the choice-of-forum provision is not applicable to claims arising out of the BIT. The language found in the choice-of-forum provision makes it clear that its scope of application is limited to any dispute regarding the construction and execution of the Concession Contract. This, of course, limits the types of claims that are required to be submitted to the courts of the Province to disputes concerning the Concession Contract.

⁶² *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, Jan. 29, 2004.

⁶³ *Azurix*, *supra* n. 43, para. 77.

166. A waiver of investment rights such as those provided under a treaty must be express and unequivocal and made by the parties involved in the dispute. In the present case, Impregilo has not in any manner waived its right to protection under the Argentina-Italy BIT.

167. Argentina provided its consent to ICSID jurisdiction in this case through the open invitation made to Italian investors in the BIT. In so doing, Argentina did not express any reservation concerning the applicability of the ICSID Convention in its territory and did not denounce the Convention. Even if it had done so, such an act would not affect the Tribunal's jurisdiction due to the consent to ICSID's jurisdiction provided before such notice. As Argentina is the Contracting State to the ICSID Convention, any participation of its constituent subdivisions or agencies before the Centre or its tribunals requires a decision of the Contracting State and its previous notice to the Centre.

168. Under Article 25(1) of the ICSID Convention, a constituent subdivision of a Contracting State may have standing before an ICSID tribunal if it has been designated to the Centre by that State. Under Article 25(3), consent by such a constituent subdivision or agency of a Contracting State requires the approval of the State unless that State notifies the Centre that no such approval is required.

169. Argentina has not made such a designation and given such approval. Since the Province was never designated to ICSID, the Province has no authority to act before it, much less to rescind Argentina's consent to ICSID jurisdiction provided through the BIT or to issue any provision in relation to ICSID jurisdiction in Impregilo's proceedings against Argentina.

170. Argentina suggests that Impregilo has waived an ICSID venue in favor of the Provincial contentious administrative courts of the city of La Plata. The adoption of this proposition would constitute a denial of justice to Impregilo, as well as a *de facto* repeal of Argentina's obligations to Impregilo under the BIT, since Impregilo would be left without a proper forum to enforce its BIT rights.

171. A long-standing principle of Argentine law states that only federal courts have the power to hear cases in which the Argentine Republic is a party or which concern federal matters such as international treaties. Consequently, the Provincial courts lack competence to examine Impregilo's BIT claims.

172. Impregilo also invokes – through the operation of the MFN clause of the BIT – the more favorable treatment granted to US investors in the Argentina-US BIT. This BIT contains an “umbrella clause” in its Article II(2)(c) which provides that each Party shall observe any obligation it may have entered into with regard to investments.

The Arbitral Tribunal:

173. According to Article 8 of the Argentina-Italy BIT, a dispute between an investor of one of the Contracting Parties and the other Contracting Party may, on certain conditions, be submitted to arbitration, provided that the dispute arises out of, or

relates to, the BIT. Impregilo alleges in this case that its rights under the BIT have been violated in several respects. Argentina objects that all the claims made by Impregilo are contract claims over which the Tribunal has no jurisdiction.

174. The Arbitral Tribunal thus has to consider whether Impregilo's claims are treaty claims rather than contractual claims, or in addition to being contractual claims, and, if they are treaty claims, whether Impregilo, according to the terms of the Concession Contract, can be considered to have waived its right to dispute settlement in the form provided for in the BIT. The Tribunal also has to examine whether even contractual claims may fall under the Tribunal's jurisdiction as a consequence of the MFN clause of the BIT.

175. Although the distinction between contractual claims and treaty claims is not always clear, the Arbitral Tribunal notes in this case that the Concession Contract deals with specific contractual rights and obligations, whereas the BIT concerns rights and obligations of a different nature. Consequently, on the one hand, not all breaches of the Province's obligations in the Concession Contract would qualify as breaches of the BIT. On the other hand, some acts may involve questions of the implementation of the Concession Contract as well as the observance of Argentina's obligations under the BIT.

176. The distinction between treaty claims and contractual claims has frequently been at issue in ICSID cases. In *Vivendi*, it was pointed out that a particular investment dispute may at the same time involve both issues of the interpretation and application of a treaty and questions of contract. In such cases, the questions as to whether there has been a breach of the treaty and whether there has been a breach of the contract are different questions, and each of them is to be examined separately.⁶⁴ This statement was relied on by the tribunal in *TSA Spectrum de Argentina S.A. v. Argentina*, which added that, if the contract contains a specific clause on dispute settlement, this does not exclude recourse to the settlement procedure in the treaty, unless there is a clear indication in the contract itself or elsewhere that the parties to the contract intended in such manner to limit the application of the treaty.⁶⁵

177. In any case, as a general rule, a violation of a contract is not a violation of international law. In *Hamester v. Ghana*, the tribunal stated that "[t]he starting premise is that only the State as a sovereign can be in violation of its international obligations".⁶⁶ This principle has been re-stated by many ICSID tribunals. The following citations are examples:

Waste Management v. Mexico:

"In the Tribunal's view, an enterprise is not expropriated just because its debts are not paid or other contractual obligations towards it are breached. There was no outright repudiation of the transaction in the present case, and if the City entered into the Concession Agreement on the

⁶⁴ *Vivendi*, *supra* n. 42, para. 101.

⁶⁵ *TSA supra* n.4, para. 58. See also *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, Aug. 6, 2003, paras. 146-47; *Eureko B.V. v. Poland*, UNCITRAL ("*Eureko*"), Partial Award, Aug. 19, 2005, paras. 112-13.

⁶⁶ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 328.

basis of an over-optimistic assessment of the possibilities, so did Acaverde. It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise.”⁶⁷

Joy Machinery Limited v. Egypt:

“A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved.”⁶⁸

Impregilo v. Pakistan:

“Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.”⁶⁹

Noble Ventures v. Romania:

“The Tribunal recalls the well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems.”⁷⁰

Azurix v. Argentina:

“The Tribunal agrees that contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract.”⁷¹

178. The Concession Contract provides in Article 16.7 that any dispute arising between the Granting Authority and the Concessionaire related to the interpretation

⁶⁷ *Waste Management, Inc. v. United Mexican States* (Number 2), ICSID Case No. ARB(AF)/00/3, Final Award, April 30, 2004, para. 160.

⁶⁸ *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, para. 72.

⁶⁹ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (ItalyPakistan BIT), Decision on Jurisdiction, para. 260, citing, *inter alia*, the review of jurisprudence in Stephen M. Schwebel, “*Justice in International Law*” (Grotius / CUP), Chapter 26 : “*On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*”: “there is more than doctrinal authority in support of the conclusion that, while mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a ‘non-commercial’ act of a State contrary to such a contract may be. That is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law. - - - when the State employs its legislative or administrative or executive authority as only a State can employ governmental authority to undo the fundamental expectation on the basis of which parties characteristically contract – performance, not non-performance – then it engages its international responsibility.”

⁷⁰ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, para. 53.

⁷¹ *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, para. 315 (*Azurix Award*).

and performance of the Contract shall be resolved by the administrative courts of competent jurisdiction in and for the city of La Plata and that the parties waive any other applicable jurisdiction or venue.

179. It should then be immediately observed that it was AGBA, and not Impregilo, that concluded the Concession Contract and made this undertaking in regard to dispute resolution.

180. The Arbitral Tribunal considers that the wording of Article 16.7 of the Concession Contract cannot be considered to exclude recourse to a remedy under the BIT in cases where a dispute arises about acts which might constitute breaches of both the Concession Contract and the BIT.

181. The suggestion that AGBA's undertaking in the Concession Contract should be considered as a waiver by Impregilo of its right to initiate proceedings based on the BIT seems to be far-fetched and unconvincing.

182. It should also be observed that Impregilo's main claims in this arbitration concern acts that are alleged to constitute expropriation, unfair treatment and discrimination, which are all claims that go beyond mere contractual breaches even if the factual basis of the two types of claims may to a large extent coincide.

183. The Arbitral Tribunal accepts, however, that some of Impregilo's allegations concern mere contractual issues. Even so, the question arises as to whether these claims, by application of the MFN clause in Article 3(1) of the Argentina-Italy BIT and the umbrella clause in the Argentina-US BIT, may fall under the Arbitral Tribunal's jurisdiction.

184. The substantive protection of the MFN clause is very wide in so far as it relates to all matters regulated by the BIT. Nevertheless, the reference to matters regulated by the BIT sets an outer limit, and it is debatable whether contractual breaches are matters regulated by the BIT.

185. It must be observed, however, that all alleged contractual breaches in the present case concern the Concession Contract between AGBA and the Province of Buenos Aires. Consequently, even if the MFN clause could be used to include contractual matters, there would not in this case be any such matter involving Impregilo as a party to a contract, and there would clearly be no basis in the BIT for examining whether the Province had violated its contractual obligations vis-à-vis AGBA, since AGBA is not an investor protected under the BIT.

186. It follows that the question of whether the MFN clause in combination with the umbrella clause could entitle the Tribunal to examine contractual issues is in this case an entirely theoretical question since there would be no contractual issues to be considered between Argentina and Impregilo.

187. The Arbitral Tribunal therefore finds it unnecessary to express an opinion on whether an extension to contractual issues on the basis of a combination of the MFN clause and the umbrella clause would be justified in other circumstances.

188. At the same time, the Arbitral Tribunal cannot accept Argentina's argument that all the claims made by Impregilo are contract claims over which the Tribunal has no jurisdiction. In fact, Impregilo argues that its investment was expropriated and was subject to unfair treatment, these being clearly issues under the BIT and not exclusively contractual claims.

189. Consequently, Argentina's third jurisdictional objection shall be upheld but only to the extent that contractual breaches, which do not at the same time involve violations of Argentina's obligations to investors under the BIT, are concerned.

V. MERITS OF THE CASE

A. Requests for relief

190. Impregilo requests:

- (a) a declaration that Argentina has violated the Argentina-Italy BIT and international law with respect to Impregilo's investments,
- (b) an order that Argentina pay compensation to Impregilo for all damages it has suffered plus compound interest until the day of full payment, and
- (c) an order that Argentina pay the costs for the proceedings, including the Tribunal's fees and expenses and the costs of Impregilo's representation, subject to compound interest until the day of full payment.

191. The Argentine Republic requests that Impregilo's claim against the Argentine Republic be dismissed and Impregilo be ordered to pay for all the expenses and costs arising out of the arbitral proceeding.

B. The Parties' positions

192. Impregilo argues that the Argentine Government:

- (a) directly expropriated or nationalized its investment in AGBA without any compensation,
- (b) failed to treat Impregilo's investment in AGBA fairly and equitably,
- (c) impaired by unjustified and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of Impregilo's investment in AGBA,
- (d) failed to provide full protection and security to Impregilo's investments in AGBA, and
- (e) violated specific obligations entered into with respect to Impregilo's investments in AGBA.

193. The Argentine Republic contests all these allegations.

194. The Parties have presented the following main arguments.

Impregilo:

195. The Concession Contract and the Regulatory Framework provided strong protection and guarantees to the investment. The four principal guarantees were: (i) protection against devaluation and inflation, addressed by having tariffs in US dollars; (ii) guarantees against unilateral changes to the tariff regime; (iii) agreements that the tariffs would cover costs, plus a reasonable rate of return; and (iv) assurances that the economic equation of the contract would not be unilaterally changed without full and integral compensation.

196. Shortly after AGBA took over the Concession Contract, the Province began to repudiate its commitments and obligations, preventing AGBA from generating the revenues it had expected to allow implementation of the work program required under the Concession Contract.

197. During the 1999 bidding process, the Province committed to deliver three waste treatment plants (the “UNIREC plants”) for the handling of effluents in what would be AGBA’s concession area. It promised that the UNIREC plants would be operational by 2001. AGBA relied on the timely entry into operation of these treatment plants. Without them, AGBA could not expand the sewage network to new areas, nor connect additional customers in areas already served. However, the Province completed the plants only after it had nationalized AGBA’s concession in 2006.

198. The Province and ORAB purposely delayed or refused AGBA’s requests to update the categorizations of AGBA’s customers. Soon after taking over the concession, AGBA sought to recategorize non-metered customers who had made improvements to their properties. Although AGBA had received the official updated customers database during the bidding process, ORAB prevented the recategorization of customers until it could verify each customer’s property valuation, which it never did. In addition, the customer database provided by the Province contained severe inconsistencies and errors.

199. Furthermore, the Concession Contract and the Regulatory Framework provided that prices for non-metered customers would be based on the Province’s 1958 Valuation methodology. The 1958 valuation had assessed values for the real estate in the concession area, and therefore, it was crucial for calculating the price to be paid by non-metered customers. However, the Valuation methodology was not compatible with the AGOSBA customers’ database provided to the bidders during the tender. At the same time, after AGBA took over the Concession Contract, the Province tried to increase its real estate tax collection, updating the 1958 Valuation methodology to the so-called 2000 Valuation methodology. The 2000 Valuation methodology improved the compatibility issues with AGOSBA’s customer database. AGBA sought to use this more up-to-date and compatible Valuation methodology to assess the non-metered property for new parcels of real estate or those with new construction. In preventing AGBA from using the more updated and

compatible Valuation methodology, ORAB hampered AGBA's expected revenues.

200. ORAB and the Province also unilaterally altered the Regulatory Framework by (i) denying AGBA's right to collect "work charges" for some new connections, and (ii) preventing AGBA from applying the 2001 coefficient for water and sewage services. ORAB delayed and eventually prohibited AGBA from applying the incremental sewage charge coefficient beyond the first year.

201. The Province's conduct was motivated by a political and populist desire to prevent any increases in water and sewage bills. Elected provincial officials were not willing to accept any increase in customers' water and sewage bills and made no effort to accommodate AGBA's contractual rights to effect increases, even though its conduct was detrimental to AGBA's investment and work plans under the Concession Contract. The Province's action damaged AGBA and its shareholders' ability to obtain the financing needed to comply with its own commitments under the works and investment plan.

202. The Province's regulatory behavior went from bad to worse in early 2002. In January 2002, the Federal Government and the Province enacted emergency legislation depriving AGBA of fundamental contract and legal rights. First, on January 6, 2002, the Federal Government enacted the Federal Emergency Law No. 25,561 (the "*Federal Emergency Law*"). The most destructive part of this Law was the elimination from public utilities concessions agreements of the right to calculate tariffs in US dollars. Instead, the peso was devalued at an artificial rate, which was later worsened when the Government let the peso float. Six days after the Federal Congress passed the Federal Emergency Law, ORAB followed the Federal Government and issued Resolution 4/2002 "pesifyng" and freezing AGBA's tariffs. This Resolution was later confirmed by the Province's Law No. 12,858 (the "*Provincial Emergency Law*"). Thus, like the Federal Government, the Province eliminated the Concession Contract's right to calculate tariffs in US dollars and express them in pesos at the current exchange rate on the billing date. This had the effect of reducing AGBA's revenues by two-thirds.

203. At the same time, the Province required AGBA to observe all their contractual and regulatory obligations and forced AGBA to participate in a renegotiation process that was supposed to bring the Concession Contract's economics back into balance. This, however, was the beginning of the end for AGBA, and for Impregilo's investment.

204. First, the Provincial Emergency Law brought any potential investment and financing in AGBA to a halt, and the Concession Contract was literally finished. Second, the Province's mandated renegotiation process was a failure.

205. By 2002, the majority of the Province's water and sewerage sector was back under the Province's control. Some concession areas had been taken over by the recently created state-owned company ABSA, and the Province favored its own company ABSA, in prejudice to the small and privately-owned AGBA.

206. While the Province funded ABSA with millions of dollars in fresh cash in 2003, including a promise to raise its tariffs by 30%, that was to become effective in

2005, it ignored AGBA's request to re-introduce balance to the Concession Contract's economic equation. The Province also started launching work plans in ABSA's concession area, all financed with the support of the Province. This was not just clear discriminatory behavior against AGBA, but it showed that the Province was unwilling to keep a private operator in its water and sewerage sector.

207. In mid 2003, the Province made clear its decision to wipe out Impregilo's investment in AGBA by dismantling the Concession Contract and the Regulatory Framework. By means of an Executive Decree of June 9, 2003, the Provincial Governor repealed the law that in 1996 had approved the Regulatory Framework, dismantling the main protections and guarantees offered by the Province during the privatization in 1999. The Governor's decree created new rules that radically departed from the guarantees of the Concession Contract and the Regulatory Framework approved in 1996.

208. First, while the Concession Contract specified that tariffs would be calculated in accordance with the economic cost of providing the service, the new regulatory regime based tariffs on customers' creditworthiness. Second, AGBA would no longer be the exclusive provider in its concession area. Third, the investments in the concession area would be chosen and implemented by the Province, not AGBA. Fourth, AGBA would not be entitled to charge a connection or work fee for new customers or connections. AGBA would also lose its right to cut off service to delinquent customers.

209. Finally, in July 2006, the Province terminated the Concession Contract, leaving no private operator in the Province and City of Buenos Aires. As motivation, the Province alleged that AGBA had failed to comply with its obligations under the Concession Contract. This allegation was without merit. In fact, any failure of AGBA to comply with the investment plan was the result of the Province's various breaches of its commitments in the Regulatory Framework and the Concession Contract. The Province, not AGBA, broke the rules of the concession by abrogating fundamental guarantees under the contract, and particularly by undermining the possibility of the investment's success by its actions in January 2002. The termination of AGBA's Concession Contract was nothing more than the culmination of the Province's and Federal Government's political desire to retake control of the water and sewerage sector.

The Argentine Republic:

210. The measures challenged by Impregilo in this arbitration are general measures adopted by the Argentine Republic and the Province of Buenos Aires in the context of a systematic and serious crisis. These measures violate neither the Argentina-Italy BIT nor international law. They had to be adopted within the context of the collapse caused by the worst economic, political and social crisis ever experienced by the Argentine Republic. They affected all the inhabitants of the Argentine Republic in the same way, whether nationals or foreigners, and were aimed at making it possible for the economy to be restructured, thus preventing all economic activities from becoming unfeasible.

211. Impregilo seeks to hide behind the emergency measures adopted by Argentina and by the Province in order to explain the failure of AGBA's concession. Such failure was the result of the high risks assumed by Impregilo, the bad business choices it made and its poor performance throughout the term of the concession.

212. Impregilo, through AGBA, voluntarily invested in one of the most impecunious regions in the Province, with a high poverty rate and a low number of inhabitants with access to the water network (an average of 35.4%) and to the sewer network (an average of 13.4%) as well as a high uncollectability rate (37% of the users failed to pay their bills in 1999). The consortium of which Impregilo was a part knew (or should have known) about the characteristics of the region.

213. An example of how unattractive this area was for investors is the fact that the bidding process for the region was cancelled because no bids were submitted in the first call and, during the second call for bids, the only party to submit a bid was the consortium of which Impregilo is a part, which was awarded the concession in exchange for the payment of a USD 1.26 million fee.

214. AGBA undertook to implement a strong investment and works program during the first five years, by means of a POES which it presented and which was approved by the Province.

215. AGBA had undertaken to invest USD 230 million during the first five years as well as to achieve the aim that, by the year 2004, 74% of the people would be connected to the water network and 55% would be connected to the sewer network. The concessionaire had further undertaken to build two sewer treatment plants and to restore five existing treatment plants.

216. In spite of AGBA's commitments, soon after the beginning of the concession there were clear signs that AGBA would not fulfill its obligations. In May 2001, prior to the emergency measures, AGBA requested that the Concession Contract be renegotiated and its obligations be suspended, claiming as a reason the high uncollectability rate and its difficulties in obtaining financing. These were two risks that had been voluntarily assumed by AGBA as concessionaire.

217. Two months thereafter, AGBA reiterated its request for renegotiation and suspension of the POES, but this time it claimed as a reason the economic crisis that had already begun to strike the Argentine Republic. Through this second request, AGBA intended to hide its actual management problems related to collectability and financing.

218. Furthermore, AGBA sought to justify its breaches in the implementation of the POES by claiming the failure of the Provincial Executing Unit ("*UNIREC*") to build two treatment plants and to expand and restore another existing plant. However, the sewer connections that poured water into such plants amounted to merely 34.7% of all the connections to be made by AGBA during the first five years and they only applied to certain districts and not to the rest of the area subject to the concession.

219. Between December 2001 and January 2002, the Argentine crisis reached its peak. In January 2002, the Argentine Federal Government enacted the Argentine

Emergency Law and, little thereafter, the Province enacted a similar law for the provincial context. One of the first measures to be applied to public utility contracts both at a national and at a provincial level was the removal of the systems for calculating rates in US dollars because those systems were tied to the existence of the convertibility regime that had been applied in Argentina between 1991 and 2001.

220. In the case of AGBA, this measure became especially important due to the fact that, because of the characteristics of the area in which the company provided the service, an increase in rates of at least 200% would have been impossible to pay. In addition, due to the serious collectability problems derived from AGBA's inefficiency, such an increase would only have worsened its situation.

221. In this context, in a spirit of goodwill for the purpose of securing the continuance of AGBA's concession, the Province declared that the goals of the POES for the first year of the concession, *i.e.* 2000, had been attained, although AGBA had not reached the expansion goals set forth for that year. In yet another display of goodwill, the Province suspended the company's obligations with respect to the second year of the concession, *i.e.* 2001, when there were already signs that the company would not be able to achieve the goals set forth for that period. As from that moment, and in order to make the process for renegotiating the contract with AGBA easier, the Province refrained from taking measures against the company in spite of its continuous breaches.

222. In response to the existing situation, the Province enacted a New Regulatory Framework and made room for an opportunity to improve the contract with AGBA by maintaining the principles of the previous framework and including essential tools for making the renegotiation easier. Such framework was invoked on several occasions by AGBA in order to benefit from its application.

223. The renegotiation process failed through the exclusive fault of AGBA which demanded, among other things, an excessive 93% rate increase as well as being exempted from any investment in the area subject to the concession.

224. AGBA threatened the Province with terminating the Concession Contract through the fault of the Province if it did not satisfy its demands within 45 days. It invoked as proof of AGBA's fulfillment of its obligations that no measures had been taken against AGBA, although this was not due to the fact that there were no breaches but to the Province's will not to affect the provision of the public service. This situation left the Province with no choice but to terminate the Concession Contract due to AGBA's flagrant breaches in the six years of duration of the concession. In order to terminate the Concession Contract, the Province followed the procedures and applied the grounds provided for therein. AGBA filed a complaint against the termination decree before the administrative courts for the city of La Plata and reserved the right to claim damages.

225. The Argentine Republic cannot be held liable for the risks assumed by Impregilo and for AGBA's poor management. In any case, even if these circumstances were not present in the case, the measures taken by the Argentine Republic and by the Province were not contrary to the BIT, to customary international law or to Argentine law.

226. Impregilo's claim for damages rests upon a calculation of the income it would have obtained if it had made investments it never actually made, funded with loans it was never granted, because of a wrong business assessment based on optimistic and incorrect financial projections, due to business risks that the company did not take into account in evaluating the business opportunity. In any case, the measures challenged by Impregilo did not cause any damage to its investment, since the net value of such investment was extremely negative when the measures were adopted.

227. The Argentine Republic has accorded fair and equitable treatment to Impregilo's investment at all times in accordance with the BIT and international law. The measures challenged by Impregilo are general in nature and bear no discriminatory feature at all. In fact, the domestic and foreign investors who were in similar situations received exactly the same treatment.

228. The measures adopted did not amount to expropriatory acts in violation of the BIT or of international law, and there was no significant deprivation of property. In addition, the regulatory actions taken by the Province and Argentina were lawful and proportionate. In this case, the regulatory powers of the State were particularly important in order to guarantee its inhabitants the human right to water.

229. The rules adopted by the Argentine Republic were not arbitrary. In the face of the acute crisis, the Argentine Republic and the Province took a series of measures that were fully justified by the need to reduce as much as possible its effects on the country in general and on investments in particular.

230. On the other hand, the obligations assumed by the Argentine Republic as regards investments do not prevail over the obligations assumed in treaties on human rights. Therefore, the obligations arising from the BIT must not be construed separately but in accordance with the rules on protection of human rights. Treaties on human rights providing for the human right to water must be especially taken into account in this case.

231. Notwithstanding the fact that the Argentine Republic did not breach any treaty provision, the measures challenged are protected under Article 4 of the BIT and under the concept of the state of necessity provided for in international law. The adoption of such measures was the only viable alternative to prevent the disappearance of the Argentine State.

C. The Arbitral Tribunal's reasoning

(i) The Concession Contract

232. The Concession Contract was concluded on December 7, 1999. It conferred on AGBA as concessionaire a number of rights and obligations which were set out in the Regulatory Framework as well as in the Contract itself. Article 3.2 of the Contract provided that AGBA should, in particular, "perform all tasks related to service provision required under the applicable laws to guarantee effective supply to Users, the protection of public health and the rational use of resources".

233. According to Article 3.3, the drinking water supply and the sewerage service should be expanded according to the POES and Five-Year Plans which were to be part of the Contract and binding on AGBA.

234. The POES (Annex F to the Contract) provided that AGBA should expand the drinking water and sewerage services and accomplish for each region certain specified goals. The drinking water and sewerage networks should be expanded during the first two years with a certain number of new connections, specified per district, and the expansion should continue with a substantial further increase as from the third year. In Article 1.8 of the Concession Contract, AGBA undertook to make all the investments required to implement the POES.

235. In return, AGBA was given various rights and guarantees in the Concession Contract. According to Article 1.6 of the Concession Contract, AGBA should enjoy an exclusive right to provide the Service within the Concession Area, subject to the Regulatory Framework and certain provisions in the Contract itself. According to Article 3.5, property owners would be under a duty to connect to the water network by paying the applicable fee for connection to the mains to AGBA. They would also be under a duty to pay for the Service pursuant to the applicable tariff regime even if the property had no connection to external Service networks. Nonetheless, this provision should not apply to vacant properties if there had been a request for non-connection or Service disconnection, which should be subject to the charges established in the Tariff Regime for those special cases.

236. The tariff system was dealt with in Annex Ñ to the Concession Contract. It provided for the prices to be paid by the Users to AGBA, for work fees and connection fees that users should pay when being connected to drinking water and sewerage services and also allowed AGBA to interrupt its services on certain conditions where users were late in paying their bills.

237. The term of the concession was 30 years and the first year of operation was 2000.

(ii) Impregilo's Investment

238. Impregilo owns 42.58 percent of AGBA's stock and made a USD 21.3 million equity investment in AGBA. In the present proceedings, Impregilo has, to a large extent, claimed violation of rights belonging to AGBA and can therefore be considered to have implicitly considered AGBA's rights as protected investments.

239. It should be pointed out that AGBA is an Argentine company, as it is incorporated under the laws of Argentina and registered in Argentina.

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

“(2) ‘National of another Contracting State’ means:

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting

State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

241. In the BIT, Article 1 gives the following definition of the expression “legal entity”:

“‘legal entity’ means, in respect of each one of the Contracting Parties, any entity established and recognized under the laws of a Contracting Party, having its seat in the territory of that Party, such as a public entity engaged in economic activities, partnerships or corporations, foundations and associations, whether with limited or unlimited liability.”

242. It follows that AGBA is not a protected investor under the BIT. Nor is AGBA a legal entity which, because of foreign control, the Contracting States have agreed should be treated as an Italian national whose rights should be protected investments for the purposes of the ICSID Convention and this arbitration.

243. A similar situation existed in *CMS v. Argentina* in which the tribunal stated as follows:

“In [the Tribunal’s] view, while the acquisition of shares qualifies as an investment under the Treaty, neither TGN, as an Argentine corporation, nor the License qualify as an investment under the BIT. TCN, the argument follows, has its own assets, including the License; because these assets do not constitute an investment under the Treaty, CMS’s claims, based on the alleged breach of TGN’s rights under the License cannot be considered to arise directly from an investment.”⁷²

244. The *CMS* tribunal accepted jurisdiction, not on the basis of any rights of the Argentine company TGN or any rights relating to the License, which were not protected investments, but on account of the existence of the shareholding of CMS in the Argentine company:

“The Tribunal [...] finds no bar in current international law to the concept of allowing claims to shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.

- - -

Because - - - the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License, and because the Claimant has a separate cause of action under the Treaty in connection with the protected investment, the Tribunal concludes that the present dispute arises directly from the investment made and that therefore there is no bar to the exercise of jurisdiction on this count.”⁷³

245. Similarly, AGBA does not qualify as a protected investor under the ICSID Convention and the BIT, and its contractual rights cannot be considered protected investments. On the other hand, Impregilo’s shares in AGBA were an investment protected under the BIT. Reference may be made here to the *Suez* cases and the following quotation from one of these cases:

“The Claimants, as shareholders in AASA, had an indirect interest in the Concession to operate the water and sewage system of Buenos Aires for a period of thirty years. - - - AASA as holder

⁷² *CMS*, *supra* n.35, July 17, 2003, para. 66.

⁷³ *Id.* paras. 48 and 68.

of the Concession had only a legal right to receive a stream of revenue from the operation of the system for a period of time. - - - As shareholders in AASA, the Claimants had an indirect interest in those same rights. Company shares are considered “investments” under the Argentina-France BIT (Article 1 (b)), the Argentina-Spain BIT (Article 1(b)(2), and the Argentina-U.K. BIT (Article 1(a)(ii)). The economic value of such shares would be directly affected by any action taken against the assets of AASA. Thus, the Claimants had investments capable of protection from expropriation.”⁷⁴

246. Consequently, the protected investment in this case is Impregilo’s shareholding in AGBA. This does not exclude that measures primarily taken in regard to AGBA may also affect Impregilo’s investment.

(iii) AGBA’s performance and the termination of the Concession Contract

247. In a letter of May 17, 2001, AGBA told the Minister of Public Works and Services of the Province of Buenos Aires that it had experienced considerable difficulties in receiving payment from users for its Services and that this had affected its capacity to make the investments required under the expansion program. As AGBA had not obtained bank loans, it had also been impossible to achieve the goals of the Five-Year Plan. AGBA therefore made the following request:

“During the 16 months it has been providing the service, AGBA has clearly shown its capacity to perform the Concession Contract in an efficient manner as regards all matters within its reasonable control. The abovementioned problems exceed such scope and therefore make it necessary to implement corrective mechanisms to restore the Contract’s equilibrium in order to fulfill its purpose.

In view of the foregoing and in order to proceed in the shortest time possible, as required by the circumstances, we hereby request that a work commission be created in order to jointly analyze the solutions and alternatives most appropriate for that purpose.

In addition, we also request, as a provisional measure, that the expansion goals be temporarily suspended until the above commission makes a decision.

Finally, we require that the Granting Authority actively cooperate in the negotiations currently being held with the [Inter-American Development Bank] for funding, in such aspects as may be within the scope of its powers.”

248. Soon thereafter, in letters of July 17 and August 15, 2001, AGBA asked ORAB to suspend temporarily the execution of the POES. In these letters, AGBA invoked the serious economic situation. In a letter of September 2001, AGBA referred to “the serious issues that preclude the normal development of the Concession” and asked for the Governor’s personal intervention in the matter. In a further letter of December 27, 2001, AGBA requested modifications of the Concession Contract in order to restore the original equilibrium of the Contract. AGBA referred to the unforeseeable and unusual impossibility to collect fees for services in the concession area and to the supervening, exceptional and unforeseeable distortion of financial market conditions that restrained access to credit and prevented compliance with investment plans. AGBA also raised a number of specific issues, such as an abrupt transition to a

⁷⁴ *Suez II*, Decision on Liability, July 30, 2010, para. 130.

metered tariff system which violated AGBA's right to obtain a fair market price for its services, deficiencies in the list of customers and incorrect users' categorization, the failure of the authorities to provide the UNIREC treatment plants.

249. It thus appears that since the end of the first half of 2001 AGBA considered the situation to be such that it could not fulfill its obligations under the Concession Contract and that the Contract therefore had to be amended in AGBA's favor or other measures had to be taken which would again make the concession a viable enterprise for AGBA. Although AGBA, in the letter of December 27, 2001, complains of the action or inaction of the authorities on specific matters, it would seem that AGBA, at this stage, attributed its difficulties to the economic situation in general and to the difficulties in obtaining payment from customers for AGBA's services.

250. However, AGBA also referred to a specific reason for some of the collectability difficulties, *i.e.* that there were large numbers of unregistered customers connected to the water network who had not previously paid for the services. In its letter of May 17, 2001, AGBA stated that the difficulties in collecting fees for the services had been seriously aggravated by the incorporation of 80,000 users who had not been included in AGOSBA's list of customers and who had a non-collection rate of 70% or even 80% in some neighborhoods. These users had never before been charged for the investment or the services which explained their reluctance to pay.

251. It is unclear whether the existence of this large group of users who had not been billed for the services provided for them had been brought to AGBA's attention before the Concession Contract was concluded. In any case, the Argentine Republic has not adduced any convincing evidence showing that AGBA had been duly informed, and the Arbitral Tribunal therefore accepts that in this regard the Argentine Republic was to some extent responsible for the unexpected problems that arose for AGBA and made it considerably more difficult for AGBA to attain the collectability goals it had set up.

252. However, this does not wholly explain AGBA's inability to fulfill its obligations according to the POES and the first Five-Year plan as regards investments and expansion of water and sewage services.

253. Nevertheless, during the first period of the concession, the Argentine authorities showed a considerable degree of indulgence and tolerance towards any deficiencies that existed in AGBA's performance. On August 27, 2001, ORAB's Technical Department declared that AGBA's performance during the first year of the concession had shown an acceptable degree of compliance with the POES. The Technical Department also supported the request for a suspension of the POES in view of the economic hardship facing the Province and the country. Subsequently, a favorable opinion was also given by ORAB's Economic Regulation Department on November 23, 2001 and by ORAB's Law and Resolution Department on December 3, 2001. Even one year later, on December 2, 2002, the Technical Department of ORAB, in a Report to the President of ORAB, declared that AGBA had essentially satisfied the goals established for the first concession year 2000.

254. Finally, in Resolution No. 69/02 of December 5, 2002, the Board of Directors of ORAB, representing the Province, found as follows:

“It may be inferred from the analysis performed that the Concessionaire met the service expansion and quality goals undertaken for the first year of the concession, as described in Annex F to the Concession Contract - - -.

With respect to the expansion goals set in connection with the drinking water and wastewater services, it must be noted that the minimum number of connections for region B indicated in Articles 2.1.1 and 2.1.2 of Annex F to the Concession Contract has been met.

In this respect, the Concessionaire made 46,588 new drinking water connections, in excess of the 26,500 connections scheduled for year one of the concession (Article 2.1 of Annex F). The Concessionaire also made 15,380 wastewater connections.

Although an expansion goal of the Concession Contract consisted in putting 26,000 new wastewater connections in operation throughout the region, it should be noted that the wastewater treatment plants were not available during that period to treat the wastewater flowing from those connections, which prevented the Concessionaire from connecting new users to the service and from putting those connections in operation.

Nevertheless, it should be highlighted that the purpose behind the expansion goals set forth in the Contract is to release the service for its use and therefore increase the number of users served, from whom the Concessionaire may recover the investment made in the expansion.

The fact that the Concessionaire was prevented from operating the treatment plants was the reason why not all wastewater connections provided for in Annex F were made, given that it is not possible to release the wastewater service for its use without previously treating the effluents collected, a situation which could pose a threat to the health of the population and the environment which must be protected by the Regulatory Agency.

It was determined that in order to replace and recondition the drinking water connections, the Concessionaire made connections along 13,200 meters, which represents 3.2% of the total length, and renewed and/or reconditioned 17,200 meters of wastewater piping, which represents 2.7% of the total length.

Pursuant to Article 2.3 of Annex F to the Concession Contract, on the basis of the percentages undertaken with respect to the annual renewal and/or reconditioning of drinking water and wastewater piping, the foregoing implies that the Concessionaire has met the annual percentage undertaken in Annex F to the Concession Contract - - -.

In addition, the Concessionaire has fulfilled the service quality goals, as evidenced by the report issued by the Service Quality Division and recorded on page 431 of the case-file, which expressly provides that *‘It is hereby informed that, during the first year of the concession, the quality of the water provided for consumption in concession area No. 2 and the discharge of wastewater effluents from the treatment plants related to the concession services meet the parameters set forth in the Contract (Annexes C and D).’*”

255. The Board of Directors of ORAB therefore resolved:

“SECTION 1: That the Annual Report on the Progress of the POES and Service Levels submitted by [AGBA] for year one of the concession, *i.e.* year 2000, be approved on the basis of the foregoing clauses;

SECTION 2: That [AGBA] has met the service expansion and quality goals of the first year of the concession (year 2000), as provided in Annex F to the Concession Contract, which was incorporated into the First Five-Year Plan which is an integral part of the POES approved by Resolution No. 07/01;”

256. As regards the second year of the concession, *i.e.* 2001, AGBA, in a letter of September 13, 2001 to the Governor of the Province of Buenos Aires, referred to the

serious situation that had arisen in regard to the implementation of the Concession Contract and asked for a meeting to discuss it. On December 27, 2001, AGBA asked the Governor to arrange immediately bilateral negotiations in order to decide on the most suitable mechanisms to restore the equilibrium of the economic and financial equation of the concession, which had been disrupted by various events.

257. The Arbitral Tribunal also notes AGBA's repeated requests in 2001 for a temporary suspension of the execution of the POES. On December 30, 2002, in Resolution No. 77/02, the Board of Directors of ORAB granted AGBA's request for a suspension (called "neutralization") of the POES obligations in the second concession year with the effect that measures which had not been accomplished during that year should not lead to penalties according to Article 13.2.5.5 of the Concession Contract.

258. At that time, the implementation of the Concession Contract had been dramatically affected by the emergency legislation enacted in Argentina at the beginning of 2002. On January 6, 2002, the Federal Argentine Government enacted Law No. 25,561 on Public Emergency and Exchange Regime Reform in which utilities contracts were "pesified" at parity level and tariffs were frozen. The Government was authorized to renegotiate public utilities contracts. On January 11, 2002, ORAB "pesified" AGBA's tariffs at parity rate. On February 28, 2002, the Province of Buenos Aires adopted certain sections of the Emergency Law as Provincial Law No. 12,858. On August 27, 2002, ORAB, in Resolution No. 56/02, suspended AGBA's right to interrupt water service to customers who had not paid their bills. On June 9, 2003, by Decree No. 878/03, a New Regulatory Framework for drinking water and wastewater public services in the Province of Buenos Aires was enacted. A request by AGBA to be allowed to make tariff increases was rejected in a letter from the Undersecretary of Public Services on August 25, 2005.

259. AGBA made various attempts to have the Concession Contract renegotiated and asked for the balance between the parties to be re-established in the new circumstances. However, the position of the authorities seems to have been initially that AGBA had assumed obligations and risks and that there was no reason to change the balance in AGBA's favor. After the Emergency Law had been enacted, the Province appeared to be prepared in principle to discuss modifications of the Contract. However, it is not clear whether any serious negotiations were conducted, and the Argentine Republic explains the negative result by referring to AGBA's allegedly excessive demands.

260. There was apparently an increasing tension between AGBA and the Province which culminated in 2006 when the new control agency OCABA, created in 2003, issued a report in which it concluded that AGBA had violated in several ways its obligations under the Concession Contract and the POES. In the same year, OCABA also fined AGBA for having failed to handle certain complaints in a timely fashion.

261. It may be noted that, in a letter of June 14, 2005 to the Minister and the Undersecretary of Public Services and also to the President of ORAB, AGBA accused the Province of violating its obligations under the Concession Contract and declared that, unless this was corrected within 45 days, AGBA would exercise its rights of termination under the Concession Contract. Finally, on July 11, 2006, the Province Governor, by Decree No. 1666/06, terminated the Concession Contract due to

AGBA's fault pursuant to Article 14.1.3 (a), (b), (h), (i) and (k) of the Concession Contract. In connection therewith, the Governor, by Decree No. 1677/06 of July 13, 2006, transferred AGBA's water and sewage service concession to the state-owned ABSA which had been created in 2002 and had already taken over the concessions from the concessionaire Azurix in other parts of the Province.

262. As reasons for the termination of the Concession Contract, the Province Governor stated in Decree No. 1666/06 (in translation):

"Whereas, in accordance with Resolution No. 84/06 and within the scope of the Regulatory Framework in force and the Concession Contract, Article 14.1.3 last part, [OCABA] prepared the required report, dated April 11, 2006, indicating the contractual obligations breached by the Concessionaire that fall within the reasons for termination due to the Concessionaire's fault set forth in Article 14.1.3 of the Concession Contract;

Whereas pursuant to said Article [AGBA] is responsible for the following:

- 1) "serious non-compliance with legal, contractual or regulatory provisions applicable to the service" (Article 14.1.3(a));
- 2) "repeated and unjustified delays in fulfilling the coverage goals set forth in the POES" (Article 14.1.3 (b));
- 3) "repeated violation of the user regulations provided for in Article 13-II of the Regulatory Framework" (Article 14.1.3 (h));
- 4) "repeatedly withholding or concealing information from the Regulatory Agency" (Article 14.1.3 (i));
- 5) "failure to furnish, renew or refurnish the Contract guaranty as provided for in Article 11.2" (Article 14.1.3 (k));

Whereas [AGBA's] failure to comply with the POES in a timely manner has been verified, as indicated in the report by OCABA's Board of Directors issued on the aforementioned date, which unreasonable delays undermine compliance with the proposed service coverage goals and which have occurred at an alarming rate. Thus, such non-compliance has had so negative an impact on service quality and management indicators as to warrant termination due to the Concessionaire's fault under Article 14.1.3 (b) of the Concession Contract;

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Whereas Resolution No. 69/02 approved the compliance with goals and milestones of the first year of implementation of the first Five-Year Plan, and Resolution No. 77/02 provided that, in relation to the coverage goals for the second year of the concession, *i.e.* those set for the year 2001, the required annulment of the implementation period of the works and expansion program should be granted, and that the percentages that had not been complied with should be adjusted together with the Granting Authority;

Whereas the aforesaid annulment of the POES implementation period for the second year of the concession did not imply setting aside the goals undertaken by the Concessionaire for that year; rather it meant that they should be readjusted in accordance with and under the procedure established by Emergency Law No. 12,858 with the Granting Authority;

Whereas the Chairman of the Board of [ORAB], by means of a communication dated September 11, 2001, submitted for consideration of the Undersecretary of Public Services, pointed out that the request for annulment did in no way imply an exemption from the POES. Thus, he indicated that "- - - the Regulatory Agency believes that the determination of the deferral of the Five-Year Plan should only be limited to the coverage goals (expansion works), that the circumstances

warrant such deferral and that a period not exceeding 6 months from that required under the Five-Year Plan should be granted to resume the execution of works". In other words, all coverage goals specified in the aforesaid plan had to be attained by the end of the Five-Year Plan. The Economic Regulation Area of ORAB shared the same opinion;

Whereas when the Board of Directors of ORAB issued the resolution authorizing the annulment of the terms of the POES approved by Resolution 7/01, it expressly pointed out that the expansion and service quality goals for the second year of the First Five-Year Plan should be adjusted together with the Granting Authority within the framework of the utility contract adjustment procedure established by Law No. 12,858 and Decree No. 1175/02 - - -;

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Whereas it follows that the annulment of the POES implementation period authorized by ORAB did not exempt AGBA from the goals undertaken which had not been attained during the second year of the concession given that they had to be attained in the following years of the Five-Year Plan;

Whereas, regarding specific details of the issues in question, it should be noted that in accordance with Appendix I of Resolution No. 7/01, the Concessionaire undertook to make investments in the amount of eighty-six million six hundred sixty and three thousand seven hundred US dollars for the expansion of the drinking water network, in the districts that comprise the concession area, thereby failing to comply with its obligations, as evidenced by the report prepared by the Regulatory Agency;

Whereas, in the city of Belén de Escobar, even though the company met the percent of population served as specified in the POES, *i.e.* 78.5%, it did not implement the drinking water network in the following areas: Paravi, where 2,740 m. of water pipe and 165 connections to the mains were to be carried out; b) Philips, with 6,300 m. of water pipe and 312 connections to the mains; and c) Ruta 9, with a 4,440-meter water pipe and 311 connections to the mains;

Whereas, in General Rodríguez District, [AGBA] did not meet the goals specified in the POES insofar as it supplies drinking water to 47.34% of the population even though the company undertook to serve 55.3% of the population;

Whereas failure to meet the specified goals in the aforesaid District was due to non-performance of the following works in the following localities: a) Distribution network in Porteño, where 18,750 m. of water pipe of different diameters and 428 connections to the mains were to be completed; b) Distribution network in Irigoyen, where 13,700 m. of water pipe of different diameters and 944 connections to the mains were to be completed; c) Distribution network in Los Viveros, where 13,250 m. of water pipe of different diameters and 447 connections to the mains were to be completed; d) Distribution network in San Martín, where 23,700 m. of water pipe of different diameters and 853 connections to the mains were to be completed; e) Distribution network in Orence, where 9,900 m. of water pipe of different diameters and 262 connections to the mains were to be completed; and f) Distribution network in Ruta 24, where 9,200 m. of water pipe of different diameters and 157 connections to the mains were to be completed;

Whereas, in the District of José C. Paz, failure to achieve the goals is notorious given that from 58.2% of the population that [AGBA] was to serve with drinking water, the company only attained 8.82%;

Whereas failure to meet the specified goals in said District was due to non-performance of the following works: a) Catchment works from a battery of twenty-one wells to be located in a catchment area in Moreno District, where a holding tank, the relevant water system of 36,250 m. of water pipe and a 10,000 m³ cistern were to be installed; b) The distribution networks amount to 209,000 m. of water pipe of different diameters, with 23,900 connections to the mains;

Whereas, in Malvinas Argentinas District, service provision to new users has practically not been complied with given that only 5.29% of the population has been served with water even though the obligation of [AGBA] under the POES was to serve 67.2% of the population;

Whereas in said District the following works have not been carried out: a) Basic Works and activation of Grand Bourg Sur, which included eleven bores near the Acceso Norte, 16,300 m. of discharge pipe, one holding tank, two treatment tanks, two cisterns, two pumping systems for network distribution; and b) A distribution network of 41,710 m. of water pipe, with 6,000 connections to the mains;

Whereas, in Merlo District, the goals of the Concessionaire under the POES were to serve 83.1% of the population; however, the Concessionaire only served 46.44% of the population;

Whereas failure to meet the goals in said District was due to non-performance of the following works: a) Basis catchment works in Libertad, which include twenty-six bores to be located in the rural area, west of the District and near Marcos Paz, where, in addition, a holding tank, a water line extending up to Libertad and a 10,000 m³ cistern were to be built. The discharge pipe will be 27,600 m. long; b) With respect to the distribution network which should have been built by the end of the first five-year period, 2386,300 m. of water pipe and 34,269 connections to the mains were to be installed for the first two stages; c) Merlo Norte distribution network, including 52,100 m. of water pipe and 7,150 connections to the mains;

Whereas, in Moreno District, the report by the Water Regulatory Agency expressly states that [AGBA] did not comply with the goals undertaken under the POES, insofar as from 81.1% of the population to be served, it only covered 42.73%;

Whereas in that District the following works were not carried out: a) Basic and distributions works in La Reja, La Reja Grande and Francisco Alvarez, including a battery of eight wells to be located in a catchment area, southwest of the District, near Ingeniero Roggero dam, 3,600 m. of discharge pipe and a 1,000 m³ tank; b) Distribution networks and connections to the mains: La Reja: 54,200 m. and 3,058 connections to the mains, La Reja Grande: 14,450 m. of water pipe and 3,136 connections to the mains; Expansion of the distribution network in Trujuy, including a battery of twelve wells west of the area to be served, near Mariano Morneo airdrome and a 10,150 m. discharge pipe; the distribution was projected from the tank of Trujuy, with a 86,200 m. long water pipe and 9,913 connection to the mains; and c) Works in Lomas de Mariló which share the production from the aforementioned battery and the distribution network to be executed included 60,700 m. of water pipe and 5,502 connections to the mains;

Whereas, in San Miguel District, according to the report provided by the Water Regulatory Agency, the goals set in the POES were not complied with given that only 45.11% out of the 74.5% of the population to be served with drinking water, was provided with water;

Whereas failure to meet the goals in said District was due to non-performance of the following works: a) Basic and distribution works for Bella Vista and Muñiz, including thirteen bores in a catchment area near the west of Bella Vista, construction of a 1,000 m³ tank, 7,865 m. of discharge pipe, 164,000 m. of distribution pipe of different diameters and 15,638 connections to the mains; b) Basic and distribution works for expansion in Santa Brigida, including two bores, 150 m. of discharge pipe, 18,650 m. of distribution pipe and 2,395 connections to the mains;

Based on the foregoing, it is clear that [AGBA] only complied with the drinking water supply expansion goals in Escobar District, even though it did not fully perform the works it had undertaken to carry out, and, with respect to the other Districts mentioned above, failure to comply with the POES is apparent insofar as none of the drinking water supply service expansion goals have been met;

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Whereas Annex F of the Concession Contract also establishes that, at the end of the fifth year of the concession, the coverage percentage of users with micro-measurement was to be 40%; however, the Concessionaire, according to the report of the Water Regulatory Agency, has

completely failed to comply with such goals as it did not install almost any water consumption meter;

Whereas the Concessionaire did not comply with Resolution No. 21/04 either, issued in proceedings No. 2430-506/04, whereby the company is ordered to install a specific number of micrometers;

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Whereas, consequently, it has been shown that the Concessionaire has not complied with the micro-measurement goals insofar as it has failed to install meters so that at the end of the fifth year of the concession the service billing system could be 40% based on consumption measurement, thus maintaining the flat rate billing system or non-metered system;

Whereas, in accordance with Resolution No. 7/01, the Concessionaire undertook to make investments in the amount of one hundred forty-four million two hundred fifty-three thousand and six hundred US dollars for the expansion of the sewer network in different districts within the concession area, for which purposes the Concessionaire was to carry out the works described in the Annex to said administrative action;

Whereas, in the city of Belén de Escobar, the Concessionaire met the goals set in the POES but failed to expand the sewer network in the area located east of the sewage treatment plant, which involves around three hundred connections to the mains;

Where, furthermore, [AGBA] had to build a new module for the sewage treatment plant to service fifteen thousand residents, which work was never carried out and, therefore, at the end of the first five-year period, the percentage of served population reached 56%;

Whereas, in General Rodríguez District, in order to comply with the goals set in the POES, *i.e.* to serve 43.4% of the population with sewerage, the sewer network should have been expanded in the following localities: los Viveros, La Armonía, Solidaridad I, Rafa and Casco Chico, with six hundred connections to the mains;

Whereas, in addition, a new module for the sewage treatment plant to service fifteen thousand residents was to be constructed, which work was never carried out by the Concessionaire and, therefore, at the end of the first five-year period, the percentage of served population was 42.01%;

Whereas, in José C. Paz District, the supplier did not perform any of the works undertaken, thereby failing to comply with all its investment obligations;

Whereas the Concessionaire should have built a sewage treatment plant on Pinazo stream with an initial capacity to serve one hundred thousand residents, to receive sewage effluents from José C. Paz Sur, conducted through a main sewage collector which would receive the effluents from the sewage main networks to be installed;

Whereas, in José C. Paz Norte, the Concessionaire did not build the network that was to connect with the sewerage system of Malvinas Argentinas District either;

Whereas, because the Concessionaire did not perform any of the works undertaken, the percentage of served population in this locality equals 0%, which entails a complete and utter failure to comply with the POES;

Whereas, in Malvinas Argentinas District, [AGBA] did not perform any of the works it was required to carry out according to the goals established in the POES regarding the provision of sewerage service to 40.9% of the population in said District;

Whereas, in the aforementioned District, the Concessionaire was required to build the first module of the sewage treatment plant on Claro stream with a treatment capacity to serve one hundred sixty-five thousand residents; a network of connections to the mains and main sewage

collectors in order to comply with the stipulated served area percentage and the works designed to conduct sewage effluents from José C. Paz Norte;

Whereas, as a result of such non-performance, the percentage of served population in the District equals 0%, which entails a complete failure to meet the expansion goals set out in the POES;

Whereas, in Merlo District, the Concessionaire undertook to extend the sewerage supply service to 58.8% of the population, for which purposes it was required to perform the following works: a) Network of connections to the sewage mains in San Martín and main sewage collectors; b) Expansion of the network of connection pipes to the sewage mains in Libertad and main sewage collectors;

Whereas, in relation to connections to the mains, in order to meet the goals established in the POES the Concessionaire had to install seventy-eight thousand five hundred connections, of which forty-six thousand connections were not installed;

Whereas, with respect to sewage liquid treatment in Libertad, the treatment capacity of the sewage treatment plant had to be expanded in order to serve ninety thousand residents;

Whereas, even though the POES required a service coverage of 58.8% of the residents of said District, at the end of the first five-year period the service was provided to only 23.77% of the population;

Whereas, in Moreno District, the Concessionaire did not perform the following works: a) Expansion of the networks of connection pipes to the sewage mains in La Perlita, Villa Anita and Moreno 2000 with 148,400 m., the relevant main sewage collector and 14,900 connections to the mains; b) Expansion of the network in Trujuy and Paso del Rey, with 130,000 m. of connection pipes to the sewage mains, 12,800 connections to the mains and a pump station to serve 13,000 residents;

Whereas the percentage of served population by the end of the first five-year period was 20.96% even though the Concessionaire was required under the contract to serve 57.8% of the residents of said District;

Whereas, in San Miguel District, [AGBA] should have performed expansion works in relation to network connections, main sewage collectors and nineteen thousand two hundred connections to the mains in order to complete the thirty-three thousand three hundred and ninety-three stipulated in the Expansion Work Five-Year Plan, and it failed to comply with the goals established in the POES as well;

Whereas, based on the foregoing, [AGBA] also failed to comply with the expansion goals regarding the sewage service;”

263. After a further account of matters in regard to which AGBA had not fulfilled its obligations, the Resolution stated:

“Whereas the foregoing entails a serious, repeated and systematic breach of contract, given that AGBA has failed to comply with most of the expansion works in connection with the drinking water and sewerage supply service, as stipulated in Annex F to the Concession Contract;

Whereas, in particular, the Concessionaire’s failure to perform any of the sewage works undertaken constitutes a gross and flagrant violation, as a result of which the percentage of served population is 0%, which implies a complete and utter non-compliance with the POES in this regard;

Whereas, with respect to service quality standards, the drinking water samples show that the level of nitrate ion exceeds the parameters established in the Concession Contract;

Whereas, in relation to sewage, the same method was used and the results indicate that treatment plants exceed quality standard parameters in connection with nitrogen, total coliforms and other compounds;

Whereas, according to the report of the Regulatory Agency, the sewage treatment plant of Escobar does not meet standards for nearly all parameters and the one in San Miguel is almost out of service given that all parameters exceed the applicable standards;

Whereas, with respect to the quality of service provision, the technical report points out that [AGBA] did not comply with its obligation to maintain drinking water storage tanks in good conditions, which were, for the most part, out of service because of their condition;

Whereas the tanks that are out of service due to poor condition and maintenance are: a) Escobar: Escobar Centro; b) General Rodríguez: Reinforced concrete Tank out of service; c) Malvinas Argentinas: Primavera; d) Merlo: Merlo Centro and Parque San Martín; e) Moreno: Moreno Centro, La Perlita, Trujuy (in service but with large unrepaired cracks); f) San Miguel: San Miguel Centro and General Sarmiento;

Whereas, with respect to service provision, Annex F to the contract establishes that at the end of the first five-year period and/or within five years, drinking water pressure should be 10 meters of water column (10 mWC) and throughout the concession area the measurement of water supply pressure does not meet the established goals, as evidenced by users' constant and successive complaints;

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Whereas [AGBA] has failed to comply with drinking water and sewerage service quality levels, according to the parameters set out in Articles 3.6 and 3.12 of the Concession Contract, thus posing a constant threat to the life and health of the population, with no corrective measures being adopted in order to rectify the situation as soon as possible;

Whereas, by means of Resolution No. 52, dated July 24, 2002, [ORAB], taking into account the complaints from the residents of Alem, local authorities and the results of the inspection conducted by the Technical Department of the Agency regarding the fact that the treatment plant located in said neighborhood was abandoned, without proper maintenance, as required from the concessionaire for the provision of the sanitation service called upon [AGBA] to comply with the obligation undertaken under Article 7.4 of the Concession Contract, by ensuring proper operation of the facilities;

Whereas the concessionaire considered that, as it was not part of the service area at the time of takeover, it was not under an obligation to maintain the plant in good working condition, let alone to operate the plant;

Whereas, however, Chapter X of Law No. 11,820 and Chapter 7 of the Concession Contract determine the system applicable to the concession of the public sanitary service, specifying that the assets comprise those transferred to the concessionaire by virtue of the contract, including the assets acquired or built by the concessionaire to fulfill the obligations arising out of the contract; therefore, it is the concessionaire's duty to manage and maintain the assets allocated to the service in the condition required by the aforesaid chapter of the Law and the contract;

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Whereas ORAB, by means of Resolution No. 32/03, determined that the Treatment Plant of Bella Vista, San Miguel District, was part of the assets allocated to the public service, as provided by Section 43-II of Law No. 11,820, as it was owned by the former AGOSBA;

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Whereas, as a result, [AGBA] should have operated the plant in a manner such that it would guarantee maintenance of sewage effluents within the quality standards specified in Annex D to the Concession Contract, as provided by Article 3.13 of the Concession Contract;

Whereas the report prepared by the Technical Department concluded that the Treatment Plant of Bella Vista was in a general state of dereliction, which shows that it was out of service and as a result of its condition, lack of maintenance and operation, effluents do not receive any sort of treatment, thus being discharged raw into the receiving water body;

Whereas [AGBA's] failure to comply with the provisions set forth in Article 3.13 of the Concession Contract regarding the effluents from the Treatment Plant of Bella Vista, San Miguel District, as well as the provisions contained in Articles 7.4, 3.2, 3.3, 3.4 and related provisions of the aforesaid Contract resulted in the imposition of the fine provided for in Article 13.2.5.2 (e) thereof and an order to cure such default, which has not been cured to this day;"

264. The Province went on to point out that AGBA had failed to comply with its contractual obligation under the Concession Contract to maintain a contract guaranty and an operations bond. On this matter, the Province made the following remarks:

"Whereas the effect that this breach of contract has on the concession as a matter of public interest is very serious, to the point that if the Province decides to terminate the contract due to the concessionaire's default, it does not have a guaranty to enforce against such breach, as provided by Article 14.2.2;

Whereas the nature of the breach is objective and it constitutes by itself sufficient ground for termination of the concession due to concessionaire's fault:

Whereas it may be concluded that all the breaches described herein fall within the grounds for termination due to the concessionaire's fault provided for in Article 14.1.3, given that the concessionaire was under the obligation to make investments to perform the works undertaken so as to attain the expansion and optimization goals set forth in the POES, and that neither the Emergency Law No. 25,561 enacted by the Argentine Government, nor its provincial counterpart, Law No. 12,858, exempted the concessionaire from complying with its obligations under the Concession Contract;

Whereas, on the contrary, Section 10 of Law No. 25,561, adhered to by the Province of Buenos Aires by means of Section 3 of Law No. 12,858, expressly provides that the elimination of indexation provisions from contracts or the pesification of public service tariffs, or the renegotiation of concession contracts will under no circumstances authorize the public service supplier to suspend or alter the performance of its obligation;

Whereas it should be noted that the breach is at present fully materialized, and in accordance with the provisions contained in Article 14.1.3, last paragraph, cannot be cured, overcome or reversed, as the damage to the population has already been done;"

265. The Province pointed out that AGBA's breaches of its obligations could not be cured and added:

"Whereas it is important to highlight the lack of conditioning of the sewage liquid treatment plants, which has a negative impact on the environment and public health, as well as the lack of minimum investments necessary to guarantee the operation of the plants in the localities mentioned above;

Whereas the non-compliance amounts to 84% in relation to installation of water networks and practically 100% in connection with the laying of sewer networks, which has deprived approximately 100,000 potential new users of drinking water and 150,000 potential new users of sewerage in the concession area;

Whereas damage to the public interest derived from such breach is irreparable, given that the main purpose of the Provincial Government in deciding the privatization of the sanitary services was to improve existing service provision and its expansion in order to serve the population that at the time did not have water supply or sewerage system;

Whereas, after six years of the execution of the contract [AGBA] has failed to comply with nearly all the goals undertaken, having made practically no investment whatsoever in service infrastructure, except for water and sewerage works in Escobar and General Rodriguez Districts;

Whereas it should be noted that the concessionaire has repeatedly and systematically violated the User Rules insofar as it has not duly addressed users' complaints regarding service provision or billing nor has it provided a response within the specified time frames or given an answer to the communication sent by [ORAB] in a timely and proper manner, in order to resolve the complaints received by said Agency;"

266. The Province concluded:

"Whereas, based on the foregoing, the grounds for termination specified in Article 14.1.3 (h) and (i) of the Concession Contract have also been met, giving rise to termination due to the Concessionaire's fault as a result of the repeated violation of the User Rules and constant withholding or concealment of information from which, in brief, it may be concluded that [AGBA] has materially breached the Contract which entitles the Granting Authority to terminate the Concession Contract due to the Concessionaire's fault, as set forth in Article 14.1.3 (a), (b), (h), (i) and (k) of the Concession Contract;"

267. The operative part of the Resolution reads in its initial part as follows:

"The Governor of the Province of Buenos Aires resolves:

SECTION 1. To terminate, from the date of notice of this Decree, the Concession Contract entered into with [AGBA] due to the Concessionaire's fault on the grounds for termination provided for in Article 14.1.3 (a), (b), (h), (i), (k) and related provisions of the aforesaid contract.

SECTION 2. [OCABA], upon notice of this Decree, shall adopt any such measures as may be necessary to ensure the receipt and continuance of the public service provision, the assets allocated thereto and the relevant personnel, as set forth in Article 14.4.3 of the Concession Contract."

(iv) Expropriation

268. The first question that arises is whether Impregilo's investment, as claimed by Impregilo, was expropriated or nationalized. Impregilo refers to a number of measures taken by the Argentine authorities throughout the concession period and leading up to the termination of the concession by Decree No. 1666/06.

269. Expropriation is not defined in Article 5 of the Argentina-Italy BIT which however mentions expropriation at the same level as nationalization, seizure and other appropriation and sets out the conditions to be fulfilled if such acts are not be consistent with the BIT. These conditions are that the measures (i) are taken for a public purpose, of national interest or security, (ii) are taken in accordance with due process of law, (iii) are non-discriminatory and not contrary to the commitments undertaken, and (iv) are accompanied by provisions for the payment of prompt, adequate and effective compensation. Expropriation and nationalization are jointly referred to hereinafter as "expropriation".

270. As in most other BITs, expropriation in the Argentina-Italy BIT may be considered to be an act taken by a State in the exercise of its sovereignty by which an investor is involuntarily deprived of property. Moreover, property should in this connection be given a broad meaning and cover any material and immaterial assets having an economic value, including concessions and contractual rights belonging to the investor. Expropriation is to be distinguished from less far-reaching measures which regulate or restrict the right to use property. Such measures may also have serious economic effects for the investor but do not constitute expropriation. However, there are borderline cases where restrictions on the use of property go so far as to leave the investor with only a nominal property right. This could in appropriate cases be regarded as indirect expropriation. There are other situations in which successive measures are taken to deprive the investor of his rights to administer his property and where at some point the investor may be considered, as a combined effect of several acts, to have been deprived of the property (so-called creeping expropriation).

271. The holder of the concession in this case was AGBA, and Impregilo was the main shareholder in AGBA. Impregilo was at no time deprived of its shareholding in AGBA. Nevertheless, Impregilo is protected under the BIT as shareholder which means that if AGBA is exposed to treatment which is not in conformity with the BIT, Impregilo may rely on its rights as shareholder. The Tribunal also refers in this connection to the case of *Azurix* which deals with a similar concession in other parts of the same Province.⁷⁵

272. During the concession period, a number of measures were taken which affected AGBA's rights. However, none of these measures amounted to a loss of the concession. Nor could the joint effect of these measures be considered to be a loss of property rights. A loss only occurred when the Province terminated the concession by Decree No. 1666/06. However, the termination of the concession is not necessarily equal to expropriation. In fact, the Concession Contract provided for termination in various defined circumstances, and if the Contract is terminated in conformity with these provisions, this is not an act of expropriation by the State but an act performed by the public authorities in their capacity as a party to the Contract.

273. Article 14.1.3 of the Concession Contract provided, *inter alia*:

“The Granting Authority may terminate the Contract due to the Concessionaire's fault on the following grounds:

a) Serious non-compliance with legal, contractual or regulatory provisions applicable to the Service.

b) Repeated and unjustified delays in fulfilling the coverage goals set forth in the POES.

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h) Repeated violation of the User regulations provided for in Article 13-II of the Regulatory Framework.

⁷⁵ *Azurix Award, supra* n. 71.

i) Repeatedly withholding or concealing information from the Regulatory Agency.

k) Failure to furnish, renew or refurnish the Contract guaranty as provided for in Article 11.1, and the Operator guaranty provided for in Article 11.2.

If any non-compliance or violation can be cured, the Regulatory Agency shall demand that the Concessionaire correct its actions, cure the breach in any suitable way and submit the relevant response, in the period fixed according to the circumstances of the situation, the nature of the violation and in view of the public interest, which shall never be shorter than thirty (30) days. Upon expiration of the period accorded to the Concessionaire, the Regulatory Agency shall give notice to the Granting Authority of the subsistence of the non-compliance or breach if it has been duly proved, and the Granting Authority may terminate the Contract due to the Concessionaire's fault."

274. In its Decision of July 11, 2006 to terminate the Contract, the Province of Buenos Aires referred to numerous breaches by AGBA of its obligations under the Contract and based the termination on Article 14.1.3 (a), (b), (h), (i) and (k) of the Contract.

275. Impregilo argues that the decision to terminate the concession was in reality a political decision based on the policy of the regime that public facilities like water and sewage services should not be provided by private companies but by entities owned by the State or the Provinces. From such a perspective, the termination was in fact an expropriation, and the reasons given for it were only a pretext for transferring the services to public bodies.

276. In support of this view, Impregilo has referred to President Kirchner's policy on these matters and to statements made by the Province's Governor, Mr. Felipe Solá, and the Minister of Public Works of the Province, Mr. Eduardo Sícario.

277. The Arbitral Tribunal accepts that the Argentine administration may have set up as a political goal to transfer water and sewerage services to public entities. However, this does not necessarily lead to the conclusion that the termination of the Concession Contract with AGBA was an act of expropriation. The Tribunal refers in this connection to the case of *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Hungary* in which the tribunal stated:

"10.3.23 However, the fact that an issue becomes a political matter, --- does not mean that the existence of a rational policy is erased."⁷⁶

278. What is decisive is whether the reasons given for the termination constituted a legally valid ground for termination according to the provisions of the Concession Contract.

⁷⁶ *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22 (ECT), para. 10.3.23.

279. The Arbitral Tribunal notes that the reasons given by the Province for its decision to terminate the Concession Contract were very extensive and specific. They include a detailed account of AGBA's performance in each separate area, *i.e.* the City of Belén de Escobar and the Districts of General Rodríguez, José C. Paz, Malvinas Argentinas, Merlo, Moreno, San Miguel and Escobar, and they indicate, in precise figures, that AGBA, during the first five-year period, failed significantly to carry out its undertakings in regard to investments and the expansion of water and sewage services. The Tribunal finds no reason to doubt that the figures contained in the Decree are mainly accurate, and the conclusion must be that AGBA did not attain the figures of investments and expansion of services set up as undertakings in the POES and the Five-Year Plan.

280. However, failures in AGBA's performance were, to some extent, connected with failures by the Province. In particular, the Province did not deliver on time the UNIREC plants which it had undertaken to deliver in 2001. This affected AGBA's ability to expand sewage connections in certain areas, at least during the latter part of the five-year period, but it cannot account for all deficiencies in its performance. There were other treatment plants which should have been established by AGBA itself but which could not be completed due to insufficient funds. Also the fact, mentioned above, of an unexpected incorporation of a large number of additional users with a particularly low collectability rate made it more difficult for AGBA to live up to some of its undertakings.

281. The question also arises whether or to what extent AGBA's obligations were restricted by ORAB's Resolutions according to which, first, AGBA had met the service expansion and quality goals of the first year of the concession (year 2000) and, secondly, the POES obligations in the second concession year (year 2001) were suspended with the effect that measures which had not been accomplished during that year should not lead to penalties according to Article 13.2.5.5 of the Concession Contract.

282. In ORAB's Resolution No. 77/02, nothing is stated, at least not explicitly, about any effects of the suspension for 2001 on AGBA's obligations during the third, fourth and fifth years of the concession (2002, 2003 and 2004). Nor is it specified for how long AGBA's obligations during the second year would be suspended. The Argentine Republic's position is that, while AGBA's obligations did not have to be fulfilled in 2001, they would have to be fulfilled later during the first five-year period and thus before the end of 2004. This view is supported by the terms of Decree No. 1666/06 terminating the concession. It could be argued, however, that the suspension would be effective as long as negotiations about a revision of the contractual conditions were going on between the Province and AGBA.

283. The Arbitral Tribunal considers that, in the examination of whether the termination of AGBA's concession constitutes expropriation, it is not decisive whether or not the Province had a correct understanding of AGBA's obligations under the Concession Contract. What is relevant is rather that the Province, with some justification, considered that AGBA had grossly failed in fulfilling its contractual obligations and terminated the Concession Contract on this basis. This is sufficient, in the Arbitral Tribunal's opinion, to exclude that the termination could be regarded as an act of – direct or indirect – expropriation or other appropriation of AGBA's

property or Impregilo's investment. It has also in no way been proven that the termination of the Concession Contract was the last step in a successive series of measures taken by the Province with a view to depriving AGBA of the concession, or, in other words, that AGBA was exposed to "creeping expropriation".

(v) Fair and equitable treatment

284. According to Article 2 para. 2 of the BIT, investments shall at all times be accorded fair and equitable treatment. It is added that neither State shall impair by arbitrary or discriminatory measures the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other State's investors.

285. The term "fair and equitable treatment" appears in many BITs. It cannot be easily defined, and it is generally believed to require at least respect for the international minimum standard of protection which, according to international customary law, any State is obliged to afford to foreign property in its territory. The Tribunal considers that the term "fair and equitable treatment", as it appears in the present BIT and in other similar BITs, is intended to give adequate protection to the investor's legitimate expectations.

286. As far as the precise relation between "fair and equitable treatment" and the minimum standard of international law is concerned, there are two main approaches adopted by ICSID tribunals.

287. The first approach is that "fair and equitable treatment" has to be equated with the minimum standard of treatment provided for by general international law. This has been, for example, the position adopted by the *CMS* tribunal:

"In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law."⁷⁷

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

"The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling in order to avoid a possible interpretation of these standards below what is required by international law."⁷⁸

289. However, the distinction between the two interpretations is not decisive in the consideration of the present case, for the reasons stated below.

⁷⁷ *CMS*, Award, May 12, 2005, para.284.

⁷⁸ *Azurix*, *supra* n. 71, para. 361.

290. If fair and equitable treatment is indeed linked to the legitimate expectations of the investors, these have to be evaluated considering all circumstances. In the Tribunal's understanding, fair and equitable treatment cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements. The same approach was followed by the ICSID tribunal in *Parkerings-Compagniet AS v. Lithuania*:

“It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.”⁷⁹

291. The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be protected from unreasonable modifications of that legal framework.

292. In this context, the Arbitral Tribunal observes that the existence of legitimate expectations and the existence of contractual rights are two separate issues. This has been highlighted by the *Parkerings-Compagniet* tribunal, which made a clear distinction between contractual obligations under national law and legitimate expectations under international law:

“It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law.”⁸⁰

293. Christoph Schreuer also explains that contractual rights are not to be equated with legitimate expectations:

“Taken to its logical conclusion this argument would put all agreements between the investor and the host State under the protection of the FET standard. If this position were to be accepted, the FET standard would be nothing less than a broadly interpreted umbrella clause.”⁸¹

294. Thus, in so far as the Province's acts are exclusively contractual, they cannot amount to a violation of the fair and equitable treatment standard based on a theory of legitimate expectations. In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*,⁸² the tribunal stated: “For the sake of completeness, the Tribunal adds that a breach of fair and equitable treatment requires conduct in the exercise of sovereign powers.”

⁷⁹*Parkerings-Compagniet AS v. Republic of Lithuania* [hereinafter *Parkerings-Compagniet*] (ICSID Case No. ARB/05/8), Award, September 11, 2007, para. 332.

⁸⁰ *Id.*, para. 344.

⁸¹ C. Schreuer, “Fair and Equitable Treatment: Interactions with other Standards”, *Transnational Dispute Management*, Vol. 4, Issue 5 at 18 (September 2007).

⁸² *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, para. 377.

295. Since Impregilo's right as shareholder in AGBA is protected by the BIT, the Arbitral Tribunal finds it relevant to examine the treatment afforded to AGBA, the company of which it was a shareholder, as such action must be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT.

296. In the context of BITs, contractual rights and obligations must in principle be distinguished from treaty rights, the relevant criterion being whether the State or its entities act as holder of sovereign power or as parties to a contract.

297. However, there may be cases where a state entity which has concluded a contract with an investor performs acts which do not only constitute a breach of the contract but are at the same time a misuse of its status as part of the State organization to the detriment of the investor and thereby involve the State's responsibility as party to a BIT.

298. In the present case, many of the acts complained of by Impregilo concern the contractual relationship between AGBA and the Province. Such acts are, for instance, those which relate to AGBA's entitlement to work charges and connection fees and to an increased sewage coefficient as well as other matters relating to specific clauses in the contractual provisions agreed between AGBA and the Province. Other contractual problems have concerned the application of tax stabilization provisions, the suspension of the right to interrupt services to non-paying customers and the installation of meters at customers' requests. Other measures that should be mentioned in this context are the Province's failure to deliver the UNIREC plants in time and the fact that a large number of users of water and sewage services with particularly low payment capacity were added to AGBA's circle of customers which made it more difficult for AGBA to comply with its contractual obligations and reach the envisaged expansion goals.

299. The Arbitral Tribunal therefore finds it appropriate to examine whether the alleged contractual breaches, or any of them, could affect Argentina's responsibility under the BIT because they were a misuse of public power or reveal a pattern directed at damaging AGBA and, indirectly, Impregilo, as one of its shareholders.

300. In this respect, the Arbitral Tribunal makes the following observations on the following alleged contractual breaches.

301. Impregilo has complained of inaccuracies in the data bases handed over to AGBA as concessionaire. The Argentine Republic has responded that the Province analyzed each claim raised by AGBA regarding the update of databases and allowed corrections to be made, where appropriate. The Arbitral Tribunal cannot find that this was a misuse of public power.

302. In so far as Impregilo alleges that AGBA was prohibited from receiving connection charges, the Arbitral Tribunal notes that, according to Article 11 of Annex Ñ, AGBA was allowed to charge and collect a connection fee, once a user had been provided with a connection to the mains. However, there was an area in which AGOSBA had already installed connections which had been improved by AGBA, and the question arose whether AGBA was entitled to bill connection charges for the improved installations. In Resolution 44/00, ORAB stated that the area was already

served by AGOSBA (“*area servida*”), that this had been made clear to all interested parties during the bidding process, and that AGBA therefore only had the right in this area to bill charges for the use of services. The Arbitral Tribunal cannot find that this was an unreasonable application of the Concession Contract or that it involved in any way the State as a sovereign power.

303. In so far as Impregilo complains that work charges were not paid to AGBA, the Arbitral Tribunal notes that, according to Article 10 of Annex Ñ, a work fee was to be paid by customers at the time the public service was connected for the drinking water supply and sewage services. In Resolution 14/02, ORAB stated that it had repeatedly asked AGBA to provide information about the justification of these charges in some areas and that AGBA had failed to do so. ORAB therefore decided in the Resolution that AGBA must refrain, in these areas, from imposing work charges until ORAB, on the basis of information provided by AGBA, had analyzed the situation further. While the Argentine Republic argues that AGBA had not sufficiently demonstrated that it had carried out building work for which it was entitled to impose work charges, Impregilo alleges that the information requested by ORAB was excessive and unnecessary. This appears as a typical contractual dispute which cannot involve responsibility under the BIT.

304. As regards AGBA’s entitlement to an increased sewage coefficient, the Arbitral Tribunal notes that Article 4 of Annex Ñ to the Concession Contract provided as a condition for the application of the coefficient that all the expansion goals in the POES for the preceding year had been satisfied. As regards the first year (2000), it seems that AGBA was granted the coefficient increase once the resolution approving AGBA’s performance had been issued. However, AGBA was not granted retroactive payment, since the authorities considered that the delay in the approval of the performance was due to AGBA’s own delay in providing relevant information. The Arbitral Tribunal has no basis for concluding that this assessment was unjustified or that it was in any way a misuse of State power. As regards the second year (2001), the Argentine Republic points out that AGBA did not attain its POES goals but was granted a suspension of their fulfillment. In such circumstances the condition in Article 4 of Annex Ñ had not been satisfied.

305. In regard to Impregilo’s complaint that ORAB failed to apply the tax stabilization provisions in the Concession Contract, the Argentine Republic replies that AGBA never requested an extraordinary review which it should have done according to the Concession Contract. On the other hand, the Argentine Republic points out that tax changes formed part of the elements that were discussed during the renegotiation process. No element is present which would elevate this matter to a treaty dispute.

306. As concerns Impregilo’s complaint of the suspension of AGBA’s right to interrupt services to customers who did not pay for the services, the Argentine Republic argues that ORAB’s decision ordering AGBA to suspend the use of the cut off mechanism for certain users was a temporary measure for the duration of the economic emergency. The Arbitral Tribunal notes that Article 29 of Annex Ñ provides that the Concessionaire may not interrupt the service in some special cases, one of them being that the Regulatory Agency directs the Concessionaire to suspend temporarily the interruption, in anticipated and extraordinary circumstances, and

pursuant to a grounded decision. Impregilo has not demonstrated that ORAB misused public power by insisting on the application of the said exception in this case.

307. As regards Impregilo's complaint of ORAB's decision to impose on AGBA an obligation to install meters at the Customer's request, the Arbitral Tribunal finds that, while this increased the demands on AGBA, it was not inconsistent with any rule in the Concession Contract. It also appears from Article 1.9 of the Contract that AGBA, in regard to the performance of the Contract, was subject to the control and regulation of ORAB as Regulatory Agency. There is no appearance of any misuse of public power in this respect.

308. As regards the Province's failure to deliver the UNIREC plants on time, the Arbitral Tribunal accepts that the absence of these plants may have made it significantly more difficult for AGBA to fulfill some of its contractual obligations. However, the reasons for the Province's failure seems to have been of a financial character, and even if this could be seen as a serious contractual breach, it does not appear that, standing alone, it would have the character required for attributing responsibility to the State as holder of public power.

309. Also in regard to the remaining alleged contractual breaches, the Arbitral Tribunal finds no element that could involve Argentina's responsibility under the BIT. Nor can the Tribunal find any evidence of a pattern of acts by State entities aimed at causing damage to Impregilo as investor.

310. The question whether Impregilo was subjected to unfair or inequitable treatment must therefore be answered on the basis of State acts other than those performed by the Province as a party to the Concession Contract.

311. As general background, it should first be noted that AGBA, already in the beginning of the concession period, had difficulties complying with its obligations in the Concession Contract. On May 17, 2001, AGBA therefore wrote to the Province and referred to the high non-collection rates in the concession area. AGBA pointed out that this affected AGBA's capacity to make the necessary investments and was an unforeseeable and substantial change in the conditions on which AGBA had entered into the concession. AGBA had also experienced difficulties in obtaining loans. AGBA therefore made the following request:

"During the 16 months it has been providing the service, AGBA has clearly shown its capacity to perform the Concession Contract in an efficient manner as regards all matters within its reasonable control. The abovementioned problems exceed such scope and therefore make it necessary to implement corrective mechanisms to restore the Contract's equilibrium in order to fulfill its purpose.

In view of the foregoing and in order to proceed in the shortest time possible, as required by the circumstances, we hereby request that a work commission be created in order to jointly analyze the solutions and alternatives most appropriate for that purpose.

In addition, we also request, as a provisional measure, that the expansion goals be temporarily suspended until the above commission makes a decision.

Finally, we require that the Granting Authority actively cooperate in the negotiations currently being held with the [Inter-American Development Bank] for funding, in such aspects as may be within the scope of its powers."

312. A second request for relief in its obligations was made by AGBA on July 17, 2001. This time AGBA referred to the serious market conditions and the difficulties to obtain loans and requested a “temporary neutralization” of the time schedule in the first Five-Year Plan.

313. On both these two requests for exemptions from AGBA’s obligations, the Province, although only after raising objections and after a long period of reflection, reacted favorably.

314. In Resolution No. 69/02 of December 5, 2002, ORAB resolved that AGBA had met the service expansion and quality goals of the first year of the concession (year 2000), as provided in Annex F to the Concession Contract and incorporated into the first Five-Year Plan which was an integral part of the POES. On December 30, 2002, in Resolution No. 77/02, ORAB also granted AGBA’s second request for a suspension of the POES obligations. It did so for the second concession year 2001 with the effect that measures which had not been accomplished during that year should not lead to penalties according to Article 13.2.5.5 of the Concession Contract.

315. However, AGBA’s problems were not resolved but were further aggravated by the emergency measures imposed in connection with the economic crisis in Argentina and by the failure to restore an equilibrium by way of a negotiated adaptation of AGBA’s contractual commitments.

316. The Arbitral Tribunal considers that, in the assessment of whether AGBA was given fair and equitable treatment, the crucial events are those which began in 2002, when emergency legislation was enacted. It is clear that AGBA’s activities were to a large extent affected by the emergency measures that were taken to meet the economic crisis and which had remaining effects for AGBA even after the crisis had subsided a few years later.

317. On January 6, 2002, the Argentine Congress adopted the Emergency Law declaring the existence of a public emergency with regard to social, economic, administrative, financial and exchange rate matters. Under this law, the State adopted general measures aimed at renegotiating public service contracts. The law was promulgated as Law No. 25,561 on Public Emergency and Exchange Regime Reform. Utilities contracts were “pesified” at parity level and tariffs were frozen. On January 11, 2002, ORAB “pesified” AGBA’s tariffs at parity rate. On February 28, 2002, the Province of Buenos Aires adopted certain sections of the Emergency Law as Provincial Law No. 12,858.

318. For AGBA, this had a dramatic negative impact on the economic prospects of the concession. As before, the fees for water and sewerage service were to be billed in pesos, but while AGBA, before the Emergency Law, had been able to rely on the legal exchange rate of 1 peso = 1 dollar, AGBA could now only change pesos according to the current exchange rate on the market, and the value of the peso on the market in relation to the dollar was considerably lower than before.

319. The question arises whether the “pesification” was a breach of Argentina’s obligation under Article 2 para. 2 of the BIT to give fair and equitable treatment to Impregilo’s investment.

320. As regards the Concession Contract, the relevant provision is to be found in Article 20 of Annex Ñ which provides that tariffs are stated in US Dollars but that users shall receive their bills stated in pesos. The Article further states:

“The applicable conversion shall be performed on the basis of the 1 Dollar = 1 Peso parity established in the Convertibility Law or any other exchange rate from time to time established by law to replace such parity in force at bill cutoff date.”

321. It appears from this provision that the Parties considered the possibility that the parity rate of 1 peso = 1 dollar might change during the concession period but only envisaged the case that the rate would be replaced by a different exchange rate also determined by law. This means, for instance, that, if a new exchange rate of 2 pesos = 1 dollar had been fixed by law, that new rate would automatically have become applicable to the Concession Contract. In other words, AGBA had no guarantee that the exchange rate would remain the same and had accepted to stand the risk if changes were made by law.

322. Article 20 of Annex Ñ does not specifically deal with the case that a new exchange rate is created by market forces and not by legislation. On the one hand, it is not obvious that the Parties would have intended this situation to be treated differently from a changed exchange rate imposed by legislation. On the other hand, the situation is undoubtedly not covered by the wording of Article 20.

323. The Arbitral Tribunal does not find it clear how the Concession Contract should be interpreted and applied in regard to this particular situation. Consequently, different views may be held on whether the “pesification” was as such a violation of the Province’s obligations under Article 20 of Annex Ñ to the Concession Contract.

324. There is, however, also another provision in the Concession Contract which should be taken into account, *i.e.* Article 12.1.1, which provides that “[t]he calculation of applicable tariffs pursuant to Article 28 II of Law 11,820 shall be based on the general principle that tariffs shall cover all operating expenses, maintenance expenses and service amortization and provide a reasonable return on Concessionaire’s investment subject to efficient management and operation by the Concessionaire and strict compliance with the applicable service quality and expansion goals”. This may be regarded as an essential basis for the concession which would have to be upheld even in a changing economic climate.

325. The Arbitral Tribunal considers that, once the value of the peso was determined by market conditions, the balance provided for in Article 12.1.1 no longer existed and that, according to Article 12.1.1, it was then incumbent on the Province, in order to treat AGBA in a fair and equitable manner, to find appropriate solutions to restore the envisaged balance. In other words, since the new exchange rate caused by the abolition of the fixed legal rate had highly detrimental effects on AGBA, the Province should have offered AGBA a reasonable adjustment of its obligations under the Concession Contract.

326. Indeed, it appears that the Emergency Law also envisaged a renegotiation of public utilities agreements to adapt them to the new exchange system. This would have been a basis for finding a new equilibrium between the Parties to the Concession Agreement and for ensuring that Impregilo, as shareholder in AGBA, was granted fair and equitable treatment.

327. In this respect, the available documentation shows that AGBA repeatedly asked for negotiations about a revision of the Concession Contract. Reference is made in this respect to AGBA's letters to various authorities dated February 19, April 17, June 11, June 28, August 14, October 8 and October 30, 2002 as well as August 27, September 22 and December 2, 2003 and January 13, 2004. Moreover, the Province, on May 13, 2002, by Decree 1175/02, set up a Special Commission for the Evaluation of the Impact of the Crisis on Tariffs and Contracts regarding Public Services.

328. It is also important to note that the New Regulatory Framework for the Provision of the Drinking Water and Wastewater Public Services, enacted in Decree No. 878/03, contained certain new elements which were unfavorable to AGBA. It provided for State intervention in corporate decisions (Section 47) and shifted the balance in favor of the users by introducing, for instance, a social tariff for low-income residential owners (Section 55). Although Decree No. 878/03 also provided for renegotiation of concession contracts, it was clear that the existence of the Decree would significantly affect the character of the renegotiations by making it in practice necessary for AGBA to accept the rules and principles already laid down in the Decree. The New Regulatory Framework therefore changed the balance between the Province and the concessionaire in a manner which was clearly disadvantageous to the concessionaire.

329. Moreover, it appears that the Province was reluctant to renegotiate the Concession Contract. The position of the Province is reflected in a letter of July 23, 2002 to ORAB in which the Undersecretary of Public Services of the Province indicated that adjustments in favor of AGBA should not be made, as this would have negative effects for the customers whose economic interests required protection.

330. Since the disturbance of the equilibrium between rights and obligations in the concession was essentially due to measures taken by the Argentine legislator, it must have been incumbent on Argentina to act to effectively restore an equilibrium on a new or modified basis. Although Argentina has attributed the failure of the negotiations to what it regarded as AGBA's unreasonable demands, it does not appear that Argentina took any measures to create for AGBA a reasonable basis for pursuing its tasks as concessionaire which had been negatively affected by the emergency legislation, including the New Regulatory Framework.

331. In these circumstances, the Arbitral Tribunal considers that Argentina, by failing to restore a reasonable equilibrium in the concession, aggravated its situation to such extent as to constitute a breach of its duty under the BIT to afford a fair and equitable treatment to Impregilo's investment.

(vi) Further allegations

332. Impregilo has also alleged that Argentina:

(a) impaired by unjustified and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of Impregilo's investment,

(b) failed to provide full protection and security to these investments, and

(c) violated specific obligations entered into with respect to Impregilo's investments in AGBA.

333. As regards the allegation under (a), the Arbitral Tribunal notes Article 2 para. 2 of the BIT which provides in a first sentence that "[i]nvestments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment" and in a second sentence that "[n]either Party shall impair by arbitrary or discriminatory measures the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other Contracting Party's investors". The Tribunal regards the second sentence as a specification of the general requirement of fair and equitable treatment dealt with in the first sentence. Consequently, the Tribunal considers that, once a breach of the obligations in the first sentence has been found, a further examination based on the second sentence is not required.

334. As regards the allegation under (b), which relates to the requirement of "full protection and security" in the Argentina-US BIT, which is claimed to be applicable in this case through the MFN clause in the Argentina-Italy BIT, the Arbitral Tribunal considers that where, as in the present case, there has been a failure to give an investment fair and equitable treatment, it is not necessary to examine whether there has also been a failure to ensure full protection and security.

335. As regards the allegation under (c), the Arbitral Tribunal, with reference to its views on the distinction between contractual claims and treaty claims, finds that the obligations referred to are contractual obligations between AGBA and the Province which fall outside the Tribunal's jurisdiction (see paras. 183-185 above).

(vii) State of necessity

336. The emergency legislation in the Argentine Republic was enacted in reaction to a very serious economic crisis in the country. The Arbitral Tribunal has no doubt that drastic measures were required in order to safeguard economic and political stability.

337. As regards the Argentina-Italy BIT, the Parties have discussed the possible impact of Article 4 of the BIT and the rules on state of necessity in international law.

338. Article 4 of the BIT provides that investors of one Contracting Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, a state of national emergency or other similar political-economic events shall be accorded by such other Party in whose territory the investment was made treatment no less favorable than that accorded to its own nationals or legal entities or to investors of any third country as regards damages.

339. The Arbitral Tribunal is satisfied that the economic crisis in Argentina in 2002 could be regarded as a political-economic occurrence similar to a national emergency and that Article 4 of the BIT is therefore applicable to the situation. It notes, however, that Article 4 provides for no exception from the obligations of the State in whose territory an investment was made but merely gives the investor a right to national treatment and most-favored-nation treatment in respect of damages.

340. The Arbitral Tribunal thus notes that the Contracting Parties, when concluding the BIT, had national emergencies and similar occurrences in mind but considered that no special regulations were necessary apart from a rule that an investor protected under the BIT would not be treated less favorably than other national or international investors. Consequently, the Parties did not find it necessary to provide in the BIT for any exception from each Contracting Party's obligations under the BIT.

341. The Tribunal thus cannot accept the Respondent's interpretation, which goes against the plain meaning of the text, and agrees with Impregilo that Article 4 applies to measures adopted in response to a loss, not to measures that cause a loss. The plain meaning of the provision is that the standards of treatment of the BIT – national and most-favored-nation treatment – have to be applied when a State tries to mitigate the consequences of a situation of war or other emergency. This is in line with the analysis of the same provision made by the tribunal in *CMS* when it stated that:

“The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreigners. The Article - - - ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.”⁸³

342. The same analysis is made in the *Suez* cases:

“270. - - - The clear meaning of those provisions is to impose on Contracting Parties an obligation of equality of treatment of investments for losses resulting from war, civil disturbance, and national emergencies. The provision contains no reference whatsoever to other obligations imposed by the BITs on Contracting Parties, let alone to provide for an exemption from such obligations.”⁸⁴

343. It is therefore the conclusion of the Tribunal that any violations committed by Argentina cannot be excused by Article 4. However, Article 4 cannot be read so as to exclude the application of customary international law to an emergency situation.

344. The Arbitral Tribunal therefore must evaluate Argentina's necessity plea under the standard set by customary international law, which the Parties agree has been codified in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. That standard by definition is stringent and difficult to satisfy. According to the ILC, necessity arises where there is an irreconcilable conflict between an essential interest on the one hand and an [international] obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-

⁸³ *CMS*, *supra* n. 77, para. 375.

⁸⁴ *Suez II*, *supra* n. 74, Decision on Liability, ICSID Case No ARB/03/19, para. 203.

performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.⁸⁵

345. As the Party pleading the defense, Argentina must meet the significant burden of proving that it should be allowed to justify its failure to perform its valid international obligations under the BIT on grounds of necessity.⁸⁶

346. At the outset, the Arbitral Tribunal must define several terms in para. 1(a) of Draft Article 25. Regarding the meaning of the term “essential interest,” the ILC has observed that “the extent to which a given interest is ‘essential’ depends on all the circumstances, and cannot be prejudged” and that “[i]t extends to particular interests of the State and its people, as well as of the international community as a whole”. In the Arbitral Tribunal’s view, the term “essential interest” can encompass not only the existence and independence of a State itself, but also other subsidiary but nonetheless “essential” interests, such as the preservation of the State’s broader social, economic and environmental stability,⁸⁷ and its ability to provide for the fundamental needs of its population. It follows that, in addition to Argentina’s overall stability, the need to provide the population with water and sewage facilities represented an “essential interest” which, in regard to thousands of people, was to be served by AGBA’s concession and which would allegedly be “imperiled” for them but for the acts of the Argentine authorities.

347. The Arbitral Tribunal must consider whether the economic situation in Argentina leading up to its implementation of the emergency legislation (Federal Law No. 25,561 of 6 January 2002 and Provincial Law No. 12,858 of 28 February 2002) constituted a “grave and imminent peril” to the State’s essential interest. In this respect, the ILC Commentary explains that “the peril has to be objectively established and not merely apprehended as possible”, and that “[i]n addition to being grave, the peril has to be imminent in the sense of proximate”.⁸⁸ According to the Commentary, the International Court of Justice explained in the *Gabčíkovo-Nagymaros Project* case that “the invoking State could not be the sole judge of the necessity, but a measure of uncertainty about the future does not necessarily disqualify a State from invoking

⁸⁵ See The International Law Commission, Articles On State Responsibility, reprinted in THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES, at 61 (James Crawford ed., Cambridge Univ. Press 2002) (2001); see also U.N. GAOR, Int’l L. Comm’n., Fourth Report on State Responsibility, U.N. Doc. A/CN.4/517 (Apr. 2, 2001). The ILC Articles (and other State responsibility documents) are available online at www.stateresponsibility.com ILC Commentary to Article 25, at para. 2; see also ILC Commentary to Article 25, at 14.

⁸⁶ ILC Commentary to Chapter V (“Circumstances Precluding Wrongfulness”), at para. 8 (“Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V - - - [including necessity] - - - the onus lies on that State to justify or excuse its conduct.”).

⁸⁷ See ILC Commentary to Article 25, at paras 5-9 (discussing cases where the “essential interest” at stake ranged from economic stability to the natural environment).

⁸⁸ ILC Commentary to Article 25, at para. 15. Nevertheless, the Commentary notes the ICJ’s decision in the *Gabčíkovo-Nagymaros Project* case, which points out that a far-off “peril” could be held to be “imminent” as soon as such peril is recognized, and just because that peril is “far off,” it is no less “certain” or “inevitable.”

necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time”.⁸⁹

348. The Arbitral Tribunal notes the following facts which are of public knowledge. At the end of 2001, savings were massively withdrawn from the banks. In order to control the situation, the Government issued Decree No. 1570/01, known as “Corralito”, on December 1, 2001, restricting bank withdrawals and prohibiting any transfer of currency abroad. The situation led to demonstrations and tens of deaths in December 2001, and these, in turn, brought about the resignation of President de la Rúa, on December 20, 2001. It can be noted that, within a term of less than 10 days, Argentina had a succession of five presidents, who resigned one after the other. The situation was indeed critical, and at the end of that month, Argentina partly defaulted on her international obligations and abandoned the convertibility regime.

349. Argentina’s crisis of 2001-2002 resulted in a massive default on the public debt, on the domestic as well as the international level. So alarming was the situation that the United Nations General Assembly resolved to suspend the payment of Argentina’s membership dues on account of the crisis, which was the first case in history where this was done.

350. On the basis of the extensive reports on the economic situation in Argentina before the emergency legislation was introduced,⁹⁰ the Arbitral Tribunal accepts that there was a grave and imminent peril to the “essential interest” of Argentina’s economic and social stability within the meaning of para. 1 (a).

351. The further question arises as to whether Argentina’s measures were “the only way” for it “to safeguard its essential interests against a grave and imminent peril”.

352. According to the ILC Commentary, the plea of necessity “is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient”.⁹¹

353. The question whether Argentina’s overall management of its public finances and resulting social unrest could have been conducted more successfully, and if so in what way, has been the subject of numerous studies by renowned experts, but the answer remains inconclusive. However, as explained below, the Arbitral Tribunal considers that another criterion for the application of the state of defense exception, *i.e.* the requirement that the State concerned has not contributed to the crisis, has not been satisfied in the present case. The difficult question of whether Argentina’s measures were the only way to safeguard its essential interests will therefore not have to be answered, since whatever the answer would be, the application of the necessity defense will be excluded for another reason in this case.

⁸⁹ *Id.*, at para. 16.

⁹⁰ *See, e.g.*, Expert Report of Dr. Liliana de Riz (Aug. 13, 2007) (discussing the dire socioeconomic conditions caused by the crisis in Argentina generally and in the area covered by AGBA in particular).

⁹¹ ILC Commentary to Article 25, at para. 15 (citations omitted).

354. Regarding the criterion under para. 1 (b), the Arbitral Tribunal finds that no essential interest of any other State or the international community as a whole could have been seriously impaired by the measures taken by Argentina. The ILC Commentary notes that “the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective”.⁹² Given this clarification and the nature of Impregilo’s “essential interests”, the Arbitral Tribunal cannot agree with Impregilo that its own interests as an Italian legal entity must be taken into account in the balancing required under paragraph 1(b). The interests of a small number of a Contracting State’s nationals or legal entities are not consistent with or qualify as an “essential interest” of that State. It follows that any impairment of those interests is irrelevant for purposes of the paragraph. Accordingly, the condition codified under para. 1 (b) has been satisfied.

355. With respect to para. 2 (a), the Arbitral Tribunal holds that the “international obligation” in question refers to Argentina’s obligations to Italian investors as contained in the BIT. The Arbitral Tribunal already has found that the *lex specialis* of Article 4 does not preclude Argentina from invoking the necessity plea, nor do any of its other obligations contained within the BIT. Thus, this criterion is also satisfied.

356. Finally, it remains for the Arbitral Tribunal to decide, in accordance with para. 2 (b), whether Argentina is precluded from invoking the necessity plea because it has “contributed to the situation of necessity”. Certain questions arise regarding how “contributed” should be defined, including whether the conduct be deliberate (*i.e.* intended to bring about the state of necessity) or reckless or negligent, or even caused by a lesser degree of fault.⁹³ In the opinion of the Arbitral Tribunal, a State’s contribution to its necessity situation need not be specifically intended or planned – it can be the consequence, *inter alia*, of well-intended but ill-conceived policies. This result comports with common sense, because a contrary interpretation always would have to ascribe underhanded motives to the government or, more frequently, to the several governments that control the State successively prior to a situation of necessity.⁹⁴

357. Moreover, the Arbitral Tribunal must consider what level of contribution by the State seeking to invoke the necessity plea should be considered as sufficient to defeat the necessity plea. According to the ILC Commentary, “contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral”.⁹⁵ The Commentary notes further that the threshold for finding that a State

⁹² ILC Commentary to Article 25, at para. 17. The Commentary also notes that “[a]s a matter of terminology, it is sufficient to use the phrase ‘international community as a whole’ rather than ‘international community of States as a whole’ - - -.” *Id.*, at para. 18.

⁹³ In apparent response to this question, the ILC Commentary relies on the ICJ’s decision in *Gabčíkovo-Nagymaros Project* case, where the ICJ considered that “because Hungary had ‘helped, by act or omission to bring about’ the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.” ILC Commentary to Article 25, at para. 20.

⁹⁴ This conclusion does not purport to characterize the intent behind the measures sought to be justified through the necessity defense, because those measures by definition are meant as a *response* to a crisis, not as a *contribution* to its generation.

⁹⁵ ILC Commentary to Article 25, at para. 20.

contributed to the “situation of necessity” under para. 2 (b) is lower than that for an equivalent finding for purposes of *force majeure* (Draft Article 23, para. 2 (a)) and distress (Draft Article 24, para. 2 (a)), because “necessity needs to be more narrowly confined”.⁹⁶

358. Applying these principles, the Arbitral Tribunal recognizes that international market forces and events taking place in, *inter alia*, Mexico, Southeast Asia, and Russia affected adversely the economy of Argentina, culminating in the crisis of the early 2000s. Yet, the Arbitral Tribunal has been persuaded by substantial evidence proffered by Impregilo that Argentina’s own economic policies over several years prior to the crisis rendered the economy of the country vulnerable to exogenous shocks and pressures, and impacted adversely the sustainability of its economic model on the national and local levels.⁹⁷ The Arbitral Tribunal notes, by way of example, Argentina’s long-term failure to exercise fiscal discipline, including control of provincial spending and of the subsidization of the Provinces by the central Government; and its inability to adopt labor and trade policies consistent with the country’s currency board. The resulting high public indebtedness and inflexibility in Argentina’s markets hampered substantially the country’s ability to cope with external shocks, leading to the 2001 crisis. It follows that Argentina contributed significantly to the “situation of necessity” within the meaning of para. 2 (b) and therefore failed to meet the criterion under that paragraph.

359. The majority of the Arbitral Tribunal therefore concludes that Argentina has not satisfied all of the conditions under Article 25 and, accordingly, may not invoke the necessity plea as a ground for precluding the wrongfulness of the acts already identified as violations of its obligations under the BIT.

360. Arbitrator Stern considers as a matter of principle that the State’s contribution to a situation of economic crisis should not be lightly assumed and, on the concrete level, is not convinced that a substantial contribution of the Argentine authorities to the crisis has been satisfactorily proven by strong and convincing evidence. However, as the violation of the fair and equitable treatment, as found by the Tribunal, continued after the crisis, she concurs with the decision on the merits.

(viii) Compensation

361. As regards compensation, the basic principle to be applied is that derived from the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case.⁹⁸ According to this principle, reparation should as far as possible eliminate the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. In other words, Impregilo should in principle be placed in the same position as it would have been, had Argentina’s unfair and inequitable treatment of Impregilo’s investment not occurred.

⁹⁶ *Id.*, at para. 20.

⁹⁷ The Arbitral Tribunal notes, in this regard, the Expert Opinion of Prof. Dr. Sebastián Edwards (Oct. 29, 2009) paras. 78-125 and its associated evidence (discussing the manner in which Argentina’s policies throughout the 1990s contributed to its 2001 crisis).

⁹⁸ *The Chorzow Factory* case, PCIJ, Series A, p. 1382.

362. The Arbitral Tribunal first notes that the price of USD 1.26 million paid by AGBA for the concession was, in relation to the number of inhabitants, very low as compared with the price per inhabitant paid by Azurix for its concession for other parts of the Province of Buenos Aires. The reason was apparently that AGBA's concession concerned a poor area in which AGBA, in order to reach the goals of the POES with regard to coverage of water and sewerage connections, would have to make very substantial investments. These investments would amount to USD 16.74 million in the first year (2000), USD 87.77 million in the second year (2001), USD 173.79 million in the third year (2002), 211.82 million in the fourth year (2003) and USD 230.92 million in the fifth year (2004).

363. The investments were necessary in order to extend the system of water and sewerage connections in the area. The number of such connections was exceptionally low and covered only 35.4% (water) and 13.5% (sewerage) of the population. According to the POES, AGBA was to increase these figures, as regards water, to 63.19% in the third year, 67.93% in the fourth year and 70.68% in the fifth year, and, as regards sewerage, to 41.63% in the third year, 51.34% in the fourth year and 55.80% in the fifth year.

364. It appears from the background documents of the concession (the Schroder reports) that the rate of collectability of tariff payments was low in the area – initially about 63% – but according to AGBA's Business Plan the rate would be gradually increased to 80% in the third year, 83% in the fourth year and 85% in the fifth year.

365. As the Arbitral Tribunal understands it, the concession was connected with considerable risks, and its success would depend on whether sufficient funds could be found and whether the payment capacity of the population could be increased quickly. It would also depend on good co-operation with the Province authorities and on the fulfillment of the Province's obligations under the Concession Contract and the POES. It may be assumed, however, that for Impregilo, as a construction company, another attractive aspect would be that the concession could pave the way to construction contracts in Argentina.

366. It soon appeared that the poor collectability rate was a more serious problem than AGBA had expected. This also made it difficult for AGBA to obtain the financing needed for its investments. Negotiations about a loan from the Inter-American Development Bank were not fruitful, and the Banco de la Provincia de Buenos Aires refused a bridge loan. To some extent, the difficulties in obtaining financing were probably due to the general economic situation, but delays in the construction program of treatment plants, some of which (the UNIREC plants) were to be constructed by the Province and others by AGBA, may also have been a relevant factor affecting the position of the loan institutions.

367. In its letter of May 17, 2001, AGBA explained to the Province that the non-collection rates were high and affected the possibilities for AGBA to find financing. As a result, it had also become impossible to achieve the goals of the Five-Year Plan. AGBA requested that a work commission be created to assess the situation and that, in the meantime, the expansion goals be temporarily suspended. The Province replied, on May 30, 2001, by pointing out that the issue of non-collection rates was AGBA's business risk but nevertheless agreed to set up a working commission. On July 17 and

August 15, 2001, AGBA again asked for a temporary suspension of the execution of the POES and this time, as reasons, referred to the economic situation.

368. The position subsequently adopted by the authorities appears to the Arbitral Tribunal to be somewhat ambiguous. While, on August 27, 2001, ORAB's Technical Department found that AGBA's performance during the first year of the concession had shown an acceptable degree of compliance with the POES, the same Department, in an internal letter of October 10, 2001, stated that neither the goals set forth in the Concession Contract nor those specified in the POES had been attained. Nevertheless, in Resolution No. 69/02 of December 5, 2002, ORAB resolved that AGBA had met the service expansion and quality goals of the first year of the concession (2000), as provided in Annex F to the Concession Contract and incorporated into the first Five-Year Plan which was an integral part of the POES.

369. In any case, it is clear to the Arbitral Tribunal that the situation changed in early 2002 with the enactment of emergency legislation which had dramatic effects on AGBA's contractual rights and obligations. As from that time, there were no possibilities for AGBA to obtain credits and to reach the goals in the POES. In fact, in Resolution No. 77/02 of December 30, 2002, ORAB agreed to suspend the obligations under the POES for the second concession year (2002). No similar decision was taken for the following years 2003, 2004 and 2005, and AGBA may have regarded its undertakings for these years also to have been suspended. The Argentine Republic has stated, however, that the intention was that all obligations for the first five-year period should be complied with before the end of that period. Impregilo seems to consider that AGBA's obligations continued to be suspended as long as possible adjustments of the Concession Contract had not been agreed between the parties.

370. The Tribunal has found that the Argentine Republic exposed AGBA to treatment which was not fair and equitable, thus violating Article 2 para. 2 of the Argentina-Italy BIT. In particular, the Argentine Republic had failed to take appropriate measures to restore the equilibrium which had been disturbed by the pesification and other measures provoked by the financial crisis. Consequently, in so far as this failure caused damage to Impregilo, Argentina should be under an obligation to compensate Impregilo for the loss it sustained as a result of unfair and inequitable treatment.

371. In principle, it is incumbent on Impregilo to prove that it suffered the damage for which it asks to be compensated. However, it cannot be established with certainty in what situation AGBA – and thus Impregilo – would have been, had the Argentine Republic's breach of the fair and equitable treatment standard not occurred. Consequently, it would be unreasonable to require precise proof of the extent of the damage sustained by Impregilo. Instead, reasonable probabilities and estimates have to suffice as a basis for claims for compensation.

372. In support of its claims for damages, Impregilo relies, in particular, on expert reports by Richard E. Walck and Leonardo Giacchino, whereas the Argentine Republic invokes other expert reports, including those of José Pablo Dapena and Germán Coloma. In the latter reports, MM. Dapena and Coloma argue that the concession had no economic value and that no compensation can therefore be justified. MM. Walck and Giacchino disagree and consider that the concession would

have produced substantial gains for AGBA. They assess AGBA's loss by applying a combination of two methods, *i.e.*, on the one hand, a cost or asset based method and, on the other hand, an income method. They consider both methods to be relevant to the assessment of damages in this case but attach more weight (two thirds) to the income method than to the asset based method (one third). They add compound interest to their calculation and arrive at the result that the total value of Impregilo's investment was, as of July 2006, USD 87,156,098 and, as of October 2008 (including interest at the rate of 15%), USD 119,362,503.

373. The Arbitral Tribunal notes that, according to AGBA's Business Plan, the concession would be highly profitable. However, there are elements which, in the Tribunal's opinion, make it doubtful whether the forecasts in the Business Plan were realistic. First, it is clear that the concession covered a risk area with a poor population whose ability – and willingness – to pay for services was very limited. This is demonstrated not only by statistical figures but also by the fact that the fee that AGBA paid to obtain the concession was very low, almost symbolic, and that the emphasis in the concession was on the large investments that AGBA was required to make in order to fulfill its obligations under the Concession Contract, including the POES and the first Five-Year Plan.

374. However, in reality only a minor part of the envisaged investments were made by AGBA. It appears clearly from the facts of the case that AGBA was unable, already at an early stage of the concession period and a considerable time before the financial crisis reached its peak, to obtain credits necessary for the investments. Moreover, it appears that AGBA was unpleasantly surprised by the low collectability rate in the concession area which must have significantly hampered the expectations of profits from the concession. Even taking into account that the collectability rate was to some degree affected by the fact that there were, as an heritage from AGOSBA, a large number of unregistered users of the water and sewage network, it was AGBA that, in principle, bore the risk of unsatisfactory results as to investments and collectability.

375. When assessing the situation as a whole, the Arbitral Tribunal cannot find it established with a sufficient degree of probability that the concession, even in the absence of acts violating the standard of fair and equitable treatment, would have been profitable for AGBA.

376. It is clear, however, that the Province contributed to some extent to the negative development of the concession by not taking appropriate action to restore the equilibrium that had been eliminated by the pesification and by imposing on AGBA a New Regulatory Framework which had a negative effect on AGBA's contractual rights. These measures which were connected with the economic crisis were the elements that definitely made it impossible for AGBA to implement the concession on an economically sound basis.

377. The failure of the concession can therefore be ascribed partly to events for which AGBA stood the risk and partly to acts or failures by the Province.

378. The fact that AGBA and the Province have a shared responsibility for the failure of the concession makes it inappropriate to calculate damages on the basis of customary economic parameters such as a cost or asset based method or an income

method. Instead, the damages to be paid by the Argentine Republic to compensate for unfair and inequitable treatment should be determined on the basis of a reasonable estimate of the loss that may have been caused to Impregilo.

379. The Arbitral Tribunal notes that capital contributions were made by the shareholders of AGBA, mainly during 2000 and 2001. These contributions constituted a capital injection that was to be used for the benefit of the concession. It is true that Impregilo assumed a risk when providing capital to AGBA. On the other hand, if AGBA's concession had been successful, this capital would have produced benefits for Impregilo as shareholder. The Tribunal does not find it possible to evaluate potential losses or gains in precise figures but considers that Argentina should in principle be obliged to restitute the investment to Impregilo as compensation for its failure to ensure fair and equitable treatment to the concession.

380. As regards the question whether Impregilo, in addition to compensation for the investment, should also be entitled to compensation for its share of AGBA's potential gains from the concession, the answer must depend on whether there is sufficient reason to believe that such gains would have been obtained, had Argentina treated AGBA in a fair and equitable manner. This would have depended on various circumstances but primarily on whether AGBA would have been able to find sufficient financing and to solve the collectability problems characterizing this particular concession area. Having regard to the character of the concession area and the difficulties experienced by AGBA at the beginning of the concession period, before any emergency laws affected the situation, the Arbitral Tribunal has considerable doubt in this respect. Impregilo has not shown that the concession was likely to have been profitable, if there had been no interference by the Argentine legislator and the Argentine public authorities.

381. It follows that the compensation to be awarded to Impregilo should be based only on the capital contribution made by Impregilo. As regards the amount of this contribution, the Arbitral Tribunal finds no reason to doubt the figures presented in MM. Walck's and Giacchino's reports. The Tribunal also considers that these figures are not affected by internal changes of shareholdings within the consortium of AGBA shareholders, *i.e.* the transfers of shares from Sideco to Impregilo which took place in March 2000 and April 2002. According to the figures in MM. Walck's and Giacchino's reports, the capital contributions of the shareholders to AGBA, mainly in 2000 and 2001, amounted to USD 45,000,000 and Impregilo's share was USD 21,294,000. Consequently, the amount to be compensated is USD 21,294,000.

(ix) Interest

382. The Parties disagree on whether the interest on any damages should be simple or compound interest. The Arbitral Tribunal notes that there is no uniform case-law on this matter but considers that compound interest is in the present case to be preferred in order to eliminate the consequences of the conduct which the Tribunal has found to give rise to an obligation to pay damages.⁹⁹

⁹⁹ Cf. *Azurix supra* n. 71, para. 440. Also, *Metalclad Corp. v. Mexico*, Award, (NAFTA Ch. 11 Arb. Trib., Aug. 30, 2000, para. 128.

383. On the other hand, the rate of interest of 15% requested by Impregilo appears to the Arbitral Tribunal to be excessive to restore Impregilo to the position in which it would have been if the breach of the BIT had not taken place. The Tribunal considers a rate of 6% to be adequate and reasonable in the circumstances of this case.

384. Since the violation found in the present case is not one of expropriation but consisted in a breach of Argentina's obligation to afford Impregilo's investment a fair and equitable treatment, it is not evident from which date interest should be calculated. There is no precise point in time when the unfair treatment took place, but there were a series of successive events – actions as well as omissions – which cumulatively were unfair to AGBA and thus also to Impregilo. However, there can be no doubt that, by July 11, 2006, when the Province terminated the concession, its breaches of the BIT had culminated. The Arbitral Tribunal therefore finds it appropriate to choose that date as starting-point for Argentina's duty to pay interest.¹⁰⁰

(x) Costs and expenses

385. The Arbitral Tribunal notes that the present case has given rise to a number of important and complex legal issues and that both Parties have raised weighty arguments in support of their respective positions. The Argentine Republic's jurisdictional objections have been almost entirely rejected, and both Parties have been only partly successful in regard to the merits of the case. In view of the issues in the case as a whole, the Arbitral Tribunal finds it reasonable to order that each Party shall bear its own costs and expenses and shall pay half of the costs for ICSID's and the Arbitral Tribunal's work.

¹⁰⁰ Cf. *Id. Azurix*. Also, *Siemens AG v. Argentina*, ICSID Case No ARB/02/8, Award, February 6, 2007, paras. 349-350.

VI. THE AWARD

The Arbitral Tribunal:

A. Declares that the dispute is within the jurisdiction of ICSID and within the competence of the Arbitral Tribunal, and dismisses Argentina's objections to the jurisdiction of ICSID and the competence of the Tribunal except as regards alleged contractual breaches which fall outside the Tribunal's competence, unless they involve at the same time violations of Argentina's obligations to investors under the Argentina-Italy BIT,

B. Declares that the Argentine Republic did not violate the Argentina-Italy BIT by expropriating or nationalizing Impregilo's investment in AGBA,

C. Declares that the Argentine Republic violated the Argentina-Italy BIT by failing to treat Impregilo's investment in a fair and equitable manner,

D. Declares that, in view of the finding under C, it is not necessary to establish whether the Argentine Republic impaired Impregilo's investment by unjustified and discriminatory measures or failed to grant full protection and security to the investment,

E. Decides that the Argentine Republic shall pay compensation to Impregilo for damages it has suffered in the amount of USD 21,294,000 and interest on that amount, compounded annually at the rate of 6% as from July 11, 2006 until the date of payment, and

F. Decides that each Party shall bear its own costs for the proceedings and pay half of ICSID's and the Tribunal's fees and expenses.

Items A, B and E of the Award were adopted by a majority of votes. Items C, D and F of the Award were adopted unanimously.

Done in English and Spanish, both versions being equally authoritative.

Brigitte Stern

Professor Brigitte Stern

Arbitrator

Date: *MAY 5, 2011*

**Subject to the attached concurring and
dissenting opinion**

Charles N. Brower

Judge Charles N. Brower

Arbitrator

Date: *10 MAY 2011*

**Subject to the attached concurring and
dissenting opinion**

Hans Danelius

Judge Hans Danelius

President of the Tribunal

Date: *17 May 2011*