INTERNATIONAL CENTER FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN
LG&E ENERGY CORP.
LG&E CAPITAL CORP.
LG&E INTERNATIONAL, INC.
(CLAIMANTS)

AND

ARGENTINE REPUBLIC
(RESPONDENT)

ICSID Case No. ARB/02/1

AWARD

Members of the Tribunal:

Doctor Tatiana B. de Maekelt, President
Judge Francisco Rezek, Arbitrator
Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal:
Ms. Claudia Frutos-Peterson

Date of dispatch to the parties: July 25, 2007

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I. INTRODUCTION

1. On 3 October 2006, the Tribunal issued a Decision on Liability (the "Decision on Liability"), in which the Tribunal found the Argentine Republic ("Respondent" or "Argentina") to be in breach of its obligations under the Bilateral Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment ("BIT", the "Bilateral Treaty" or the "Treaty") with respect to (i) the standard of fair and equitable treatment and the prohibition to accord treatment less favorable than that required by international law under Article II(2)(a); (ii) the prohibition of discriminatory measures under Article II(2)(b); and (iii) the obligations covered by the "umbrella clause" under Article II(2)(c).

2. However, the Tribunal found that the Respondent's conduct was justified under the State of Necessity as contemplated by Article XI of the Treaty and general international law. The Respondent was therefore exempted from responsibility while this situation lasted, i.e., from 1 December 2001 until 26 April 2003.

3. The Tribunal consequently determined that Argentina was liable for damages to LG&E Energy Corp. LG&E Capital Corp. and LG&E International Inc. (the "Claimants" or "LG&E") for breaches of the Treaty, except during the period of the State of Necessity, and retained jurisdiction to determine such damages in a subsequent phase of the arbitration.

4. On 3 November 2006, the Tribunal issued Procedural Order No. 6 in which it invited the parties to comment on the method proposed by the Tribunal to establish the amount of damages suffered by the Claimants. The Secretary of the Tribunal circulated the parties' comments on 5 December 2006. On 12 April 2007, the Tribunal declared the proceedings closed under Rule 38(1) of the ICSID Arbitration Rules.

5. This Award deals **exclusively** with the determination of damages including interest (Section II) and costs (Section III). The Decision on Liability, dated

3 October 2006 and the Decision on Objections to Jurisdiction, dated 30 April 2004, rendered by this Tribunal, form an integral part of this Award.

6. In determining the damages suffered by the Claimants, the Tribunal has considered, together with allegations and evidence submitted by the parties and their experts, the financial and economic expertise provided at its request and with the parties' consent mainly by Geoffrey Senogles of LBC International Investigative Accounting, Switzerland, and by *Oxford Economic Forecasting.*[1] The Tribunal wishes to express its gratitude to the experts for their valuable collaboration as well as to the parties and their experts for their thorough allegations.

II. DAMAGES

7. Prior to the issuance of the Decision on Liability, the parties explained at length their position with respect to damages in their submissions and in the expert reports that accompanied them. The arguments on damages were discussed during the Hearing held in Washington D.C. from 23 to 29 January 2005, in which the parties' experts were also examined. The Post-Hearing Briefs ("PHB") of both parties likewise contained allegations on damages.

8. Subsequently, the parties presented their positions with regard to the Tribunal's method for establishing the amount of damages suffered by the Claimants, contained in Procedural Order No. 6 (the "Tribunal's method").

9. Accordingly, the Tribunal's analysis for the determination of damages will follow this sequence: it will first present and examine the parties' general positions on damages that have lead the Tribunal to establish the principles concerning the assessment of compensation that underlie the Tribunal's method, included in Procedural Order No. 6 (Section A). The Tribunal will then present and examine the parties' positions concerning the proposed method (Section B), and will finally quantify the amount of compensation (Section C).

[1] With assistance from Vanessa Rossi and Simon Knapp of Oxford Economic Forecasting and also Douglas Glassford.

A. The Principles Concerning the Assessment of Damages

(1) Parties' General Positions on Damages

10. The Claimants argue that Argentina's treaty violations substantially eliminated the value of their investment in Distribuidora de Gas del Centro ("Centro"), Distribuidora de Gas Cuyana S.A. ("Cuyana") and Gas Natural BAN S.A. ("GasBan") (together the "Licensees"). Consequently, Claimants are entitled to full compensation for the damages sustained, including (i) the full market value of their loss; (ii) pre- and post-Award compound interest at a reasonable commercial rate; and (iii) the costs and expenses associated with the arbitration proceedings (Claimants' Memorial, ¶184).

11. In respect to the value of their loss, Claimants allege that the general principle governing compensation for breaches of international law was set out by the Permanent Court of Justice in the *Chorzów Factory* Case. In accordance with this principle, the Claimants are entitled to compensation that fully eliminates the effects of the Respondent's breach of its obligations (Claimants' Memorial at ¶¶183-185).

12. The Claimants explain that full compensation in international law is measured by the fair market value ("FMV") of the loss to the investor. In the case of expropriation, the appropriate measure of the Claimants' loss is the FMV of the investment at the time of expropriation. In the case of the other claims, such measure is the same FMV of the investment minus the residual value (Claimants' Memorial at ¶188).

13. LG&E alleges that the preferred method to establish the FMV of a publicly-traded corporation is to determine the market value of its shares. The price paid by an investor for a share in an arms-length transaction shortly before the government's interference with the investment is likewise reliable evidence of the FMV of the asset.

14. Based upon the opinions of their experts, Professor Eduardo Schwartz and Carlos Lapuerta, Claimants calculate the FMV of their investments in Cuyana and GasBan by using the sale price for their publicly-traded shares. The value of their

investment in Centro, which is not publicly traded, was estimated from the stock price information of the three publicly-traded gas distribution companies (GasBan, Cuyana and MetroGAS). The market values were allegedly confirmed by analysis of several large block sales of shares of gas-distribution companies.

15. The Claimants' experts estimated the value of LG&E's investments at US$268 million on 18 August 2000, when the Respondent first breached the Treaty by suspending the PPI adjustment, and US$20 million in October 2002, once trading activity on the Buenos Aires Stock Exchange had adjusted to the enactment of the Emergency Law. Consequently, the Claimants allege that compensation for their expropriation claim is in the order of US$268 million and US$248 million (US$268 million minus US$20 million) on their remaining claims (excluding interest and costs) (Claimants' Memorial, ¶¶193-194).

16. Claimants defend that August 2000 and October 2002 are the dates that best reflect the difference in value of LG&E's investment with and without legal protections. In their opinion, it is pertinent to begin measuring damages from August 2000 because it was at that time that the Argentine Government began to dismantle the legal protections provided by the regulatory framework for the gas-distribution companies. Accordingly, Claimants reject the Respondent's preference for taking November 2001 as the beginning period because, by that time, stock prices were already depressed by Respondent's breaches of the Treaty, and thus LG&E's damages would not reflect the previous decline in the value of its stock resulting from Respondent's breaches and the consequent market uncertainty over the Government's commitment to the legal protections of the tariff regime (Reply, ¶260).

17. Claimants defend October 2002 as the period by which time the market had accepted that legal protections of the tariffs were no longer to be upheld and that the Government would no longer implement tariff relief or provide compensation. Claimants reject the Respondent's suggestion to use recent stock prices in order to establish the end value of LG&E's investment. Stock prices subsequent to October 2002 reflect the market speculation over uncertain tariff relief for an industry no longer protected by a stable regulatory framework. In addition, using

recent stock prices would allow the Respondent to unfairly benefit from its failure to remedy its breaches and to manipulate stock values in order to reduce damages (Claimants' Reply, ¶¶257-262).

18. At a later stage, and in response to Argentina's arguments, the Claimants' experts also performed an abbreviated DCF analysis based on the forecast of the dividends that LG&E would have likely received from its companies up until the end of the Licenses. The net present value of lost dividends was estimated at US$271 million (without pre-Award interest), allegedly confirming the experts' calculations based on the stock market value (Claimants' PHB, ¶¶79-80; Schwartz & Lapuerta second rebuttal report p. 17).[2]

19. Claimants emphasize that the destruction of the value of their investment was caused by the Argentine Government's breach of its legal commitments rather than by economic factors (Claimants' Reply, ¶¶266-267). LG&E points out that, while the legal protections offered by the tariff regime were still in effect, gas-distribution company stocks remained stable and retained their value despite the recession. In fact, the gas industry suffered no major losses linked to the drop in demand during the economic recession, since it is relatively insensitive to price fluctuations and customers do not readily switch to alternatives. Thus, but for the elimination of the requirement that tariffs be calculated in U.S. dollars (*pesificación*), the value of LG&E's investment would have weathered a devaluation of the peso (Claimants' Memorial, ¶198).

20. Finally, Claimants deny that the country risk premium allegedly included in the gas distribution tariffs provided compensation for the dismantling of the tariff regime. In particular, Claimants note that (i) this premium was not included in the initial tariffs and that, when introduced by ENARGAS in the first tariff review, it applied only to a reduced portion of the tariff; (ii) LG&E's actual returns were much lower than the cost of equity that ENARGAS calculated for the tariff reviews; and (iii) exonerating the Respondent because investment returns included such a premium would be tantamount to saying that high-risk borrowers may

[2] The value used by the Claimants in their PHB was corrected to reflect the use of 2027 as the date for termination of the Concession.

violate their legal obligations without consequence because their lenders may have charged them higher rates (Claimants' PHB, ¶¶85-88).

21. With regard to interest, Claimants allege that they are entitled to pre-Award interest measured by the one-month interest rate earned on U.S. Treasury Bills, compounded monthly as from August 2000. As to post-Award interest, Claimants will seek appropriate market-based rates when and if required for the enforcement of an unpaid award (Claimants' Memorial, ¶206).

22. The Respondent invokes the following grounds to oppose the claim for compensation: (i) the inadequacy of the methods used by the Claimants' experts to value LG&E's investment; (ii) the arbitrariness in the choice of valuation dates for LG&E's investment; (iii) the unjust enrichment of the Claimants; and (iv) the effect of the country risk premium in excluding compensation for the Claimants.

23. Firstly, in respect to the inadequacy of methods used by the Claimants' experts to value LG&E's investment the Respondent argues that: (i) stock prices for GasBan and Cuyana are unreliable due to the illiquidity and volatility of the Argentine market (Rejoinder ¶¶377-385); (ii) information on MetroGAS and GasBas is not appropriate to estimate the value of Centro given the significant differences between the companies' business structures, in particular their leverage (Rejoinder, ¶¶391-393); and (iii) of the six arms-length transactions examined by the Claimants' experts, only three can be referenced to the stock prices current at the time of the transaction and, in all three cases, the difference between the transaction price and the stock prices is considerable (Rejoinder ¶¶386-388). Alternatively, the Respondent's expert, Mr. Fabian Bello, proposes the use of DCF as a more appropriate and rigorous method to value the investments (Bello's Report of September 2004, ¶¶35-36).

24. Secondly, as to the dates chosen by the Claimants to perform the valuation of their investment, the Respondent argues that they are arbitrary and chosen to maximize their loss since they compare the best possible trading values with the worst historical trading values (Counter-Memorial, ¶366). In particular, the Respondent asserts that (i) the suspension of the PPI did not cause any damage to the

Claimants' investments since the decrease in their value during 2000 and 2001 was the result of the economic recession that affected all assets during that period; the use of August 2000 avoids reflecting such deterioration in value (Counter-Memorial ¶367); and (ii) after October 2002 the value of LG&E's investment increased considerably: by January 2004 the values for Cuyana and Centro exceeded their November 2001 values by 42% and 26% respectively. The 13% decreased in value experienced by GasBan cannot be blame on the Respondent but on the financial policy of the company, notably on it excessive leverage.

25. Consequently, the Respondent alleges that LG&E's claims for damages are inadmissible, since no damage has been inflicted, and premature, since the value of the Licensees is exposed to strong fluctuations and is dependant on the result of the renegotiation process (Counter-Memorial, ¶¶394-395; Rejoinder, ¶417).

26. Thirdly, the Respondent argues that compensating the Claimants would result in unjust enrichment because: (i) if compensation for expropriation were conceded, LG&E's return for the period 1997-2002 would be considerably higher (in excess of 16% per annum) (Rejoinder, ¶¶449-458); and (ii) if compensation for the violation of other Treaty protections is granted, LG&E would be in the "absurd" situation in which it would receive an amount higher than that invested and, in addition, would retain its stake in the Licensees (that have increased its overall value since October 2002), being entitled to future dividends (Rejoinder, ¶¶459-466).

27. It is the Respondent's opinion that the country risk premium calculated by ENARGAS and included in the tariffs has already compensated LG&E for the risk of investing in a country like Argentina (Rejoinder. ¶¶405-407).

28. Finally, the Respondent objects to LG&E's claims concerning interest. In the event that the Tribunal decides to grant the Claimants' request for interest, they should be simple and not compounded (Counter-Memorial, ¶357). In addition, since Claimants received profits during 2000 and 2001, awarding interest from August 2000 would result in double recovery (Rejoinder, ¶474).

(2) Tribunal's Analysis

29. It is well established in international law that the most important consequence of the committing of a wrongful act is the obligation for the State to make reparation for the injury caused by that act.[3] The questions arise as to the applicable standard and measure of compensation and the method to quantify it.

30. These questions are particularly thorny when it comes to defining the standard and measure of compensation applicable for treaty breaches other than expropriation. There are no express provisions in the Treaty addressing these issues and pre-existing guidance in arbitral jurisprudence is very limited. In establishing the standard of reparation; the measure of compensation; and the method to quantify it applicable in this case, the Tribunal takes recourse to the principles governing reparation under international law and the few precedents in investment treaty arbitration. In the same manner the Tribunal includes the claim for interest as part of the Claimants' compensation.

(a) *The Applicable Standard for Reparation*

31. The Tribunal agrees with the Claimants that the appropriate standard for reparation under international law is "full" reparation as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case and codified in Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (the *Draft Articles* or *DARS*).[4] In accordance with the PCIJ, reparation:

> "[…] must, so 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. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear […]"[5]

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[3] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* ("Factory at Chorzów"), Permanent Court of International Justice Proceeding, Merits 1928, P.C.I.J. Series A. No. 17, p.21.

[4] For an explanation as to the origin of the Draft Articles *see* the Decision on Liability, ¶245 footnote 62.

[5] *Factory at Chórzow*, p. 47.

32. Reparation can thus take the form of restitution or compensation.[6] Claimants have requested compensation measured by the fair market value of their loss.[7] The Tribunal, however, does not follow Claimants' request for the measure of compensation for the reasons set out below.

(b) *The Measure of Compensation*

(i) The Inapplicability of Fair Market Value as the Measure of Compensation

33. At the heart of the Claimants' argument lies the valuation of their loss by reference to the fair market value of that loss. Respondent do not oppose the use of the FMV, but rather, the method for its estimation.

34. To determine the FMV of their loss, the Claimants establish the value of the gas distribution companies (and of LG&E's investment using the percentage of shares owned) based on stock price and large share purchase values. The only difference in the valuation for the expropriation claim and the other claims is in the subtraction of the residual value in the later case. Argentina proposes DCF as the method to calculate such value but does not conduct a calculation.

35. In the Tribunal's view, this type of valuation is appropriate in cases of expropriation in which the claimants have lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of investment. However, this is not the case. The Tribunal rejected the claim for indirect expropriation put forward by the Claimants on the basis that Argentina's measures:

> "[…] did not deprive the investors of the right to enjoy their investment […] the true interests at stake here are the investments' asset base, the value of which has rebounded since the economic crisis of December 2001 and 2002 […] the effect of the Argentine State's actions has not been permanent

[6] Article 34 of the DARS also includes satisfaction as a third form of reparation. Satisfaction is, however, irrelevant for the purposes of this case and will not be considered by the Tribunal.

[7] However, Claimants, in their comments to Procedural Order No. 6, include a request that resembles restitution and that will be analyzed in the context of the method for the quantification of compensation in section II.B.(2) below.

> on the value of the Claimants' shares, and Claimants' investment has not ceased to exist."[8]

36. For the Tribunal, compensation in this case cannot be determined by the impact on the asset value; it does not reflect the actual damage incurred by Claimants. The measure of compensation has to be different.

37. It may be added that FMV is referred to in Article IV of the Treaty as the measure of compensation in cases of expropriation. The Tribunal considers that its application does not extend similarly to other treaty standards. As noted by the tribunal in *SD Myers* when analysing the analogous situation under NAFTA, the treaty does not state that it applies to all breaches of its provisions but "*expressly attached it to expropriations*."[9]

38. Furthermore, there may be a difference between "compensation" as the consequence of a legal act and "damages" as the consequence of the committing of a wrongful act.[10] This distinction has been noticed by various tribunals.[11] If FMV is not the proper measure of compensation for unlawful expropriation, it is *a fortiori* not appropriate for breaches of other Treaty standards.

39. The Tribunal notes, however, that when addressing the question of the absence of applicable treaty compensation standards for breaches other than expropriation,

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[8] 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, ¶¶198-200.

[9] *S.D. Myers, Inc v. Government of Canada* ("SD Myers I")**,** UNCITRAL Rules, First Partial Award of November 13, 2000, ¶307.

[10] Marboe, Irmgard, *Compensation and Damages in International Law. The Limits of "Fair Market Value"*, The Journal of World Investment and Trade, October 2006, Vol. 7 No. 5, p. 726. The Tribunal wishes to highlight the general lack of consistency in the use of the terms "compensation" and "damages" noted by Marboe. In spite of their different connotations, they are used interchangeably and normally not linked to a specific legal subject matter. The result is that the different legal concepts behind the terms are mixed, creating confusion. This lack of clarity seems to have been aggravated by the fact that the ILC in its DARS chose the term "compensation" for the consequence of an illegal act of the State. *See* Marboe, pp. 723-726.

[11] *See e.g. AGIP S.p.A. v. People's Republic of the Congo*, (ICSID Case No. ARB/77/1), Award of November 30. 1979, 1 ICSID Reports ¶95 (1993); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, (ICSID Case No. ARB/84/3), Award of May 20, 1992, 3 ICSID Reports, ¶183 (1995) 189; *Amoco International Finance Corp. v. Islamic Republic of Iran* (Partial Award), 15 Iran –US CTR 189 (1987-II), 27 ILM 1314 ¶265 (1987); *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, (ICSID Case No. ARB/03/16), Award of October 2, 2006, ¶481.

recent tribunals have opted to apply FMV. Yet, their decisions were grounded on the correspondence between the situation under analysis and expropriation. In *Azurix v. Argentina* the tribunal decided that "*compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over*."[12] The tribunal in *CMS v. Argentina* noted that "*While this standard* [FMV] *figures prominently in respect to expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.*"[13] The Tribunal considers that the situation in *Azurix* is different from that of LG&E because the Licenses, the main asset of the Licensees, are still in force. With respect to *CMS*, the Tribunal is of the view that "*important long-term losses*" in the circumstances of this case are too uncertain and have not been adequately proven.

40. Apart from Article IV, no other provision of the Treaty deals with issues of compensation. The silence of a treaty in this respect has been interpreted as an indication of the intention of the parties "*to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA.*"[14] On the basis of this discretion, the Tribunal now turns to the determination of the applicable measure of compensation in this case.

(ii) The "Actual Loss" Incurred "As a Result" of the Wrongful Acts as the Appropriate Measure of Compensation

41. Pursuant to Article 36 of the DARS "[t]*he State is under an obligation to compensate for the damage caused thereby*" and compensation "*shall cover all financially assessable damage including loss of profits in so far as it is established.*" The determination of compensation depends on the identification of

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[12] *Azurix Corp. v. Argentine Republic* ("Azurix"), (ICSID Case No. ARB/01/12), Award of July 14, 2006, ¶424.

[13] *CMS Gas Transmissions Company v Argentine Republic* ("CMS"), (ICSID Case No. ARB/01/8), Award of May 12, 2005, ¶410.

[14] *See S.D. Myers, Inc v. Government of Canada* ("SD Myers II"), UNCITRAL Rules, Second Partial Award of October 21, 2002, ¶309 ; *Marvin Roy Feldman v. United Mexican States* ("Feldman"), (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002, ¶195.

the damage caused by Respondent's wrongful acts and the establishment of lost profits.

42. As to the damage caused, it is useful to recall the definition of this concept made in the *Lusitania* case:

> "The fundamental concept of 'damage' is […] reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."[15]

43. After considering this definition and again the dictum of the *Factory at Chorzów* case,[16] the *ILC Commentary* concludes that the function of compensation is "*to address the actual losses incurred as a result of the internationally wrongful act.*"[17]

44. Following this approach and to establish compensation for discriminatory treatment, the tribunal in *Feldman v. Mexico* noted that

> "[…] in case of discrimination […] what is owed by the responding Party is the amount of loss or damage that is adequately connected to the breach […] if loss or damage is the requirement for the submission of a claim, it arguably follows that the Tribunal may direct compensation in the amount of the loss or damage actually incurred."[18]

45. Accordingly, the issue that the Tribunal has to address is that of the identification of the "*actual loss*" suffered by the investor "*as a result*" of Argentina's conduct. The question is one of "*causation"*: what did the investor lose by reason of the unlawful acts?

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[15] *See Opinion in the Lusitania Cases*, UNRIAA, vol. VII, p. 39 (emphasis in original). Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, United Nations (2005) (*ILC Commentary*), Article 36(3), p. 245.

[16] *Factory at Chorzów*, p. 47.

[17] *ILC Commentary* Article 36(4) p. 245. (Emphasis added).

[18] *Feldman*, ¶194. (Emphasis added). *See also* SD Myers, ¶¶100, 1074; and *Petrobart Limited v. Kyrgyz Republic*, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, (Energy Charter Treaty), pp. 77-78 (29 March 2005).

46. The starting point of this analysis is to recall what the unlawful acts were. In its Decision on Liability, the Tribunal identified the abrogation of the specific guarantees provided by Argentina in the gas regulatory framework as the fundamental act giving rise to the breach of the Treaty obligations. In particular, the Tribunal considered that (i) the abolition of the right to calculate tariffs in dollars before conversion to pesos; (ii) the abandonment of the PPI adjustments; (iii) the suspension of the tariff reviews; and (iv) the forced renegotiation of the licenses violated the standard of the fair and equitable treatment and the umbrella clause and resulted in discriminatory treatment against the gas distribution companies.

47. What was the loss suffered by LG&E as a result of these measures? The Claimants argue that they resulted in the "destruction" of their investment, with a reduction in value of 93% between August 2000 and October 2002. As noted above, the Tribunal found that the value of LG&E's investment has "rebounded" since the economic crisis and that the effect of the measures has not been permanent on the value of the Claimants' shares. In fact, the loss of the capital value has not crystallized. Had LG&E sold its investment, as did other foreign investors, for a depressed value resulting from the measures, capital value would become a practicable basis for determining compensation. The Tribunal believes that the claim for the loss in capital value is, as noted by Respondent, premature and therefore rejects it as basis for compensation.[19]

48. In the Tribunal's view, the measures – in particular, the abolition of calculation of tariffs in dollars before conversion into pesos, and the abolition of the PPI and five-year adjustments – have resulted in a significant decrease in the Licensees' revenues that, in turn, has produced a decrease of dividends distributed to shareholders. Had the basic guarantees of the gas regulatory framework been maintained, the level of dividends received by the Claimants would have been higher. In that manner, the Tribunal determines that the actual damage inflicted by

[19] Similarly, in *Feldman*, the tribunal discards the claim for capital value, stating that "*CEMSA's 'going concern value' is to be dismissed because this item requires a finding of expropriation, which is not the present case*". *See Feldman*, ¶198.

the measures is the amount of dividends that could have been received *but for* the adoption of the measures.

49. The Tribunal considers damages to begin with the adoption of the first of these measures, being the injunction to suspend the PPI adjustments on 18 August 2000. Damages have continued throughout the period in which Argentina's conduct remained not in conformity with the Treaty. Whether Argentina has restored the tariff regime or has provided for an alternative solution that would put an end to the wrongful act, remains to be established on the basis of the evidence submitted. As will be explained below, the Tribunal has found that, as of 28 February 2005, Argentina's breach had continued.

50. Argentina argues that the loss in value of Claimants' investments was due to the economic collapse that affected all assets in the country and not to the alleged breaches of the tariff regime. In the Tribunal's view, it appears evident that the value of assets such as those owned by LG&E would have been negatively impacted by the economic situation. However, the Tribunal considers that the loss incurred by Claimants is the dividends they could have earned had the tariff regime not been abrogated. Respondent's conduct is the proximate cause of this loss.

51. The Claimants raise the claim for loss of profits, in response to the method proposed by the Tribunal in Procedural Order No. 6. This claim will be addressed in the context of the analysis of the Tribunal's method. However, as a matter of principle, it is necessary to outline at this point the distinction between accrued losses and lost future profits. Whereas the former have commonly been awarded by tribunals, the latter have only been awarded when "*an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable*."[20] Or, in the words of the Draft Articles, "*in so far as it is established*". The question is one of "*certainty*".

[20] *ILC Commentary Article* 36(27) pp. 259-260.

"*Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.*"[21]

52. The Tribunal makes a final remark with respect to the allegations on the impact of the country risk premium on compensation. Although this premium was included in the calculation of tariffs, it does not excuse Argentina for the abrogation of the tariff regime. The tariff regime was an essential feature for enticing foreign investors to invest in the gas industry and an express commitment of the Argentine Government. The tariff regime offered additional conditions than those covered by the country risk premium. In addition, acknowledging Respondent's arguments, as noted by the Claimants, would result in the absurd situation that high-risk borrowers would be excused from their international responsibility.

53. In view of the foregoing, the Tribunal has decided to adopt a method of calculation that accounts for the principles stated by the Tribunal and at the same time assures that the Claimants are "fully" compensated for the damage incurred as a result of Argentina's wrongful acts. This method is described and discussed at Section II.B below.

(c) *Interest*

54. Claimants seek compound interest from 18 August 2000 through the date of the Award at a rate equal to the one-month interest rate earned on U.S. Treasury bills. Respondent rejects this claim for interest and argues that, were the Tribunal to award it, simple interest should be applied. Respondent also defends that interest be calculated from August 2000. In its view, during 2000 and 2001, LG&E received dividends and awarding interest would result in double recovery.

55. In the Tribunal's view, interest is part of the "full" reparation to which the Claimants are entitled to assure that they are made whole. In fact, interest recognizes the fact that, between the date of the illegal act and the date of actual payment, the injured party cannot use or invest the amounts of money due. It is

[21] *ILC Commentary* Article 36(27) pp. 259-260.

therefore decisive to identify the available investment alternatives to the investor in order to establish "full" reparation.[22]

56. It has been acknowledged that in "modern economic conditions", funds would be invested to earn compound interest. For instance, the tribunal in *Azurix* notes that "[…] *compound interest reflects the reality of financial transactions, and best approximates the value lost by an investor*."[23] Likewise, the tribunal in *MTD v. Chile* considers that "*compound interest is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor*."[24]

57. Based on these considerations, the Tribunal will decide in the section on quantification and after assessing the parties' position on the Tribunal's method, the type of interest due, the applicable rate and the period covered.

(3) Tribunal's Conclusions

58. After careful consideration of the parties' arguments and their expert reports, the extensive evidence submitted and the particular circumstances of this case, the Tribunal concludes that Claimants are entitled to "full" reparation in the form of compensation that wipes out the consequences of Argentina's breach of the Treaty protections. Compensation is to be measured by the actual loss incurred by the Claimants as a result of Argentina's wrongful acts. This loss corresponds to the amount of dividends that Claimants would have received *but for* Argentina's breaches. The method to quantify compensation should account for the principles stated by the Tribunal and at the same time assures that the Claimants are "fully" compensated for the damage incurred as a result of Argentina's breaches. Finally, interest that best identifies the investment alternatives for the Claimants will be added until the date of payment in full.

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22 *See Marboe, op. cit., supra* at 10, p. 754.

23 *See Azurix*, ¶440.

24 *See MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* ("MTD"), (Caso CIADI No. ARB/01/7), Award of May 25, 2004, ¶251.

B. The Tribunal's Method for the Quantification of Compensation

(1) Tribunal's Procedural Order No. 6

59. In light of the Tribunal's finding that the loss incurred by Claimants is the amount of dividends that they would have earned *but for* the abrogation of the basic guarantees, the methods for quantifying the loss initially discussed by the parties in their submissions are inadequate. Neither the stock market price of shares nor the DCF would properly account for the accrued loss as noted in Procedural Order No. 6. Consequently, the Tribunal has decided to adopt the method described in that Procedural Order and summarized as follows:

> "A calculation will be made of the dividends that would or could have been generated without any change in the tariff system. Dividends received by the Claimants will be subtracted from this figure, after which the damages suffered during the State of Necessity will be subtracted from this amount."

60. The method is based on the premise that, had Argentina maintained the tariff regime, the dividends received by Claimants between 18 August 2000 and 28 February 2005 would have been in effect greater than those actually paid out. As a result, the "but for" dividend calculation includes the restoration of the basic guarantees of the tariff regime, i.e. the elimination of the measures that the Tribunal found to have caused the loss, at ¶46 above. The purpose is to put the Claimants into the position they would have been in had the measures not been adopted.

61. The calculation takes into account the following assumptions:

- The maintenance of the tariff regime which included the PPI adjustment, the five-year adjustments and the calculation of the tariff in dollars before its conversion into pesos (*pesification*).

- The point of departure for the analysis of each company is the annual average dividend during the period preceding the State of Necessity.[25]

- Payment of annual dividends is made every six months maintaining the previous company practice.

- Effective PPI adjustments in January and July of each year are based on the U.S. *Bureau of Statistics.*

- The five-year review that may have been made during the second half of 2002 would have repeated factor "X" of the adjustment made in 1997 for each company.

- Dividends would have been affected by fluctuations in the peso in relation to the dollar.

- Dividends actually paid by the companies are considered on the dates and in the amounts established in the public records and in the financial by-laws.

- The percentage of LG&E's shares in gas companies has remained constant.

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[25] The pertinence of focussing on past performance was noted by the Governing Council of the United Nations Compensation Commission when analyzing claims for loss relating to income-producing properties for a given time period (arising from the 1990/91 invasion and occupation of Kuwait by Iraq). The Governing Council noted:

> "In principle, the economic value of a business may include loss of future earnings and profits where they can be ascertained with reasonable certainty. In the case of the loss of businesses and their earning capacity resulting from the invasion and occupation of Kuwait, it can be expected that a number of such businesses can be or could have been rebuilt and resumed. The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future. Compensation should be provided if the loss can be ascertained with reasonable certainty based on prior earnings or profits. For example, the loss of any earnings or profits during the relevant time period could be calculated by a multiple of past earnings and profits corresponding to that time period."

United Nations Compensation Commission, Governing Council decision 9. *Proposition and Conclusions on Compensation for Business Losses: Types of Damages and Their* Valuation. S/AC/.26/1992/9 (March 1992). The United Nations Compensation Commission is a subsidiary organ of the United Nations Security Council. It was established by the Security Council in 1991 to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait.

- Each company continued to apply the same dividend policy as before August 2000.

- Losses incurred during the State of Necessity (1 December 2001 – 26 April 2003) are to be subtracted.

62. Procedural Order No. 6 finally noted that interest will be due on the amount of loss dividends up until the date of payment in full.

(2) Parties' Position on the Tribunal's Method

63. Claimants' comments on the Tribunal's method set forth in Procedural Order No. 6 were submitted on 4 December 2006, together with the comments from their experts and the witness statement of Mr. Enrique Jorge Flaiban, LG&E's Country Manager – Argentine Business.

64. Although Claimants acknowledge that the Tribunal's method eliminates many uncertainties, they argue that it is unfair to them since it results in damages that are far lower than damages calculated according to other techniques used in such circumstances. However, they consider that a prompt award of damages using an adjusted version of the Tribunal's method would be preferable to further delays that would result from "perpetuated debates over how to calculate damages." (¶2).[26] Accordingly, Claimants (i) set out their disagreement with the Tribunal's method; (ii) elaborate on its shortcomings; and (iii) propose a revised method and calculation of damages relying upon it.

65. The Claimants' disagreement with the Tribunal's method lies on their perception that the "damages-in-arrears" approach is unwarranted and improper. Firstly, the Claimants believe the approach to be inconsistent with their right to full compensation under international law (¶28). In the Claimants' view, the breach of Argentina's obligations has continued well after the Tribunal's cut-off date for damages (28 February 2005) and there is no indication that Argentina is willing to restore the tariff regime (¶29). The Award should therefore include damages for

[26] References to paragraphs or pages in this section correspond to the parties' respective comments to the Tribunal's Procedural Order No. 6.

the continuing injury expected to occur (i.e. lost future profits), as long as such damages can be calculated on the basis of reasonable criteria. The Claimants' propose a revised method that would seek to include a calculation of projected lost dividends and permits the inclusion of these damages with a "reasonable degree of certainty" (¶33).

66. Secondly, the Claimants allege that the approach is unfair and burdensome because it would force them to seek periodic additional relief at great cost and expense. This would place on them the whole burden of the risk and uncertainty resulting from Argentina's conduct and would reward it for persisting in its illegal conduct (¶28). Further, it would perpetuate the investment dispute and, therefore, maintain the adversary relationship between the Claimants and the Licensees, on the one hand, and the Argentine Government, on the other (¶38).

67. The Claimants contend that the chief shortcoming of the Tribunal's method is its failure to give fair and consistent consideration to the past and future growth of the business. In fact, the methodology assumes no inherent business growth in the dividends that the Claimants would receive in the absence of breach and subtracts the actual dividends being received by the companies to calculate the lost dividends. Yet the subtracted actual dividends reflect the growth of the Licensees' business. This inconsistency depresses the calculation of lost dividends with every passing year (¶25).

68. In addition, the Claimants argue that the damage-in-arrears approach creates a "time lag" in the recovery of damages resulting from the interaction of the Tribunal's cut-off date of 28 February 2005 and the assumption that dividends would be paid following previous company practice i.e., dividends are paid and declared after termination of the year in which they were generated. In that manner, the methodology would prevent the Claimants from receiving, as of 28 February 2005, dividends that should have earned during the course of 2004 because the hypothetical dividends for that calendar year would not have been formally declared and paid until April 2005. The impact of this methodological feature could be substantial for the calculation of damages (¶¶3, 9).

69. Consequently, the Claimants propose that a fair solution would be to apply the proposed method including a calculation that takes account of projected lost dividends. In addition, the Tribunal should invite the Respondent to give formal assurances that it will fully restore the basic guarantees of the gas regulatory framework by a date certain. The Claimants would be able to accurately calculate their loss based upon the Respondent's reaction. The Claimants' proposal will be described in more detail in Section II.B.(3)(a) below.

70. The values resulting from the calculations performed in accordance with Claimants' proposal and accounting for the correction of the "time lag" are as follows: (i) damages through 28 February 2005: US$40.7 million; (ii) damages from March 2005 to December 2006: US$29.8 million; (iii) additional damages from 1 December to 31 December 2007 (should Argentina not restore tariff regime guarantees): US$20.7 million; and (iv) damages measuring the currently impaired value of the investment (from 1 January 2008 until the end of the term of the Licenses in 2027): US$174 million.

71. Although Claimants' calculations incorporate pre-judgement interest at a yield available on one-month United States treasury bills, the Claimants' experts suggest that interest should be calculated at a rate equal to Argentina's borrowing rate, that is, substantially higher, to prevent Argentina from benefiting financially from the difference in rates by delaying payment of damages.

72. Finally, the Claimants allege that, should the Tribunal decide to defer consideration of damages to future periods, it should afford the parties notice of its intention to allow them to comment on the form of the Award (¶54).

73. The Respondent submitted its comments as to the Tribunal's method on 1 December 2006. It did not present any expert opinion or witness statement. These comments refer to (i) the average historical and paid dividends; (ii) the PPI; and (iii) the interest rate.

74. Firstly, the Respondent notes that, according to the Licensees' financial statements, the average annual dividends for the 1993-2001 period were lower than those used in Procedural Order No. 6 (page 1). In addition, average annual

dividends between 18 August 2000 and 28 February 2005 for GasBan and Centro were underestimated, and those for Cuyana were overestimated (page 2). The Respondent provides revised calculations for these amounts.

75. Secondly, the Respondent argues that the Tribunal's method should consider the agreements of January and July 2000, signed by the Licensees, to temporarily suspend the PPI adjustment. To be consistent with regulation, the January and July adjustments envisaged in Procedural Order No. 6 should be calculated on the basis of the PPI values of April and October.

76. Finally, the Respondent proposes the adoption of a pre-judgement interest rate based on short-term U.S. Treasury bills.

(3) Tribunal's Analysis

77. The Claimants raise a number of concerns relating to (a) the principles underlying the Tribunal's method, and (b) certain methodological shortcomings. These concerns will be considered in detail below. The Tribunal will also consider the parties' comments on interest (c).

78. As to the comments made by Argentina, the Tribunal has checked the figures for average historical and paid dividends; considered the dates for the PPI values; decided that the contention to the starting date for the calculation of damages was inadmissible in view of the actual date in which the dismantling of the tariff regime began; and noted the Respondent's acceptance of the interest rate initially proposed by Claimants.

(a) *The Principles Underlying the Tribunal's Method*

79. For the Claimants, the method proposed does not provide "full" compensation because it disregards the continuous breach of Argentina's obligations and does not account for the damages resulting from this continuous breach. It also imposes upon the Claimants the risk and uncertainty created by Argentina's conduct and the burden to seek periodic additional relief at great cost and expense.

80. Accordingly, LG&E argues that a fair solution would be to apply the Tribunal's method while incorporating a calculation that includes projected lost dividends and proposes:

81. Firstly, that the Tribunal "*invite"* the Respondent to give formal assurances that it will fully restore the basic guarantees of the gas regulatory framework by a given date.

82. Secondly, if Respondent gives such assurances, the Tribunal should enter a final award comprising (i) *historical lost dividends*, from 18 August 2000 through 30 November 2006, with the exception of lost dividends attributable to the State of Necessity period; (ii) *projected lost dividends*, from 1 December 2006 up until the date at which the Respondent has committed to restore the basic guarantees in accordance with *per diem* calculations; and (iii) an *order* directing Respondent to comply with that commitment ¶¶42-44; 54).

83. Thirdly, if the Respondent declines to make formal commitments to restore the basic guarantees, the Tribunal should enter a final award comprising: (i) *historical lost dividends*, from 18 August 2000 through 30 November 2006 with the exception of lost dividends attributable to the State of Necessity period; (ii) *damages* from 2006 up until the date of the Award using *per diem* calculations; and (iii) the *present value of lost dividends* up until the final date of the respective Licenses. Lost dividends would be calculated using the Tribunal's method corrected to overcome its shortcomings ¶¶42-44; 54).

84. The Tribunal does not agree with the Claimants' proposition. Firstly, the Tribunal notes that what Claimants finally label as an "*invitation*" is in fact a requirement that the Tribunal "*direct"* that "*by 15 March 2007, the Respondent may formally commit itself to restoring the full tariff regime on or before 31 December 2007*" (¶¶6, 11). Such restoration would actually result in the re-establishment of the situation that existed prior to the wrongful act.[27] This is the effect of restitution.

[27] *ILC Commentary*, Article 35(1), p. 237.

85. Furthermore, the Tribunal notes that it agrees with Claimants that the abrogation of the basic guarantees of the gas tariff regime constitutes a continuous breach that extends to the entire period during which such abrogation continues and remains not in conformity with the Treaty (except during the State of Necessity period that justifies such breach).[28] During this period and provided that the obligation is still in force, the State is under a duty to perform the obligation breached.[29] It is also obliged to cease the wrongful act.[30] Ceasing the wrongful act would imply restoration of the basic guarantees of the tariff regime. The result of cessation in this case would be indistinguishable from restitution.[31]

86. If approached as cessation, the Claimants' request is in no way different from a demand for the reiteration of Argentina's obligations under international law. The Tribunal clearly states in its Decision on Liability that upon termination of the State of Necessity period, Argentina's obligations were once again effective; it should therefore have re-established the tariff scheme offered to LG&E or compensated the Claimants for the loss incurred.[32] As Argentina has chosen not to restore its tariff obligations, the Tribunal sees no point in repeating its order and would consequently order and quantify the payment of compensation.

87. Likewise, if approached as restitution, the Tribunal cannot go beyond its fiat in the Decision on Liability. The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty. Consequently, the Tribunal arrives at the same conclusion: the need to order and quantify compensation.

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28 The *ILC Commentary* notes that examples of continuing wrongful act include 'the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State'. *ILC Commentary*, Article 14(3), p. 139.

29 Article 29 of the DARS.

30 Article 30 of the DARS.

31 This eventuality was noted by the *ILC Commentary* at Article 30(7), p. 218.

32 Decision on Liability, ¶265.

88. Secondly, the Tribunal has noted that it agrees with the Claimants' observation as to the continuing nature of Argentina's breach. However, it can only award compensation for loss that is certain. The Tribunal is not convinced of the certainty of the lost future dividends and therefore rejects this claim.

89. As noted before, lost future profits have only been awarded when "*an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable*."[33] Prospective gains which are highly conjectural, "too remote or speculative" are disallowed by arbitral tribunals.[34]

90. In this case, the Tribunal judges that future loss to the Claimants is uncertain and any attempt to calculate it is speculative. The uncertainty concerning lost future profits in the form of lost dividends results from the fact, noted above, that Claimants have retained title to their investments and are therefore entitled to any profit that the investment generates and could generate in the future. Any attempt to calculate the amount of the lost dividends in both the actual and "but for" scenarios is a highly speculative exercise. If the Tribunal were to compensate LG&E for lost future dividends while it continues to receive dividends distributed by the Licensees at a hypothetical low amount, a situation of double recovery would arise, unduly enriching the Claimants.

91. To support its claim for lost future profits, the Claimants invoke a number of cases in which such profits have been awarded by tribunals.[35] However, these cases differ from LG&E's on one essential point: in each case the investors had lost title to their property or the relevant contracts or licenses had been put to an end. In such circumstances, it is certain that the claimants would have lost the opportunity to earn any future profit.[36]

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[33] *ILC Commentary*, Article 36(27), pp. 259-260.

[34] Jiménez de Aréchaga, E, *International Responsibility*, in M. Sorensen (ed.), *Manual of Public International Law* p. 570 (1968).

[35] *See* Claimants' comments to Procedural Order No. 6, dated 4 December 2006, at ¶20.

[36] In *Amco II*, the claimants' hotel is seized and the investment license cancelled (*Amco Asia Corporation v. The Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in Resubmitted Case (5 June 1990) 89 I.L.R 580 (1992)); in *LETCO* the government deprives claimant of its

92. Thirdly, as to the date for calculating accrued losses, Claimants contend that the cut-off date should be December 2006, the date of submission of their comments on Procedural Order No. 6. According to Claimants, there is "*no justification*" for using 28 February 2005 as the cut-off date once evidence is produced that "*the breach has continued and is continuing*". Claimants claim to have produced this evidence by submitting the witness statement of Mr. Enrique Flaiban who testified on the status of the Licensees' tariff levels.

93. The Tribunal agrees with Claimants that, if evidence is produced, damages should be awarded. However, Claimants forget that, for evidence to be considered by this Tribunal, Argentina must be given the opportunity to react to such evidence. The Respondent did not have this opportunity with regard to Mr. Flaiban's witness statement.

94. The Tribunal decided during the Hearing that no further submissions or evidence would be presented after 28 February 2005,[37] the date of the PHB in which conclusive remarks concerning each parties' case were to be exposed. The Claimants themselves opposed the introduction of new evidence by Argentina after this date.[38]

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concession (*Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award (31 March 1986); in *Sapphire* the allegation is for termination of a contract as a result of breaches by the defendant (*Sapphire International v. NIOC*, Award (15 March 1963), 35 *International Law Reports* p. 136) (1967); in *Lena Goldfields*, the Soviet government puts the claimant's concession to an end and takes over the plants and secret technical processes (*Lena Goldfields Company Ltd. v. Soviet Union*, 36 Cornell L.Q. 42 (1951-1952); in *Shufeldt* the concession agreement for chicle-extraction is terminated by the *Guatemalan government* (*United States of America (on behalf of P.W. Shufeldt) v. Republic of Guatemala*, 24 Am. J. Int'l L. 799 (24 July 1930). With respect to *Robert May*, although it referred to the termination of a contract to manage an operate a railroad, the *ILC Commentary* notes that in that case lost profits were not awarded beyond the date of adjudication. *See*, *ILC Commentary*, Article 36(31) footnote 608. Finally, the tribunal in *SD Myers* does not award lost future profits, but rather, the net income streams lost, the abridgment of the time available to the claimant and the value of income delayed as a result of the Canadian closure. "[Canada] *is not responsible for more." SD Myers*, at ¶228.

[37] *See* Hearing in the merits, January 29, 2005, Hearing Transcripts, vol. 7, at 1616-24.

[38] Argentina attempted on three occasions to introduce evidence regarding the alleged progress in the renegotiation process (Letters of 2 September 2005, 12 January 2006 and 11 April 2006). The Claimants opposed to the Tribunal's acceptance of such evidence (Letters of 14 September 2005, 24 January 2006 and 27 April 2006). The Tribunal, based in its previous decision that no further submissions be filed, rejected the introduction of the evidence (Letters of 5 October 2005, 30 January 2006 and 9 May 2007).

95. Respect for due process obliges this Tribunal to only consider evidence that the other side has been able to test. On the basis of this evidence, the Tribunal assesses Argentina's continuous breach of its obligations between 18 August 2000 and 28 February 2005. Any event occurring after 28 February 2005 that could be seen to remedy the Respondent's breaches and affect the calculation of damages (like the progress on the renegotiation process) is not considered in the present procedure, as indicated in Procedural Order No. 6.

96. Fourthly, Claimants' arguments that they would have to bear the risk and uncertainty resulting from Argentina's conduct and the burden to seek periodic additional relief at great cost and expense are not entirely without merit. However, the Claimants have chosen to maintain their investments in Argentina regardless of its reluctance to re-establish the gas regulatory framework following the end of the State of Necessity period. The decision to maintain their investments in Argentina has its consequences: (i) the impact of Argentina's conduct on the value of investments has not crystallized and is subject to the changing regulatory environment and fluctuations of the stock market; (ii) lost future profits are uncertain and their calculation is speculative; and (iii) compensation could only be awarded for damages actually suffered and sufficiently proven.

97. This is in no way a reward to Argentina for its continued wrongdoing. This Tribunal has established that the abrogation of the basic guarantees of the gas tariff regime has breached Argentina's obligations under the Treaty. This breach makes Argentina liable for the payment of compensation as long as Argentina fails to restore such regime after 28 February 2005. The recognition of this responsibility is, on the contrary, an incentive to Argentina to restore the tariff regime or a least to engage in genuine arms-length negotiations to avoid future condemnatory decisions.

98. Finally, the Tribunal does not agree with Claimants that it has to request the parties' views as to the form of this Award. The parties have had the opportunity to comment on the Tribunal's method, including the eventuality of future proceedings.

(b) *The Alleged Methodological Shortcomings*

99. Claimants make two contentions in this respect: (i) that the Tribunal's method does not allow consistent consideration of the business growth; and (ii) the existence of a rolling "time lag" in the recovery of damages resulting from the difference in time between declaration and payment of dividends.

100. The Tribunal considers that Claimants' arguments as to the impact of business growth on the dividends that would have been generated by the distribution companies between 2000 and 2005 but for abrogation of the basic guarantees of the gas tariff regime, are reasonable. In fact, the underlying growth (other than PPI and X-factor adjustments) would lead to increased dividend payouts. Consequently, damages have been calculated to account for this fact. The calculation considers available information as to the levels of business activity of the distribution companies during the relevant period. It takes the appropriate measure of actual growth to be the average annual growth rate of gas volumes.

101. The contention as to the "time lag" is similar to the choice of accounting frameworks, between cash accounting or accruals accounting. Cash accounting recognizes revenue and expenditure transactions only on the date that cash or bank movements take place whereas, by contrast, accruals accounting recognizes the benefit or liability incurred based on the timing of the underlying event. Accruals accounting is more widely used than cash accounting since it reflects more fully and accurately the financial position of an entity. Accordingly, the Tribunal has included in its calculations those dividends paid and payable in April 2005 but, on the same basis, has excluded any dividends found to have been paid to shareholders during the early months of the loss period.

(c) *Interest*

102. The Tribunal disallows the Claimants' expert proposal to use Argentina's borrowing rate as speculative and extemporaneous. The Tribunal notes further that Argentina has supported the use of a pre-judgement interest rate based on short-term U.S. Treasury bills. This is therefore the rate of interest to be applied.

103. In addition, the Tribunal is of the opinion that compound interest would better compensate the Claimants for the actual damages suffered since it better reflects contemporary financial practice.

104. As far as the period is concerned, interest should be paid from the period 18 August 2000 until the date of this Award. The Tribunal disagrees with Argentina that payment of interest from 2000 would result in double recovery. Interest is due on the amount of dividends that Claimants would have received but for abrogation of the tariff regime minus the dividends actually received and is distinct from the dividends actually received. Lost dividends compensate Claimants for Argentina's breach and interest compensates Claimants for the impossibility to invest the amounts due.

105. Finally, in case the amount awarded is not paid in full by 30 days after the dispatch of this Award, the Respondent shall pay compound interest at a rate of six-month U.S. Treasury bills until the date of payment in full of this Award.

(4) Tribunal's Conclusions

106. The Tribunal's method to quantify compensation calculates the dividends that Claimants would have received *but for* Argentina's breaches and subtracts from such dividends those that were actually received by Claimants. Losses during the State of Necessity period are subsequently subtracted. The method was adjusted to account for the Claimants' comments on the methodological shortcomings and the verification of the dividend figures and the PPI data. Compound interest at the rate of six-month U.S. Treasury bills will be added.

C. Quantification of Compensation

107. Based on the foregoing considerations, the Tribunal has used the following figures for the quantification of compensation:

	CUYANA	CENTRO	GASBAN
Total PPI adjustments (a)	**$ 1.5m**	**$ 1.4m**	**$ 3.2m**
Total 5-year adjustment (b)	**$ -0.6m**	**$ -0.6m**	**$ -1.2m**
'But for' dividends Aug. 2000- Feb. 2005	**$ 117.6m**	**$ 112.3m**	**$ 247.0m**

	CUYANA	CENTRO	GASBAN
[*including* a and b above]			
Actual dividends paid Aug. 2000–Feb 2005	**$ 41.9m**	**$ 38.1 m**	**$ 69.6 m**
Average annual growth rate of gas volumes [2000-2005]	**4.21%**	**3.32%**	**4.22%**
LG&E shareholding	14.4%	45.9%	19.6%

108. Consequently, the Tribunal establishes that the actual loss incurred by Claimants is quantified as follows:

	Cuyana (million US$)	**Centro** (million US$)	**GasBan** (million US$)	**Total** (million US$)
LG&E dividends loss	10.9	34.0	34.8	79.7
Minus; Loss suffered during the period of emergency	-4.3	-12.6	-11.9	-28.8
Subtotal	6.6	21.4	22.9	50.9
Interest[39]	**+0.9**	**+2.7**	**+2.9**	+6.5
Total	**7.5**	**24.1**	**25.8**	**57.4**

109. In the light of all of the above, the Tribunal awards Claimants US$57.4 million as compensation for the damages suffered as a result of Respondent's continuing breach of its Treaty obligations between 18 August 2000 and 28 February 2005, including interest up until the date of the Award.

III. COSTS

A. The Principles Concerning the Allocation of Costs

(1) Parties' Positions

110. LG&E requests that the Tribunal award it all costs and expenses for the arbitration, including reasonable attorneys' fees in consideration of Respondent's breaches of its obligations under the Treaty and its denial to accept responsibility (Claimants' Memorial, ¶207).

[39] Calculated up to 11 July 2007.

111. The sole reference to costs made by the Respondent is found in the Rejoinder of its Request for Relief, in which it asks the Tribunal for the "*costas*" meaning *the costs* of the proceedings.[40]

(2) Tribunal's Analysis

112. The Tribunal notes that Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules grant discretion to ICSID tribunals with regard to the award of costs. The Tribunal further notes that there is no uniform practice in treaty arbitration with regard to this matter. However, recently, tribunals have made recourse to the basic principle "*costs follow the event"* or "*loser-pays-rule*" according to which the cost of the arbitration should be borne by the unsuccessful party.[41] The outcome of the case becomes the most significant factor in determining the allocation of costs.

113. In the present case, not all Claimants' claims are successful; likewise, some of the Respondent's defences prevail. This result would call for an equitable allocation of costs. The Tribunal decides therefore that each party should bear its own costs, expenses and attorney's fees.

(3) Tribunal's Conclusion

114. The Tribunal decides that each party should bear its own costs, expenses and attorney's fees.

IV. DECISION

115. For the foregoing reasons, the Tribunal renders its decision as follows:

a. Within 30 days of the date of dispatch of this Award, Argentina shall pay to LG&E, the sum of US$57,400,000.00, as well as compound

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[40] In fact, Article 77 of the Argentine Procedural Code provides that "*La condena en costas comprenderá todos los gastos causados u ocasionados por la sustanciación del proceso* […]."

[41] *International Thunderbird Gaming v. United Mexican States*, UNCITRAL (NAFTA) Award of January 23, 2006; *Methanex v. United States of America*, UNCITRAL (NAFTA) Award of August 3, 2005; *Ceskoslovenska Obchodni Banka v. Slovakia*, (ICSID Case No. ARB/97/4), Award of December 14, 2004.

interest on that amount at a rate of six-month U.S. Treasury bills until the date of payment in full of this Award.

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

[*Signed*]
Professor Albert Jan van den Berg

Arbitrator

Date: June 27, 2007

[*Signed*]
Judge Francisco Rezek

Arbitrator

Date: June 29, 2007

[*Signed*]
Dr. Tatiana B. de Maekelt

President

Date: July 9, 2007