Date of dispatch to the parties: May 22, 2007

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

ENRON CORPORATION
PONDEROSA ASSETS, L.P

(CLAIMANTS)

AND

ARGENTINE REPUBLIC

(RESPONDENT)

ICSID Case No. ARB/01/3

AWARD

Members of the Tribunal:

Professor Francisco Orrego-Vicuña, President
Professor Albert Jan van den Berg, Arbitrator
Mr. Pierre-Yves Tschanz, Arbitrator

Secretary of the Tribunal:
Ms. Claudia Frutos-Peterson

Representing the Claimants

Mr. R. Doak Bishop
King & Spalding
Washington, D.C.
United States of America

and

Mr. Guido Santiago Tawil
M&M Bomchil
Buenos Aires
Argentina

Representing the Respondent

H.E. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Buenos Aires
Argentina

A. Introduction

1. The Claimants, Enron Corporation and Ponderosa Assets, L.P., are companies respectively established under the laws of the State of Oregon and the State of Delaware, United States of America. Enron's principal place of business is located in Houston, Texas. Enron owns and controls Ponderosa Assets, L.P., with its principal place of business in Houston, Texas. The Claimants are represented in this proceeding by:

Mr. R. Doak Bishop
King & Spalding
1100 Louisiana, Suite 3300
Houston, Texas 77002

Mr. Guido Santiago Tawil
M&M Bomchil
Suipacha 268, Piso 12
C1008AAF
Buenos Aires, Argentina

2. The Respondent is the Argentine Republic, represented in this proceeding by:

H.E. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Posadas 1641
CP 1112 Buenos Aires, Argentina

3. By letter of March 22, 2007 the Secretary of the Tribunal informed the parties that the Tribunal had declared the proceedings closed in accordance with ICSID Arbitration Rule 38 (1). This Award contains the Tribunal's Decision on the Merits rendered in accordance with ICSID Arbitration Rule 47, as well as the Tribunal's Decisions on Objections to Jurisdiction, which are part of this Award. The Award also contains a Procedural Order issued by the Tribunal on the discontinuance of certain tax claims. In rendering its Award, the Tribunal has taken into account all pleadings, documents and testimony produced in this case insofar as it considered them relevant.

B. Summary of the Proceedings

1. Procedure leading to the Decisions on Jurisdiction

4. On February 26, 2001, the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") received from Enron Corporation and Ponderosa Assets L.P., (the "Claimants") a Request for Arbitration against the Argentine Republic (the "Argentine Republic" or the "Respondent"). On February 27, 2001, the Centre acknowledged receipt and transmitted a copy of the Request to the Argentine Republic and to the Argentine Embassy in Washington, D.C., in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules"). The Request concerned certain tax assessments allegedly imposed by some Argentinean provinces in respect to a gas transportation company in which the Claimants participated through investments in various corporate arrangements (the "original" or "stamp tax claim"). In the Request, the Claimants invoke the provisions of the 1991 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments ("the Bilateral Investment Treaty", "Bilateral Treaty" or "Argentina-US BIT")[1].

5. On March 25, 2003, the Claimants filed before the Centre a new Request for Arbitration against the Argentine Republic, invoking the protections of the Bilateral Investment Treaty. The Request concerns the refusal of the Argentine Government to allow tariff adjustments in accordance with the United States Producer Price Index ("PPI") and the

[1] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments, signed on November 14, 1991, which entered into force on October 20, 1994.

enactment of Law No. 25.561 which nullified PPI adjustments and the calculation of tariffs in dollars of the United States of America (the "ancillary claim").

6. On March 28, 2003, pursuant to Article 46 of the ICSID Convention, the Centre forwarded the new Request to the Arbitral Tribunal to determine whether to receive it as an ancillary claim to the stamp tax claim. On the same date, the Tribunal requested the Argentine Republic to submit any observations that it may have in this respect. On April 15, 2003, the Argentine Republic presented its observations concerning the Claimants' new Request for Arbitration. On April 25, 2003, after having examined the observations submitted by both parties in this respect, the Tribunal decided to accept the new Request for Arbitration as a claim ancillary to the stamp tax claim in accordance with Article 46 of the ICSID Convention, and to have both cases proceed on separate tracks until the Tribunal has decided on jurisdiction with respect to both claims. In its communication, the Tribunal also proposed an expedited procedure to the parties for filing their submissions on jurisdiction in connection with the ancillary claim.

(i) The Stamp Tax Claim

7. With respect to the "stamp tax claim", after receiving the Claimants' Request for Arbitration, on April 5, 2001, the Centre requested the Claimants to explain how each of the two Claimants in the present case would meet the conditions for registration of the Request. On April 6, 2001, the Claimants satisfied this request from the Centre.

8. Pursuant to Article 36(3) of the ICSID Convention, on April 11, 2001, the Secretary-General of the Centre registered the Request. On the same date, in accordance with Institution Rule 7, the Secretary-General notified the parties of the registration of the Request and invited them to proceed to constitute an arbitral tribunal as soon as possible.

9. On April 12, 2001, the Claimants submitted a proposal for the number of arbitrators and the method of their appointment. Under the Claimants' proposal, the Tribunal would consist of three arbitrators, one arbitrator to be appointed by each party and the third, who would be the President of the Tribunal, to be appointed by agreement of the parties.

10. On April 25, 2001, the Argentine Republic notified the Centre of its agreement to the Claimants' proposal concerning the number of arbitrators and the method of their appointment. In those circumstances, on April 27, 2001, the Centre confirmed that the Arbitral Tribunal in the present case would consist of three arbitrators, one arbitrator appointed by each party and the third, who would serve as the President of the Tribunal, to be appointed by agreement of the parties.

11. On May 11, 2001, the Claimants appointed Mr. Pierre-Yves Tschanz, a Swiss national. On July 10, 2001, the Argentine Republic appointed Dr. Héctor Gros Espiell, a national of Uruguay. The parties, however, failed to agree on the appointment of the third, presiding, arbitrator. By letter dated August 30, 2001, the Claimants requested that the third, presiding, arbitrator be appointed pursuant to Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules").

12. In those circumstances, and after consulting the parties, Professor Francisco Orrego Vicuña, a Chilean national, was appointed by the Centre as the third presiding arbitrator. Pursuant to Rule 6(1) of the Arbitration Rules, on November 1, 2001, the Secretary-General notified the parties that all three arbitrators had accepted their appointment and the Arbitral Tribunal was therefore deemed to have been constituted on that date. On the same date, in accordance with ICSID Administrative and Financial Regulation 25, the parties were informed that Ms. Claudia Frutos-Peterson, ICSID Counsel, would serve as Secretary of the Arbitral Tribunal.

13. The first session of the Tribunal with the parties was held on December 5, 2001, in Washington, D.C. During the first session, the parties agreed that the Tribunal was

properly constituted in accordance with the ICSID Convention and the Arbitration Rules and that they did not have any objections to any members of the Tribunal.

14. During the first session, the parties also agreed on several procedural issues, which were later reproduced in the written minutes signed by the President and the Secretary of the Tribunal. Regarding the written phase of the proceedings, the Tribunal, after consulting with the parties in this respect, fixed the following time limits for the presentation of the parties' pleadings: The Claimants would file a memorial within 90 days from the date of the first session; the Respondent would file a counter-memorial within 90 days from its receipt of the Claimants' memorial; the Claimants would file a reply within 60 days from their receipt of the Respondent's counter-memorial and the Respondent would file a rejoinder within 60 days from its receipt of the Claimants' reply. It was further agreed that if the Respondent raised any objections to jurisdiction the following alternative tentative schedule would apply: The Respondent would file a memorial on jurisdiction within 45 days from the receipt of the Claimants' memorial on the merits; the Claimants would file a counter-memorial on jurisdiction within 45 days from their receipt of the Respondent's memorial on jurisdiction; the Respondent would file a reply on jurisdiction within 30 days from its receipt of the Claimants' counter-memorial on jurisdiction, and the Claimants would file a rejoinder within 30 days from their receipt of the Respondent's reply on jurisdiction.

15. On January 14, 2002, the Claimants requested a suspension of the proceedings for six months in order to explore the possibility of settling the dispute through direct consultations with the authorities appointed by a new government of the Argentine Republic. By a letter dated January 30, 2002, the Argentine Republic informed the Centre that it did not consider necessary that the proceedings be suspended at this stage.

16. On January 31, 2002, the Claimants requested the suspension of the proceedings for a period of six months in order to obtain certain internal authorizations to continue with the

arbitration. On February 5, 2002, the Tribunal requested the Argentine Republic to present any observations in this respect. The Argentine Republic presented its observations on February 18, 2002, agreeing to an extension of only three months. On February 25, 2002, the Tribunal issued Procedural Order No. 1, granting an extension of 90 days, from the date of the Procedural Order, for the Claimants to obtain the relevant authorization to continue with the proceeding.

17. On May 22, 2002, the Claimants informed the Tribunal that they had been authorized to proceed with the arbitration and requested an extension until August 1, 2002 to file their memorial on the merits. On May 29, 2002, the Tribunal granted the extension sought by the Claimants. In its communication, the Tribunal noted that the Argentine Republic would, if it requested, be entitled to the same time extension granted to the Claimants to file its counter-memorial on the merits.

18. On August 1, 2002, the Claimants filed their memorial on the merits and accompanying documentation. On December 13, 2002, the Argentine Republic notified the Tribunal that it would be using part of the extension granted by the Tribunal in its letter of May 29, 2002 to file its memorial on January 15, 2003. Pursuant to ICSID Arbitration Rule 41(1), on January 15, 2003, the Argentine Republic filed a memorial raising objections to the jurisdiction of the Centre and the competence of the Tribunal.

19. On January 21, 2003, in accordance with ICSID Arbitration Rule 41(3), the proceedings on the merits were suspended by the Tribunal.

20. On March 5, 2003, the Claimants requested an extension of time to file their counter-memorial on jurisdiction. On the same date, the Tribunal invited the Argentine Republic to provide its observations to the Claimants’ request. The Argentine Republic presented its observations on March 7, 2003. On March 11, 2003, the Tribunal granted the extension sought by the Claimants and informed the parties that the Argentine Republic

would be granted an extension on the same terms to file its reply on jurisdiction if it so requested.

21. On March 31, 2003, the Claimants filed their counter-memorial on jurisdiction. Thereafter, on May 20, 2003, the Argentine Republic filed its reply on jurisdiction and on June 26, 2003 the Claimants filed their rejoinder on jurisdiction.

22. The hearing on jurisdiction took place in Paris on September 3-4, 2003. At the hearing the Claimants were represented by Messrs. R. Doak Bishop (King & Spalding, Houston), Guido Santiago Tawil (M. & M. Bomchil, Buenos Aires), Craig S. Miles (King & Spalding, Houston) and Ignacio Minorini Lima (M. & M. Bomchil, Buenos Aires); all of whom addressed the Tribunal on behalf of the Claimants. The Respondent was represented by Messrs. Carlos Ignacio Suárez Anzorena, Jorge Barraguirre and Ms. Beatriz Pallarés, all from the office of the Procuración del Tesoro de la Nación Argentina. Mr. Suárez addressed the Tribunal on behalf of the Argentine Republic. During the hearing, the Tribunal also put questions to the parties in accordance with ICSID Arbitration Rule 32(3).

23. On January 14, 2004, the Tribunal issued its unanimous Decision on Jurisdiction concerning the Claimants' original claim. In its Decision, the Tribunal rejected the Respondent's objections to jurisdiction. On this basis, the Tribunal concluded that the Centre had jurisdiction and that the Tribunal was competent to consider the dispute between the parties concerning the original claim in accordance with the provisions of the Argentina-U.S. BIT. On the same day, the Tribunal issued its Procedural Order No. 2 declaring the continuation of the proceeding on the merits, regarding the original claim.

24. Certified copies of the Tribunal's Decision on Jurisdiction were distributed to the parties by the Secretary of the Tribunal.

25. In accordance with Procedural Order No. 2, on May 17, 2004, the Respondent filed its counter-memorial on the merits.

(ii) The Discontinuance of the Stamp Tax Claim

26. On May 28, 2004, the Claimants requested the suspension of the proceeding concerning the Claimants' original claim for a period of six months in order to verify if certain decisions currently before the courts in Argentina could have an effect in the Claimants' original claim. On June 1, 2004, the Tribunal requested the Argentine Republic to present its observations to Claimants' request. On June 8, 2004, the Argentine Republic presented its observations accepting to suspend the proceedings, but requested the suspension to be for a period of eighteen months. On June 10, 2004, having examined the positions of both parties, the Tribunal issued its Procedural Order No. 3, declaring the suspension of the stamp tax claim for a period of eight months. Thereafter the parties successively agreed and the Tribunal granted, by letters of February 25 and September 8, 2005, further suspensions of the stamp tax claim for a period of six and four months respectively.

27. On December 8, 2005, at the end of the hearing on the merits for the ancillary claim, after having heard the position of the parties, the Tribunal issued a Procedural Order on Discontinuance of the Stamp Tax Claim embodying the parties' agreement on the discontinuance, without prejudice to the merits of the proceeding of the stamp tax claim.

28. In its Procedural Order on Discontinuance the Tribunal declared, among other things, that the discontinuance of the stamp tax claim shall in no way affect the disposition of the ancillary claim. The Procedural Order decides as follows:

> 1. The proceeding of the Stamp Tax Claim is hereby discontinued without prejudice to the Parties' claims on the merits;
>
> 2. Either Party shall be entitled to file the Stamp Tax Claim as a new proceeding with ICSID;
>
> 3. In such new proceeding,

- the Parties shall remain bound by the decision on jurisdiction rendered by the Arbitral Tribunal in the Stamp Tax Claim of January 14, 2004,

- the arbitral tribunal to be appointed shall have the same members as currently the Arbitral Tribunal -- or if one or more arbitrators become unavailable for any reason he shall be replaced by using the method in which he was appointed,

- the memorials, evidence and other submissions already submitted in the Stamp Tax Claim shall become part of the record;

4. The discontinuance of the Stamp Tax Claim shall in no way affect the disposition of the Ancillary Claim;

5. The costs incurred in the Stamp Tax Claim until its discontinuance shall be borne in equal shares by the Parties.

(iii) The Ancillary Claim

29. As noted above, the Tribunal proposed an expedited schedule to the parties for filing their submissions on jurisdiction in connection with the ancillary claim. Based on this schedule, Argentina filed its memorial on jurisdiction on August 20, 2003, while the Claimants filed their counter-memorial on jurisdiction on October 17, 2003. On November 19, 2003, Argentina filed its reply and on December 22, 2003, the Claimants filed their rejoinder.

30. Subsequently, a hearing on jurisdiction regarding the ancillary claim was held in Paris, on April 1 and 2, 2004. At the hearing the Claimants were represented by Messrs. R. Doak Bishop and Craig S. Miles from the law firm of King & Spalding, Houston, United States, as well as by Messrs. Guido Santiago Tawil, Alix M. Martínez and Ms. Silvia M. Marchili from the law firm of M. & M. Bomchil, Buenos Aires, Argentina. Messrs. Bishop and Tawil addressed the Tribunal on behalf of the Claimants. The Argentine Republic was represented by Ms. Cintia Yaryura, Ms. Ana Badillos, and Mr. Ignacio Pérez Cortés from the office of the Procuración del Tesoro de la Nación Argentina. All of them addressed the Tribunal on behalf of the Argentine Republic.

31. During the hearing, the Tribunal also put questions to the parties in accordance with ICSID Arbitration Rule 32(3).

32. On August 2, 2004, the Tribunal issued its unanimous Decision on Jurisdiction concerning the ancillary claim rejecting the Respondent's objections to jurisdiction. In its Decision the Tribunal concluded that the Centre had jurisdiction and that the Tribunal was competent to consider the dispute between the parties regarding the ancillary claim in accordance with the provisions of the Argentina-U.S. BIT. Certified copies of the Tribunal's Decision on Jurisdiction were distributed to the parties by the Secretary of the Tribunal.

33. On August 18, 2005, after an exchange between the parties, the Tribunal issued Procedural Order No. 4, ordering the continuation of the proceeding concerning the ancillary claim. The ancillary claim constitutes the object of the present Award on the merits.

2. *Procedure Leading to the Award on the Merits*

34. Pursuant to the Tribunal's Procedural Order No. 4, on November 17, 2004 the Claimants submitted their memorial on the merits while the Respondent submitted its Counter-memorial on March 7, 2005. On May 6, 2005, the Claimants submitted their Reply on the merits and on July 7, 2005, the Respondent submitted its Rejoinder.

35. After consulting with both sides, the Tribunal by letter dated June 15, 2005 informed the parties that the hearing on the merits would be held at the seat of the Centre in Washington D.C. from November 28, 2005 to December 8, 2005.

36. The hearing was held as scheduled. At the hearing the Claimants were represented by Messrs. Doak Bishop, Craig S. Miles, Martin Gusy and Ms. Zhennia Silverman of the law firm of King & Spalding LLP Houston, United States; Messrs. Guido Santiago Tawil,

Hector M. Huici and Ms. Silvia M. Marchili of the law firm of M & M Bomchil, Buenos Aires, Argentina. The Respondent was represented by Messrs. Osvaldo César Guglielmino, Gustavo Scrinzi, Jorge Barraguirre, Félix Helou, Ignacio Pérez Cortéz, Tomás Braceras, Rodolfo Alberto García Bollini, Rodrigo Ruíz Ezquide, Fabián Markaida, Carlos Winograb and Mesdames María Luz Moglia, Leticia Sierra Lobos and Alicia Federico, all from the Procuración del Tesoro de la Nación Argentina, Buenos Aires, Argentina.

37. As indicated by the Tribunal, on February 28, 2006 the parties filed their post-hearing briefs.

38. In the course of the hearing, the Tribunal and the parties discussed the possibility of retaining independent expert advice to better understand the underlying assumptions and methodology relied upon in the valuation reports offered by the parties' experts. After a brief exchange between the parties and the Tribunal as to the appointment of the independent expert, the Tribunal by letter dated March 16, 2006, appointed Mr. Luis Hernán Paul, a Chilean engineer, finance consultant and professor of economics, as its expert.

39. On May 26, 2006, Mr. Héctor Gros Espiell submitted his resignation as an arbitrator. On the same date, a vacancy on the Tribunal was announced by the Centre, and pursuant to ICSID Arbitration Rule 10(2), the proceeding was suspended. On July 10, 2006, after consulting the parties, the Chairman of the Administrative Council appointed Professor Albert Jan van den Berg, a Dutch national, as arbitrator in accordance with ICSID Arbitration Rule 11(2)(a). On July 11, 2006, the Tribunal was reconstituted and the proceedings were resumed.

40. On October 30, 2006, the Claimants submitted to the Tribunal an Application for Provisional Measures requesting the Tribunal to order the office of the Procurador del Tesoro de la Nación Argentina "to cease its actions (or inactions) with respect to the

ENARGAS file and exercise all deliberate dispatch to ensure the resumption of Claimants' right to consummate the CIESA swap and their right to manage, control and dispose of their CIESA/TGS shares". Subsequently, the Claimants' request for provisional measures was slightly modified requesting the Tribunal to order "Argentina to exercise all deliberate dispatch to ensure approval of the second stage of the CIESA swap and to refrain from taking any further act itself or through any of its agencies that aggravates the present dispute." After hearing the Respondent's observations in this respect, the Tribunal dismissed on December 13, 2006 the Claimants' request for lack of jurisdiction over the subject matter of the requests made, either in its original or in its modified versions.

C. Considerations

Argentina's Privatization Program

41. Beginning in 1989, the Government of Argentina undertook a vast program of privatization of State-owned companies, including, among other key sectors of the economy, gas transportation and distribution. With a view to restructure the Argentine economy, the Currency Convertibility was introduced in 1991 (Law 23.928) and the Argentine peso was fixed at par with the United States dollar (Decree 2128/91). Various other measures were directed at opening the economy to foreign trade and investments, including most significantly among them the policy of negotiating bilateral investment treaties with many countries.

42. New rules governing gas transportation and distribution were introduced in 1992 by the Gas Law (Law 24.076) and the implementing regulations embodied in de Gas Decree (Decree 1738/92). Under this regulatory framework, gas transportation was separated

from distribution. Two major transportation companies were created to this effect, resulting in Transportadora de Gas del Sur ("TGS") and Transportadora de Gas del Norte ("TGN"), while eight other companies were established for gas distribution. This award concerns the dispute arising from the Claimants' investment in TGS.

43. In order to facilitate the process of privatization, a Standard Gas Transportation License or "Model Licence" was approved by Decree 2255/92 including the applicable Basic Rules; all such rules were embodied in the License actually signed by TGS and the Government of Argentina and approved by Decree 2458/92. The duration of the License is of 35 years, leading up to 2027. An "Information Memorandum" concerning the privatization of Gas del Estado, the former State-owned transportation and distribution company, together with a "Pliego" explaining the bidding rules and the legal and contractual arrangements, were provided to prospective investors so as to organize the bidding process. The parties dispute the legal significance of these information materials. Discussions to attract investors were held with prospective foreign investors in Argentina and abroad, while the broad program of bilateral investment treaties noted was simultaneously undertaken with a view to provide guarantees to such investments.

44. The Claimants explain that in making the decision to invest in TGS, they relied specifically on the conditions offered by these various legislative and regulatory enactments. These conditions, the Claimants assert, included the calculation of tariffs in US dollars; their semiannual adjustment according to changes in the US Producer Price Index ("PPI"); the commitment that there would be no price freeze applicable to the tariff system and, if one was imposed, the licensee had a right to compensation; the commitment that the license would not be amended by the Government, in full or in part, except with the prior consent of the licensee; a 35-year license, with the possibility of a 10-year extension; and the commitment not to withdraw the license except in case of specific breaches listed.

45. All of the above, the Claimants maintain, was in turn related to the setting of gas tariffs at a level that would ensure operators with sufficient revenues to cover all reasonable costs, taxes, depreciation and a reasonable profit. In this context, the Claimants assert, the Government of Argentina made additional representations concerning the immediate and automatic adjustment of tariffs in case the parity between the dollar and the peso would experience a variation, the use of the New York exchange rate for adjustments, and the passing through to consumers of all cost variations resulting from changes in tax provisions.

46. The Government of Argentina, as will be discussed further below, has a different understanding about the meaning and extent of these various elements of the legal and regulatory framework.

Claimants' investment in TGS

47. The Claimants' investment in TGS has evolved over time by means of a number of complex transactions. It began in 1992 when Enron Pipeline Company Argentina S. A. ("EPCA"), an indirectly wholly-owned subsidiary of Enron, formed with three other companies a bidding consortium to submit a bid for TGS. The Consortium was awarded 70% of the shares of TGS. Ultimately, in order to comply with the requirement that an Argentine company should hold the shares in TGS, the Consortium incorporated Compañíа de Inversiones de Energía S. A. ("CIESA"), which became the holder of the 70% of the shares awarded. Each of the four members of the Consortium acquired a 25% interest in CIESA, and consequently, through CIESA, an indirect 17.5% interest in TGS.

48. The purchase price for the 70% of the shares of TGS is put by the Claimants at US$561,189,000. The Consortium contributed to CIESA first US$305,000,000 (or US$76,250,000 for each member) and later the balance of US$256,189,000 (or

US$64,047,250 for each member). In respect of the first contribution, the Claimants explain that Enron made a direct cash contribution of US$7,625,000 to CIESA, while the balance of US$68,625,000 was satisfied through a loan to CIESA by Chase Manhattan Bank, which Enron guaranteed. The Tribunal must note at this point that this loan became a crucial issue in the discussions on valuation that will be addressed further below. It is further explained that in respect of the second contribution, Enron contributed its total share by means of Argentine foreign and domestic debt securities[2].

49. EPCA in turn qualified as a member having the technical operation expertise required by the regulations. In this capacity it entered into a Technical Assistance Agreement with TGS. EPCA also contributed, it is explained by the Claimants, US$21,900,000 to CIESA in the form of a direct payment to the Chase Manhattan Bank in partial satisfaction of the loan referred to above.

50. In 1996, both Enron and one other member of the Consortium purchased an additional 25% interest in CIESA from another member, each paying US$117,500,000. Enron thus became the indirect owner of a 37.5% interest in CIESA and, through it, of a 26.25% interest in TGS.

51. Also in 1996 Enron and one other member purchased the remaining 25% of the shares of CIESA from another shareholder, for a total price of US$ 249,150,000, of which Enron paid its share by two transfers of funds. Enron thus became the indirect owner of 50% interest in CIESA and, through it, of 35% interest in TGS.

52. Other transactions made in 1999 between CIESA's shareholders and their subsidiaries, and the purchase of publicly traded shares of TGS by EPCA in the amount of US$ 7,000,170, according to the Claimants, resulted in Enron becoming the indirect holder of a 27.65% interest in TGS through its 50% participation in CIESA, the indirect holder of

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[2] Witness Statement of K. George Wasaff of November 12, 2004, paras. 22-31.

an additional 7.593% interest in TGS through its participation in the subsidiary company EDIDESCA and the indirect holder of 0.02% in TGS through its participation in EPCA. The aggregate of Enron's interest in TGS at this stage is thus claimed to be 35.263%.

53. The evolving structure of ownership, however, does not end there. Enron's participation in TGS, while remaining the same in respect of CIESA, changed again in respect of both the subsidiaries EDIDESCA (7.62%) and EPCA (.23%), thus totaling (through Ponderosa) an indirect ownership of 35.5% interest in TGS, as explained by the Claimants.

54. Additional transactions took place in 2005 and 2006. The first of these transactions, the *Rawhide* or *Ponderosa Settlement* and the parallel *CIESA Settlement*, was executed in part on August 29, 2005 and resulted in reducing Ponderosa's interest in TGS from 35.5% to 20.7% in the Claimants' estimate, a figure which the Respondent puts at 19.5%. In view of the fact that the parties have constantly referred to a 19.5% in this proceeding, the Tribunal will use this last figure for ease of reference. This reduction involved complex arrangements under which the Claimants and related subsidiaries, by means of an exchange of shares through a trusteeship agreement, transferred their participation in CIESA to Petrobras and others of its various subsidiaries, acquiring from them a direct participation in TGS of 11.65% that together with Enron's participation of 7.85% through its subsidiaries totaled 19.5%. On January 27, 2006, the Claimants sold shares representing 15.2% of TGS to D. E. Shaw Laminar Emerging Markets LL. C. for US$114.6 million, with an option to buy the remainder of the Claimants' shares in TGS (*i.e.*, 4.3%) for US$33.9 million.

55. The Government of Argentina, while not disputing that the transactions described in the preceding paragraphs took place, considers that their true meaning is different from that explained by the Claimants. The Respondent asserts that Enron could only claim for a 19.5% indirect interest in TGS, not for 35.5%, because its investment was financed in part by the loan taken by CIESA. The fact that Enron guaranteed this loan, the Respondent

maintains, does not mean that the cash flow received by CIESA from TGS would benefit Enron as it would have to be applied first to CIESA's creditors. The Respondent also argues in this respect that the 2005 transaction noted above confirms this view in so far the Claimants exchanged their nominal 35.5% indirect interest in TGS for a real 19.5% direct interest.

56. The Respondent also objects to other aspects of the Claimants' description of their investment, in particular the distinction between a regulated and a non-regulated sector of the business and the true value of the debt securities with which the purchase of the shares in TGS was paid in part. The Respondent also explains that the technical assistance agreement between TGS and EPCA was transferred to Petrobras in 2004, for an undisclosed amount, thus not allowing for any claims in this respect after the transfer date.

57. As a result of these various differences about the meaning of the investment, the Parties have also different views about the amounts that were actually involved, the returns obtained on the investment and the true measure of damages.

58. The Claimants estimate their total investment in TGS to be in the amount of US$343,954,134 and that TGS invested in Argentina's gas transportation system US$925.5 million. This, in the Claimants' view, resulted in significant improvements in the performance of the gas sector; financial gains for the Government of Argentina in terms of cash revenue from the sale of *Gas del Estado*; transfer of indebtedness; tax revenues; and low gas prices ranking among the lowest in the world.

59. The Government of Argentina has a very different view about the amounts actually invested by Enron in the indirect purchase of TGS. In the Respondent's estimate, Enron would have paid US$84.8 million for the purchase of the original 17.5% interest in TGS and an alleged US$250.4 million for the additional 18% purchased later, resulting in a total investment of US$335.1 million for the claimed 35.5% interest.

60. This, the Respondent asserts, would have resulted in benefits to the investor of US$487 million through 2004 in dividends and fees, a residual value of US$349.1 million and a rate of return on the investment of 39.4%, all of it totaling a net result of US$500 million in favor of Enron. In other estimates the rate of return on the investment for the period 1992-2004 is put at 64.1%, and at 35.9% for Enron's total participation, with net gains of US$527 million. The Claimants dispute these estimates because in their view, if a 64% return were true, it would have resulted in a cumulative staggering figure of US$7355.10 million through 2004; it is argued that the true rate of return was not more than 8.4% with a total income received by Enron of US$390.5 million, while the real damage suffered amounts to US$278.7 million to August 2000 or US$323.4 million to December 2001. The precise figures which the Claimants have requested as damages will be discussed in the context of valuation.

61. As many of these views are inextricably related to valuation issues and the conclusions of expert reports, they will be considered further below in this other context.

The measures complained of

1. No adjustment for PPI since 1999

62. Throughout the 1990s the regulatory system devised for the gas transportation sector operated without difficulties, including most significantly the periodic modification of tariffs to reflect changes in the cost of natural gas and the adjustment of tariffs, both up and down, following the variations in the US PPI. A quinquiennial tariff revision was also approved by ENARGAS, the government regulatory agency for the gas sector, for the period 1997-2002.

63. In late 1999, however, the situation began to change as the impending economic, social and political crisis evidenced its early symptoms. The political and public opinion environment was not sympathetic towards utility companies and the foreign investors therein as a consequence of tariff increases resulting from the operation of the regulatory framework, including the influence of higher natural gas prices and taxes.

64. Government officials met with industry representatives in late 1999 and early 2000 to discuss the suspension of tariff increases. As a result, an agreement was signed on January 6, 2000, postponing for six months the PPI adjustment due on January 1, 2000 and providing that the deferred increase would be recovered with interest in the period July 1, 2000-April 30, 2001 (ENARGAS Resolution 1470/00).

65. This agreement, however, proved to be short-lived. The Government insisted a few months later that tariffs should be frozen altogether for a two-year period. As a result, a second suspension agreement intervened on July 17, 2000, suspending through June 30, 2002 PPI adjustments as from July 1, 2000 and providing that the differences would be placed in an interesting-bearing stabilization fund and tariff increases would resume at the end of the suspension period, including the recovering of the deficits originating in these arrangements (Decree 669/00).

66. The Government of Argentina expressly stated in this last decree that investments connected to the privatization process were protected by the legislation in force and, in particular, by the bilateral investment treaties signed by the Government. It should be noted that while the Government of Argentina considers the above-mentioned agreements as the outcome of genuine consent by the parties, the Claimants assert that Licensees were pressured by the Government into giving their consent.

67. Not long after the second agreement, a judicial injunction was requested by the Argentine Ombudsman ("*Defensor del Pueblo de la Nación*") against Decree 669/00 on the argument that it was both unconstitutional and contrary to the law. The injunction was

granted on August 18, 2000, suspending this decree pending a ruling on the legality of the PPI adjustment mechanism, a ruling that has not been issued thus far; the Respondent has explained, however, that the injunction would have been confirmed indirectly by the Argentine Supreme Court in 2005. The injunction was appealed by both the ENARGAS and the Ministry of Economy on the argument that it would upset the economic balance of the license and alter the system of tariffs established in US dollars and their PPI adjustment, which were the instruments chosen with “the aim of luring investors” in the privatization process. The appeal was rejected on October 5, 2001.

68. On the basis of this injunction, ENARGAS directed the licensees to suspend all PPI adjustments and has rejected all requests for adjustment made since. This includes the PPI adjustment under the first agreement noted. As a result, no such adjustments have been made since 1999. This is the situation that gives rise to the first claim before this Tribunal.

69. The Government of Argentina has a different view of the ultimate meaning of this process. The Respondent explains that the PPI adjustment made sense at a time when adjustments in pesos were prohibited under the Convertibility law, because of the adverse effect that indexation had on inflation, and the US price indexes were considerably lower than those of Argentina. This, however, it is further explained, changed dramatically in 1998-1999 when the Argentine economy entered into recession and deflation, with lower costs and prices, and the US inflation became considerably higher than that of Argentina, thus making the PPI an unreasonable mechanism that would only lead to tariff increases.

70. The Respondent also explains that a PPI adjustment of tariffs on January 1, 2000 would have meant a 3.78% increase, while that due on July 1, 2000 would have meant a 6.18% increase, including the increase postponed under the first agreement noted above. This is what, in Respondent’s view, justifies the need for the agreements made with the licensees and was also the issue considered by the judge granting the injunction, together with the interests of consumers. In any event, it is asserted, the Government is only complying

with a binding judicial decision even if not agreeing with its terms. The non-adjustment of tariffs for PPI increases would thus be the result of, first, the consent of the parties and, next, the order of the judiciary.

2. The Emergency Law

71. The crisis referred to above continued to evolve and expand until major trouble became evident in late 2001. The Government of Argentina decided in that context to enact on January 6, 2002, Law No. 25.561 or the "Emergency Law", which has come to be at the heart of this and many other claims brought by foreign investors against the Argentine Republic.

72. The Emergency Law eliminated the right to calculate tariffs in U. S. dollars, converting tariffs to pesos at the fixed rate of exchange of one dollar to one peso. In addition, the Government was authorized under this Law to devalue the peso, which a few days later was fixed at a new rate of exchange of 1.40 pesos per dollar for certain transactions (mainly banking transactions) and the free market rate for all other transactions. A month later, the free market rate applied to all transactions. PPI adjustments were definitely abolished.

73. The Emergency Law also directed the Government of Argentina to begin a renegotiation process of public utility contracts affected by the measures indicated. The second quinquiennial review of gas tariffs that should have taken place in 2002 was paralyzed by ENARGAS. While the rights of licensees were expressly safeguarded under the arrangements first set up to undertake the renegotiation, gradually the Government conditioned the right to participate in this process to the abandonment of all claims (by the Licensees or their shareholders), either totally or partially according to the nature of the claim, before local courts or arbitral tribunals. Various bodies in charge of

renegotiation have been set up over time and the deadlines established have been regularly extended, the last extension leading to the end of 2007.

74. The renegotiation process has succeeded in respect of a number of public utility contracts and sectors[3], notably among them the gas producers, but has not made much progress in the gas transportation and distribution industry, except for one contract with a gas provider (GASBAN), signed in July 2005. Information about the later steps of presidential and congressional approval is not available in the record. It was explained at the hearing on the merits that this last renegotiation arrangement provides for a 27% tariff increase during the transition period and it is believed to consider a 120% increase thereafter[4].

75. Exchanges of correspondence with TGS have not borne fruit in respect of a negotiated settlement and preliminary proposals made by the Government have not met the expectations of the licensee. Claimants explain that this is due in part to the fact that the tariff adjustment proposed has been well below the minimum required by the industry and in part to the fact that none of the rights existing under the license would be reestablished and that no compensation would be paid for the losses incurred thus far. In addition, Claimants are required to withdraw legal actions and make the Government whole for any adverse decision.

76. The Claimants also explain that in spite of the fact that the Government, recognizing the difficulties many companies are going through, has on occasion been willing to authorize small emergency adjustments, these have been systematically blocked by court injunctions. The Bill on National Public Utilities introduced by the Government in Congress in 2004 has also been the cause of concern, it is maintained, because, if approved, it would result in the final and complete abandonment of the regulatory system

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[3] Witness Statement of Jorge G. Simeonoff of July 5, 2005, paras. 57-66.

[4] Remarks of Ignacio Pérez Cortés, Hearing Transcript, Vol. 1, November 28, 2005, pp. 154-157.

and conditions governing the licenses. The Claimants also argue that a trusteeship arrangement established for the expansion of the gas transportation network, although involving a tariff adjustment, does not benefit the licensees but only new investors in such scheme.

77. The Respondent attaches an entirely different meaning to the developments outlined above. It first explains that the crisis that erupted in full force in late 2001 has been among the most severe in the world, with dramatic consequences in social well-being and increased poverty, deep recession, deflation and unemployment, all of it leading to political events characterized by instability and institutional collapse. In this context, it is further explained, the Government had no other option than to enact the Emergency Law and abandon the convertibility regime.

78. The pesification of contracts and financial obligations that followed, the Respondent asserts, was applied to the Argentine economic system as a whole and did not target foreign investors in utility companies in particular, and even less did it adversely discriminate against them. In any event, it is also argued, the Emergency Law was expressly declared by Congress as one of public order so that no individual could invoke alleged acquired rights against its provisions, and as a consequence superseded all prior rules that were inconsistent with the new law.

79. The Government of Argentina also explains that the renegotiation process is gradually advancing and that a good number of contracts have been successfully renegotiated. It is further asserted that international claims have been one obstacle to the more expedient progress of negotiations. In any event, it is explained, UNIREN, the government agency presently in charge of the renegotiations, has made various offers to TGS and this company participates in various expansion projects, including the trusteeship arrangement mentioned above and other partial agreements to this effect, all of which result in benefits to the company.

I. DAMAGING EFFECTS CLAIMED

80. The Claimants sum up the damaging effects of the measures described in two major areas of the business. The first is the inability to secure international financing as a result of TGS having been unable to restructure its debt of over US$1 billion and the ensuing default on the payments due. It is explained that as a consequence TGS was rated D (default) by Standard & Poor's credit rating[5].

81. The second area the Claimants explain has suffered major damages is that concerning the revenues and the value of the company. According to the Claimants, the unavailability of PPI adjustments for 2000-2001 alone led to a loss of revenue in the amount of US$15.8 million. The emergency measures, it is also maintained, have decreased the value of the regulated business of the company in more than US$1 billion, decreasing from a value of US$1.68 billion it had in December 2001 to US$651.3 million, less than the debt associated with the regulated business and thus resulting in a total loss of the equity value. It must be noted that the Claimants make a sharp distinction between the regulated part of the business and the non-regulated part of the business, a question that will be examined further below.

82. The Government of Argentina also believes differently in this regard. It is first argued that TGS must be considered as a business as a whole, including both the regulated sector of gas transportation and the non-regulated sector of production of Liquified Natural Gas (LNG), as both were subject to the privatization. The LNG Plant of *Complejo Cerri* (Bahía Blanca), as well as the midstream services provided in preparing gas for its injection in the gas transportation network and the construction, operation and

[5] Witness Statement of Eduardo Ojea Quintana of November 16, 2004, paras. 185-216.

maintenance of gas pipelines through subsidiaries, form an integrated whole and hence must also be computed in the value of TGS.

83. The Respondent explains that the revenues of the non-regulated sector alone have increased 420% in US dollars in the period 1993-2004, while its incidence in the total income of TGS has been constantly increasing. It is thus the case, it is further asserted, that TGS benefited from the devaluation, while its costs were pesified and international prices increased. Moreover, it is explained, TGS is the principal exporter of LNG in Argentina.

84. A second aspect that leads the Respondent to differ from the actual damages claimed is that since the outset TGS adopted an aggressive financial policy, which by 2001 meant that 50% of the company's assets had been financed with debt. This is contrasted with the tariff calculation which assumed that 33% of assets would be debt-financed, a figure that was increased in the first quinquiennial tariff revision to 36.6%. This policy, the Respondent argues, allowed the company to distribute generous dividends and pay significant fees, which totaled US$ 1,354 million or 97% of the accumulated earnings. ENARGAS duly warned, it is also explained, about the implications of this policy and about changes in depreciation periods. The result of it was, in the Respondent's view, that the crisis impacted on TGS more significantly than would have been the case with a prudent financial policy.

85. The Respondent concludes in this matter that TGS has today a value 40% higher than before the emergency measured on the stock market value of its shares, or US$668.29 million. In the Respondent's estimates, TGS earned approximately US$1.2 billion on the amount invested or 325%. The Government of Argentina also asserts that the indebtedness resulting from CIESA's financial policy noted above should be taken into account.

86. Some of the issues related to the discussion of damages have legal implications while all of them have valuation implications. These various aspects will also be discussed further below.

II. LEGAL CLAIMS AND DEFENSES

87. The Claimants maintain that the various measures complained of have resulted in the violation of specific commitments made to the investors and the contractual obligations the Government undertook under the License, all of it in a manner contrary to the applicable legal and regulatory framework and the specific guarantees provided under the Argentina-United States bilateral investment treaty. All such commitments and guarantees were determinative of the decision to invest in TGS, the Claimants also argue.

88. These commitments, the Claimants assert, include in particular the right to calculate the tariffs in US dollars, the semi-annual adjustment in accordance with the variation of the US PPI and the quinquiennial review of tariffs. In addition, the Claimants also maintain, the obligation not to freeze tariffs or subject them to price controls, or if done so to compensate the licensee, as well as the obligation not to alter the License without the consent of the licensee, were prominent guarantees under the License.

89. As all the measures complained of originate in actions of the Government of Argentina or attributable to it, the Claimants further state, a wrongful expropriation of the investment has ensued, both in the form of direct and of indirect or creeping expropriation. It is also claimed that fair and equitable treatment and legitimate expectations have been violated, arbitrariness and discrimination have characterized the measures adopted, and full protection and security have not been provided to the investors. It follows, in the Claimants' view, that all the guarantees provided under the Treaty have been breached.

90. The legal defense of the Respondent is principally based on the argument that the legal and regulatory framework governing the privatization provided only for the right of the licensee to a fair and reasonable tariff and that the right to the calculation of the tariffs in US dollars was a feature that could last only as long as the Convertibility Law was in force, but not if this law was abandoned at some point in time.

91. The Respondent also argues that if the investors relied on the information conveyed by private consulting firms, such as that contained in the Information Memorandum, this cannot be attributed to the Government which expressly disclaimed any responsibility for such information.

92. In addition, the Respondent explains, the Government has the duty to take into account the interests of the consumers in regulating a national public service such as the transportation of gas, a function which is within the ambit of discretionary Government powers.

93. In the view of the Government of Argentina, the legal and regulatory framework of Argentina has been strictly enforced in adopting the measures in question and none of it involves a breach of the Treaty. Moreover, it is also maintained, the Government's responsibility is excluded both under the Argentine legislation and jurisprudence on emergency and under the rules of international law governing the state of necessity, whether customary or contained in the bilateral investment treaty.

94. The legal claims put forth by the Claimants and the defenses opposed by the Respondent will be examined in the necessary detail in connection with each of the specific measures complained of.

III. THE PPI CLAIM

95. The first claim the Tribunal needs to consider is that concerning the semi-annual adjustment of tariffs in accordance with the US PPI, a claim which originates in the measures adopted in 2000-2001, continued under the Emergency Law and kept unchanged since.

96. The Claimants argue in this respect that this adjustment is a right guaranteed under Article 41 of the Gas Law, which provided for the adjustment of tariffs "in accordance with a formula based on international market indicators", and was further confirmed by the Basic Rules, which, as explained in the Information Memorandum invoked by the Claimants, was specifically related to the US PPI. As such, the Claimants assert, it is a vested right and was so recognized under Decree 669/00 noted above in describing this adjustment as a "legitimately acquired right". This adjustment mechanism, the Claimants maintain, was an essential feature of the tariff system devised for the privatization, as it would prevent erosion of the US dollar value of the tariffs, and its suspension and abandonment was related to purely political reasons, thus causing a substantial loss.

97. The Government of Argentina explains that the situation was different. Article 41 of the Gas Law, it is argued, expressly related the adjustment to the change in value of goods and services of the industry. The US PPI made sense, the argument follows, at the beginning of the privatization process when the US indexes were lower than those of Argentina, but lost any meaning when the situation in Argentina was reversed and the economy went into recession, and deflation. As noted above, the Respondent explains that any US PPI indexation would have resulted in higher tariffs at a time when the economy was experiencing serious difficulties and later ended up in a major crisis.

98. The Respondent also argues in this connection that the purpose of the US PPI adjustment was only to reflect the evolution of changes in costs and not to ensure a given value of tariffs in US dollars. The costs considered, in the Respondent's view, unlike what the

Claimants believe, include operational costs which are a part of the concept of fair and reasonable tariffs according to the Gas Law.

99. In any event, it is also maintained by the Respondent, the suspension of the adjustment was first agreed with the licensees and next ordered by the judicial injunction of August 2000, which came to be indirectly confirmed by the Argentine Supreme Court on May 24, 2005[6]. The fact that the Government appealed the injunction on arguments which were shared by the Claimants, it is also maintained, does not mean that the Government should at present ignore the decisions of the Argentine judiciary in dismissing the appeal and later in indirectly confirming such injunction, as it is its duty under the Argentine Constitution and administrative law[7].

100. The parties also differ on the meaning of the ENARGAS Resolution that ordered the observance of the judicial injunction of August 2000 (Resolution 3480/00). In the Claimants' view, such Resolution went beyond the judicial suspension which only referred to the adjustments embodied in the second agreement, that is those due as from July 1, 2000, but not to what had been agreed for the first semester in the first agreement. On these bases, the Claimants requested the reconsideration of the ENARGAS Resolution, but this request was denied. The Respondent explains that the Resolution in question only informed the Licensee that the injunction should be observed and the tariffs managed accordingly.

101. The Tribunal must first note that it is correct that Article 41 of the Gas Law, while providing for adjustment of tariffs in accordance with a formula based on international market indicators, also related this formula to the change in value of goods and services. The formula, however, was not defined under the Law. This task was left to the Basic Rules of the License, which provided in this connection that tariffs were to be adjusted

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[6] Respondent's Exhibit no. 225.

[7] Legal Opinion of Julio Rodolfo Comadira of June 2005, para. 177.

semi-annually in accordance with the US PPI. This was also the information conveyed to investors by the Information Memorandum.

102. The Tribunal is persuaded that such understanding was also the Government's view at the time and for almost a whole decade. This explains that Decree 669/00, dealing specifically with this mechanism, referred to the adjustment under it as a "legitimately acquired right", thus involving an unequivocal recognition of the existence of such a right.

103. Even if the Information Memorandum was in fact prepared by private consultants and the responsibility of the Government was expressly disclaimed, if it had been in error in this respect, what is not quite likely in the case of highly prestigious consulting firms engaged by the Government to explain the privatization plan to prospective foreign investors, such error would not have passed unnoticed to competent government officials. In such case, moreover, the Government would have been under the duty to issue a clarification, as otherwise a false legitimate expectation would have been created. No such clarification was ever issued until the US PPI was first suspended and next discontinued under the Emergency Law. It is thus the conclusion of the Tribunal that the licensees had a right to the US PPI adjustment under both the regulatory framework and the License, confirmed by the context and the practice of the privatization.

104. This is not to say that the Government did not have the sovereign authority to change its mind later, as in fact it did. The rationale for this change might be perfectly reasonable in light of changing economic conditions in the country, a matter which is not for the Tribunal to judge. But even to this end, the Government had mechanisms available under the License and the regulatory framework, including the quinquiennial tariff revision. One such revision had already taken place ("RQT I") and one other was in preparation to govern the tariffs precisely as from 2002 ("RQT II"), but this was never finalized. If the Government decided to take a different route, this cannot be to the detriment of investors' rights and any ensuing damage must be compensated if legally justified.

105. The meaning of the ENARGAS Resolution adopted in connection with the judicial injunction of PPI adjustments must be understood in the context of what such injunction aimed at. While the Claimants are right in pointing out that the injunction did not refer to adjustments related to the first agreement, the fact of the matter is that the injunction in question sought to suspend the increase of tariffs in general. ENARGAS cannot be faulted for having so understood. It must be kept in mind that the undertakings of the first agreement would have also begun to materialize in the second semester of 2000, the period which the injunction was considering.

IV. THE CLAIM ABOUT THE CALCULATION OF TARIFFS IN US DOLLARS

1. The Claimants' argument

106. The central claim in this arbitration is that concerning the alleged right to calculate tariffs in US dollars. The Claimants argue in this respect that under the Gas Law, the Gas Decree and the Basic Rules of the License, key tariff-related guarantees were offered to investors, paramount among which were the calculation of tariffs in US dollars, the US PPI adjustment, the commitment not to freeze tariffs or subject them to price control without compensation, and the obligation not to amend the License without the consent of the licensees.

107. The Claimants maintain that such guarantees were at the heart of the protection offered against currency fluctuations and an essential feature to attract foreign investors to the privatization process. The Claimants further assert that their claim is not related to an issue of devaluation, and hence also unrelated to questions arising under the Convertibility Law as the Respondent argues, but based on the breach of guarantees made

available to investors so as to keep them free from the extreme fluctuations that had historically characterized the Argentine economy, including the period immediately preceding the privatization. The Claimants believe that if such guarantees were not available at the time they were needed because of renewed fluctuations, they would be entirely futile.

108. In support of their views, the Claimants invoke in particular Article 41 of the Gas Decree, which provides that "Transportation and Distribution Tariffs shall be calculated in Dollars" (Tribunal's English translation), just as Article 9.2 of the Basic Rules indicated that the "tariff has been calculated in US dollars". It would then be expressed in pesos at the time of billing. This understanding, it is further maintained, was confirmed by the minutes of a meeting of the Privatization Committee held on October 2, 1992, stating in connection with Article 9.2 of the Basic Rules that it "makes sufficiently clear that the tariffs are in dollars and that they are expressed in convertible pesos, and, therefore, in case of an eventual amendment to the Convertibility Law, they should be automatically re-expressed at the modified parity"; this understanding made it unnecessary to include additional rules in respect of this guarantee.

109. The Claimants further invoke in confirmation of this understanding, among a number of other provisions, the wording of Annex F of the Pliego to the effect that tariffs "shall be adjusted immediately and automatically in the event that parity varies", indicating to this effect that the "quantity of Argentine currency necessary to acquire a US dollar in the New York market shall be applied".

2. The Respondent's argument

110. The Government of Argentina holds a completely different view about the meaning of the Gas Law and related provisions on this issue. It believes first that the essential provision

of the Law is that embodied in Article 2 to the effect that tariffs shall be fair and reasonable, a provision that is also reflected in Article 2 (6) of the Gas Decree in terms of the obligations which ENARGAS must ensure. The concept of a fair and reasonable tariff is associated, the Government maintains, to the objective of covering operating costs, taxes and depreciation and earning a reasonable income, all of which within the framework of an efficient operation of a satisfactory service at the minimum cost and a return similar to other activities of comparable risk.

111. In the context of such concept, the Respondent argues, the reference to the calculation of tariffs in US dollars, and related PPI adjustment, could only be understood as inextricably related to the Convertibility Law. This is confirmed, the argument follows, by the very terms of Article 41 of the Gas Law when making express reference to the fact that tariffs shall be expressed in pesos convertible under Law 23.928 (the Convertibility Law) and taking into account the parity established in Article 3 of its Regulatory Decree (Decree No. 2.128/91), which was the one to one parity between the peso and the dollar. The Respondent finds further confirmation of this link to the Convertibility Law in Article 9.2 of the License, which also referred to Article 3 of the Regulatory Decree and its eventual modifications.

112. It is thus the case, the Respondent asserts, that the mechanism envisaged only the possibility of a modification of the relationship between the peso and the dollar under the Convertibility Law, but not the situation if the Convertibility Law was altogether abandoned. In the Respondent's view, the modification of the parity under the Convertibility Law is different from the abandonment of such Law. In this last scenario, the calculation of tariffs in US dollars no longer made any sense, the Respondent believes. The Respondent also explains that this was the understanding of the Privatization Committee, which recorded in its minutes of July 17, 1992 that the parity should be adjusted in accordance with the New York market and that "the adjustment proposed does

not consider the current exchange rate as the basis, but the currency board exchange rate", concluding that "as long as Argentina does not abandon the currency board system, no tariff adjustment will be required".

113. The Respondent also reads the minutes of the Privatization Committee of October 2, 1992 referred to above, as expressly conditioning the adjustment of tariffs in case of modification of the parity to the Convertibility Law. The Respondent argues that this is so particularly because when the Committee concluded that the License offered sufficient coverage in this respect, a proposal that would have provided for adjustment in case of abandonment of the convertibility was rejected. The Respondent further maintains that the Gas Decree makes no mention at all of the possibility of abandonment of the Convertibility Law.

114. Although Annex F of the Pliego, noted above, seems to convey a broader concept of tariff adjustment in case of modification of the parity, the Respondent points out that this Annex was held to be merely descriptive, just as the Information Memorandum, on which Claimants also rely, is a non-binding document that was not prepared by the Government, and any responsibility thereunder was expressly disclaimed. It is also explained that in any event the Memorandum was prepared before the regulatory framework was enacted.

3. *Discussion of historical experience*

115. The views of the parties also differ significantly in respect of this specific claim in light of arguments concerning the historical experience of the privatization of ENTEL, the national telecommunications company. This privatization, the Respondent asserts, confirms that calculation of tariffs in US dollars was inextricably related to the Convertibility Law.

116. ENTEL was privatized under the Law on the Reform of the State, but before the Convertibility Law was enacted; originally tariffs were set in “Australes”, the Argentine currency at the time, and adjusted in accordance with the Consumer Price Index of Argentina (IPC). The Respondent explains that because the Convertibility Law froze tariffs and adjustments in pesos, the parties agreed to express tariffs in US dollars and to adjust them on the basis of the US PPI variations, but this, unlike the case of TGS, was done without specific reference to the Convertibility Law. The Respondent concludes in this respect that this evolving framework evidences that there was no exchange rate assurance given and that, consequently, the devaluation risk was not eliminated or shifted to the Government, as argued by the Claimants, and that the Respondent received no compensation for any such currency risk.

117. The Claimants reach an entirely different conclusion on this historical experience. It is first explained that the tariffs of ENTEL, even before any changes were made, included a US dollar component to temper devaluation effects that was automatically triggered if certain ratios were met, just as international services were set in Gold Francs. It is next maintained that the changes introduced after the Convertibility Law was enacted were made precisely to ensure that no adverse effects would ensue for the investors and to provide incentives for new investments.

118. In addition, the fact that the tariffs calculated in US dollars were to be billed in pesos at the exchange rate applicable at the time of billing, confirms in the Claimants’ view that the system is not related to the Convertibility Law, as they also argue in the case of TGS. It is also explained, lastly, that underwriting arrangements made with banks and the placement of remaining shares in the New York and Buenos Aires markets, resulted in additional benefits to the Government that would not have been possible had the risk of currency fluctuation not been eliminated under the tariff system.

4. The discussion about country risk

119. The parties disagree also about another regulatory issue, namely whether tariffs were higher because they included a premium for the risk that convertibility might be abandoned at some point in the future. This the Respondent equates with country risk or default risk, and argues that if the licensees were guaranteed that US dollar tariffs would be converted to pesos at the prevailing exchange rate, they would be obtaining a double benefit as the tariffs already were set higher to offset this risk.

120. In the Respondent's view, the original tariffs were established taking into consideration debt bonds of the Argentine Republic (Bonex 1989), which resulted in a higher cost of debt of 9.50%. RQT I also considered a 6.17% country risk and RQT II had envisaged a figure of 7.40% to this effect, all of it leading to additional return over the invested capital. On the basis of these arguments, the Respondent concludes that the Claimants cannot pretend to charge higher tariffs for a risk, and later, if the risk materialized, argue that such risk should not be born by them.

121. The Claimants maintain that such an argument is wrong because country risk only relates to the default on sovereign debt, which is conceptually different from the risk concerning "pesification" and the freezing of tariffs. The latter was, in the Claimants' view, allocated to the Government through the License and the tariff system envisaged, for which it was rather the investors who paid more for shares benefiting from this guarantee.

5. Discussion about an incomplete regulatory framework

122. Still one other regulatory issue divides the opinion of the parties in connection with the meaning of the tariff system. In the Respondent's view, because the regulatory framework was incomplete and did not foresee what should be done in case the Convertibility Law

was abandoned, it falls upon the Government to adapt the licenses to the new situation. This was done, it is explained, by means of the pesification of the whole economy, the dollarization of export-related tariffs and the renegotiation of contracts and licenses.

123. This, the Respondent maintains, is the duty of the Government in respect of a public utility service, and such regulatory powers are exercised in a discretionary manner as it is accepted in economic theory and judicial decisions in both Argentina and other countries, particularly if the need for adaptation results from a major economic crisis. In the Respondent's opinion, the exercise of this regulatory power in such a context cannot be considered equivalent to a unilateral derogation or amendment of the tariff regime, as argued by the Claimants.

124. The Claimants deny that the regulatory framework might be considered incomplete because all the assurances given were specifically related to the possibility that the Convertibility Law might be abandoned in the future. The only meaning of the Emergency Law in this context, it is maintained, was to unilaterally change the tariff system and related aspects. Moreover, the Claimants argue, none of the mechanisms provided under the License to undertake a tariff revision were used.

125. The Claimants also point out that the Argentine legislation itself provides all the necessary guarantees in terms of fundamental safeguards of acquired rights and legitimate expectations. Even the regulatory powers recognized to governments in cases of changed circumstances, it is also argued, are limited and subject to specific conditions, and do not reach into questions of compensation and financial advantages, least of all alter the economic balance of the contract. The Claimants also assert that it was precisely in order to provide for a clear limit to these powers that the Government included in the License the guarantee that it could only be amended with the consent of the parties and that it could not be terminated except in very specific situations. The discussion of the pertinent legal arguments will be addressed by the Tribunal further below.

126. The Claimants also contest the Respondent's views about the meaning of the Emergency Law in this context as they believe it was adopted following political motivation in a climate of hostility towards investors and that the renegotiation process that followed has not been conducive to any solution for TGS, as discussed above. Issues relating to export contracts and the question of the non-regulated business of TGS will be discussed separately.

6. The Tribunal's findings on the US dollar calculation of tariffs

127. The Tribunal is grateful to counsel for the parties for the detailed arguments with which they have assisted the Tribunal in the examination of this claim. The Tribunal finds the Claimants' arguments about the existence of a right to the calculation of tariffs in US dollars persuasive.

128. This conclusion is based first on the examination of the legal and regulatory framework. If the Gas Decree and the Basic Rules of the License unequivocally refer to the calculation of tariffs in US dollars, and such feature was also explained in the same terms by the Information Memorandum, there cannot be any doubt about the fact that this is the central feature governing the tariff regime.

129. Given the emphasis that this regulatory framework placed on the stability of the tariff structure, it is not surprising that the calculation of tariffs in US dollars, as the PPI adjustment, were assigned a significant role therein. Whether devaluation could at some time intervene was not ignored, but hardly addressed in view of the fact that stability was the principal aim and, as will be explained, the problem would be corrected by means of the automatic adjustment of tariffs to the new level of exchange rate.

130. The Respondent has devoted particular attention to the link that in its view these clauses have with the Convertibility Law. It is maintained in this respect that if tariffs were set in

US dollars independently from the Convertibility Law this would have resulted in an unreasonable, unfair and unconstitutional legal regime[8], unsustainable in Argentine courts as it would be in the courts of the United States in light of the regulatory experience of that country. Sophisticated investors and their lawyers, it is also asserted, could not have relied solely on the information conveyed by unofficial documents, such as the Information Memorandum or Annex F of the Pliego, and if they did their claims should be now held inadmissible.

131. The Respondent also relies on a witness statement to the effect that if tariffs had been set in dollars independently from the Convertibility Law, the risk of devaluation would have been placed on the consumers, which were the less prepared to face such a risk[9].

132. The Claimants have also invoked in favor of their argument decisions of the Argentine Supreme Court holding that if for political or other reasons the Government decides to maintain tariffs lower than the cost and a reasonable profit, compensation should be granted, as otherwise the assets of the company or its profits would be destroyed[10]. Claimants have also distinguished the *Maruba* case[11], invoked by the Respondent to show that there was no entitlement to the original tariff but only to a reasonable rate of return, arguing that in such case the tariff system was different, was not established by contract and there were no provisions for its amendment.

133. It is true that the Gas Decree provides that tariffs calculated in US dollars shall be expressed in pesos convertible under the Convertibility Law and that reference is made to the need to take into account the parity established under Decree 2128/91, which regulated the convertibility regime.

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[8] *Id.*, paras. 97, 106.

[9] Witness Statement of Cristian Folgar of March 5, 2005, para. 45.

[10] *Compañía de Tranvías Anglo Argentina v. Nación Argentina*, p. 569, as cited in Claimants' Reply, no. 186.

[11] *Maruba Empresa de Navegación Marítima v. Ministerio de Obras y Servicios Públicos*, Fallos 321:1784 of June 30, 1998, submitted as Respondent's Legal Authority no. 31.

134. The meaning of these provisions, however, can also be read differently. Convertibility, as the Claimants have argued, is different from the question of a given parity or exchange rate, as convertibility simply relates to the right to buy a certain foreign currency with local currency. It is the exchange rate that will determine how much local currency you will need to buy a unit of the foreign one. Because the Convertibility regime was aiming at the stabilization of the economy following a period of galloping inflation and continued devaluation of the currency, the Government of Argentina chose to do the two things at the same time. It first confirmed the right to the convertibility of the currency, which has remained unaffected. Simultaneously it pegged the peso to the US dollar at the one to one parity, while also prohibiting indexation in pesos. This fixed parity is the one no longer available following devaluation and the adoption of a floating rate system.

135. This difference is reflected in the regulatory framework with which the Tribunal is concerned. The Gas Decree indeed made a link to the first aspect in referring to pesos convertible under the Convertibility Law, but the reference to a given parity established under the Convertibility Decree was more qualified. In fact, Clause 9.2 of the License did take into account that the parity and the ratio could be amended in the future, as it expressly refers to the eventual modifications of Convertibility Decree 2128/91. Further references of the Pliego to the New York market exchange rate must be understood in the same context.

136. In reaching this conclusion the Tribunal is also mindful of the economic context in which convertibility and the ensuing privatization were introduced. Precisely because these measures were preceded by a long period of economic turmoil, investors would not be attracted to participate in the privatization process unless specific assurances were provided in respect of the stability of their arrangements. These were the specific guarantees envisaged in the calculation of tariffs in US dollars, the conversion in pesos of

the calculated amounts at the time of billing at the prevailing exchange rate and its US PPI adjustment, together with other stabilization mechanisms of contractual arrangements.

137. The distinction made by the Respondent between the modification of the convertibility regime and its abandonment is not persuasive. Guarantees and stability are meant precisely to operate when problems arise, not when business continues as usual. The tariff regime approved was devised as a permanent feature of the privatization, not a transitory one, and if it was intended to be transitory it should have also been clearly advised to prospective investors, but again nothing of the sort was done. The regulatory and contractual arrangements were thus not incomplete, as argued, and if such were the case it would certainly not have passed unnoticed to competent officials, businessmen and counsel and advisors.

138. The Tribunal must note that the discussion of the matter in the Privatization Committee was on occasions confusing. The Respondent, as noted, has invoked in favor of its argument the minutes of the Privatization Committee meeting of July 17, 1992, where few weeks after the enactment of the Gas Decree reference was made to adjustment of tariffs, not at the actual exchange rate, but at the convertibility rate, and that unless convertibility was abandoned there should be no adjustments on this basis. The minutes further added a reference to the adjustment of parity in the New York market and to an understanding of the Committee to the effect that if convertibility was abandoned licensees should be assured of adjustment according to a realistic exchange rate.

139. While these minutes could be read as allowing for adjustment under the convertibility regime and not if it were abandoned, a different reading is also justified. In fact, the Committee was discussing two different kinds of adjustment. It was first discussing the thought of an automatic adjustment in accordance with the variation of cost structure expressed in pesos, but this was ruled out as it meant an indexation forbidden under the Convertibility Law. It is in relation to this cost adjustment that reference was made to the

convertibility exchange rate and to the view that no adjustments on these bases should take place unless convertibility was abandoned and, if this was the case, a realistic exchange rate should then be found for the adjustment.

140. At the same time, the Committee was discussing an adjustment related to the parity and its eventual modifications, which was the one that finally the regulatory framework and the License included in its terms. This is the kind of adjustment that would follow the New York market exchange rate and was expressly referred to as the "adjustment for parity". This was what the Committee later addressed in the minutes of October 2, 1992, invoked by the Claimants in support of their own view, where the Committee decided to reject a proposal to the effect of expressly referring to the abandonment of the convertibility regime on the ground that Clause 9.2 of the License embodied a sufficient guarantee in connection with the adjustment at the modified exchange rate.

141. The Tribunal also wishes to consider on this point the witness statement of Mr. Patricio Carlos Perkins, who was a key official in the privatization process and the author of the initiative that the Committee addressed on October 2, 1992. In referring to the approach followed by the Government officials at the time, Mr. Perkins explains:

> "Although there was consensus in applying US Dollar-based tariff rates, the manner by which such criteria would be expressed in the official documents was a matter of some discussion.
> Government officials decided that expressing tariff rates in Convertible Pesos according to the Convertibility Act and its Regulatory Decrees was sufficiently clear and that it was not prudent to state in the official documents that Argentina could eventually abandon convertibility in the future. This was the criterion argued by Government representatives on the Committee. I wanted it stated clearly in the section of the license where the tariff rates, service terms and conditions were addressed that the tariff rates were established in US Dollars and invoiced in local currency at the exchange rate prevailing at the billing date.
> After much discussion, it was decided that the license would state that tariff rates have to be calculated in US Dollars and that invoicing would be made in Convertible Pesos […]
> Therefore, in order to attract many well-qualified bidders, the licensees were protected from this risk. It was established in item 7.1 of Annex F to the Pliegos, that in case of an eventual variation in the parity of the local

> currency to the US Dollar, tariff rates would be "immediately and automatically" adjusted."[12]

142. The Tribunal would have wished that Mr. Perkins had been examined and cross-examined on this and other aspects of his testimony, and also to put questions to him, but his participation in the hearing on the merits was regrettably prevented by an injunction issued by an Argentine judge on November 24, 2005 at the request of the Government. The Tribunal makes no inference of this situation, but decided in Procedural Order No. 5, dated December 2, 2005, that the witness' written statement was admissible and that, moreover, Mr. Perkins enjoyed and continues to enjoy the immunities provided under Articles 21 and 22 of the ICSID Convention. Quite different was the situation concerning the witness Mr. Roberto Kozulj, who after giving a written statement did not appear at the hearing providing the Tribunal with a rather vague and unsatisfactory explanation; as the witness could not be cross-examined, the Tribunal has not considered his testimony[13].

143. The conclusion of the Tribunal on this matter does not mean that it ignores economic reality and the crisis which has affected Argentina in the recent past. It is perfectly possible that economic conditions can change, as they dramatically did, and this can have a profound effect on the economic balance of contracts and licenses. In this context, the Respondent's argument that the Gas Law was principally concerned with a fair and reasonable tariff is not misconceived. To this effect, particularly if tariffs ceased to be fair and reasonable, the regulatory framework provided for specific adjustment mechanisms, tariff reviews on periodic basis and even the possibility of an extraordinary review. The issue then is not whether contracts should remain frozen forever, but whether they can be adjusted to such changing realities in an orderly manner as provided under the regulatory

[12] Witness Statement of Patricio Carlos Perkins of December 11, 2004, paras. 294-297.

[13] Remarks of R. Doak Bishop, Hearing Transcript, Vol. 1, November 28, 2005, pp. 9-10.

framework and the contract itself, including the negotiated modification of the license, or whether this will be done by unilateral action of the Government.

144. The real problem underlying the claims is that the unilateral action by the Government became the predominant feature of the process of adjustment. Broad as the regulatory authority of States and governments might be at present, it can only be exercised within the confines of the law and duly taking into account the rights of individuals. It will be seen further below that the Argentine legislation and the decisions of courts in that country have carefully set out the limits of government regulatory power in light of a long experience of economic crisis and emergency intervention.

145. In support of its view that the calculation of tariffs in US dollars is inextricably linked to the Convertibility Law, the Respondent also invokes arguments concerning the historical experience surrounding the privatization of ENTEL. The conclusions the Tribunal draws from that experience are not quite the same as those of the Respondent.

146. It is first an undisputed fact that because the Convertibility Law froze indexation in pesos and adopted other currency stabilization measures, the terms of the original privatization of ENTEL were no longer viable and had to be adapted to the new economic policy. All the changes introduced were done in agreement with the licensee, which is thus an entirely different situation from the present one. The ultimate meaning of this agreement was, as argued by the Claimants, to avoid adverse economic consequences for the licensees arising from the changed regulatory measures, which is also a proposition different from the instant case.

147. Without prejudice to the Claimants’ argument that the original tariff structure included a US dollar component and other stable value references, the fact that the new agreement provided for US dollar-calculated tariffs without reference to the Convertibility Law, far from proving that those tariffs later were inseparable from that law, such as the Respondent alleges was the case of the gas tariffs, it rather proves the contrary. If tariffs

were calculated in US dollars and converted into pesos without reference to the Convertibility Law in the case of ENTEL, it can well be read as a confirmation of the conclusion that the reference to the Convertibility Law in later arrangements was not a guarantee conditioned on a given parity. On the other hand, the fact that ENTEL's tariff was not related to the Convertibility Law did not spare this company from the consequences of the Emergency Law and related measures.

148. The Tribunal is not persuaded either by the argument concerning the premium for a country risk. That such a premium was considered in the tariff structure and RQT I is not disputed. The issue is whether this premium and the guarantee of tariff adjustment in case of a changed parity with the US dollar are compatible or they should be considered as a kind of "double dipping" by the Claimants.

149. The Tribunal concludes in this respect that country risk or default risk is related exclusively to the risk of default of a given country on its foreign debt and as such it relates to the question of the financial structure of the investment, making borrowing more costly and being compensated by means of the additional premium. The currency devaluation is a different kind of risk and responds to a different rationale, as it concerns the level of income and revenues of the company as reflected in the tariff system and its eventual adjustments. While these risks may in some way interact, for example country risk increasing as a result of currency instability, they operate independently from each other and are subject to different safeguards.

150. In the end, there are two rather simple and practical considerations which the Tribunal must also keep in mind. If a premium was provided for the country risk and this risk was the same as the devaluation risk, why allow for an additional adjustment mechanism under the regulatory framework? The second consideration is still more elementary. If the meaning of the tariff structure was not to allow for adjustment in case the original parity would be abandoned, why then bother to establish a mechanism in US dollars when

peso-denominated tariffs would have accomplished the same result? The only logical answer is that if the risks considered were the same, none of these additional mechanisms of protection would have been necessary.

Claim concerning the breach of stability clauses of the License

151. The Claimants have also argued that the measures adopted by the Respondent resulted in other breaches of the License concerning some basic guarantees about the stability of this instrument. This claim refers in particular to Clause 9.8, which prohibits the freezing, administration or control of prices, and if because of controls prices would be lower that the level resulting from the tariff, the licensee shall be entitled to compensation for the difference. The claim also refers in particular to Clause 18.2 of the License, in the terms of which the Licensor shall not amend the Basic Rules of the License, in whole or in part, without the written consent of the Licensee.

152. Two aspects must, however, be clarified at the outset. The first is a jurisdictional argument which the Respondent has reiterated in the pleadings on the merits to the effect that the investors are not the licensees and, therefore, cannot invoke the terms of a contract to which they are not parties. The Tribunal has dealt with this question in its Decision on Jurisdiction.

153. The second issue is a novel one. The Respondent has argued that as the prohibition of Clause 18.2 refers to the License not being modified by the Licensor, and the Licensor is the Executive Branch of Government, any measures or effects arising from congressional action, such as the Emergency Law, or from judicial decisions, such as the US PPI

injunction, are not adopted by the Licensor and hence not envisaged in the prohibition of unilateral modification[14].

154. Ingenuous as this argument might be it is no more than a play of words because the Executive Branch binds the State in guaranteeing certain rights to foreign investors. Furthermore, quite evidently any State action, governmental, legislative or judicial, must respect the rights acquired under a contract. If contract rights were at the mercy of other branches of the State the rule of law, under both domestic and international law, would be seriously in jeopardy, a view which is not quite likely to be accepted in an arbitration which, at least in part, is governed by international law.

155. The Tribunal must also note that Clause 18.2 of the License, in prohibiting the modification of the License makes special reference to the fact that even if an authorized modification under the Service and Tariff Regulations results in a favorable or unfavorable alteration of the economic and financial balance existing before the modification, the Licensee will have the right to request the pertinent adjustment of the tariff. It is that economic balance what the whole tariff regime purported to ensure.

Regulatory economic and financial defenses

156. In addition to the specific arguments made by the Respondent in respect of each of the claims explained above, it has also raised a number of important questions touching on economic and financial aspects that are closely related to the regulatory framework governing the investment. These defenses will be examined next, without prejudice to what will be discussed as pertinent in connection with valuation issues further below.

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[14] Respondent's Post-Hearing Brief, p. 10.

The question of leverage policy

157. The Respondent asserts that TGS has obtained an annual return of 33% over its investment and that its stock market value in Buenos Aires and New York is 40% higher in dollars than the value it had before the crisis, thus resulting in a situation that, far from meaning a drop of 78% in the value of the company, as claimed, has actually meant that the value has considerably increased.

158. The Respondent, as explained above, also maintains that the leverage policy followed by the company has had a negative impact on its equity value, which would otherwise be higher, and this is not something for which the Government is to be held liable, as the risk for having taken a large debt in foreign currency belongs to the Claimants. TGS, the Respondent believes, could have taken other more prudent options, such as debt in pesos or even in dollars in the local market, which were later pesified at a one-to-one parity, or could have diversified the risk of devaluation. This was not done, in the Respondent's view, in order to obtain higher dividends and benefit from tax advantages, an approach which was also allegedly followed by CIESA; time depreciation of assets would also have been modified in order to increase profits.

159. In this regard the Respondent argues that the tariff system envisaged under the Gas Law was geared to satisfy reasonable costs of operation, taxes, amortization and a reasonable return, but did not include financial costs, and required in addition an efficient service at the minimum cost for consumers.

160. The Respondent further asserts that the decisions of the Argentine courts have been at one in considering, in light of earlier devaluations, that the risk entailed in foreign currency obligations is a market business risk that cannot be transferred to the State. The Respondent also recalls in this respect that in accordance with Clause 2.4 of the Basic Rules the Government does not guarantee or ensures the return on the operation of the

business, and that more generally neither TGS nor the Claimants can exclude themselves from the effects of the crisis.

161. The Claimants oppose this defense on the basis that the leverage policy adopted was reasonable in light of the long-term optimal capital structure of the industry as a whole, and that it was not too different from the estimates used in RQT I and proposed for RQT II. The first envisaged a debt to capital ratio of 36.7% while TGS was at a ratio of 40.8%. The second considered 46% compared to 49.8%, respectively. It is also explained that the question of time depreciation followed the rules issued by ENARGAS, except at a point when this entity delayed the enactment of such rules.

162. In addition, the Claimants explain that the leverage of CIESA is irrelevant in this arbitration because they are claiming for their own losses and not for those of CIESA, and that, in any event, the dividend distribution policy was reasonable as it ranged between 15% and 35% of annual revenues, an approach that was never questioned by the Government when it was a shareholder of TGS.

163. The Claimants do not believe that there were relevant options to taking debt in foreign currency abroad, particularly since the Argentine financial markets did not have sufficient funds available, which was the very reason why the Government itself had to resort to foreign financial markets for its needs. Lastly, the Claimants assert that the value of TGS's shares is not representative of the value of the company, in part because the shares are extremely illiquid and its traded volumes are not significant, a question that will again be examined in connection with valuation.

164. The first question the Tribunal must address is whether the tariff included financial costs as part of their structure. There can be no doubt that this was the case. It must be recalled that Article 38(a) of the Gas Law specifically relates the income obtained to the sufficient recovery of, among other elements, depreciation (or "*amortización*"), just as Article 2(4) of the Gas Decree still more specifically provides for the recovery of all costs, "including

the cost of capital”. The Tribunal is also mindful of the fact that also the very elements of RQT I and the proposed RQT II did envisage the question of leverage in calculating the tariff, just as the original tariff structure did.

165. Whether the leverage was reasonable is not something the Tribunal is called to decide on. While ENARGAS did discuss this matter with the licensees, no claim was made that the policy followed might be contrary to the regulatory framework or the License. This was essentially a company decision and the fact that tariff calculation was to be made in US dollars and adjusted in accordance with the US PPI did provide for a reasonable assurance allowing for the option of taking debt in dollars in the international financial markets. The Tribunal is also persuaded by the argument that sufficient financing was not available in Argentina for such a large operation, which aimed precisely at attracting foreign investments in the country.

166. If the claim before the Tribunal dealt with the question of devaluation, the Respondent’s argument to the effect that devaluation falls within the sovereign prerogative of the State would be entirely appropriate. But this is not a claim about the devaluation and so has been expressly disavowed by the Claimants. It is a claim concerning the breach of the various aspects of the tariff system that have been explained above and the rights the investors have in that respect in light of the legal, regulatory and contractual commitments made.

167. The Tribunal must also conclude that the view of the Respondent to the effect that CIESA could not claim for the interest the investors had in TGS, if these were separately compensated, is correct, and if such eventual compensations were to be accumulated they would result in a “double-dipping” or double recovery. To the extent that the investors are compensated for their interest, that is the end of the matter in respect of such interest as far as the Respondent is concerned. This issue is also related to the discussion of what is precisely the interest the Claimants held in TGS, which will be addressed further below.

A. The question of export contracts

168. A second defense the Respondent raises is that TGS is a major exporter of gas in Argentina, and that Decree 689/02 expressly excluded from the pesification transportation and other contracts related to exports. It follows, in the Respondent's view, that the impact of devaluation on the company is much smaller than claimed as the tariffs in this area have been kept in US dollars and the US PPI continues to apply, with the result that such tariffs have increased by 15.89% since 2002 and returns have increased. This, the Respondent maintains, is a further confirmation that TGS, far from being affected by the abandonment of Convertibility, has benefited from it.

169. The Claimants oppose to such a defense the argument that, first, TGS's export-related revenue is insignificant as it amounts only to 1% of the total revenue of the company and, next, that the decision to exclude this activity from pesification was not taken to benefit the company but to ensure a greater flow of foreign currency into the country. It is also pointed out that ENARGAS, in rejecting a request by a foreign shipper to the effect that the PPI should not apply to export contracts, invoked arguments which are coincident with those of the Claimants, namely that transportation costs have increased as a consequence of devaluation and that investments cannot be recovered with frozen and pesified tariffs.

170. The meaning of the parties' arguments on this matter is not quite clear. The Respondent appears at some point to identify the export gas transportation business with the export of LNG, but at the same time Decree 689/02 applies to a broader range of export-related activities. On the other hand, it is not clear either whether the Claimants are addressing in this context also the revenue originating in the non-regulated sector of their business.

171. Be that as it may, the Tribunal must note that the Respondent's arguments about the meaning of the emergency are not quite consistent with Decree 689/02. By its very terms, this Decree provided that export-related tariffs would be adjusted in the manner established in the respective licenses, which is to say calculated in US dollars and adjusted by the US PPI. Thereby the Decree appears to confirm that such mechanisms did in fact survive as rights under the license in spite of the fact that the Convertibility Law had come to an end. On the other hand, if the Decree, as it is also argued, aimed at reestablishing a right which allegedly had been abrogated by the Emergency Law, it then appears to take up a certain legislative role. In any event, the Decree is certainly taking up a judicial role because it orders this reestablishment of rights as from August 2000 in spite of the fact that the judge did not so order under the injunction.

172. The Tribunal does accept the Respondent's view that the revenue originating in the export side of the business does contribute to mitigate the eventual damages arising from the measures discussed, and to that extent it should be reflected in the valuation of the company. But this is true only in respect of the regulated side of the business. To the extent that this revenue relates to the non-regulated sector it is then inseparable from the discussion about whether non-regulated business should be included in the overall valuation of the company, as argued by the Respondent, or kept entirely apart, as argued by the Claimants. The Tribunal will turn to this issue next.

B. Regulated and non-regulated business activities

173. The Respondent has also raised in its defense that if the claim for compensation refers to the Claimants' interest in TGS, such interest relates to the company as a whole, including all of its business, regulated or non-regulated, and that shares representing that interest

cannot be separated into different portions. This argument is in turn linked to the Respondent's view that the appropriate method of valuation is the value of shares in the stock market, among other reasons because when an investor purchases a share in a company it is considering the value of that share in connection with the business in its entirety.

174. The Respondent asserts in this matter that the shares transferred by the Government to TGS referred both to regulated activities, such as transportation, and to non-regulated activities, most notably the production of LNG in the plant of *General Cerri*. This decision was based, it is maintained, on the fact that technically one activity is inseparable from the other in light of both operational and geographical considerations[15], as this was expressly recognized by the Privatization Committee when discussing the proposal that the plant of *General Cerri* should be integrated into the southern transportation business unit ("*unidad de negocios de transporte del Sur*") and concluding that this recommendation was the most appropriate because of the "operational consequences of the geographical location of the plant of General Cerri"[16]. According to the Respondent's experts, it appears that such an integrated approach to the regulated and non-regulated sides of the business was also present in the debt restructuring of TGS[17], having also been explained that "the debt of the regulated and unregulated businesses are not separable"[18].

175. The Claimants believe differently. In their view, there are no physical or operational reasons why the plant in question should be included in TGS's assets and in fact neither the Privatization Committee nor TGS considered this possibility. The accounts of the non-regulated sector, it is further explained, are kept separately from those of the

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[15] Witness Statement of Charles Joseph Massano, March 2, 2005, paras. 14-21; Testimony of Charles Joseph Massano, Hearing Transcript, Vol. 4, December 1, 2005, pp. 633-637.

[16] Minutes of the Privatization Committee Meetings of October 8 and 9, 1991, Respondent's Exhibit no. 32.

[17] Expert Report of García Sánchez, Casarín, and Sarria Allende ("GSCSA Expert Report") of June 2005, paras. 19, 170.

[18] Expert statement of Javier García Sánchez, Hearing Transcript, Vol. 6, December 3, 2005, pp. 915-916.

regulated sector, as required by the applicable rules. In any event, it is also argued, in spite of the fact that the non-regulated sector benefited from the devaluation and its revenue has increased, the financial profile of TGS was significantly damaged by the measures adopted by the Government.

176. The Tribunal realizes that there are two different approaches to this question. Looked at from the point of view of the value of equity as expressed in shares, the Respondent's argument has merit. In fact, shares are not divisible and represent an interest in a company as a whole. Their stock market transactions are priced considering this whole, for better or worse. If stock market valuation is chosen as the appropriate method to determine the value of the company and eventual compensation for losses, the integration of regulated and non-regulated activities is the natural consequence.

177. There is, however, another approach. The only purpose of the claims brought to the Tribunal is to obtain compensation for losses allegedly suffered as a consequence of government measures. These measures refer only to a sector of activity which is subject to regulation. It follows that if regulated tariffs were the source of the complaint, it is only the consequence of the measures in respect of such tariffs that should be compensated. Conversely, it is quite evident that if the non-regulated sector had been affected by government measures, a claim to the effect that tariffs of the regulated activity should be increased to compensate for that loss would not be admissible. Valuation methodologies do exist so as to measure the damage on an individual sector of the business.

178. Which of the two approaches is more convincing is the question the Tribunal must now address. Admittedly, the privatization process and the License were not quite clear in providing a precise answer to this question. On the one hand, the Privatization Committee did refer, as noted by the Respondent, to a business unit. The License, while defining the licensed service as that concerning gas pipeline transportation (Clause 1.1), appears to

narrow its scope to the regulated sector, but in fact the privatization undertaken included both sectors of activity simultaneously.

179. The intention of what was done is where the answer must then be found. The Tribunal is persuaded by two arguments the Claimants have made. As noted, TGS was instructed under the applicable rules to keep the accounts of the two sectors completely separate from each other. This was so decided so that the non-regulated sector would not end-up in any way affecting the transportation regulated sector. Annex XXVII of the Share Transfer Agreement stated that "The Licensee shall carry out the operation of General Cerri Plant keeping separate accounting records so that the results of said Plant operation and the respective costs do not affect the rendering of the transportation service. For this purpose, said Plant shall be organized as a branch, or a controlled company"[19].

180. This very intention was confirmed, the Claimants also explain, by ENARGAS Resolution 1660/2000. In instructing for separate accounting, this entity stated that this measure resulted from "the principle that cost distribution between activities and related companies should not amount to subsidies to non-regulated activities, thus avoiding users from being subject to higher tariffs –in benefit of other activities– than those that should pertain to the service provided"[20].

181. At the time, the Government was evidently thinking that the success of the regulated tariff system should not subsidize the non-regulated business and thus avoid that consumers pay tariffs higher than those relating strictly to transportation. Avoidance of cross-subsidization is the right economic principle applied by many companies that have various sectors of activity within their overall business. This is the same principle that applies the other way round. The success of the non-regulated business should not subsidize the losses of the regulated business and this is to be the criteria also guiding the

[19] Claimants' Post-Hearing Brief, p. 23, no. 101.

[20] *Id.*, p. 24, no. 102.

eventual determination of compensation. The Tribunal thus concludes that the regulated and the non-regulated sectors of TGS are to be kept separate and independent for the purpose of this claim.

C. The influence of renegotiation

182. The Tribunal has noted above the parties' views about the meaning of renegotiations currently before the UNIREN. The Respondent believes that following the emergency, renegotiation is in fact the only viable alternative and much progress has been made in a variety of sectors, including the gas transportation sector in terms of an agreed understanding with GASBAN S. A., while some other gas companies are also very advanced in the process of reaching an agreement.

183. The Respondent also asserts that in this context it is reasonable for the Government to require the discontinuance of arbitration claims as these are interfering with the progress of negotiations, particularly in the case of companies which have sold their interest in the licensed companies, as the Claimants in this arbitration have.

184. The Claimants do not share this optimistic view as they assert that no progress has been made in many years and that, in any event, the understandings reached are still subject to some further form of legislative and executive approval, which has not been forthcoming. The Claimants also explain that this question is in abeyance from another point of view, namely that the understandings reached only provide for a provisional adjustment of tariffs while the long-term tariff structure has not even been discussed.

185. The main points of disagreement, in the Claimants' view, continue to be the limited adjustment, the uncertainty about the long-term tariff and the question of discontinuance of arbitration claims, which they regard as simply another form of pressure in breach of

the investors' rights under the Treaty. Particularly troublesome, in the Claimants' argument, is the understanding that with or without renegotiation there does not appear to be any intention of compensating for past losses, as confirmed by Mr. Simeonoff, head of UNIREN, at the oral hearing when stating that "I understand that there is not going to be any compensation" for the freezing of tariffs and the elimination of PPI adjustments[21].

186. Whatever the virtues or shortfalls of the renegotiation process, the Tribunal is not called to pass judgment on any of its aspects as this depends exclusively on whether the parties agree or not on new contractual terms of the license. Any process of negotiation requires of course that the parties genuinely agree on the outcome and this cannot be imposed or forced upon one party. There are, moreover, two aspects originating in this discussion that are indeed the concern of the Tribunal. The Tribunal must first hold that the Claimants positively have a right to resort to arbitration under the Treaty and this cannot be curtailed by the terms of the renegotiation or in any other manner, except with the consent of the Claimants.

187. To the extent that this discussion also implies that there are measures arising from the emergency likely to extend beyond the temporary character that an emergency has by definition, the Tribunal must also consider this situation. This is so because temporary or permanent effects of a given measure have a different incidence on the legal consequences arising from such measures, a matter that will be discussed separately below.

D. The Trust Fund

[21] *Id.*, p. 8, with reference to Hearing Transcript, Vol. 3, November 30, 2005, p. 493.

188. As evidence that normalization is progressing, the Respondent explains that a Trust Fund was established in 2004 to facilitate new investments in the gas transportation and distribution with a view to the expansion and extension of the network. It is also explained that TGS accepted to participate in this Trust and has benefited from it in terms that licensees make their services available to a greater number of consumers and their sales and revenues increase.

189. The Claimants oppose this other defense on the ground that far from proving normalization the Trust Fund proves rather the opposite, that is that the licensee's tariff system has been dismantled and a new approach has been introduced in its place. The Claimants assert that under this new approach only new investors benefit from tariff increases related to the expansion and licensees are left in a situation which makes still more difficult the recovery of costs connected to investments under the license, with an evident result of adverse discrimination.

190. To the extent that TGS has consented to this Trust Fund and its operation, the Tribunal considers that the question cannot be a matter of complaint before it. Whatever the meaning and extent of the Trust Fund, it does not raise a question concerning the tariff system under the License. At the most it provides indirect and limited evidence about the organization of the industry after the emergency.

E. The Claimants' interest in TGS

191. The Tribunal has explained above the discussion the parties have had in respect of the interest the Claimants really held in TGS. In the Respondent's view, this interest is only 19.5%, and in the Claimants' view it is 35.5%. The discussion is related to the fact that

Enron financed part of its investment with a loan taken by CIESA in its own name, guaranteed by Enron.

192. The Respondent also maintains that the transactions made by the Claimants in 2005 resulted in the exchange of an indirect 35.5% holding in TGS for a direct 19.5% holding, while shortly thereafter, in 2006, they sold most of their holdings to another investor, which has a right to a further purchase of the balance, thus effectively withdrawing from both CIESA and TGS.

193. A distinction is made by the Respondent to this effect between the corporate rights of Enron in TGS, which the Respondent admits amount in fact to 35.5%, and the right to dividends that TGS distributes, which amount only to 19.5%. The latter right, it is argued, is the consequence of CIESA having taken a loan for financing part of Enron's investment, and thus having to apply such dividends first to payments to the lenders and then to Enron in proportion to their financial contributions. Mr. Fabián Bello, expert for the Respondent, explains this distinction in the following terms:

> "Enron holds 35.5 percent corporate rights in TGS, but it has no right from the economic viewpoint (…) to receive 35.5 of the dividends distributed by TGS […] when CIESA receives the dividends, it has to first pay the interest of the debt and then distribute the dividends"[22].

194. The Respondent and its experts maintain that claiming compensation for 35.5% assumes that the Claimants are taking charge of CIESA's debt on their behalf, which is not the case, thus resulting in depleting CIESA and impeding that creditors collect their debt[23].

195. The Claimants have explained that these transactions do not have any influence or consequence in respect of the damages claimed, an aspect that will be examined in the context of valuation. A witness for the Claimants also explains that during "my ten-year

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[22] Respondent's Post-Hearing Brief, para. 111, with reference to the testimony of Fabián Bello, Hearing Transcript, Vol. 5, December 2, 2005, p. 877.

[23] Expert statement of Fabián Bello, Hearing Transcript, Vol. 5, December 2, 2005, p. 856; Expert statement of Javier García Sánchez, Hearing Transcript, Vol. 6, December 3, 2005, p. 904, pp. 982-983.

tenure with CIESA at each of the Board meetings and also in each of the statements we had to report, we had to present to the regulatory agency on the company's shareholders, the participation was based on the 35 percent participation…"[24].

196. There are, however, some legal issues in this regard that the Tribunal must consider now The first is a jurisdictional question that the Respondent has suggested in correspondence with the Tribunal, to the effect that the 2006 transaction would have decisive implications in this arbitration, presumably because the Claimants would no longer have any interest in CIESA or TGS.

197. The Claimants assert that this is not the case in light of ICSID Tribunal's jurisprudence, where it has been held that the Claimants' jurisdictional standing "is made by reference to the date on which such proceedings are deemed to have been instituted"[25] and that "Events that take place before that date may affect jurisdiction; events that take place after that date do not"[26].

198. The Tribunal is satisfied that this last view is indeed correct and that jurisdiction is not altered by later transactions. It should also be noted that the 2006 transaction expressly safeguarded the Claimants' rights in this litigation (Share Purchase Agreement, Schedule B). A different question arises in respect of the agreements themselves, as these will not necessarily be within the Tribunal's jurisdiction to the extent that they might refer to different matters or involve different parties.

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[24] Testimony of Eduardo Ojea Quintana, Hearing Transcript, Vol. 2, November 29, 2005, p. 325.

[25] Claimants' Post-Hearing Brief, pp. 35-37, with reference to *Ceskoslovenska obchodni banka, a.s. (CSOB) v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Objections to Jurisdiction of May 24, 1999, 14 *ICSID Rev.-FILJ* 251 (1999), para. 31.

[26] *Id.*, with reference to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Jurisdiction of November 14, 2005, paras. 60-62.

199. A separate issue arises from the Claimants' assertion that damages are not affected either by the 2005 or 2006 transactions as damages are measured as from the date of expropriation, at which time the Claimants owned a 35.5% interest in TGS[27].

200. While the principle that damages are specifically related under the Treaty to the date prior to the events giving rise to the claim is correct, this is not to mean that events taking place after that date are not relevant for a determination of compensation, as happens for example when a given transaction is made to minimize damages. This too will be considered by the Tribunal in the context of valuation.

201. A third issue concerns the situation of CIESA's debt on behalf of the Claimants. If the Claimants eventually obtain compensation for the whole of the 35.5% interest they claim to have in TGS, either they should take over the debt or otherwise make CIESA whole, either directly or through some other transaction. The Tribunal can assume that CIESA and its shareholders will make sure that the interest of the company is not affected by the transactions made, as it is already evident in the 2005 swap noted above.

202. If such interest was in any way affected, CIESA might have a claim against the Claimants, but not against the Respondent. On the other hand, if the Respondent reaches a negotiated agreement with TGS it will also make sure that its terms will take into account any compensation that might have been paid for an interest in the company; thus it cannot be assumed here either that double payment will occur. The specific influence of these considerations in the valuation of the claim will be discussed further below.

(a) The applicable law

[27] Claimants' letter to Secretary of the Tribunal of September 1, 2005; Claimants' letter to Secretary of the Tribunal of February 2, 2006.

203. The parties have also disagreed about the law applicable to this dispute. The Claimants hold the view that under Article 42(1) of the Convention, in the absence of agreement between the parties, the law of Argentina applies in this case, just as international law does in light of the second sentence of that Article. The Claimants assert, however, that domestic law is relevant primarily to factual matters only, such as the nature of the assurances made to the Claimants. In the Claimants' view, it is the Treaty that principally applies as *lex specialis* between the parties, while other rules of international law not inconsistent with the Treaty also have a role, including the rules on the interpretation of treaties and customary rules that provide for a minimum treatment of covered investments.

204. The Respondent believes that Article 42 has a different meaning as to the role of the various sources of law it enumerates. In its view, domestic law is not confined to factual matters but has a substantive role in defining the rights of the investor, particularly when property rights are involved in the dispute; these rights are not defined by international law but by the local law to which the investor has voluntarily submitted. More importantly, the Respondent also asserts, when the parties have agreed on a forum-selection clause giving jurisdiction to a domestic court, this choice cannot be ignored later by an international tribunal. It is further explained that this approach does not exclude the application of either the Treaty, in defining for example which investors are covered under its provisions, or general international law, which provides for rules on the treatment of investments.

205. The Tribunal must note that on this matter the discussion of the parties is largely theoretical. Article 42(1) of the Convention has provided for a variety of sources, none of which excludes a certain role for another. This is particularly evident in the case of complex disputes such as that presently before the Tribunal. As the issue of the choice of forum was discussed in the Decision on Jurisdiction, it shall not be considered again here. What matters now is the law applicable to the merits of the dispute.

206. The Respondent is right in arguing that domestic law is not confined to the determination of factual questions. It has indeed a broader role, as it is evident in this very case from the pleadings and arguments of the parties that have relied heavily on the Gas Law and generally the regulatory framework of the gas industry, just as they have relied on many other rules of the Argentine legal system, including the Constitution, the Civil Code, specialized legislation and the decisions of courts. The License itself is governed by the legal order of the Argentine Republic and it must be interpreted in its light[28].

207. So too, the Claimants are right in arguing about the prominent role of international law. Both the Treaty and international conventions have been invoked by the parties, as they have also discussed the meaning of customary international law in a number of matters. While on occasions writers and decisions have tended to consider the application of domestic law or international law as a kind of dichotomy, this is far from being the case. In fact, both have a complementary role to perform and this has begun to be recognized[29].

208. It must be noted also that the very legal system of the Argentine Republic, like many modern systems, provides for a prominent role of treaties under both Articles 27 and 31 of the Constitution. Treaties are constitutionally recognized among the sources considered "the supreme law of the Nation". It follows that in case of conflict between a treaty rule and an inconsistent rule of domestic law, the former will prevail. This is not just the consequence of the Constitution so providing, but also the solution dictated by Article 27 of the Vienna Convention on the Law of Treaties in that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Consistent with this role of international law, regulatory instruments have also made specific reference to the protection of investments under the Treaty (Decree 669/00).

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[28] License, Clause 16.1.

[29] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), *Ad Hoc* Committee Decision on Application for Annulment of February 5, 2002, 41 *ILM* 933 (2002), para. 941.

209. The Tribunal must also note that in examining the Argentine law as pertinent to various issues disputed by the parties, it finds that there is generally no inconsistency with international law as far as the basic principles governing the matter are concerned. The Tribunal will accordingly apply both Argentine law and international law to the extent pertinent and relevant to the decision of the various claims submitted.

V. THE STABILITY OF CONTRACTS AND THE LICENSE UNDER ARGENTINE LAW

210. The Tribunal has concluded above that various rights the Claimants have under the license are no longer observed in light of the measures complained of. It is now necessary to examine the Argentine law governing contracts in order to determine whether liability exists under the domestic legal order.

211. The Respondent has raised again the objection that such rights, to the extent they exist, belong to TGS as the licensee and not to the Claimants. As noted, this question has already been decided in the decision on jurisdiction and it shall not be discussed again here. The Respondent adds on this point an argument on the merits concerning an issue of potential double recovery. In its view, if the Tribunal grants compensation to the Claimants and then the license is reconstituted in some way compensating TGS, consumers will end up paying twice in terms of increased tariffs.

212. The Respondent contends that this is contrary to the principle held in the *Chorzów* case[30], as the parties would not be put in the same position they would be in had the contract been observed. The Tribunal cannot provide an answer to a question which is in essence speculative. However, as noted above in respect of another argument concerning double recovery, it can only express the certainty that if the situation arises or its consequences

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[30] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland) (Chorzów Case*), Permanent Court of International Justice Proceeding, as referenced in Respondent's Post-Hearing Brief, no. 34.

would end up affecting the tariffs, able government negotiators or regulators would make sure that no such double recovery or effects occur.

213. Article 17 of the Argentine Constitution enshrines the basic principle that “property may not be violated and that no inhabitant of the Nation can be deprived of it except by virtue of a sentence based on law”. The Constitution also provides in Article 28 that “the principles, guarantees, and rights recognized in the preceding articles shall not be modified by the laws that regulate their enforcement”. Consistent with these provisions, Article 1197 of the Civil Code mandates that contractual rules must be observed as the law between the parties. Stability of rights and contracts is thus a central feature of the applicable domestic law.

214. This is not to say that contractual obligations must be kept unchanged forever irrespective of the circumstances. Article 1198 of the Civil Code addresses the case of extraordinary and unforeseeable events that could allow a party to the contract to request its termination for having become excessively onerous, thus recognizing the theory of “imprevisión” and seeking the rebalancing of the contractual benefits. *Force majeure* and unjust enrichment are also mechanisms that would allow for renegotiation and rebalancing of contractual obligations.

215. The Respondent’s legal expert, Professor Julio Rodolfo Comadira, regrettably deceased before the hearing on the merits, explained that in his view, the theory of “imprevisión” applied in the context of this dispute as this theory relates mainly to administrative contracts and the events characterizing the greatest economic crisis in history could not have been foreseen[31]. The Respondent relies by reference on these legal arguments[32].

216. The parties discussed at various points whether the events underlying the claims had or not been foreseeable in light of the various meanings they tend to assign to insuring

[31] Legal Opinion of Julio Rodolfo Comadira of June 2005, para. 131.

[32] Respondent’s Rejoinder, para. 608.

against country risk and whether it includes or not the devaluation risk and the risk concerning the freeze of tariffs, as they have discussed about who bears what risk. The Respondent is right in stating that to consider a risk is not the same as foreseeing that the events in question will necessarily take place. However, if the major features of the whole regulatory regime put in place under the privatization were based on taking cover against all kind of risks inspired by the economic history of the country and the instability of the 1980s, including country risk and devaluation, it is in itself indicating that the parties were quite aware of the dangers ahead. It would then make no sense if when the dangers materialized, as they did, the protection envisaged would not operate.

217. This question aside, however, it must be kept in mind that, at least as the theory of "imprevisión" is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation should in addition be the occurrence of an irresistible force, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. In the commentary to this article it is stated that "*Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis"[33].

218. Important as this discussion is, the Respondent's principal argument has not relied on the theory of "imprevisión", but state of emergency. The courts of Argentina have on various occasions addressed recurring situations of emergency declared by Congress, conditioning their legal recognition to very precise terms[34]. The Supreme Court has held in connection with the Emergency Law presently in force that

> "…it is not useless to remind, as the Tribunal has done for long, that restrictions imposed by the State on the normal exercise of patrimonial

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[33] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 171, (ed., Cambridge University Press) (2002).

[34] Rubén S. Stiglitz: *Contratos Civiles y Comerciales* (1998), paras. 28-30.

> rights must be reasonable, limited in time, and constitute a remedy and not a mutation in the substance or essence of the right acquired by judicial decision or contract…"[35].

219. The Claimants have introduced an expert opinion of Dr. Alberto R. Bianchi which together with that of Professor Comadira offers a most learned, albeit differing, discussion of the state of Argentine law on the question of regulatory powers. In Dr. Bianchi's view, although "the emergency authorizes the use of extraordinary powers, it does not allow the exercise of unlimited powers. Police power in this case is limited in three senses: (i) it cannot result in a change in the substance or essence of a right acquired under a judgment or contract; (ii) measures are subject to a reasonability judicial review; and (iii) measures are temporary in essence"[36].

220. It is against this background that the Tribunal must examine the effects of the emergency measures enacted in 2002 on the obligations and commitments defined in the License. The License of course is not an ordinary contract since it involves the operation of a public service under the regulatory authority of the State, but even in this context the licensees enjoy specific rights which are subject to protection under the Constitution, the law and the provisions of the contract. As noted above, however strong the regulatory powers of the State might be they are still governed by the law and the obligation to protect the rights acquired by individuals.

First requirement: temporality

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[35] Argentine Supreme Court, Judgment in the case *Provincia de San Luis c. P. E. N. –Ley 25561, Dto. 1570/01 y 214/02 s/ amparo*, March 5, 2003. (Translation by the Tribunal).

[36] Legal Opinion of Alberto B. Bianchi of October 11, 2005, para. 386.

221. The Tribunal can well understand the need to adopt emergency measures in the midst of the major crisis that has been noted. Yet this is not enough to validate these measures in light of the applicable law. A first question that must be examined in this respect is whether the measures adopted are temporal or permanent, a matter on which the parties' views also differ. The Respondent has repeatedly emphasized the temporal nature of the emergency measures and the fact that the Emergency Law expires on precise dates, which have been extended, it is argued, so as to ensure the orderly settlement of complex outstanding problems. The fact is, however, that year after year the expiry date has been extended and presently the Emergency Law is scheduled to end on December 31, 2007. This is the situation that gives rise to the Claimants' argument that the Emergency Law has in reality been turned into a permanent feature of the Argentine economy.

222. The Tribunal finds that this is a rather disquieting situation because in actual fact the crisis is largely over, although quite naturally aftershocks might still be felt for some time. An expert witness for the Claimants believes the crisis began to improve in 2003 at the time when the Central Bank was able to convince the public to buy its newly-issued financial instruments[37]. Another ICSID tribunal has set this date some time by the end of 2004 or beginning of 2005[38]. In any event, the fact that the Argentine economy has grown 35.5% in the period 2003-2006, with an average growth of 8.8%, and that the Government has prepaid its obligations to the International Monetary Fund, are evidence enough that the crisis is behind[39]. The argument about the temporary character of the emergency measures would thus seem not to be quite confirmed by the facts.

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[37] Expert statement of Sebastián Edwards, Hearing Transcript, Vol. 7, December 6, 2005, pp. 1234-1235.

[38] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005, 44 *ILM* 1205 (2005).

[39] Economic Commission for Latin America and the Caribbean, *Statistics Yearbook of Latin America and the Caribbean 2006*, Economic Statistics, Table 2.1.1.1.

Second requirement: no essential mutation of rights

223. A second requirement the courts have set for the legal validity of the emergency measures is that the restrictions imposed must provide a remedy and not result in the mutation of the substance or essence of the rights acquired under a contract. A witness for the Respondent advanced a view that appears not to be consistent with this other requirement, namely that a good part of the emergency provisions, especially those on conversion to pesos and elimination of dollar clauses "were taken not on a transitory basis. They were adopted on a definitive basis"[40]. Such effects would mean in fact the permanent elimination of the rights under the License, at least in so far as the calculation of tariffs in US dollars and their PPI adjustment are concerned. Licensees might of course accept the terms of a new tariff regime in the context of a renegotiated contract; in such a case, the mutation would be validated by the agreement of the parties.

Third requirement: reasonableness

224. A third requirement the courts have indicated is that restrictions imposed under the emergency must be reasonable. The discussion on the tariff regime outlined above reveals profound disagreement between the parties about what is to be regarded as a just and reasonable tariff. While for the Claimants a tariff frozen for nearly five years and kept unadjusted for seven years cannot in any way be considered reasonable, for the Respondent this was the only measure possible in the context of crisis and deflation and is

[40] Witness Testimony of Eduardo Ratti, Hearing Transcript, Vol. 3, November 30, 2005, p. 555.

thus eminently reasonable. Costs, leverage, devaluation, returns and other issues examined are characterized by this same difference of opinions.

225. The Tribunal can only note in this respect that both the Government and the licensees of public services have repeatedly indicated that there is an inescapable need to attend to tariff adjustments and thereby ensure the continued operation of the companies and the necessary supply of energy and other services. The very emphasis the Respondent has put on the question of renegotiation is further evidence of this recognition. It follows that the prolongation of emergency measures without reestablishing or rebalancing the benefits of the License cannot be regarded as satisfying the legal requirement of reasonableness.

Unilateral determinations and consented adjustment

226. There is still one other aspect that does not help the Respondent’s argument about the consistency of the emergency measures with the domestic legal order. If changes became necessary, they cannot be unilaterally decided by the Government or its regulators, competent as they may be. This is a decision that has either to be taken jointly by the parties, as in a successful renegotiation, or requested from a judge, as in Article 1198 of the Civil Code. In any event, even in the case of the regulatory authority entailed in a license, this decision is subject to judicial control.

227. It so happens that the domestic judicial control of the emergency decisions has for the most turned out adversely for the Respondent’s justification, as in *Provincia de San Luis* noted above, but as judicial determinations are made on a case by case basis they have not been taken to mean that the measures as a whole might not be compatible with Argentine legislation.

228. It must also be noted that the licenses have carefully provided for a detailed adjustment mechanism so that tariffs would be revised periodically in order to take into account the true conditions of the industry, thus evidencing that the question of an eventual rebalancing of benefits was not ignored. The semi-annual adjustment under the PPI, an efficiency-related adjustment following the first quinquennial review, and an investment-related adjustment also applicable after the first five-year review, were some of the mechanisms envisaged to reflect the changes in the value of goods and services for the operator. The five-year review was another such mechanism. In addition, the possibility of an extraordinary review to correct tariffs considered inadequate, discriminatory or preferential was also included in the license terms; this review could be initiated either by ENARGAS or the licensees.

229. All such mechanisms could have resulted in an increase of tariffs or equally in a reduction. The interests of consumers could have been attended to and protected under these mechanisms, particularly if the tariffs became unrealistic and excessive in the context of a changed economic environment. Such changes would also have met the obligation under the License not to amend it without the agreement of the licensees as the latter had already given their consent by agreeing on the license terms. Yet, the Government chose not to use the alternatives provided under the license and resorted instead to the unilateral determination made under the emergency measures.

230. Even assuming that the implementation of any such mechanism would have taken some time and that the Government needed to react quickly in confronting an emergency situation, which is a perfectly understandable concern, such measures could have been taken for a limited time span while reviews were carried out. It is this unilateral determination, not the license corrections required, that ultimately resulted in the inconsistency of the measures taken with the domestic legal order.

Liability under Argentine law

231. The inescapable conclusion for the Tribunal to reach is that in considering the claims purely from the point of view of the Argentine legislation as one of the laws applicable to the dispute, the obligations which the Argentine Republic had and the commitments it undertook under the License were not observed. This is particularly significant in view that the License is expressly subject to Argentine law in some key respects, without prejudice to the effect that these legal arrangements have under the Treaty and international law. Liability is thus the consequence of such breach and there is no legal excuse under the Argentine legislation which could justify the non-compliance, as the very conditions set out by this legislation and the decisions of courts have not been met.

232. Yet, the Tribunal bears in mind that a major crisis indeed there was. While these unfortunate events do not in themselves amount to a legal excuse, neither would it be reasonable for the Claimants to believe they are not affected by some of the effects. The economic balance of the license was clearly affected by the crisis situation, and just as it is not reasonable for the licensees to bear the entire burden of such changed reality neither would it be reasonable for them to believe that nothing happened in Argentina since the License was approved. This is something the Tribunal will duly take into account in considering the compensation that follows such finding of liability and how the crisis period influences its determination.

The Treaty as the applicable law

233. The Tribunal must now examine the question of whether the breach of the License and its regulatory regime, in addition to its assessment under Argentine legislation, amounts to a breach of the Treaty guarantees.

1. *The claim of expropriation*

234. The principal claim made in this arbitration is that the measures adopted since early 2000, and particularly those following in 2002 under the Emergency Law, have expropriated the Claimants' investments, both directly and indirectly, in a manner contrary to the protection granted under Article IV of the Treaty. The Claimants argue that their investment comprises the equity in TGS, the capital contributed to this effect, the rights under the Technical Assistance Agreement and the specific rights related to the tariff regime of the License. The deprivation, the Claimants maintain, has been permanent, not merely ephemeral, and no prompt, adequate and effective compensation has been paid. In the Claimants' view, compensation must be paid irrespective of the purpose of the measures[41].

235. The Claimants assert that the Respondent has directly expropriated the rights to tariff adjustment and calculation they have under the License, as well as the right to be free from a tariff freeze, as all of it was expressly derogated by the Emergency Law. A transfer of revenues is also alleged to have taken place as a result. The Claimants also invoke in support of their argument on expropriation an OPIC "Memorandum of Determinations" of August 2, 2005, which concludes that expropriation in violation of international law has taken place with regard to this investment.

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[41] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of February 17, 2000, available at <http://www.worldbank.org/icsid/cases/santaelena_award.pdf>, paras. 71-72.

236. Simultaneously, the Claimants maintain, the measures in question are "tantamount to expropriation", thus constituting an indirect or creeping expropriation unfolding in time and resulting in a cumulative substantial destruction of the value of the investment. This kind of measures includes various forms of regulatory action unreasonably interfering with the investor's property rights, the Claimants explain, just as the measures involve conduct inconsistent with legitimate expectation and with the assurances offered to induce the investment or the capacity for rational decision-making in the business.

237. The Respondent argues at the outset that the same measures complained of cannot give rise simultaneously to a claim of direct and indirect expropriation and that the wrong justification of the claim must lead to its rejection[42]. It is also argued as a preliminary point that in the Tribunal's Decision on Jurisdiction only equity participation was held to be an investment qualifying for protection, not other kinds of peripheral rights that the Claimants now untimely invoke in their argument on the merits[43].

238. The Respondent opposes the claim arguing that there has been no transfer of property rights to the benefit of the Government or the consumers and without redistribution there is no expropriation[44]; in these circumstances, if compensation for expropriation were paid there would be unjust enrichment of the service providers. The Respondent also asserts that temporary measures, particularly emergency measures, do not qualify as expropriation as they do not entail permanent deprivation of earnings or corporate rights and no such effects can be shown in the present dispute; that substantial deprivation of fundamental property rights must be established and that no such deprivation has taken place or been proven in this case; that losses must be significant, while the Claimants

[42] *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of September 16, 2003, 44 *ILM* 404 (2005), paras. 20, 22.

[43] Remarks of Jorge Alberto Barraguirre, Hearing Transcript, Vol. 1, November 28, 2005, pp. 121-124.

[44] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Arbitration Proceeding, Final Award of September 3, 2001, available at <http://ita.law.uvic.ca/documents/LauderAward.pdf>, para. 203.

continue to benefit from earnings or the sale of shares; that the value of the investment would have been further reduced had the measures not been adopted; and that a mere contract violation cannot be turned into a Treaty claim.

239. The Respondent also argues that the purpose of the measures is relevant to make a determination on an expropriation claim, particularly if such measures are adopted under the police power of the State and are proportional to the requirements of public interest. Moreover, the Respondent maintains, the Treaty does not protect legitimate expectations but only specific rights and in this case none of the measures questioned can be equated to those considered in other cases as being inconsistent with the guarantees offered to induce the investor or amounts to the destruction of the capacity for rational decision-making.

240. The Tribunal is again grateful to counsel for the parties for having undertaken a thorough explanation of their views on the issue of expropriation, invoking in support of their respective views a wealth of decisions, opinions of writers and other authorities that allow understanding the parties' arguments in all their meaning and differences.

241. The first question the Tribunal must address is that of the protected investment. The Respondent argues that the Tribunal in the jurisdictional stage held that the dispute was one related to investment in equity and that nothing else can now be considered in the merits This, however, has to be understood in the context of a determination about whether minority shareholders had a right to claim independently, as the Respondent itself recalls. In that context, the issue was whether an investment in equity so allows. The Tribunal must also recall that the reference paragraph 30 of the Decision on Jurisdiction made to a definition of investment is related to the very broad definition of the Treaty as reproduced in paragraph 29 of that Decision. Accordingly that broad definition is the one governing this discussion.

242. The equity investment was the vehicle through which a complex business relationship was developed and which can be affected in other of its elements by the measures

questioned. This is the case, for example, of the measures affecting the tariff regime envisaged in the License, which is the key factor determining the success or failure of the investment in the equity of TGS.

243. This discussion, in any event, turns out to be rather academic as the Tribunal is persuaded by the merit of the Respondent's argument on direct expropriation. In fact, the Tribunal does not believe there can be a direct form of expropriation if at least some essential component of property rights has not been transferred to a different beneficiary, in particular the State. In this case it can be argued that economic benefits might have been transferred to an extent from industry to consumer or from industry to another industrial sector, but this does not amount to affecting a legal element of the property held, such as the title to property.

244. The question of indirect or creeping expropriation is more complex to assess. The Tribunal has no doubt about the fact that indirect or creeping expropriation can arise from many kinds of measures and these have to be assessed in their cumulative effects. Yet, in this case, the Tribunal is not convinced that this has happened.

245. The list of measures considered in the *Pope & Talbot* case as tantamount to expropriation, which the Respondent has invoked among other authorities, is in the Tribunal's view representative of the legal standard required to make a finding of indirect expropriation. Substantial deprivation results in that light from depriving the investor of the control of the investment, managing the day-to-day operations of the company, arrest and detention of company officials or employees, supervision of the work of officials, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part[45].

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[45] *Pope & Talbot Inc. v. Canada*, NAFTA (UNCITRAL) Arbitration Proceeding, Interim Award of June 26, 2000, para. 100.

246. Nothing of the sort has happened in the case of TGS or CIESA or any of the related companies, so much so that the Claimants' interests in these companies have been freely sold and included in complex transactions, some involving foreign companies too, as evidenced by the 2005 and 2006 agreements already described. The Tribunal must accordingly conclude that the Government of Argentina in adopting the measures complained of has not breached the standard of protection established in Article IV(1) of the Treaty.

247. The Tribunal must also point out that although the OPIC "Memorandum of Determinations" referred to above reaches a different conclusion on this matter, it responds to a different kind of procedure and context that cannot influence or be taken into account in this arbitration.

248. The question of devaluation has also been discussed by the parties in the context of its influence on a finding of expropriation, particularly in light of the meaning each attaches to the *Himpurna* case.[46] However, as the Tribunal has explained above, this is not a dispute about devaluation, nor has so been claimed, but about allegedly breached rights under a regulatory framework and the License. This discussion thus does not alter the Tribunal's determination about expropriation.

249. The Tribunal's conclusion does not mean that the measures discussed are free from legal consequences under other Treaty standards, as will be seen below, or free from liability for compensation arising from the damage they may have caused.

250. The Respondent's argument about the inappropriateness of claiming simultaneously a direct and an indirect expropriation, as the Claimants have done, is also persuasive. In fact, if a given measure qualifies as a form of direct expropriation it cannot at the same time qualify as an indirect expropriation, as their nature and extent are different. The

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[46] *Himpurna California Energy Ltd. v. Republic of Indonesia,* UNCITRAL Arbitration Proceeding.

converse is also true. This is not to conclude, like in *Generation Ukraine*, that the claim has to be rejected because the measures complained of were not described with precision and coherently, as here they have been competently substantiated.

2. *The claim concerning the standard of fair and equitable treatment*

251. The Claimants have argued that in addition to expropriation the Respondent has breached the standard of fair and equitable treatment established under Article II(2)(a) of the Treaty on various counts: failing to act in good faith, abusing its rights, repudiating assurances given, altering regulatory approvals and conditions, and failure to provide a stable and predictable legal environment.

252. Originating in the obligation of good faith under international law, the Claimants explain, this particular standard has gradually acquired a specific meaning in light of decisions and treaties, including a treatment compatible with expectations of foreign investors,[47] the observance of arrangements on which the investor has relied to make the investment[48]and the maintenance of a stable legal and business framework.[49]

253. The Respondent's argument on this matter is based on the premise that fair and equitable treatment is a standard not different from the customary international law minimum standard and that it is not for tribunals to set out its meaning or even less to legislate on the matter. The Respondent asserts that this view is confirmed by the NAFTA Free Trade

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[47] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, 43 *ILM* 133 (2004), para. 115.

[48] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration Proceeding, Partial Award of September 13, 2001, available at <http://www.investmentclaims.com/decisions/CME-Czech-PartialAward-13Sept2001.pdf>, para. 611.

[49] *Occidental Exploration and Production Company (OEPC) v. Republic of Ecuador*, London Court of International Arbitration Administered Case No. UN 3467, Final Award of July 1, 2004, available at <http://www.asil.org/ilib/OEPC-Ecuador.pdf >, para. 183.

Commission[50] and the Chile-US Free Trade Agreement, in clarifying that fair and equitable treatment does not entail any treatment additional to or beyond that required by customary law,[51] as well as by a number of NAFTA and ICSID decisions and the opinions of learned writers.

254. In the Respondent's view what has been criticized by recent decisions is a kind of conduct that evidences inconsistency in State action,[52] radical and arbitrary modification of the regulatory framework[53] or endless normative changes to the detriment of the investor's business.[54] None of that, the argument follows, is present in the instant case where the measures adopted were eminently reasonable in light of the economic crisis described and the changes in the economic conditions of the country.

255. In particular, the Respondent maintains that devaluation was the result of market decisions and that the constant decisions of courts in other crises has reaffirmed the constitutionality of measures of this kind, most notably in the context of the United States' great depression. The *Thunderbird v. Mexico* decision has also been invoked by the Respondent in support of its view that the standard of fair and equitable treatment does not include the protection of legitimate expectation and it is not different from the international minimum standard[55].

256. The Tribunal notes that the Respondent is right in arguing that fair and equitable treatment is a standard none too clear and precise. This is because international law is not too clear and precise either on the treatment due to foreign citizens, traders and investors

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[50] FTC decision, NAFTA Free Trade Commission, Interpretation of NAFTA Article 1105(1), July 21, 2001, available at < http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>.

[51] Chile-United States Free Trade Agreement of June 6, 2003, available at <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file1_4004.pdf>, Article 10.4.2.

[52] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of May 25, 2004, available at <http://www.asil.org/ilib/MTDvChile.pdf>, para. 164.

[53] *Tecmed*, para. 154.

[54] *OEPC*, pars. 184-186.

[55] Respondent's Post-Hearing Brief, p. 13.

or with respect to the fact that the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development[56].

257. The evolution that has taken place is for the most part the outcome of a case by case determination by courts and tribunals, as evidenced among many other investment treaty and NAFTA decisions by the *TECMED*, the *OEPC* and the *Pope & Talbot* cases[57]. This explains that, like with the international minimum standard, there is a fragmentary and gradual development. Such development however partly hinges on the gradual formulation – both in cases and legal writings – of 'general principles of law' (as understood under Article 38(1)(c) of the ICJ Statute) able to guide and 'discipline'[58] the evaluation of state conduct under investment treaty standards.

258. It might well be that in some circumstances where the international minimum standard is sufficiently elaborate and clear, fair and equitable treatment might be equated with it. But in other more vague circumstances, the fair and equitable standard may be more precise than its customary international law forefathers. This is why the Tribunal concludes that the fair and equitable standard, at least in the context of the Treaty applicable to this case, can also require a treatment additional to, or beyond that of, customary law. The very fact that recent FTC interpretations or investment treaties have purported to change the meaning or extent of the standard only confirms that those specific instruments aside, the standard is or might be a broader one.

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[56] Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, BYIL, Vol. 70, 1999, para. 100.

[57] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003; *Occidental Exploration and Production Company (OEPC) v. Republic of Ecuador*, London Court of International Arbitration Administered Case No. UN 3467, Final Award of July 1, 2004; *Pope & Talbot Inc. v. Canada*, NAFTA (UNCITRAL) Arbitration Proceeding, Interim Award of June 26, 2000.

[58] *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of January 9, 2003, 18 *ICSID Rev.—FILJ* 195 (2003); 6 *ICSID Rep.* 470 (2004), para. 124.

259. The Tribunal is bound to interpret Article II(2)(a) of the Treaty "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose*" as required by Article 31 of the Vienna Convention. The Tribunal gives weight to the text of the Treaty's Preamble, which links the standard to the goal of legal stability: '*fair and equitable treatment of investment is desirable in order to maintain a stable framework for the investment and maximum effective use of economic resources.*'

260. Thus, the Tribunal concludes that a key element of fair and equitable treatment is the requirement of a '*stable framework for the investment*', which has been prescribed by a number of decisions[59]. Indeed, this interpretation has been considered '*an emerging standard of fair and equitable treatment in international law*'[60].

261. This Tribunal notes, however, that the stabilization requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State. As noted by the tribunal in *CMS*:

> It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects[61].

262. The protection of the '*expectations that were taken into account by the foreign investor to make the investment*'[62] has likewise been identified as a facet of the standard. The *Tecmed*

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[59] *OEPC*, paras. 190-191; *CMS*, paras. 274-276; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006, available at <http://www.worldbank.org/icsid/cases/pdf/ARB021_LGE-Decision-on-Liability-en.pdf>, para. 124.

[60] *LG&E*, para. 125.

[61] *CMS*, para. 277.

[62] *Tecmed*, para. 154.

approach has been consistently adopted by subsequent decisions[63]. *Tecmed* described such expectations as '*basic*'[64], while in the context of NAFTA, tribunals have qualified them as '*reasonable and justifiable*'[65]. What seems to be essential, however, is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment[66] and that such conditions were relied upon by the investor when deciding to invest[67].

263. The Tribunal observes that, as acknowledged by previous arbitral tribunals, the principle of good faith is not an essential element of the standard of fair and equitable treatment and therefore violation of the standard would not require the existence of bad faith[68].

264. The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Argentina in the early 1990s constructed a regulatory framework for the gas sector containing specific guarantees to attract foreign capital to an economy historically unstable and volatile. As part of this regulatory framework, Argentina guaranteed that tariffs would be calculated in US dollars, converted into pesos for billing purposes, adjusted semi-annually in accordance with the US PPI and sufficient to cover costs and a reasonable rate of return. It further guaranteed that tariffs would not be subject to freezing or price controls without compensation. Foreign investors were specifically targeted to

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[63] *MTD*, para. 114.; *OEPC*, para. 185; *Eureko B.V. v. Poland*, *Ad Hoc* Proceeding, Partial Award of August 19, 2005, available at <http://www.investmentclaims.com/decisions/Eureko-Poland-LiabilityAward.pdf>, para. 235; *LG&E*, para. 127.

[64] *Tecmed*, para. 154.

[65] *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA (UNCITRAL) Arbitration Proceeding, Award of January 26, 2006, available at <http://www.iisd.org/pdf/2006/itn_award.pdf>, para. 147.

[66] *Southern Pacific Properties (Middle East) Limited (SPP)* v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Award of May 20, 1992, 32 *ILM* 1470 (1993), para. 82; *LG&E*, para. 130.

[67] *SPP*, para. 82; *CME*, para. 611; *Tecmed*, para. 154; *Thunderbird*, para. 147; *LG&E*, para. 127.

[68] *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of October 11, 2002, 42 *ILM* 85 (2003), para. 116; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of June 26, 2003, 42 *ILM* 811 (2003), para. 32; *OEPC*, para. 186; *Tecmed*, para 153; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2), Award of June 2, 2000, 40 *ILM* 56 (2001), para. 93; *CMS*, para. 280; *LG&E*, para. 129.

invest in the privatization of public utilities in the gas sector. Substantial foreign investment was undertaken on the strength of such guarantees, including the investment made by Enron in TGS.

265. The Tribunal observes that it was in reliance upon the conditions established by the Respondent in the regulatory framework for the gas sector that Enron embarked on its investment in TGS. Given the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions.

266. A decade later, however, the guarantees of the tariff regime that had seduced so many foreign investors, were dismantled. Where there was certainty and stability for investors, doubt and ambiguity are the order of the day. The long-term business outlook enabled by the tariff regime, has been transformed into a day-to-day discussion about what comes next. Tariffs have been frozen for almost five years. The recomposition of the tariff regime is subject to a protracted renegotiation process imposed on the public utilities that has failed to provide a final and definitive framework for the operation of business in the energy sector.

267. The Respondent might be right in distinguishing this case from the factual scenarios that recent decisions have faced, but this does not mean that Argentina's acts are consistent with the meaning of the protection under the Treaty. It is clear that the 'stable legal framework' that induced the investment is no longer in place and that a definitive framework has not been made available for almost five years.

268. Even assuming that the Respondent was guided by the best of intentions, which the Tribunal has no reason to doubt, there is here an objective breach of the fair and equitable treatment due under the Treaty. The Tribunal thus holds that the standard established in Article II(2)(a) of the Treaty has not been observed and that to the extent that it results in a detriment to the Claimants' rights it will give rise to compensation.

3. The claim concerning the breach of the umbrella clause

269. The Claimants have also brought to this Tribunal a claim for an alleged breach of the obligations the Respondent entered into with regard to the investment, in light of the "umbrella clause" of Article II(2)(c) of the Treaty. This aspect of the claim is built on the premise that the protection envisaged is an expression of the obligation to observe the principle *pacta sunt servanda*. The Claimants cite in this context the view of Judge Higgins to the effect that such principle and acquired rights "emphasize the protection that the private party has been given against either a later change of mind by the State or against the exercise of the State's regulatory powers"[69].

270. The Claimants argue that the clause applies to obligations arising from a contract or from broader undertakings contained in the State's own law and that the Respondent's measures breached every commitment made in the Gas Law, the Gas Decree and the License, with particular reference to the tariff regime and the commitment not to amend the License without TGS's consent.

271. The Respondent opposes this claim arguing that it did not undertake any specific obligation with regard to the investment or Enron in the Treaty, the investment legislation or the legislation regulating the License. In addition, it alleges that under customary law, violations of contracts cannot be equated with a treaty breach and thus do not engage the international responsibility of the State[70], and that, as held in *SGS v. Pakistan*, contract

[69] Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil des Cours 267, 347 (1982), as cited in Claimants' Memorial, para. 316.

[70] *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of October 12, 2005, available at <http://www.investmentclaims.com/decisions/Noble-Ventures-Final-Award.pdf>, para. 53.

claims do not qualify as BIT claims[71]. Moreover, the Respondent maintains the Tribunal in *SGS v. Philippines*, while disagreeing with some aspects of the *Pakistan* decision, still held that the umbrella clause only comprises obligations undertaken with respect to a specific investment and thus the clause does not extend to ordinary contractual breaches that must be taken to the contract forum.

272. In any event, it is also asserted that because the commitments were made in respect of TGS they cannot be invoked by the Claimants and the License does not qualify as an investment agreement. The Respondent relies upon the *Noble Ventures v. Romania* decision insofar as it would limit the application of the umbrella clause to investment contracts. Claimants oppose such an interpretation because that decision, in their view, referred to contracts made with regard to an investment[72].

273. The Tribunal recalls that the text of Article II(2)(c) reads "*[e]ach party shall observe any obligation it may have entered into with regard to investments*", a text which should be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty"* as indicated by Article 31(1) of the Vienna Convention.

274. Under its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature. Tribunals interpreting this expression have found it to cover both contractual obligations such as payment[73] as well as obligations assumed through law or regulation[74]. 'Obligations' covered by the 'umbrella clause' are nevertheless limited by their object: '*with regard to investments*'.

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[71] *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, available at http://www.investmentclaims.com/decisions/SGS-Pakistan-Jurisdiction-6Aug2003.pdf.

[72] Claimants' Post-Hearing Brief, para. 17.

[73] *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Award of March 9, 1998, 37 *ILM* 1391 (1998), para. 29; *Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004; 8 *ICSID Rep.* 518, paras. 127-128.

[74] *SGS v. Islamic Republic of Pakistan* para. 166; *LG&E*, para. 175.

275. Through the Gas Law and its implementing legislation, the Respondent assumed '*obligations with regard to investments'*: tariffs calculated in US dollars converted to pesos for billing purposes, linked to the US PPI and sufficient to provide a reasonable rate of return were intended to establish a tariff regime that assured the influx of capital into the newly privatized companies such as TGS and ensured the value of such investment. The dismantling of these guarantees would suffice to establish a violation of the obligations entered into by the Respondent with regard to the Claimants' investment.

276. In addition, the prohibition of price controls without indemnification and the prohibition of License amendments without consent, although contained in the License were also approved by decree[75] and formed part of the implementing legislation that established the tariff regime. The obliteration of these commitments likewise entails a violation of obligations entered into by the Respondent with regard to the Claimants' investment.

277. The Tribunal concludes accordingly that the breach of the obligations noted undertaken both under contract and law and regulation in respect of the investment have resulted in the breach of the protection provided under the umbrella clause of Article II(2)(c).

4. *The claim about arbitrariness and discrimination*

278. The Claimants assert that there has also been a breach of Article II(2)(b) of the Treaty because the measures adopted are both arbitrary and discriminatory. The claim of arbitrariness is based on the argument that such measures destroyed the rights and reasonable expectations of the Claimants, lacked proportionality and were in violation of the law. The claim of discrimination relies on the view that the measures fell

[75] Obligations undertaken in the License were initially approved by Decree 2255/92 (Model License) and later specifically ratified with regard to TGS by Decree 2458/92.

disproportionately on the largely foreign-owned gas sector. A long list of specific measures is given by the Claimants in respect of each of these aspects.

279. The Respondent opposes this claim asserting that the measures were consistent with the law and aimed at continuing the operational income and earnings of the companies, while at the same time being proportionate to the purpose sought, reasonable and, in any event, lacking in any intention to breach the rule of law or affect judicial propriety, as required by numerous judicial and arbitral decisions.

280. Neither is there discrimination, the Respondent maintains, because the regulated gas sector is very different from other sectors operating in a competitive market, such as banking, and the entities involved are far from being in a similar or even comparable situation, thus not being discriminated if treated differently in light of each individual or sector requirement. Least of all is there any capricious, irrational or absurd differential treatment of the Claimants, who are not even among those who have suffered the most severe consequences of the measures adopted.

281. After examining the detailed arguments of the parties and their supporting authorities and decisions, the Tribunal is not persuaded by the Claimants' view that there is here arbitrariness or discrimination. The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, and as concluded they were not consistent with the domestic and the Treaty legal framework, but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place.

282. The Tribunal reaches a similar conclusion in respect of discrimination. There are quite naturally important differences between the various sectors that have been affected, so it

is not surprising either that different solutions might have been or are being sought for each, but it could not be said that any such sector has been singled out, in particular either to apply to it measures harsher than in respect of others, or conversely to provide a more beneficial remedy to one sector to the detriment of another. The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors.

283. The Tribunal accordingly concludes that the Respondent has not breached the protection provided under Article II(2)(b) of the Treaty.

5. *The claim about failure to give full protection and security*

284. Lastly, the Claimants argue that there has been a failure to give full protection and security to the Claimants' investment, as required under Article II(2)(a) of the Treaty. The Claimants rely to this effect on the broader interpretation of this requirement made particularly in *CME*, where the standard was related not just to physical security but also to the legal protection of the investment.

285. The Respondent believes differently, arguing first that the standard only relates to physical protection and security, as evidenced in *AAPL* and *AMT* where installations were destroyed, and asserting next that *CME* does not mean that the interpretation it made of the standard is the accepted definition under international law, so much so that it was at the same time contradicted by the opposite conclusion in *Lauder*.

286. There is no doubt that historically this particular standard has been developed in the context of physical protection and security of the company's officials, employees or facilities. The Tribunal cannot exclude as a matter of principle that there might be cases where a broader interpretation could be justified, but then it becomes difficult to

distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation.

287. In this case no failure to give full protection and security to officials, employees or installations has been alleged. The argument made in general about a possible lack of protection and security in the broader ambit of the legal and political system is not in any way proven or even adequately developed. The Tribunal accordingly rejects this claim and finds that no breach of Article II(2)(a) of the Treaty has taken place.

The alternative plea of emergency

288. In case the Tribunal would find that a breach of the Treaty has taken place, the Argentine Republic has pleaded in the alternative exemption from liability in light of national emergency or state of necessity under domestic law, general international law and the Treaty, all of it based on the severity of the crisis that affected the country as from 2000.

289. The Respondent explains in detail the severity that characterized the crisis affecting the country, which threatened in its view the very existence of the State and its independence. The Respondent explains in particular that the significant decrease of the Gross Domestic Product, consumption and investment during the crisis period, together with deflation and the reduction in value of Argentine corporations, resulted in widespread unemployment and poverty, with dramatic consequences in health, malnutrition and social policies. In addition, public institutions were no longer functioning.

290. With a view to overcome such difficulties there was an urgent need to resort to emergency, described by the Respondent as a severe form of necessity, which materialized in the 2002 Emergency Law. The Respondent explains in this respect that

the Emergency Law was not the cause of the unfolding economic emergency but the normative consequence of a situation that had become manifest in world financial markets. The measures adopted, the Respondent maintains, were the remedy recommended by distinguished economists and led to the gradual recovery that is noticeable at present.

1. Necessity and emergency under the Argentine Constitution

291. The Respondent explains that the Argentine Constitution provides for various kinds of emergency measures, including most prominently economic emergency, which in this case was declared by Congress, and that as a public act on emergency measure benefits from a presumption of legality, subject to constitutional control by the judiciary. The emergency legislation, the Respondent maintains, meets the requirements laid down by judicial decisions to the extent that there exists a state of necessity, the rules are aimed at attending to public interest, the remedy introduced is proportional to the emergency and its time frame is reasonable and related to the causes of the emergency. So too, the Respondent asserts, the measures enacted by the Government acting on powers delegated by Congress observe the legal requirements of emergency as provided under the Constitution.

292. In the Claimants' view, the Respondent has not demonstrated that the degree of threat required to invoke the defense of necessity has been met, particularly because the existence of the State has not been imperiled as if it had faced a military threat, nor has it demonstrated that the derogation of the specific guarantees and obligations disputed was justified.

293. The Tribunal has examined above the situation of the measures complained of in the context of the Argentine legislation. While there can be no doubt that emergency has been continuously invoked and recognized in Argentina, precisely because of that the courts have been careful in stating the conditions under which emergency may be exercised and legally validated. In the context of the present emergency, the Tribunal is mindful of the specific requirements laid down in *Provincia de San Luis*, and these, as concluded, have not been met by the emergency legislation. It follows that the very constitutional provisions that were subject to judicial control and led to the definition of those conditions cannot be invoked to preclude the wrongfulness of the measures adopted if they do not comply with the conditions indicated.

2. The plea of state of necessity under customary international law

294. The Respondent maintains in this respect that state of necessity is consolidated under international law as a concept precluding wrongfulness of the measures adopted in its context and exempting the State from international responsibility. The *Neptunus* case and the *Gabcíkovo-Nagymaros* judgment, as well as Article 25 of the International Law Commission's Articles on State Responsibility, are invoked in support of this conclusion.

295. The Respondent argues in particular that it has not contributed to the situation of necessity as most of the intervening factors were exogenous; that the measures adopted were the only means to safeguard an essential interest against a grave and imminent peril because otherwise the situation would have gone out of control; that no essential interest of other States beneficiaries of the obligation or of the international community as a whole have been seriously impaired; and that the Claimants or TGS have not been treated differently from other investors in this sector.

296. In answering to arguments advanced by the Claimants, the Respondent distinguishes the *Himpurna* case from its own situation on the ground that in that case the State company PLN had expressly waived in the contract the possibility of invoking *force majeure* in justification of non performance and that the alleged events had not been proven, thus explaining the decision of the Tribunal not to admit economic emergency. So too, the Respondent distinguishes *Socobelge* where the financial situation of Greece never got to be considered by the Permanent Court of International Justice.

297. The Respondent emphasizes in particular that in the view of experts Argentina had no other option than to undertake the pesification of the contractual relations as every other remedy was unviable[76] and that, as noted, Argentina did not contribute to the situation of necessity because the main difficulties originated in external shocks, including the Asian and Russian crises, devaluation in Brazil and strengthening of the US dollar. An expert for Argentina concludes that "the Argentine currency board was not sustainable and had to be abandoned given the external and other shocks that hit the economy […] Also, the only really feasible and desirable exchange rate regime after the collapse of the peg was a floating exchange rate regime such as the one adopted by the local economic authorities in Argentina; alternatives such as dollarization were undesirable and/or unfeasible."[77]

298. Following the *Gould* case, the Respondent concludes that in view of the existence of a state of necessity damage caused is not attributable to the State as it originates in "social and economic forces beyond the power of the state to control through the exercise of due diligence."[78] Compensation thus is not due, the Respondent maintains.

299. While the Claimants share the Respondent's view that Article 25 of the Articles on State Responsibility reflects customary international law in this matter, they believe the case

[76] Expert Opinion of Nouriel Roubini of February 24, 2005, para. 50.

[77] *Idem*.

[78] *Gould Marketing Inc., as successor to Hoffman Export Corporation v. Ministry of National Defense of Iran*, 3 Iran-US C.T.R. 147, submitted as Respondent's Legal Authority no. 228.

has not been proven. Specifically the Claimants maintain that Argentina has not demonstrated that it was threatened by a grave and imminent peril, that the measures adopted were the only way to safeguard against that peril, that the obligation in question does not exclude the defense of necessity and that it did not contribute to the situation of necessity. The *Himpurna* and *Socobelge* cases are relied on by the Claimants in support of their assertions.

300. The Claimants emphasize that, contrary to the Respondent's assertion, the crisis finds its origins in endogenous factors which in the view of another expert are almost entirely the result of Argentina's own policy failures,[79] particularly the failure to implement structural reforms in the 1990s ensuring fiscal discipline, labor market flexibility, open foreign trade and the maintenance of the credibility of the currency board. The Claimants also argue that options other than pesification were available and thus this measure was not the only way to address the crisis; among the options discussed there was the structural reforms indicated, the agreed restructuring of its debt, dollarization and devaluation without pesification. Such alternative plans have worked in other countries, such as Uruguay, the expert explains.

301. The expert opinion of Professor Sebastián Edwards summarizes its conclusions on the following main points: Argentina itself primarily caused its economic crisis by making policy mistakes prior to 2001 and a series of additional mistakes in 2001; external shocks played a limited role in the Argentine economic crisis; and the country had a number of options available throughout the 1990s and during 2000 and 2001, and even after devaluation Argentina did not have to pesify.[80] A rebuttal opinion by Professor Nouriel

[79] Expert Opinion of Sebastián Edwards of April 27, 2005, paras. 33-82.

[80] *Id.*, paras. 126-137.

Roubini was introduced by the Respondent in opposing the Claimants' views and its expert's analysis.[81]

302. The conclusion the Claimants reach, as indicated in Article 27 of the Articles on State Responsibility, is that even in the case of state of necessity the preclusion of wrongfulness is without prejudice to, first, the compliance with the obligation concerned and, next, the question of compensation for any material loss caused by the measures adopted, thus not allowing for the permanent repudiation of rights or to ignore the necessary compensation.

303. The Tribunal's understanding of Article 25 of the Articles on State Responsibility to the effect that it reflects the state of customary international law on the matter, is not different from the view of the parties in this respect. This is not to say that the Articles are a treaty or even a part of customary law themselves; it is simply the learned and systematic expression of the development of the law on state of necessity by decisions of courts and tribunals and other sources along a long period of time. Article 25 states:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> *(a)* Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> *(b)* Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> *(a)* The International obligation in question excludes the possibility of invoking necessity; or
>
> *(b)* The State has contributed to the situation of necessity.[82]

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[81] Expert Opinion of Nouriel Roubini of June 24, 2005.

[82] Article 25, ILC's Articles on Responsibility of States for Internationally Wrongful Acts.

304. There is no disagreement either about the fact that state of necessity is a most exceptional remedy subject to very strict conditions because otherwise it would open the door to elude any international obligation. Article 25 accordingly begins by cautioning that the state of necessity "may not be invoked" unless such conditions are met. Whether in fact the invocation of state of necessity in the Respondent's case meets those conditions is the difficult task the Tribunal must now undertake.

305. The first condition Article 25 sets out is that the act in question must be the only way for the State to safeguard an essential interest against a grave and imminent peril. The Tribunal must accordingly establish whether the Argentine crisis qualified as affecting an essential interest of the State. The opinions of experts are sharply divided on this issue, ranging from those that consider the crisis had gargantuan and catastrophic proportions to those that believe that it was not different from many other contemporary situations of crisis around the world.

306. The Tribunal has no doubt that there was a severe crisis and that in such context it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State is not convincing. Questions of public order and social unrest could be handled as in fact they were, just as questions of political stabilization were handled under the constitutional arrangements in force.

307. This issue is in turn connected with the existence of a grave and imminent peril that could threaten that essential interest. While the government had the duty to prevent the worsening of the situation and could not simply leave events to follow their own course, there is no convincing evidence that the events were out of control or had become unmanageable.

308. It is thus quite evident that measures had to be adopted to offset the unfolding crisis. Whether the measures taken under the Emergency Law were the "only way" to achieve

this result and no other alternative was available, is also a question on which the parties and their experts are profoundly divided, as noted above. A rather sad world comparative experience in the handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.

309. While one or other party would like the Tribunal to point out which alternative was recommendable, it is not the task of the Tribunal to substitute for the governmental determination of economic choices, only to determine whether the choice made was the only way available, and this does not appear to be the case.

310. Article 25 next requires that the measures in question do not seriously impair the interest of State or States toward which the obligations exists, or of the international community as a whole. The interest of the international community does not appear to be in any way impaired in this context as it is rather an interest of a general kind. That of other States will be discussed below in connection with the Treaty obligations. At that point it will also be discussed whether the Treaty excludes necessity, which is another condition peremptorily laid down under the Article in comment.

311. A further condition that Article envisages is that the State cannot invoke necessity if it has contributed to the situation of necessity. This is of course the expression of a general principle of law devised to prevent a party taking legal advantage of its own fault. Although each party claims that the factors precipitating the crisis were either endogenous or exogenous, the truth seems to be somewhere in between with both kind of factors having intervened, as in the end it has been so recognized by both the Government of Argentina and international organizations and foreign governments.

312. This means that to an extent there has been a substantial contribution of the State to the situation of necessity and that it cannot be claimed that the burden falls entirely on exogenous factors. This has not been the making of a particular administration as it is a

problem that had been compounding its effects for a decade, but still the State must answer as a whole.

313. The Tribunal must note in addition that as held in the *Gabcíkovo-Nagymaros* decision, with reference to the work of the International Law Commission, the various conditions discussed above must be cumulatively met, which brings the standard governing the invocation of state of necessity to a still higher echelon. In light of the various elements that have been examined, the Tribunal concludes that the requirements of the state of necessity under customary international law have not been fully met in this case.

3. *The plea of necessity under Article IV(3) of the Treaty*

314. The Respondent also justifies the invocation of necessity in the terms of Article IV(3) of the Treaty. This Article provides:

> Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.[83]

315. The Respondent, following the decision in *Gabcíkovo-Nagymaros* in that it held that the essential interest of the State cannot be reduced to questions of the existence of the State but extends also to other matters such as a grave danger to ecological preservation,[84] asserts that in the present case, with every more reason, the fact that human life was endangered in the crisis context justifies the inclusion of this type of event under the

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[83] Article IV(3) of the Argentina-U.S. BIT.

[84] *Gabcíkovo-Nagymaros Project* (Hungary/Slovakia), International Court of Justice, Judgment of September 25, 1997, para. 53.

terms of Article IV(3), and concludes that accordingly the invocation of necessity is not excluded by the Article in comment, thereby meeting the requirement that Article 25 of the Articles on State Responsibility also envisages to this effect.

316. The Respondent also relies to this effect on the expert report of Dean Anne-Marie Slaughter and Professor William Burke-White, where it is concluded that the measures adopted by Argentina are fully consistent with the terms of Article IV(3). [85]

317. The Claimants oppose this other justification on the ground that Article IV(3), far from reducing Argentina's obligations, adds to them by requiring national treatment and most favored nation treatment of the investors as compared to the treatment of other companies in light of the measures adopted to offset any losses. It is also argued that the decisions in *AMT* and *AAPL* upheld the liability of the host State in spite of situations of war and civil disturbance being invoked under the provisions of the respective applicable treaties.

318. In the Claimants' view, Article IV(3) applies only to the measures adopted in response to a loss, such as compensation, but not to the measures that cause the loss and, moreover, do not apply to economic emergencies but only to "war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events". In any event, the Claimants conclude, this Article does not exempt Argentina from liability and the duty to pay compensation.

319. An expert opinion of Professor José Alvarez is relied upon by the Claimants in support of their arguments, as the expert concluded that the Article in question provides further assurances to foreign investors and is not "a further exception permitting derogations from the treaty."[86]

320. The Tribunal must note that the only meaning of Article IV(3) is to provide a minimum treatment to foreign investments suffering losses in the host country by the simultaneous

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[85] Legal Opinion of Anne-Marie Slaughter and William Burke-White of March 2, 2005, paras. 58-59.

[86] Legal Opinion of José E. Alvarez of April 20, 2005, para. 70.

interplay of national and most favored nation treatment, and this is only in respect of measures the State “adopts in relation to such losses”, that is corrective or compensatory measures.

321. While there is no reason to exclude from this Article economic emergency measures in given circumstances of particular gravity, it still would not allow derogation from rights under the Treaty as it refers to a different matter. Even less so can it be read as a general escape clause from treaty obligations and thus does not result in excluding wrongfulness, liability and eventual compensation. Accordingly, the Tribunal concludes that state of necessity cannot be justified under this Article in the terms that the Respondent has invoked it.

4. The plea of necessity under Article XI of the Treaty

322. The discussion of Article XI of the Treaty has been particularly complex in this proceeding given the wealth of arguments of the parties and of authorities and materials brought to the attention of the Tribunal. The Tribunal is once more grateful to counsel for the parties and to the experts that have written learned opinions, in particular Dean Anne-Marie Slaughter, Professor William Burke-White and Professor José Alvarez.

323. Article XI of the Treaty reads as follows:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.[87]

324. The Respondent, relying on the opinion of Dean Slaughter and Professor Burke-White, asserts that public order and national security exceptions have to be interpreted broadly in

[87] Article XI of the Argentina-U.S. BIT.

the context of this Article, including economic security and political stability; moreover, this Article was understood to be self-judging to the extent that each party will be the sole judge of when the situation requires measures of the kind envisaged by the Article, subject only to a determination of good faith by tribunals that might be called upon to settle a dispute on this question. In the Respondent's view, the gravity of the crisis faced amply justifies resorting to such measures which can only be considered as adopted in good faith.

325. The Respondent also explains that in application of this Article Argentina has been able to maintain public order, has protected its essential security interests and has recomposed with great difficulty the relations with the international economic system, all of which while treating foreign investors like any other investor.

326. The Respondent assigns particular significance to the self-judging character of this Article, which the Respondent maintains has been reaffirmed by the interpretation of the United States in a number of bilateral investment treaties and statements before Congress, all of which allow Argentina to benefit from the same understanding on the basis of reciprocity[88]. The experts assert that "Argentina and the United States negotiated and signed a BIT that allowed either party to take measures otherwise inconsistent with their obligations under the treaty if that party deemed it necessary to protect its national security interests."[89]

327. The Claimants do not share the same understanding, and neither does Professor José Alvarez. It is first argued that Article XI is not self-judging and that judicial review is not limited to a good faith determination but has to examine the facts and whether they qualify under the requirements of state of necessity. It is also maintained that a self-judging clause is an extraordinary exception that has to be clearly stated, as has been done

[88] Legal Opinion of Anne-Marie Slaughter and William Burke-White of July 1, 2005.

[89] Legal Opinion of Anne-Marie Slaughter and William Burke-White of March 2, 2005, para. 63.

in Article XXI of the GATT and confirmed by the International Court of Justice in the *Nicaragua* case in rejecting an argument of the United States similar to that of Argentina here, just as it has been expressly included in some bilateral investment treaties, most notably the U.S.-Russia BIT Protocol, but nothing of the sort was done in the Treaty here applicable.

328. The expert opinion of Professor Alvarez summarized its conclusions on the meaning of Article XI stating that this essential security/public order clause "(1) is not self-judging; (2) does not apply to 'economic emergencies', except in the most extraordinary and so far unprecedented circumstances; and (3) even when it does apply (for example, in the event of war or insurrection), is not the equivalent of a 'denial of benefits' or termination clause in a treaty, and so does not negate state responsibility to pay compensation for actions that harm investors." [90]

329. The Claimants do not believe that exchanges between the U.S. Government and Congress in different contexts and to a very limited extent could be taken to mean that a self-judging interpretation was intended for the Treaty here applied.[91] In fact it is asserted that the opposite is true because at the time the U.S. Government explained that the Treaty "contains an absolute right to international arbitration of investment disputes."[92]

330. The Claimants further argue that, in any event, Article XI does not apply to economic emergencies but only to internal security, just as international peace and security were interpreted to mean the obligations under the Charter of the United Nations, nor does it relieve Argentina from paying compensation. A self-judging interpretation, the Claimants

[90] Legal Opinion of José E. Alvarez of April 20, 2005, para. 8.

[91] *Id.*, paras. 16-17.

[92] Letter of Submittal of the U.S.-Argentina BIT, January 13, 1993.

conclude, would result in creating a broad and sweeping exception to the obligations under the Treaty and would eviscerate the very purpose and object of this kind of treaty.[93]

331. In examining this discussion, the Tribunal must first note that the object and purpose of the Treaty is, as a general proposition, to apply in situations of economic difficulty and hardship that require the protection of the international guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.

332. While there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI, to interpret that such a determination is self-judging would be definitely inconsistent with the object and purpose noted. In fact, the Treaty would be deprived of any substantive meaning.

333. The Tribunal notes that the Treaty does not define what is to be understood by essential security interest, just as it does not contain either a definition concerning the maintenance of international peace and security. The specific meaning of these concepts and the conditions for their application must be searched for elsewhere. In respect of international peace and security this task is rendered easier by the fact that the parties themselves agreed that its meaning is to be found in the context of the obligations under the Charter of the United Nations, as provided in Article 6 of the Protocol to the Treaty. The situation is more complex in respect of security interests because there is no specific guidance to this effect under the Treaty. This is what makes necessary to rely on the requirements of state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, so as to evaluate whether such requirements have been met in this case.

[93] Legal Opinion of José E. Alvarez of April 20, 2005, para. 54.

334. The expert opinion of Dean Slaughter and Professor Burke-White expresses the view that the treaty regime is different and separate from customary law as it is *lex specialis*[94]. This is no doubt correct in terms that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. Had this been the case here the Tribunal would have started out its considerations on the basis of the Treaty provision and would have resorted to the Articles on State Responsibility only as a supplementary means. But the problem is that the Treaty itself did not deal with these elements. The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned. As concluded above, such requirements and conditions have not been fully met in the instant case.

335. As explained by Dean Slaughter, the position of the United States has been gradually evolving towards the support of self-judging clauses in respect of national security interests and some bilateral investment treaties reflect this change, albeit not all of them. Yet, this does not necessarily result in the conclusion that such was the intention of the parties in respect of the Treaty here relevant. Truly exceptional and extraordinary clauses such as a self-judging provision normally must be expressly drafted to reflect that intent, as otherwise there can well be a presumption about it not having that meaning in view of its exceptional nature. In the case of the Treaty nothing was said to this effect and the elements invoked in support of a self-judging character originate for the most part in congressional discussions in the United States concerning broader issues or indirect interpretations.[95]

336. The discussion noted about the GATT and the *Nicaragua* decision, just as the *Oil Platforms* case, confirm that the language of a provision has to be very precise in order to lead to a conclusion about its self-judging nature and in all those cases language

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[94] Legal Opinion of Anne-Marie Slaughter and William Burke-White of July 1, 2005, paras. 43-47.

[95] Respondent's Post-Hearing Brief, pp. 19-20.

differences turned out to be crucial for the rejection of arguments favoring such exceptional character. So too, the International Court of Justice held in the *Gabcíkovo-Nagymaros* case, referring to the conditions defined by the International Law Commission, that "the State concerned is not the sole judge of whether those conditions have been met."[96]

337. Not even if this was the interpretation given to the clause today by the United States would this necessarily mean that such interpretation governs the Treaty. What is relevant is the intention the parties had in signing the Treaty and this does not confirm the self-judging interpretation. Even if this interpretation were shared today by both parties to the Treaty, it would still not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries.

338. As an English court has recently held in respect of a claim of non-justiciability relating to a State challenge to the *OEPC* award, the fact that a treaty is concluded between States cannot derogate from rights that belong to private parties, in the instance concerning dispute settlement, and as a consequence the doctrine of non-justiciability could not apply.[97]

339. In light of this discussion, the Tribunal concludes that Article XI is not self-judging and that judicial review in its respect is not limited to an examination of whether its invocation or the measures adopted were taken in good faith. The judicial control must be a substantive one as to whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness. As the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the

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[96] *Gabcíkovo-Nagymaros*, paras. 51-52.

[97] *Republic of Ecuador v. Occidental Exploration and Production Company (OEPC)*, Queen's Bench Application of April 29, 2005, available at <http://www.investmentclaims.com/decisions/Occidental-Ecuador-QueensBenchApplication-29Apr2005.pdf>, para. 85.

Articles on State Responsibility, thus concluding that necessity or emergency are not conducive to the preclusion of wrongfulness, there is no need to undertake a further judicial review under Article XI as this Article does not set out conditions different from customary law in this respect.

340. Judicial determination of the compliance with the requirements of international law in this matter should not be understood as if arbitral tribunals might be wishing to substitute for the functions of the sovereign State, but simply responds to the duty that in applying international law they cannot fail to give effect to legal commitments that are binding on the parties and interpret the rules accordingly, unless this derogation is expressly agreed to[98].

341. The Tribunal explained above that it would consider the requirement of Article 25 of the Articles on State Responsibility as to the act not seriously impairing an essential interest of the State towards which the obligation exists in the context of the Treaty obligations. In light of the discussion above about changing interpretations, it does not appear that the invocation by Argentina of Article XI, or state of necessity generally, would be taken by the other party to mean that such impairment does arise.

342. Be that as it may, in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations, as explained by the English court case in *OEPC* noted. The essential interest of the Claimants would certainly be seriously impaired by the operation of Article XI or state of necessity in this case.

5. *Temporality and Compensation*

[98] *See* discussion in Charles Leben, *L'état de nécessité dans le droit international de l'investissement*, CAHIERS DE L'ARBITRAGE, 2005/3, pp. 47-52.

343. There are still two other aspects of state of necessity the Tribunal needs to discuss. There is first the question that necessity is a temporal condition and, as expressed in Article 27 of the Articles on State Responsibility, its invocation is without prejudice to "(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Confirmed by international decisions, this premise does not seem to be disputed by the parties, although the Respondent's argument to the effect that one thing is the temporal nature of the emergency and another the permanent effects of its measures, discussed above, does not seem to be easily reconciled with the requirement of temporality. This in turn results in uncertainty as to what will be the legal consequences of the end of the Emergency Law.[99]

344. The second question is that Article 27 also provides that necessity is without prejudice to "(b) the question of compensation for any material loss caused by the act in question". Again confirmed by international decisions, this other premise has been much debated by the parties as noted above. The Respondent does not share this premise because, as was also noted above, the record shows that eventually there would be no compensation for past losses or adverse effects originating in the emergency measures in the context of renegotiations undertaken.[100]

345. The Respondent's view appears to be based on the understanding that Article 27 would only require compensation for the damage that arises after the emergency is over and not for that taking place during the emergency period. Although that Article does not specify the circumstances in which compensation should be payable because of the range of possible situations, it has also been considered that this is a matter to be agreed with the affected party[101], thereby not excluding the possibility of an eventual compensation for

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[99] Witness Testimony of Gustavo Simeonoff, Hearing Transcript Vol. 3, November 30, 2005, pp. 481-482.

[100] *Id.*, p. 493.

[101] James Crawford,*op. cit.*, p. 190.

past events. In the absence of a negotiated settlement between the parties, this determination is to be made by the Tribunal to which the dispute has been submitted.

D. Remedies and Compensation

1. The Parties' Submissions

346. The Claimants request relief under three heads. Firstly, the Claimants submit that under Article IV of the Treaty the expropriation they have suffered requires the payment of full compensation in accordance with the fair market value of the expropriated investment. The Claimants also explain that their damages experts ("LECG") have used two dates to this effect in their calculations: August 31, 2000, at which time the first injunction concerning the US PPI had been just issued, and December 31, 2001, the date just before the enactment of the Emergency Law. Full compensation is, according to Claimants, also to be paid for the other Treaty breaches claimed, including fair and equitable treatment.

347. Secondly, the Claimants claim the management fees due under the Technical Assistance Agreement (TAA), arguing that they constitute a "*delayed compensation and should be included in computations of historical profitability or damages.*" [102] Thirdly, the Claimants require that compensation be paid for the loss of revenue derived from the unavailability of US PPI adjustments for 2000-2001.

348. Under these three heads, the Claimants' methods and related estimations of damage are as follows. To calculate the fair market value of the expropriated investment, the Claimants explain that LECG used three methods: the Discounted Cash Flow approach (DCF), book

[102] Claimants' Reply, para. 677.

value, and unjust enrichment.[103] Under DCF, the experts value the equity damage of the Claimants as of August 31, 2000 at US$243,775,916. With a valuation date of December 31, 2001, the Claimants' damages are estimated at US$272,722,850 and updated through November 2004 at US$382,016,802. Using the book value approach these figures are respectively US$337,549,800 and US$472,823,217. The unjust enrichment approach results in amounts for December 31, 2001, ranging from US $579,475,694 to US $582,018,216, depending on whether a "purchase price" or a "wealth transfer" variant is adopted.

349. Regarding damages related to management fees under the TAA, the Claimants contend that DCF is the only valid method given that the expected future cash flow from management fees to Enron is not reported in TGS financial statements. LECG estimates damages to Enron under this head at US$34.8 million of December 2001, and US$48.7 million updated to November 2004.

350. Finally, Claimants estimate damages from outstanding PPI adjustments at US$ 15.8 million based on the sum of the adjustments denied. LECG notes that this loss – while included in the August 2000 valuation - was written off from TGS books and is thus not taken into account for the valuation at December 2001.

351. The experts evaluate the overall damages to Claimants as of August 31, 2000 at US$278,722,689, and updated through November 2004 at US$495,217,600. With a valuation date of December 31, 2001, damages are estimated at US$323,399,817, which updated through November 2004 amount to US$453,002,615. Using the book value approach these figures are US$388,226,768 and US$543,809,030, respectively.

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[103] The DCF and the Book Value methodologies are used to calculate what LECG identifies as 'Damage to Claimants as Equity Holders' or 'Equity Damage' to which management fees and PPI damages are subsequently added. The Unjust Enrichment approaches seem not to differentiate between these items.

352. The Claimants also request pre-award interest at commercially reasonable rates, compounded quarterly, as they also request the award of all costs and expenses of the arbitration, including legal fees.

353. The Respondent opposes the claim for compensation on various grounds. Firstly, it makes the following three objections of general nature: (i) that the claim is illusory given the towering return on investment obtained by the Claimants prior to the crisis and the current stock market value of TGS; (ii) that the damages were the result of the aggressive financial policy of TGS and CIESA, in particular their high leverage and TGS' indebtedness in foreign currency; and (iii) that country risk included in the calculation of tariffs has already compensated Claimants' alleged losses.

354. Secondly, the Respondent disagrees with a number of methodological assumptions underpinning the Claimants' valuation. The Respondent argues that (i) Enron's participation in TGS is not 35.5% but should be reduced to 19.5% considering the debt taken by CIESA on behalf of the Claimants; and (ii) that both the regulated and the non-regulated business should be considered together for the purpose of valuation since damages to the regulated business cannot be estimated without accounting for the return obtained in the same period by the non-regulated business.

355. The Respondent objects to the use of DCF to calculate the value of equity damage as a matter of principle and formulates specific objections to the results obtained by the Claimants. The inputs taken into account are also discussed by the Respondent's experts, as will be examined further below.

356. The Respondent also objects to the payment of compensation for the fees of the Technical Operator, among other reasons because the TAA was transferred to Petrobras for an undisclosed amount in 2004.

357. Likewise, the Respondent opposes the claim for PPI damages arguing that this ignores the existence of the agreements signed in January and June 2000 suspending PPI adjustments

and never challenged by the Claimants. If any damage were to be awarded on this ground, it should cover only marginal benefits derived from the July agreement.

358. These various submissions by the parties and their experts will be examined below in connection with the specific issues concerning valuation and compensation.

2. The Applicable Standard of Reparation

359. The Treaty does not specify the damages to which the investor is entitled in case of breach of the standards of treatment different from expropriation, *i.e.*, fair and equitable treatment or the breach of the umbrella clause. Absent an agreed form of restitution by means of renegotiation of contracts or otherwise, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party, as was established by the Permanent Court of International Justice in the *Chorzów Case*:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[104]

360. Various tribunals have applied this principle in deciding damages for breach of "fair and equitable treatment."[105] As noted by *SD Myers*, the silence of the treaties, in that case of NAFTA, indicates the intention of the drafters "*to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case.*"[106] The Tribunal added that: "*whatever precise approach is taken, it should reflect the general*

[104] *Chorzów*, Judgment No. 13 (Claim for Indemnity - The Merits) of September 13, 1928, available at: <http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1/>, para. 47.

[105] *S.D. Myers, Inc. v. Canada*, UNCITRAL Arbitration Proceeding, Partial Award of November 13, 2000, paras. 311-315; *Metalclad Corporation v. United Mexican States*, (ICSID Case No. ARB(AF)/97/1), Award of August 30, 2000, para. 122; *MTD*, para. 238.

[106] *S.D. Myers*, para. 309.

principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation."[107]

361. The present Tribunal finds that the appropriate approach in the instant case is that of compensation for the difference in the 'fair market value' of the investment resulting from the Treaty breaches. The notion of 'fair market value' is generally understood as the price at which property would change hands between a hypothetical willing and able buyer and an hypothetical willing and able seller, absent compulsion to buy or sell, and having the parties reasonable knowledge of the facts, all of it in an open and unrestricted market.

362. Fair market value is indeed the applicable Treaty guideline for measuring damages in cases of expropriation. However, and as other tribunals in the past[108], this Tribunal is faced with the problem of whether a standard mainly related to expropriation, such as fair market value, can be applied to situations not amounting to expropriation.

363. On occasions, the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line. Given the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation.[109]

3. *The Tribunal's finding*

[107] *Id.*, para. 315.

[108] *Marvin Feldman v. The United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002.

[109] *See* also *CMS*, para. 410. In the absence of guidance regarding the standard of compensation for the breach of fair and equitable treatment in the US-Argentina BIT, the tribunal in the case of *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of July 16, 2006, para. 424 concluded that: "*compensation based on the fair market value of the Concession would be appropriate*."

364. The Tribunal wishes to express its appreciation to the expert appointed by it, Mr. Luis Hernán Paul, who has assisted the Tribunal in understanding essential technical information to arrive at the conclusions that follow. The Tribunal also expresses its appreciation to LECG, Dr. Fabián Bello and the experts for GSCSA, all of whom have provided important views and comments in support of their respective findings. The Tribunal has also considered with particular attention the comments made by the parties to both the preliminary and the final report of the Tribunal's expert.

365. In analyzing the parties' contentions on damages the Tribunal will proceed as follows. Firstly, it will address the arguments of general nature raised by the Respondent – described in paragraph 353. Secondly, it will address Claimants' claims following the approach proposed by the Claimants' experts and consisting in dividing damage claims into the following categories: (i) damages as equity holders – covering the loss in value of the Claimants' equity (*equity damage*) and the loss in value derived from the suspension of the PPI adjustments (*PPI damages*); and (ii) damages as technical operator (*operator damages*).

366. In conducting this analysis, the Tribunal will first deal with methodological issues before proceeding to calculate the quantum of the compensation for each of the Claimants' claims. It will conclude with the calculation of consolidated damages.

A. Respondent's general arguments opposing liability

i) Historical return on investments

367. The Respondent and both Mr. Bello and GSCSA have argued against compensation being awarded in this case because the historical return that the Claimants obtained on the investment was allegedly significantly higher than that considered in the determination of tariffs in connection with the cost of capital. According to the Respondent, the Claimants'

actual capital contribution to TGS was minimal since most of the funds originated in the loan made by the Chase Manhattan Bank to CIESA. In addition, GSCSA suggests that there are numerous errors in the Claimants' calculations relating to the rate of return on investments, dividends and fees.

368. The Claimants allege that the Respondent's estimates of Claimants' returns on equity are flawed because they miscalculate the initial contribution and inflate TGS' and Claimants' earnings. Moreover, these estimates are irrelevant for damage calculation since damages are a direct result of the measures introduced since 2002 on a forward-looking basis.[110]

369. The Tribunal must reject Respondent's arguments. Firstly, as noted by the Claimants, their claims refer to the impact of the measures on the value of their investments. The calculation of such value is based on reasonable estimates of future demand, revenue and expenditures and excludes consideration of past performance or returns. Historical return on investment is therefore irrelevant for determining damages.

370. Secondly, LECG is right in observing that differences between the estimated rate of return and the actual return are inherent to the price-cap system under which TGS operates. Under such system recouping extra profits between tariffs reviews will depend on the company's efficiency. Without analyzing the calculations presented by both parties at this stage, the Tribunal notes that even if Claimants' actual returns were higher than those estimated by the ENARGAS, such returns will not disallow claims for compensation of Treaty breaches. Neither historic nor estimated returns have been retained as a valid ground to oppose compensation under international law.

ii) The question of leverage

[110] LECG Expert Report of May 2005, para. 82.

371. As noted above under ¶¶ 158-167, the Respondent has also raised the issue of CIESA's and TGS' reliance on financial leverage as an objection to liability. The Respondent and its experts, in particular Mr. Bello, argue that TGS' aggressive leverage policy considerably increased TGS vulnerability to changing economic conditions. Such vulnerability was compounded by TGS' "double leverage" following CIESA's own recourse to debt. TGS' declaration of default and its subsequent loss in value is therefore directly linked to financial policy decisions and cannot be attributed to Respondent's measures.

372. The Claimants note that TGS' financial policies were reasonable and followed normal standards for the gas transportation industry.[111] In the absence of the Respondent's measures, TGS leverage would not have represented a potential liquidity or financial problem for the firm since historical performance and cash flows perspectives were sufficient to cover the typical financial ratio covenants considered by lenders.[112] Finally, Claimants observe that CIESA's financing is irrelevant for damage computation since damages should be computed only once by looking at Claimants' stake in TGS.

373. The Tribunal agrees with the Claimants' approach. TGS' leverage was reasonable by industry standards and close to that advised by the regulator. The difference between the optimal leverage considered by ENARGAS and the actual leverage of TGS was not significant: respectively 36.7% as compared to 40.8% in RQT I (1996), and 46% as compared to 49.8% in RQT II (2001).[113] It may also be noted that none of the debt holders expressed any concern regarding the level of leverage before the measures were taken.

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[111] *Id.*, para. 64.

[112] *Idem.*

[113] *Id.*, para. 63; Expert Opinion of Fabián Bello of February 28, 2005, para. 28.

374. The argument made by the Respondent as to the need to take into account the market capitalization of TGS shows that the value of TGS' stock was constantly and significantly positive before the measures were adopted, thus suggesting that the stock market did not consider such leverage as endangering the company prior to the measures.

375. It was only after the pesification of tariffs that the company defaulted on its debt and the stock exchange price decreased dramatically.[114] Consequently, the decrease in value was generated by the measures and not by the leverage.

376. The Tribunal notes that CIESA's debt in this context is irrelevant. However, it will play an important role in defining the actual investment of the Claimants in TGS, as will be analyzed below.

iii) Country risk

377. The Tribunal has extensively considered in its examination of liability above under ¶¶ 119-121; 148-150 the question of whether the country risk premium reflected in the tariff includes the risk of devaluation or the risk of tariff freeze and pesification, which the Respondent has raised in opposition to any claim of liability concerning such measures. According to the Respondent, any finding to the contrary would result in granting the Claimants double compensation for the same risk.

378. As mentioned, the Tribunal believes that the 'country risk' does not include the risk of freeze and pesification of tariffs, which was separately and specifically protected under the Regulatory Framework. Claimants have therefore not been compensated for these measures. Consequently, the valuation will consider the effect of freeze and pesification of the tariffs on the investment and this shall be reflected in the resulting compensation.

[114] *See* GSCSA Expert Report of June 2005, para. 138, for stock exchange price.

B. Claimants' claims regarding damages

i) Equity damage: methodological issues

379. The equity damages correspond to the loss in value of Claimants' investment in TGS derived from the measures, in particular from the *pesification* of tariffs. In estimating these damages, the Tribunal recalls that "*compensation should undo the material harm inflicted by a breach of an international obligation*."[115] In this case, as noted above, the breach concerns the fair and equitable treatment and the umbrella clause.

380. To "*undo the material harm*" in this case, the Tribunal considers that it needs to compare the value of Claimants' investment before the measures were adopted and its value at present. To determine the value of the investment at these periods, the Tribunal will apply the principle of fair market value, as described above.

381. The parties disagree, however, on the appropriate method for establishing the fair market value. While the Claimants have relied to this effect on the DCF and other methods (*i.e.*, book value and unjust enrichment), the Respondent has favored the stock exchange valuation of the shares. The Respondent's expert, Mr. Fabián Bello, has also explained that market capitalization offers an additional method with which DCF assessments can be verified and corrected. In the instant case, shares in TGS are normally traded in both the Buenos Aires and New York stock exchanges. Claimants have rejected the use of the stock market value alleging principally (i) the illiquidity of TGS share; (ii) the effects of thin markets like Buenos Aires, namely, the disconnection between stock prices and real values and the volatility of share values due to erratic macro economic performance.

[115] *S.D. Myers*, para. 315.

382. The Tribunal is not persuaded by the use of book value or unjust enrichment in this case because these methodologies do not provide an adequate tool for estimating the market value of TGS's stake. The book value of TGS stake is by definition valid for accounting purposes but, as noted by LECG, fails to incorporate the expected performance of the firm in the future.[116] The unjust enrichment method does not provide a value of the company; it computes damages by looking at the extent of unfair enrichment by the Government. The estimation of the unfair enrichment would then be determined on the basis of the price paid for the license or the wealth transferred to the entity benefiting from the enrichment.

383. With regard to stock market value, the Tribunal accepts Claimants' point that when markets are illiquid or the volume of transactions is limited, market capitalization might provide distorted valuation indications. However, it is still possible to rely on this approach if longer periods of time are taken into consideration so as to determine relevant averages as suggested by the Tribunal's expert.

384. In view of the fact that TGS is a "going concern", the Tribunal believes that its fair market value should include the measure of its future prospects.[117]

385. Since DCF reflects the companies' capacity to generate positive returns in the future, it appears as the appropriate method to value a "going concern" as TGS.[118] Moreover, there is convincing evidence that DCF is a sound tool used internationally to value

[116] LECG Expert Report of May 2005, para. 157.

[117] This accords with established international practice. Such an approach was adopted in the following decisions: *Amco Asia Corporation and Others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Award in Resubmitted Case of June 5, 1990, 1 ICSID Reports (1993); *Liberian Eastern Timber Corp. (LETCO) v. Republic of Liberia* (ICSID Case No. ARB/83/2), Award of 31 March 1986, 2 ICSID Reports (1994), pp. 372-377; *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of August 30, 2000 available at http://www.worldbank.org/icsid. Consideration of future prospects also features in the following decisions of the US-Iran Tribunal: *Starett Housing Corp. v. Islamic Republic of Iran*, Award No. ITL 32-24-1 of December 19, 1983 and *Phillipps Petroleum Company Iran v. Islamic Republic of Iran*, Award No. 425-39-2 of June 29, 1989.

[118] The DCF method is widely endorsed, both by financial institutions and international jurists. *See* for example *Legal Framework for the Treatment of Foreign Investments:* Volume II: Guidelines (Washington D.C., The International Bank for Reconstruction and Development / The World Bank) (1992).

companies[119], albeit that it is to be used with caution as it can give rise to speculation. It has also been constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law.[120]

386. In light of these considerations, the Tribunal is persuaded that the DCF method offers a reliable approach in this case. The Tribunal finds, in addition, that Mr. Bello's initial submission of verifying DCF results in accordance with the valuation that market capitalization might reflect is a useful tool to which the Tribunal will have recourse.

387. In the present case there is yet another aspect that must be considered. Market transactions have taken place in respect of the Claimants' participation in TGS, both in connection with the swap that took place with Petrobras and the later sale of shares to an investment fund. Willing sellers and willing buyers in this case are thus no longer hypothetical but real enough, a situation that has turned to be meaningful in the Tribunal's findings. In fact, these transactions and in particular the sale of the Claimants' 15.2% stake in TGS to D.E. Shaw and the option to purchase the remaining 4.3% participation in TGS are an accurate reflection of the current market value of the company.

388. LECG uses DCF for establishing both the value before the measures were taken and the current value of the Claimants' participation in that business, the difference between one and the other being the estimated losses, subject to some adjustments. While the Tribunal finds nothing wrong in that approach, which is commonly used and has been applied by other tribunals,[121] it involves some degree of uncertainty in the assumptions taken into account. Because there are in this case specific transactions concerning the Claimants' participation in TGS, the Tribunal considers that the real value obtained in these transactions better reflects the current value of such participation. This is a value which is

[119] LECG Expert Report of May 2005, para. 159, no. 131.

[120] *See* for example: *Amco (Resubmitted Case)*, pp. 616-617; *LETCO*, pp. 372-377; and *CMS*, para. 411.

[121] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005.

certain and arises from market transactions. Moreover, such transactions were specifically made with the intention of mitigating losses.

389. Consequently, the Tribunal will apply DCF to estimate the value of TGS and of Claimants' investment (*i.e.*, their equity participation in TGS) before the measures were adopted, in particular, before pesification took place. To estimate the current value of TGS and of Claimants' investment, the Tribunal will use the sale transaction with D.E. Shaw. Both results would then be contrasted with the stock market value. Next, the Tribunal will establish the difference between these two values to calculate the damages suffered by the Claimants as shareholders of TGS. Finally, the Tribunal will consider *operator damages* and *PPI damages* (if any) to establish the overall compensation to the Claimants' for the Treaty breaches incurred by the Respondent.

390. Before moving to the quantum of equity damages, the Tribunal will address the Respondent's disagreements with regard to two important issues for the estimation of the equity damage: (i) the question of the Claimants' actual participation in TGS, including the discussion of CIESA's debt; and (ii) the question of regulated and non-regulated business.

a) The question of the Claimants' actual participation in TGS and the incidence of CIESA's debt

391. One of the most difficult questions that the Tribunal has had to address is that concerning the true participation of the Claimants in TGS, namely whether it amounts to a 35.5%, as the Claimants argue, or only to a 19.5%, as the Respondent believes. As noted, this difference arises from the fact that the Claimants' participation in TGS was in part financed by a loan that CIESA took on their behalf. The Tribunal must note for the sake of clarification that these figures have been used by the parties so as to simplify the

arguments made; in fact, each figure is the aggregate result of various shareholdings, some direct and some indirect.

392. The Tribunal notes that the financing of the parent company's (*i.e.*, Enron) final investment (*i.e.*, TGS) through the indebtedness of the holding company (*i.e.*, CIESA) is a normal investment practice. Such practice will as a rule not affect the determination of the value of the shareholding for compensation purposes. In fact, because the parent company shall normally be liable for such debt, it would be entitled to recover the entire equity interest. In the present case, however, the situation is different. While the parent company at first guaranteed CIESA's debt and was liable for it, it then became the debt of CIESA alone. Eventually the parent company assumed and swapped its share of this debt for its own equity in TGS thereby diluting its final investment. The approach to compensation must therefore also be different.

393. Indeed, the swap executed with Petrobras in connection with CIESA's debt restructuring in 2005 transformed Enron's initial indirect participation of 27.65% in TGS into a direct participation of 11.65% in that company.[122] In exchange, the Claimants' liability for CIESA's debt was proportionally reduced.[123]

394. Upon completion of the swap Enron is to hold a direct stake of 19.5% in TGS (the initial 7.85% direct participation plus 11.65% following the swap). However, Enron sold shares representing 15.2% of TGS to the investment fund D.E. Shaw in January 2006. Subject to the completion of the second stage of the swap, leaving Enron an additional direct participation of 4.3%, D.E. Shaw also has the option of purchasing this additional stake.

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[122] The 7.85% remaining direct interest of Claimants in TGS (through Enron's subsidiaries other than CIESA) was kept aside the swap transaction but was later included in the sale and option agreement entered into by Enron with D.E. Shaw.

[123] The swap comprised two stages. First, EACH and EPCA, Enron's subsidiaries, transferred to a trustee indicated by Petrobras their 40% stake in CIESA; Petrobras in turn transferred to Enron's subsidiaries 7,35% of its direct stake in TGS. Second, EACH and EPCA would transfer their remaining 10% stake in CIESA to Petrobras; Petrobras in turn, approved the transfer by CIESA of 4.3% of its stake in TGS to Enron's subsidiaries. This second stage is awaiting ENARGAS approval.

395. While this second stage is pending Enron remains proportionally liable for CIESA's debt. The Tribunal assumes, however, the success of the second stage of the swap leading to the extinction of the remaining liability. The Tribunal will accordingly consider the effects of the swap agreement as a whole.

396. Before entering into the analysis of the effects of the circumstances mentioned above, the Tribunal wishes to recall that the disposal of Enron's participation in TGS does not affect its jurisdiction to decide in this case. As discussed above, ICSID jurisdiction is determined on the date the arbitration is instituted and subsequent changes in their ownership of TGS does not affect jurisdiction.[124]

397. How do Enron's guarantees and assumption of CIESA's debt affect the determination of its participation in TGS and eventually the calculation of damages?

398. Firstly, following the swap operation as a whole, Enron's initial indirect participation of 27.65% in TGS is reduced to 11.65%. Enron is further released from its obligations as guarantor of CIESA's debt. The 11.65% therefore represents the net asset value of Claimants' participation in CIESA, *i.e.*, the book value of Enron's assets in CIESA (which represented 27.65% of TGS stake) less liabilities (50% of CIESA's debt). The pre-existing 7.85% TGS stake directly owned by Enron should be added to this value to obtain the net asset value of Enron's overall participation *i.e.*, 19.5%. This stake corresponds to the sale agreed with D.E. Shaw.

399. Secondly, CIESA's original debt should be taken into account when determining the value of Enron's investment prior to the measures. Claimants are correct in affirming their right to claim for their initial 35.5% participation in TGS. However, when valuing that stake, one cannot ignore the underlying debt burden if the latter is linked to the investor by the guarantee and subsequently serves to dilute the very same stake. As a

[124] *CSOB*, para. 31; *Vivendi*, paras. 60-62.

matter of accounting principle therefore, comparing the current value of Enron's investment (as determined by the sale to D.E. Shaw) requires calculation of the net asset value of the Claimants' investment as of December 2001 obtained by deducting Claimants' participation in CIESA's debt.

400. It can then be concluded that Argentina will compensate the Claimants for the full value of their investment, which for the reasons explained does not include the portion of the investment financed by CIESA's indebtedness.

401. The Tribunal will accordingly use the 35.5% participation in TGS as the starting point of valuation, will deduct from such amount the Claimants' share in CIESA's liabilities, for which they no longer have any responsibility, and attain a net value, which is to be compared with the net present value of the sale to D.E. Shaw.

b) The question of the regulated and non-regulated business

402. As noted above under ¶¶ 173-181, the parties have discussed the question whether valuation should take into account only the damages affecting the regulated business of TGS, as argued by the Claimants, or should off-set against any such losses the positive results of the non-regulated business, as argued by the Respondent. For the reasons explained, the Tribunal believes that both kinds of business should be kept separate and distinct. Accordingly, only the regulated business of TGS will be taken into account in the considerations that follow.

ii) Equity damage: the quantum of compensation

403. The Tribunal turns next to estimating the quantum of compensation for equity damages. In light of the considerations made above, only the regulated business of TGS will be

taken into account to this effect. As noted, pesification of tariffs beginning in 2002 is the central factor in determining compensation as it has the higher incidence on the difference in value in December 31, 2001, before the measures were adopted, and the net present value.

404. As concluded above, the Tribunal will compare the value of the Claimants' participation in the regulated business of TGS before pesification and the current value of such participation. While the first value will be established using DCF, the current value will be based on the sale price to D.E. Shaw on January 18, 2006, taking into account only the value attributable to the regulated business.

The DCF value at December 31, 2001

405. The Tribunal will start from the premise that the figures and assumptions used by LECG in their expert valuation of damages at December 31, 2001 are correct. The Tribunal notes that while two dates have been discussed by the Claimants as relevant to valuation (August 31, 2000 and December 31, 2001), most of the experts' work has dealt with the latter date. While another ICSID tribunal has used August 17, 2000 as the appropriate date to this effect,[125] the Tribunal finds appropriate to follow in this case the experts' approach as the most serious damages arose in connection with the Emergency Law.

406. There are, however, specific comments and criticism made by the Respondent and its experts, as well as by the Tribunal's expert, to the LECG figures, criticism that has been taken into account by the Tribunal to reach a conclusion in this respect. The valuation done by LECG has been tested under different scenarios so as to check for accuracy and reasonableness. In this respect, the Tribunal finds that a number of variables require

[125] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005.

adjustment, with particular reference to the tariff base, the Weighted Average Cost of Capital ("WACC") and the period over which tariff adjustment should realistically take place. These adjustments will be explained next.

407. Such adjustments reflect the reality of the crisis that took place in Argentina and the specific influence it has in connection with valuation and compensation, a matter which, as the Tribunal has explained, necessarily has to be reflected in this context. It is here where the difference with a normal business scenario will become evident.

The tariff base

408. The tariff base used by LECG for December 31, 2001, or US$1,789 m., has been criticized by Mr. Bello as being excessive in light of the work done by ENARGAS and the participating consultants in preparation for the RQT II, which gave a lower end amount. The Respondent's expert considers that the base suggested by the Claimants should be reduced by US$225 m.

409. Taking into consideration this criticism and other adjustments that had been considered by ENARGAS, the Tribunal's expert proposed as the appropriate tariff base an amount of US$1,669.4 m.

410. The Tribunal's expert has accepted the reductions made by the ENARGAS consultants, with the exception of the exclusion of the working capital, which he considers must be included in the tariff base because it is as necessary as the investment in fix assets in order to develop the business. The Tribunal considers this to be a reasonable proposition and will accordingly follow its expert best estimate for a tariff base in the amount of US$1,669 m., a figure which is lower than that suggested by LECG and higher than that suggested by the Respondent.

The WACC

411. The experts also disagreed about the appropriate WACC that should be applied in this case. While LECG has used a WACC of 12.24% for December 31, 2001, GSCSA has discussed a WACC of 14.86%. The Tribunal's expert considers it is appropriate to use a higher premium for risk than those used by LECG and proposes a 12.6% WACC, based on the WACC considered by ENARGAS for RQT II (10.4%) plus an adjustment for inflation.

412. The Tribunal finds that the ENARGAS figure constitutes an objective and realistic calculation since it would have been the actual cost of capital applied by the regulator in the calculation of tariffs if the RQT II had not been aborted. While the ENARGAS did not reach a final determination on this matter, the figures discussed at the time reflected the options available and its most likely outcome. The adjustment for inflation is necessary to make it consistent with the nominal values used by LECG.

413. In light of these considerations the Tribunal considers that the figure proposed by the Tribunal's expert is reasonable and should also be retained for the calculation of compensation.

Period of tariff adjustment

414. LECG applied the whole tariff adjustment beginning in 2002 in a single year, using to this end an increase of 144%. The Tribunal believes this is not a realistic scenario in a crisis context and has accordingly, as argued by Mr. Bello, chosen to extend the period of tariff adjustment to six years, resulting in an increase of 20.8% for each year of such period with a total adjustment of 211%.

415. Such change is not significant in respect of the effect on demand that could result from one or the other choice because of the stable contractual commitments used in the gas transportation industry, and thus its effect on compensation will not be significant either. Yet, the Tribunal considers reasonable to allow for a longer period over which the tariff adjustment will take place. Tariff adjustment over a period of six years allows in fact for a better spread of the WACC indicated as the average return of the business.

Efficiency adjustment

416. The experts also discussed the question of the application of an efficiency factor in the determination of tariffs (Factor X). While for Mr. Bello this factor should be considered and would result in a lower tariff adjustment, LECG has explained that it is implicit in the cash flow estimates on which the initial tariff adjustment is based.

417. In the Tribunal's view, whether this factor is taken into account in an explicit or an implicit manner, the end result will not be different. The Tribunal will accordingly retain the figures used to this effect by LECG.

Percentage attributable to the regulated business

418. In determining the value of the regulated and the non-regulated business of TGS, LECG, following the same approach as the ENARGAS, has used the percentage each business has in the total fixed assets of the company, which results in 86% for the regulated business and 14% for the non-regulated business in 2001. In LECG's view, this percentage is the same resulting from the earnings of each business before taxes. The Respondent insists that such separation is artificial and unviable for damage calculation.

419. The Tribunal's expert has considered more reliable to this effect the use of the operational income for each business, as reflected in TGS' statements, which results in 88% for the regulated business and 12% for the non-regulated business for 2001. The Tribunal sees no reason to depart from this approach.

Value of the regulated business in 2001

420. The Tribunal, as explained above, will use for establishing the value of the regulated business of TGS at December 31, 2001, the figures given by LECG with the following adjustments: the tariff base is reduced from US$1,789 m. to US$1,669 m.; tariff adjustment will spread over a period of six years with an annual increase of 20.8% and a total of 211%; WACC is increased from 12.24% to 12.6% and the participation in the regulated business is increased from 86% to 88%.

421. The value resulting from the above adjustments in light of DCF is US$1,574 m., which, after deducting the debt of the regulated business or US$934 m., yields an asset value of US$639.7 m. The Claimants' 35.5% participation is thus US$227.1 m.

422. Because of the reasons explained before, the Tribunal will take into consideration the situation of the Claimants' participation in CIESA's debt. CIESA's total debt at December 31, 2001 amounts to US$223.3 m.; the Claimants' participation in this debt is 50%, which if considered only in the percentage attributable to the regulated business (88%) results in an amount of US $98.1 m.

423. The total net value of the Claimants' participation in the regulated business at December 31, 2001 is, therefore, US$227.1 m. minus US$98.1 m. corresponding to their share in the debt, or a net figure of US $129 m.

Verification using stock exchange value

424. The Tribunal has noted above that the value of market capitalization is a relevant element to verify the outcome of the DCF method so as to establish whether the variables used in the latter reflect reasonable assumptions. The use of market capitalization is intended only as a reference value and not as valuation tool in itself.

425. The Tribunal has first concluded in this respect that to use the stock value of December 2001 would result in grave distortions since at that point the unfolding crisis had led to wide speculation. In fact, as explained by GSCSA, the stock market was used to obtain and transfer dollars by means of the purchase of American Depository Receipts (ADR's).[126] Arbitrage of currencies to bypass the "*corralito*" by means of ADR transactions became a common practice at the time, which badly affected the reliability of stock market prices. It should be noted that the average stock market value of TGS for December 2001 (US$867 m.) was paradoxically higher than that of the precedent months November 2001 (US$749 m.) and October 2001 (US$781m.). It was also higher than the average for the period September-November 2001 (US$835 m.). The Tribunal will accordingly exclude the figures for the month of December.

426. Applying the percentages determined above, the stock value of the regulated business of TGS ranges from US$658.1 m. for November 2001 and US$734.3 for the period September-November 2001.These figures are not too different from those resulting from LECG's analysis (US$768 m.). Because the Tribunal has used a lower tariff base for the reasons explained, the difference increases in respect of the figures used by the Tribunal (US$639.7 m.), but it is still within an acceptable range and does not result in a disproportionate outcome.

[126] GSCSA Expert Report of June 2005, para. 136.

427. Stock exchange prices for TGS would result systematically in values higher than those determined by the Tribunal's expert applying DCF, not only considering the averages for 2001 but also the result of longer periods of time. If, for example, the average for 1999-2001 is used, the value of the regulated business is US$1,094 m. The same holds true for any average corresponding to 2001. As noted, if December 2001 is used as a reference point, values will also be higher.

428. The Tribunal is accordingly satisfied that the figures resulting from DCF do not show unreasonable differences with those resulting from the verification done in light of the stock market value.

Current value of the regulated business

429. The Tribunal has found above that the transactions with respect to the sale of TGS shares to D.E. Shaw provide an accurate and realistic base for the estimate of the current fair market value of the company. Having a market transaction of such characteristics is then preferable, in the instant case, to the use of DCF that implies a number of uncertainties derived from assumptions on the future that may turn out to be true or not.

430. D.E. Shaw bought the Claimants' 15.2% in TGS for US$114.6 million. It further took an option to purchase the Claimants' remaining 4.3% participation in TGS. Although the approval of this transaction is still pending, for the sake of a complete calculation the Tribunal includes the purchase price included in the 'Option Agreement' of US$33.9 m. The total current value is accordingly of US$148.5 m.

431. The participation of the regulated and the non-regulated business in this last figure has now to be determined. Applying the same criterion of the operational earnings used for 2001, this time for 2005, as reflected in TGS' statement for that year, the regulated

business has a 42% participation in the total business, while the non-regulated business has 58%.

432. In its comments to the final report of the Tribunal's expert, the Claimants have argued that the approach taken by the expert as to the allocation of 42.5% of the 2006 transaction equity value to the regulated segment assumes that also only 42.5% of TGS' outstanding debt as of 2005 corresponds to that regulated segment. In the Claimants' view, this result does not reflect the reality because the vast majority of that debt had been contracted prior to 2002 to finance the regulated sector business. So as to avoid an implicit cross-subsidy between the regulated and the non-regulated business, the Claimants assert that the same debt allocation of 88% made in 2001 should be applied in 2005, while 42.5% is used for the allocation in respect of the firm value.

433. The Tribunal has examined with great attention this argument as it also believes that the correct principle to apply is that there should be no cross-subsidies between those segments. However, the Tribunal must also note that unrealistic results would emerge from the Claimants' proposals noted above. In fact, if the allocation proposed by the Claimants for 2001 is kept, only US$16.5 m. out of the equity value of US$753.9 m., that is about 2% of the equity value implied in the D.E. Shaw transaction could be attributed to the regulated business in 2005, while 98% would be allocated to the non-regulated sector. In light of current valuation of other business operating in the regulated area of gas transportation, this is not a reasonable outcome.

434. Moreover, the Claimants' experts had suggested for the allocation of participation in 2001 the asset value of the regulated and non-regulated segments. This was also the approach considered by ENARGAS for the determination of tariffs. If this same approach is followed in 2005, not only for the debt but also for the firm value as Claimants request, the results obtained do not seem quite reasonable. In fact, it is estimated that 85% (percentage of assets attributable to the regulated business in light of the financial

statements for 2005) of the total equity value resulting from the D.E. Shaw transaction would pertain to the regulated business under this scenario.

435. The Tribunal does not question that the different methodological approaches discussed above might be conceptually valid. Given that such approaches lead to extreme results of 2% in one scenario and 85% in the other, both arising from the arguments of the same party, the Tribunal believes that the suggestion made by the Tribunal's expert is more balanced and realistic. Moreover, the allocation of debt between one segment and the other was never explicitly argued before the Tribunal.

436. The Tribunal concludes accordingly that it will keep the allocation suggested by the Tribunal's expert. It follows that of the total current value of US$148.5 m., the value of the regulated business is US$62.5 m. as at January 2006. Expressing this value in 2001 currency value the Claimants' participation amounts to US$38.6 m.

Verification of the current value using stock exchange value

437. If extrapolated, the 2006 transaction would result in a value of US$761.5 m. for the whole of TGS' business. This is less than the stock exchange value of the company at the time, which was US$855 m. The Tribunal does not believe, however, that this difference reflects an abnormal result and may well be explained by the fact that the price of the sale was agreed in 2004 and came to be executed in 2006.The stock market value of TGS fluctuated in 2004 between US$589 m. and US$869 m, and thus the value of US$761.5 m. falls well within this range.

438. The difference between the value of the Claimants' participation in the regulated business of TGS in 2001 US$129 m., prior to the measures, and the value of the 2006 transaction expressed in 2001 currency US$38.6 m., results in an amount of US$90.4 m. in respect of the pesification of tariffs.

439. The Tribunal will proceed to decide on the operator and PPI damages to finally add up all relevant concepts to estimate overall compensation for the Claimants.

i) Operator damages

440. The Claimants have requested the award of damages relating to the Technical Assistance Agreement ("TAA") between TGS and EPCA, dated 28 December 1992[127]. Under its terms, EPCA receives compensation for its role as "Technical Operator" of TGS' gas transportation system, and its annual compensation is the higher of: (1) US$3 million, or (2) 7% of TGS' EBIT minus US$3m. The Claimants' experts have calculated that the after-tax value of the TAA to Enron was US$46.4 million as of December 2001.[128]

441. According to the Claimants, the substantial reduction of TGS' revenue stream caused by the freeze of tariffs damaged the Technical Operator.[129] Moreover, the Claimants allege that their returns as Technical Operator are a form of delayed return from the risks it took under the privatization.[130]

442. The Respondent disputes the claim concerning the TAA explaining that such fees could not be considered a part of delayed compensation to be counted as damages because the Agreement was devised to remunerate specific know-how made available to TGS for a limited duration. In addition, since 2000, the operator fees are not included in the calculation of tariffs as decided by ENARGAS.[131] Finally, the Respondent argues that the TAA was transferred to Petrobras for an undisclosed amount in 2004.

[127] Claimants' Exhibit n. 40.

[128] Claimants' Memorial, para. 87; Claimants' Reply, paras. 672-677.

[129] Claimants' Reply, para. 674.

[130] *Id.*, para. 677.

[131] Respondent's Counter-Memorial, paras. 40-50; Respondent's Rejoinder, paras. 810-816.

443. The Tribunal is persuaded by the Respondent's arguments to the effect that the TAA claim should not be admitted. The Claimants have not proven convincingly that the fees under the TAA are a form of delayed compensation and therefore should be included in computations of profitability or damages. While the Claimants' damages experts have included this claim in the losses suffered by the Claimants related companies,[132] the TAA nor any other contemporaneous document show that the management fees were deferred compensation for Claimants' investment. To the contrary, Article 2.5 of the TAA refers to "compensation for the *performance* by Enron Argentina of its obligations *hereunder*" (emphasis added).

444. The Tribunal must also note in reaching its conclusion in respect of this claim that the TAA was transferred to Petrobras on July 15, 2004, which transfer was approved by Enargas in 2004. Claimants refer to a "transfer of the fee to Petrobras,"[133] but have not produced a copy of the transfer agreement nor have they quantified the amount that Petrobras would have paid for the transfer.

ii) PPI Damages

445. The freeze of tariff adjustment in accordance with the US PPI for 2000 and 2001 also needs to be measured in the context of valuation. While the freeze also has effects after 2001, these are included in the damage arising from pesification.

446. LECG has calculated the Claimants' damage arising from this claim in the amount of US$ 15.8 m. at December 2001. The Respondent contested this claim late in the proceedings in its second comments to the expert report (letter of 9 November 2006) by arguing that the existence of the agreements signed in January and June 2000 suspending

[132] LECG Expert Report of November 2005, para. 205; and of May 2005, para. 104.

[133] Claimants' Reply, para. 673.

PPI adjustments, although not challenged by the Claimants, was ignored. In addition, according to the Respondent, if any damage was to be awarded on this ground, it should only include marginal benefits derived from the July agreement.

447. The Tribunal finds no merit in Respondent's arguments. TGS and other Licensees agreed on suspension of the PPI adjustments in January and June 2000 on the basis that the amounts not collected as a result of the suspension would be recouped later and with interests. With the abolition of the PPI adjustments by Law 25,561 such recouping is no longer available.

448. The Respondent has failed to provide an alternative calculation on the basis of its allegations. Thus, LECG calculation as used by the Tribunal's expert will be applied by this Tribunal in the determination of compensation.

C. The amount of overall compensation

449. The amount of equity damages in respect of the pesification of tariffs calculated of US$90.4 m. needs to be increased by the damages corresponding to the freeze of tariffs in accordance with the US PPI, calculated at US$15.8 m.

450. It follows that the damage for pesification US$90.4 m. plus the damage for freeze of tariffs US$15.8 m. results in a total amount of damages of US$106.2 m. As, for the reasons explained above, the Tribunal will not be considering compensation for the damages of the Technical Operator, this last figure is the total amount of damages awarded, subject only to the application of interest as determined below.

D. Interest

451. The Claimants' experts calculated the amount of damages at 31 December 2001 and then proceeded to update such value to the date of submission of their initial Report, *i.e.*, November 2004, using their WACC. In addition, the Claimants expressly requested the application of interest at "commercially reasonable rates" (*i.e.*, compound interest on a quarterly basis) through the date of the award so as to compensate for "the time value of money and the lost opportunity to earn a reasonable rate of return."[134]

452. While the experts' technical approach is many times used for the updating of a value, and was also suggested by the Tribunal's expert, the Tribunal believes that once the amount of damage and compensation has been determined at a given date it is more appropriate that such amount should bear interest as from such date. Moreover, any risk of double recovery is thereby avoided. The Tribunal will therefore order the payment of interest at the 6 month average LIBOR rate plus 2 per cent for each year, or proportion thereof, for the period beginning on January 1, 2002 and, as requested by the Claimants, until the date of dispatch of the Award. Interest shall be compounded semi-annually. The Tribunal considers this to be a reasonable interest for the period envisaged.

E. Costs

453. Considering the decisions regarding the various issues in this case, each party shall bear the legal costs incurred by it in connection with the present arbitration and the arbitration costs shall be borne in equal shares by the parties.

[134] Claimants' Memorial, para. 378.

NOW THEREFORE THE ARBITRAL TRIBUNAL

DECIDES AND AWARDS AS FOLLOWS

1. The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(2)(a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty.
2. The Respondent shall pay the Claimants compensation in the amount of US$106.2 million.
3. The Respondent shall pay the Claimants interest at the 6 month average LIBOR rate plus 2 per cent for each year, or proportion thereof, beginning on January 1, 2002 until the date of dispatch of the Award. Interest shall be compounded semi-annually.
4. Each party shall pay one half of the costs of the arbitration and bear its own legal costs.
5. All other claims are hereby dismissed.

Made in Washington D.C., in English and Spanish, both versions equally authentic.

Profesor Albert Jan van den Berg

Arbitro

Fecha: 07 mayo 2007

Sr. Pierre-Yves Tschanz

Arbitro

Fecha: 09 mayo 2007

Profesor Francisco Orrego-Vicuña

Presidente

Fecha: 15 de Mayo de 2007