

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

In the proceedings between

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.

(Claimants)

and

The Argentine Republic
(Respondent)

ICSID Case No. ARB/03/19

and

In the arbitration under the Rules of the
United Nations Commission on International Trade Law between

AWG Group
(Claimant)

and

The Argentine Republic
(Respondent)

DECISION ON LIABILITY

Members of the Tribunal

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

Secretary of the Tribunal

Mr. Gonzalo Flores

Date: 30 July 2010

Representing the Claimants:

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

Representing the Argentine Republic:

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

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

Table of Abbreviations

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| AASA | Aguas Argentinas S.A. |
| AGBAR | Sociedad General de Aguas de Barcelona S.A. |
| AWG | AWG Group Ltd. |
| AySA | Agua y Saneamientos Argentinos S.A. |
| BIT | Bilateral Investment Treaty |
| ETOSS | Ente Tripartito de Obras y Servicios Sanitarios |
| ICSID | International Centre for Settlement of Investment Disputes |
| OSN | Obras Sanitarias de la Nación |
| PMES | Plan de Mejoras y Expansión del Servicio (Service Improvement and Expansion Plan) |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNIREN | Renegotiation and Public Services Analysis Unit |
| VCLT | Vienna Convention on the Law of Treaties |

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I. Procedural Background

A. Commencement of the Arbitration

1. On 17 April 2003, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received a Request for Arbitration (“the Request”) against the Argentine Republic (“the Respondent” or “Argentina”) from Aguas Argentinas S.A. (“AASA”), Suez, Sociedad General de Aguas de Barcelona S.A. (“AGBAR”), Vivendi Universal S.A. (“Vivendi”), and AWG Group Ltd (“AWG”), (together, “the Claimants”). AASA was a company incorporated in Argentina. Suez and Vivendi, both incorporated in France, AGBAR, incorporated in Spain, and AWG, incorporated in the United Kingdom, were shareholders in AASA. The Request concerned the Claimants’ investments in a concession for water distribution and waste water treatment services in the city of Buenos Aires and some surrounding municipalities and a series of alleged acts and omissions by Argentina, including Argentina’s alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.¹

2. In the Request, Claimants Suez and Vivendi invoked Argentina’s consent to dispute settlement through ICSID arbitration provided in the 1991 Bilateral Investment Treaty between the Argentine Republic and France (the “Argentina–France BIT”)² and AGBAR relied on Argentina’s consent in the 1991 Bilateral Investment Treaty between the Argentine Republic and the Kingdom of Spain (the “Argentina-Spain BIT”).³ Claimant AWG invoked Argentina’s consent to arbitrate investment disputes under the 1990 Bilateral Investment Treaty between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland (the

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

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

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

“Argentina-U.K. BIT”)⁴, which provides in Article 8 (3) that in the event an investment dispute is subject to international arbitration, Argentina and the investor concerned may agree to refer their dispute either to ICSID arbitration or to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”) and that failing such agreement after a period of three months the parties are bound to submit their dispute to arbitration under the UNCITRAL Rules. Although the required three months had elapsed without agreement, AWG in its Request for Arbitration invited Argentina to agree to extend ICSID arbitration to AWG’s claims under the Argentina-U.K. BIT.

3. On 17 April 2003, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”), acknowledged receipt and transmitted a copy of the Request to the Argentine Republic and to the Argentine Embassy in Washington, D.C.

4. On 17 July 2003, the Acting Secretary-General of the Centre registered the Request, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention” or “the Convention”). The case was registered as ICSID Case No. ARB/03/19 with the formal name of *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*.⁵ On that same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed to constitute an arbitral tribunal as soon as possible. Argentina did not agree to extend ICSID jurisdiction to the claims of AWG but it did agree to allow the case, although subject to UNCITRAL rules, to be administered by ICSID.

⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990, and in force since 19 February 1993.

⁵ As noted in footnote 1 *supra*, on this same date the Centre registered two further requests for arbitration regarding water concessions in Argentina: ICSID Case No. ARB/03/18 (*Aguas Cordobesas S.A., Suez, and AGBAR v. Argentine Republic*) and ICSID Case No. ARB/03/17 (*Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales del Agua, S.A. v. Argentine Republic*).

B. *Constitution of the Tribunal*

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

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

7. On 17 February 2004, the Deputy Secretary-General of ICSID, in accordance with ICSID Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal. The parties agreed that the same tribunal would hear and decide ICSID Case No. ARB/03/19 and the UNCITRAL arbitration initiated by AWG, along with two other cases involving water concessions in the provinces of Santa Fe (ICSID Case No. ARB/03/17) and Cordoba (ICSID Case No. ARB/03/18).

C. *Preliminary Session and Scheduling*

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

9. On 7 June 2004, the Tribunal held a session with the parties at the seat of the Centre in Washington, D.C. During the session the parties in ICSID Case No. ARB/03/19 confirmed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections in this respect. Similarly, in the case governed by the UNCITRAL Arbitration Rules, AWG and Argentina also agreed that the Tribunal had been properly constituted.

10. During the session the parties also agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal.⁶ The Tribunal, after consultation with the parties, also fixed a timetable for the written and oral pleadings in these cases.

D. *Respondent's Challenge to Jurisdiction*

11. In accordance with the agreed timetable, on 1 January 2005, the Claimants filed a joint Memorial on the Merits with accompanying documentation with respect to ICSID Case No. ARB/03/19 and the arbitration under the UNCITRAL Rules relating to the AWG claims. In response to the Claimants' Memorial, Argentina submitted a Memorial with objections to jurisdiction on 28 February 2005, alleging six specific grounds as to why ICSID and the present Tribunal were without jurisdiction to hear and decide Claimants' claim for damages. Certain of these objections applied only to Claimants' Suez, Vivendi, and AGBAR, which asserted ICSID jurisdiction, while others were applicable to all the Claimants.

12. By letter of 17 March 2005 the Tribunal confirmed the suspension of the proceedings on the merits in accordance with ICSID Arbitration Rule 41(3) and Article 21 of the UNCITRAL Arbitration Rules. On 6 April 2005, the Claimants filed their Counter-Memorial on Jurisdiction.

E. *Petition for Transparency and Participation as Amicus Curiae*

13. In the meanwhile, on 28 January 2005, five non-governmental organizations (NGOs), Asociación Civil por la Igualdad y la Justicia, Centro de Estudios Legales y Sociales, Center for International Environmental Law, Consumidores Libres Cooperativa Ltda. de Provisión de

⁶ During the session the parties agreed on a series of procedural matters related to the present cases and ICSID Cases Nos. ARB/03/17 and ARB/03/18. These agreements included a staggered schedule of written and oral submissions. A copy of the minutes of the session was enclosed as Annex No.1 to the Tribunal's Decision on Jurisdiction.

Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores, filed a “Petition for Transparency and Participation as Amicus Curiae” (the “Petition”) with the Secretary of the Tribunal. Following the filing of the Petition, the Tribunal invited the parties to make any observations they might have in this regard, and both parties submitted their views on this matter. On 19 May 2005, the Tribunal issued an *Order in Response to a Petition for Participation as Amicus Curiae*, setting out the conditions under which the Tribunal would consider amicus curiae submissions.⁷

F. *Withdrawal of AASA as a Claimant*

14. As agreed upon during the 7 June 2004 session, a hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. on 11 May 2005. Following the hearing, as the Tribunal was in the process of deliberating on jurisdiction, counsel for the Claimants, by letter of 9 February 2006, informed the Tribunal that the Claimant shareholders of AASA were in the process of selling their interests in AASA to third parties and that “... in order to facilitate the required approval by the Republic of Argentina of such sale, AASA has decided to withdraw its claim in the above-referenced arbitration” but that such withdrawal was expressly without prejudice to the Claimant Shareholders’ claims in this proceeding. Upon invitation of the Tribunal, the Respondent filed its observations to this withdrawal by letter of 15 February 2006. The Respondent did not object to the withdrawal of AASA but requested that the Claimant AASA provide the Respondent copies of the minutes of the shareholders’ meeting (*Asamblea de Accionistas de AASA*) with respect to the decision authorizing such withdrawal. At the same time, the Respondent advanced further arguments objecting to the Tribunal’s jurisdiction and asserting that AASA’s decision to withdraw extinguished the claims of the other claimants in this case. At the invitation of the Tribunal, counsel for AASA provided copies of the minutes of the AASA’s shareholders’ meeting of 8 February 2006, authorizing the discontinuance of its claim before this Tribunal. At the same time, counsel for the Claimants rejected each of the Respondent’s arguments challenging the Tribunal’s jurisdiction with respect to the other Claimants. The Tribunal provided copies of these documents to the Respondent and requested its observation concerning AASA’s withdrawal. By letter of 31 March 2006, the Respondent informed the Tribunal that “...the Argentine Republic does not oppose the proposed cessation by the Concessionaire... AASA...” in ICSID Arbitration ARB/03/19 (“... *la República Argentina*

⁷ A similar request was subsequently filed with the same tribunal by a non-governmental organization and three named individuals in ICSID Case No. ARB/03/17. The Tribunal’s *Order in Response to a Petition for Participation as Amicus Curiae* of 17 March 2006 in that case is available at ICSID’s website icsid.worldbank.org.

no se opone al desistimiento planteado por la[s] Concesionaria[s] AASA...”), but argued that such withdrawal had legal consequences with respect to the Tribunal’s jurisdiction over the shareholder Claimants and their claims.

15. In its deliberations on this request, the Tribunal found that neither the ICSID Convention nor the Rules specifically provided for the withdrawal of one party from an arbitration proceeding which is to continue thereafter. ICSID Arbitration Rule 44, the provision of closest relevance to the action requested by the Claimant AASA, allows the discontinuation of an arbitration proceeding at the request of a party when the other party does not object. But Arbitration Rule 44 by a strict reading of its terms does not apply to the withdrawal of a single party. Nonetheless, the Tribunal, relying on Article 44 of the ICSID Convention, which grants ICSID tribunals the power to decide procedural questions not covered by the Convention or the Rules, concluded that it had the power to order the discontinuance of proceedings with respect to one party at its request when the other party did not object. The Tribunal found that permitting such discontinuance in this case was in accordance with the basic objective of the ICSID Convention of facilitating the settlement of investment disputes, of which ICSID Arbitration Rule 44 is a specific manifestation. It also was of the view that the continued participation of AASA in this proceeding would serve no useful purpose in bringing about a fair and correct resolution of the present arbitration.

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

G. *The Tribunal’s Decision on Jurisdiction*

17. After having considered each and every jurisdictional objection raised by the Respondent, the Tribunal rejected them all, except for the fourth objection based on the status of AASA as an Argentine corporation, which objection had become moot because of the discontinuance of the

proceedings in the case with respect to AASA. In its Decision on Jurisdiction of 3 August 2006,⁸ the Tribunal thus decided that ICSID and this Tribunal had jurisdiction over ICSID case No. ARB/03/19 and that this Tribunal also had jurisdiction over the UNCITRAL arbitration between AWG and the Argentine Republic. The Tribunal therefore directed that the former case proceed on the merits in accordance with the ICSID Convention, the ICSID Rules, and the applicable bilateral investment treaties and that the latter case proceed on the merits in accordance with the UNCITRAL Arbitration Rules and the applicable bilateral investment treaty. The Tribunal accordingly made the necessary Orders for the continuation of the proceeding pursuant to ICSID Arbitration Rule 41(4) and Article 21 of the UNCITRAL Arbitration Rules. Subsequently, with the consultation of the parties, the Tribunal scheduled dates for a hearing on the merits.

H. *Amicus Curiae Submission*

18. On 1 December 2006, the five non-governmental organization that had previously requested to submit *amicus curiae* submissions in this case formally filed a “*Solicitud de autorización para realizar una presentación en calidad de Amicus Curiae*” (Petition for Permission to Make an *Amicus Curiae* Submission) in accordance with the Tribunal’s Order of 19 May 2005, referred to above in paragraph 13. After receiving the observations of the parties on this Petition, the Tribunal in an *Order in Response to a Petition By Five Non-Governmental Organizations For Permission to Make an Amicus Curiae Submission*, of 12 February 2007,⁹ permitted them to file a single joint submission under specified conditions not later than 14 April 2007. The five non-governmental organizations did in fact submit a joint *amicus curiae* submission, which was subsequently transmitted to the parties for their observations.

I. *Respondent’s First Arbitrator Challenge*

19. On 12 October 2007, shortly before the hearing on the merits was to take place, the Respondent filed a Proposal pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules to disqualify Professor Gabrielle Kaufmann-Kohler as a member of the Tribunal “... by virtue of the objective existence of justified doubts with respect to her impartiality.” (para. 1) (“... *en virtud de la existencia objetiva de dudas justificadas respecto de su imparcialidad*”). The alleged basis for this request arose out of the fact that Professor Kaufman-Kohler had been a member of an ICSID tribunal in the case of *Compañía de Aguas del*

⁸ Available at icsid.worldbank.org.

⁹ Available at icsid.worldbank.org.

Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,¹⁰ which had rendered an award against Argentina on 20 August 2007.

20. Once the Tribunal became aware of the Respondent's Proposal, Professor Kaufmann-Kohler immediately withdrew from Tribunal deliberations, and the two remaining Tribunal members suspended proceedings in the three cases pending before it on 15 October 2007, forwarded the Respondent's Proposal to the Claimants with a request for their observations, and invited Professor Kaufmann-Kohler to furnish any explanations that she wished to make. After receiving submissions from the parties and from Professor Kaufmann-Kohler, the two remaining members of the Tribunal deliberated and, on 22 October 2007, made a *Decision on the Proposal for the Disqualification of a Member of the Tribunal*,¹¹ rejecting the Respondent's Proposal, directing that the state of suspension of the proceedings be terminated, and affirming the schedule of hearings fixed by agreement of the parties.

J. *Hearing on the Merits*

21. A hearing on the merits in these cases took place from 28 October 2007 through 8 November 2007 at the seat of the Centre in Washington, D.C. Each side in the case presented a number of witnesses for examination by the other side and questions from the Tribunal. Messrs. Nigel Blackaby and Lluís Paradell, Ms. Noiana Marigo, Ms. Maria Julia Milesi, Ms. Patricia García, Ms. Andrea Camargo García and Ms. Daisy Joye, from the law firm Freshfields Bruckhaus Deringer LLP; Mr. Bernardo Iriberry, from Estudio Cardenas, Di Cío, Romero, Tarsitano & Lucero, Abogados in Buenos Aires; Mr. Julio Durand from Estudio Cassagne, Abogados in Buenos Aires; Mr. Jean-Marie Guvain, Ms. Isabelle Froment-Meurice and Mr. Antoine Tchekhoff from Suez Environment; Mr. Miquel Griño, from AGBAR; Mr. Enrique Arnsten, from Anglian Water Limited (AWG) and Messrs. François Moncomble and Charles-Louis De Maud'huy, from Vivendi Universal S.A., attended the hearing on behalf of the Claimants. Messrs. Adolfo Gustavo Scrinzi, Gabriel Bottini, Jorge Barraguirre, Fabián Rosales Markaida, Mauricio D'alessandro Longhin, Alejandro Turyn, Facundo Perez Aznar, Diego Gosis Nicolas Grosse, Javier Pargament, Florencio Travieso, Nicolas Diana, Nicolas Duhalde, Julian Negro and Carlos Winograd, and Ms. Adriana Bustó and Ms. Alejandra Mackluf, from the *Procuración del Tesoro de la Nación Argentina*, Mr. Bernard Mettetal, from HMN & Partners, and Mr. Ignacio Torterola, from the Embassy of the Argentine Republic in Washington D.C.,

¹⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3); hereinafter "Vivendi II."

¹¹ Available at icsid.worldbank.org.

attended the hearing on behalf of the Respondent. The Tribunal posed questions to the parties, as provided in Rule 32(3) of the Arbitration Rules. At the end of the hearing, the Tribunal directed the parties to simultaneously file post-hearing briefs by a specified date in early January 2008.

K. *Respondent's Second Arbitrator Challenge*

22. On 29 November 2007, before the time for the filing of the parties' post-hearing submissions had passed, the Respondent filed with the Tribunal a second proposal to disqualify Professor Kaufmann-Kohler (hereinafter "Respondent's Second Proposal") pursuant to Article 57 of the Convention and Rule 9 of the ICSID Arbitration Rules "... on the basis that Mrs. Kaufmann-Kohler does not meet the conditions required to be an arbitrator in the above mentioned proceedings, pursuant to the provisions set forth in Article 14(1) of the ICSID Convention." Specifically, the Respondent alleged that "... Mrs. Kaufmann-Kohler cannot be 'relied upon to exercise independent judgment,'... since [she] holds the position of Director of the UBS group...", which held shares in Suez and Vivendi and engaged in certain other activities relating to the international water sector. Moreover, the Respondent asserted that Professor Kaufmann-Kohler failed to disclose this fact to the parties and to ICSID as is required by the ICSID Arbitration Rules. The Respondent's Second Proposal also extended to two other ICSID cases, not subject to the jurisdiction of this Tribunal, in which Professor Kaufmann-Kohler is also serving as an arbitrator.¹²

23. On receipt by the Tribunal of the Respondent's Second Proposal, Professor Kaufmann-Kohler withdrew from Tribunal deliberations. The two remaining members suspended the proceedings (including the date for the filing of post-hearing submissions) on 4 December 2007, forwarded the Respondent's Second Proposal to the Claimants with a request for their observations, and invited Professor Kaufmann-Kohler to furnish any explanations that she wished to make. By letter of 4 December 2007 to the parties, the two remaining members of the Tribunal expressed their understanding that in keeping with the parties' agreement that a single tribunal was to hear the above-captioned cases the parties were bestowing on the remaining members the authority to decide the challenge under the UNCITRAL Arbitration Rules in the case of *AWG Group Limited v. the Argentine Republic*. Neither party expressed any objection to the Tribunal proceeding on this basis.

¹² *Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/22) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23).

24. Upon receiving an explanation from Professor Kaufmann-Kohler and an exchange of observations on the matter from the parties, the remaining members of the Tribunal in a Decision dated 12 May 2008¹³ determined that Professor Kaufmann-Kohler's position as a non-executive director of UBS, one of the world's largest asset managers, did not affect her independence as an arbitrator in the above-entitled cases since she was unaware of UBS's specific, relatively small holdings in any claimant and moreover was not in any way involved with UBS activities in the water sector. It also concluded that she therefore had no obligation to disclose her UBS directorship to the parties or to the Tribunal. The Tribunal further directed the parties to submit their post-hearing submissions by 18 June 2008, which they did.

25. The Tribunal has now considered and deliberated upon the parties' various written submissions and the oral arguments presented during the course of the hearing on the merits. Since the parties pleaded ICSID Case No. ARB/03/19 jointly with the UNCITRAL case of *AWG Group Limited v. the Argentine Republic* and filed joint memorials relating thereto, and since the facts and legal questions in both cases are virtually identical, the Tribunal has determined that it is appropriate to issue a single statement of its conclusions, as it did in deciding on jurisdiction.

II. The Facts of this Dispute

A. Background

26. This investment dispute arises out of one of the world's largest water distribution and waste water treatment privatizations in a great city, the city of Buenos Aires. To accomplish the privatization, the Argentine Republic granted a concession to an entity, Aguas Argentinas S.A., organized and managed by the Claimants, all of which had significant interests and experience in the water business. The Respondent is a federal republic consisting of the autonomous city of Buenos Aires and twenty-three provinces.

27. Prior to the granting of the concession in this case, the provision of water and sewage services in Argentina had been the responsibility of State-owned and managed entities. From 1912 until 1980, *Obras Sanitarias de la Nación* (OSN), a corporation owned by the federal government, provided water and sewage services throughout most of the territory of Argentina. In 1980, the government of Argentina decentralized water and sewage services, transferring this

¹³ Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal of 12 May 2008.

function to provincial authorities, with the exception of the City of Buenos Aires and certain surrounding municipalities, which remained the responsibility of OSN.

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

B. *The Privatization of the Buenos Aires Water and Sewage Systems*

29. To address the situation at a general level, in 1989 Argentina enacted the State Reform Law,¹⁴ which declared the country's public services to be in a state of emergency and proposed to launch a broad program of privatization to remedy the situation, by which the Argentine government would transfer the assets, operations, and functions of various designated State-owned companies and entities to private and primarily foreign investors in accordance with certain specified legal arrangements. The State Reform Law also invited the country's provinces to participate in the privatization process. Subsequently, Argentina took certain other measures attractive to private and foreign investment to its territory. Less than two years after the State Reform Law, Argentina adopted the Convertibility Law by which it tied or "pegged" the value of the Argentine Peso to the United States Dollar and established a currency board requiring that the amount of Argentine currency in circulation be equivalent to the foreign currency reserves held by the State.¹⁵ Starting in 1990, it also began to conclude bilateral treaties "for the reciprocal promotion and protection of investments" with various countries. By the year 2000, it had concluded 57 such bilateral investment treaties, commonly known as BITs, including the December 1990 Argentina-U.K. BIT, the July 1991 Argentina-France BIT, and the October 1991 Argentina-Spain BIT, under which the Claimants assert various rights in these cases.

¹⁴ Law No. 23,696 of 23 August 1989 (the State Reform Law) (Exh. C-5).

¹⁵ Law No. 23,928 of 28 March 1991(Exh. C-12).

30. As part of its reform and privatization program, Argentina enacted Decree No. 2074/90 of October 5, 1990 to establish a regulatory framework by which various designated public services, including OSN, would be privatized and transferred to private and foreign investors through a bidding process whereby they would be granted long-term concession agreements that would require the infusion by investors of new capital and technology.¹⁶ The federal government actively publicized its desire to privatize these services and made significant efforts, including a road show in Brussels, to interest particularly qualified foreign enterprises to invest in the privatized entities, preparing and distributing a prospectus toward this end.¹⁷ On 30 June 1992, the Argentine government issued Decree 999/92, known as the “Water Decree” to establish a regulatory framework for the privatization of OSN and to provide for the rights and obligations of the future concessionaire, the related regulatory bodies, and the users of the service.¹⁸ To attract the most qualified and experienced investors and to secure investment on the most favorable terms, the government established a rigorous international bidding process that included a pre-qualification procedure which would allow only the most financially and technically qualified enterprises to engage in actually bidding to take over the privatized public service.

31. Based on the principles set down in the Water Decree, the Federal Ministry of Public Works and Services promulgated detailed Original Bidding Rules (*Pliego de Bases y Condiciones*) that stated the object, term, and rules of the Concession, defined the bidding procedure, specified the rules concerning the concession contract, and also set out a model of the future Concession contract. These rules, as subsequently revised, and the related model contract specified certain important provisions governing the financial aspects of the proposed concession, including investment commitments, tariffs, and standards of efficiency to be achieved by the concessionaire. Argentina was not seeking just any investor, but an investor who would provide comprehensive and efficient service at lowest cost to users. The cost to users was determined by the tariff charged by the concessionaire for the service provided. Throughout the process, various international institutions, particularly the World Bank and the Inter-American Development Bank, strongly supported Argentina’s privatization program with advice, financing, and encouragement.¹⁹ In addition, Argentina was assisted by two external consultants, William Halcrow & Partners Ltd., with respect to technical issues, and Banque Paribas, with respect to financial matters.

¹⁶ Decree No. 2074/90, of 5 October 1990 (Exh. C-7).

¹⁷ See, e.g., The “Information Memorandum” issued by OSN, dated November 1991 (Exh.C-19).

¹⁸ Decree No. 999/92, of 30 June 1992 (the “Water Decree”) (Exh. C-33).

¹⁹ Respondent’s Counter-Memorial, paras. 32-41.

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

32. In response to these measures, the Claimants Suez, AGBAR, Vivendi and AWG, together with Argentine companies Banco de Galicia y Buenos Aires S.A., Sociedad Comercial del Plata S.A. (SCP), and Meller S.A., formed a consortium in 1992 to bid for the concession to operate specified water distribution and waste water systems in the city of Buenos Aires and surrounding municipalities. The winning bidder was to be the bidder who promised the largest average tariff reduction after making specified investments and meeting certain quality and efficiency standards. The Revised Bidding rules established a reference tariff, known as the "K" factor. During the tender period, this reference tariff was revised upward on two occasions by the Argentine government to take account of inflation and taxes. Each bid was to include an Adjustment Coefficient which was intended to reduce the "K" factor or reference tariff. The "K Factor Adjustment Coefficient," known as the CAFK, proposed by a bidder, which would lead to the lowest tariff, all other requirements being met, would be the winning bid. Such proposed adjusted tariff was to be applied throughout the life of the concession. The revenues from tariff payments by the users of the service were to be paid in Argentine currency and were to constitute the cash flow that over the years of the concession would cover the costs of operating and developing the service, as well as yield a return to investors. As will be seen below in the discussion of the legal framework of the concession, provision was also made in the regulations and concession contract for tariff revisions during the period of the concession.

33. Ultimately, the consortium organized by the Claimants was chosen as the winning bidder, primarily because it proposed to charge the lowest tariff among all the other bidders. On 28 December 1992, the Government of Argentina by Resolution No. 155/92 of the Secretariat of Public Works and Communications, later approved by Decree No. 787/93 of 20 September 1993, awarded the Claimants' consortium the Concession to operate the water distribution and waste water services system in the City of Buenos Aires and surrounding municipalities. Pursuant to the legal and regulatory framework governing the privatization process, the consortium subsequently formed an Argentine company, Aguas Argentinas S.A. (AASA) with an initial capitalization of US\$120 million to hold and operate the Concession. At the company's foundation, AASA's capital stock was owned in the following proportions: (i) Suez (25.3%); (ii) Vivendi (known at the time as Compagnie Générale des Eaux) (8%); (iii) AWG (4.5%); (iv) SCP (20.7%); (v) Meller S.A. (10.8%); (vi) AGBAR (12.6%); (vii) Banco de Galicia (8.1%); and the Employee Stock Ownership Program (10%). Individual shareholding would

subsequently change with the addition of new shareholders and the departure from the company of others.

34. On 28 April 1993, AASA formally concluded a thirty-year Concession Contract with the Argentine Government,²⁰ represented by the Minister of Economy and Public Works. On 1 May 1993 it assumed control and management of the designated water distribution and waste water systems. The Concession Contract, which will be discussed at length below in connection with the Concession's legal framework, specified the tariff regime to which AASA was entitled and mandated service quality standards and expansion and investment goals that the Concessionaire was required to meet. Pursuant to the Concession Contract, the Concessionaire did not own the assets of the water and sewage service it was to manage and develop, nor its investments in them, and it was required at the end of the Concession to return the service to the Argentine State in good operating condition. Neither AASA nor the Claimants were required to pay Argentina for obtaining the Concession; however, the Concession Contract required them to post a performance bond to protect Argentina against injury due to deficient operation of the water and waste water systems entrusted to them. Following the legal requirements, Claimant Suez was designated as the operator of the Concession and its rights and responsibilities in that capacity were defined in a Management Contract annexed to the Concession Contract.

D. *The First Eight Years of Operation (1993-2001)*

35. Due to the poor state of the water and sewage system subject to the Concession, the Concessionaire was obligated under the Concession Contract to undertake major investments for expansion and improvement of the system. As is customary in long-term concessions implying substantial investments in early years, the Concession's investment requirements exceeded the amounts that might be gained immediately from tariff revenues; consequently, the Concessionaire sought loans from local and international sources, primarily from multilateral lending agencies whose loans were denominated and payable in U.S. dollars. It chose to rely on loans from multilateral agencies because long-term loans of the type needed to finance infrastructure investments were not available from Argentine financial institutions and because AASA considered the interest rate charged by the multilaterals agencies more favorable than that of other forms of available financing. The multilateral agencies required as a condition for lending that the shareholders in AASA promise to provide financial support to AASA in the event it was

²⁰ Exh. C-44.

unable to make scheduled payments under the loans. In addition, the consortium members were required to secure a bank guarantee in favor of the Argentine government to guarantee their promised performance and investments under the consortium. According to the Claimants' Memorial on the Merits, by 2001 AASA had invested a total of US\$1.7 billion in the concession, consisting of US\$120 million in AASA's initial capital, US\$706.1 million primarily from loans by multilateral lending institutions, and the remainder from cash flows generated by AASA.²¹

36. As a result of these investments, substantial improvement and expansion of the water distribution and sewage systems appear to have taken place. Evidence offered by the Claimants and not challenged by the Respondent indicates that between 1993 when AASA assumed the Concession, and 2005 when the Concession was near its end the population with access to drinking water increased from 5,559,270 persons to 7,859,000 persons (an increase of 41.37%) and the population with access to sewage services increased from 4,532,856 persons to 5,989,000 persons (an increase of 32.12%). Moreover during that same period the production of drinking water increased from 3,398,000 cubic meters a day to 4,700,000 cubic meters a day (an increase of 33%), the sewage treatment capacity increased from 27,305,000 cubic meters a day to 80,334,603 cubic meters a day (an increase of 194.20%), and the water network expanded from 11,913 kilometers to 16,459 kilometers (an increase of 38.16 %). It would therefore seem that as a result of the Concession the Respondent achieved at least some of the goals that it had sought in undertaking the privatization of the water and waste water treatment systems of Buenos Aires. Although the Respondent made various allegations at the hearing on the merits concerning AASA's poor performance, particularly with regard to the level of nitrates in the water, it does not appear from the evidence that the Argentine authorities raised performance issues with AASA in any serious way during the period 1993 to 2001, the first eight years of the Concession.

37. As will be seen below, the legal framework governing the relationship between the parties to this case remained relatively stable from 1993 until approximately 2001. Indeed, relations between the Concessionaire and the Argentine State appeared to have been relatively harmonious and cooperative throughout those eight years. Moreover, the financial condition of AASA was sound, as evidenced by the fact that in January 1999 Standard & Poor's awarded it an investment grade rating of BBB-. Duffs and Phelps gave it a similar rating.

²¹ Claimants' Memorial, paras. 23-24.

38. In view of the fact that the Concession was to extend over thirty-years until the year 2023, the legal framework and the Concession Contract provided defined procedures to make adjustments in tariffs, investment commitments, and other factors, according to specified conditions, in the face of changing and unexpected circumstances. During the period between 1994 and 2001, the Argentine authorities agreed to two such adjustments. The first took place in 1994 when the *Ente Tripartito de Obras y Servicios Sanitarios* (ETOSS), the regulatory authority, and the municipality of Buenos Aires requested AASA to incur additional investments in order to expand the system beyond the requirement of its then current investment plan. By ETOSS Resolution 81/94 of 30 June 1994, with the approval of the relevant government authorities, an extraordinary tariff revision was effected under the regulations to allow for the requested increased investments.

39. A second adjustment in the terms of the Concession came about as a result of a renegotiation that took place during the period 1997-1999. On 12 April 1996, AASA sent a note to ETOSS formally requesting a “structured discussion” of various issues concerning the Concession and asking for a tariff revision that could take account of Argentine realities and various difficulties that the Concession was experiencing. These difficulties included the country’s higher than anticipated inflation rate, the refusal of some sectors of the community to pay the infrastructure charge for water and sewage connections, a tariff regime considered inadequate because of being subject to political pressures, and higher than expected per capita consumption of water, among others.²² The Argentine government formally authorized a renegotiation on various issues of concern including the “economic and financial parameters of the concession,” the incorporation of new areas into the Concession, investment deferral, and master plans for waste water and drinking water, among others.²³ Over the next two years, representatives of AASA and the government negotiated and agreed upon numerous issues affecting the Concession. Periodically, matters agreed upon would be embodied in an “*Acta Acuerdo*” which would subsequently be formally approved by government decree. Thus for example, an *Acta Acuerdo* of 30 October 1997, subsequently, approved by Decree 1167/97 of 20 November 1997, approved a new investment plan, eliminated the infrastructure charge from the tariff, and agreed on exchange rate modifications to the tariff. And an *Acta Acuerdo* of 21 November 1998, approved by Resolution 1103/98 of 28 December 1998, requested AASA to

²² Note No. 6682/96, of 12 April 1996 (Exh. C-52; or Exh. R-41).

²³ Decree No, 149/97, of 14 February 1997 (Exh. R-49).

prepare a “Model Company,” which if approved would be used to evaluate the efficiency of AASA operations. A government decree formally ended the renegotiation in November 1999.²⁴

40. The significance of these revisions and renegotiations lies not in the details of what the parties discussed and agreed to but rather in what they suggest about the parties’ relationship with and intentions toward each other. First, it seems clear that the parties considered that any difficulties encountered could be resolved through consultations and negotiations. The Concession Contract, as will be seen, required the Concessionaire and the government to “... to establish and maintain a fluid relationship that facilitates the performance of this Concession Contract.”²⁵ It seems clear from the manner in which the parties resolved difficulties during the first eight years of the concession that such a desired fluid relationship did exist. On the other hand, during the course of this conflict and in retrospect, Argentina has suggested another interpretation for the revisions and renegotiations: that the Claimants made an unrealistically low bid in order to win the Concession and thereafter used the revision and renegotiation processes to secure tariff increases, which if they had been included in the original bid, would not have gained the Claimants the Concession in the first place. Other than supposition, Argentina offered no evidence to support this interpretation of the Claimants’ actions. For example, it did not offer evidence as to how the Claimants’ bid compared to those received from other bidders. It is also to be noted that Argentina had the assistance of international consultants in designing the bidding rules and evaluating the bids submitted.

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

41. By the year 2000, the Argentine Republic began to experience significant economic difficulties that would eventually lead to a financial crisis having serious consequences for the country, its people, and its investors, both foreign and national. The early manifestation of this impending crisis was the increasing difficulty that Argentina was experiencing in paying its foreign debts. The government’s early response to this situation was the institution of an austerity program that tightened fiscal policies, reduced public spending, and raised taxes. These measures did not reverse the deteriorating situation and indeed appear to have had a negative effect on AASA’s tariff collections. In early 2001, AASA’s financial situation worsened when its credit rating was downgraded by Standard & Poor’s, resulting in a substantial increase in costs to access financing necessary to meet its investment obligations under the Concession.

²⁴ Decree 1369/99, of 29 November 1999 (Exh. C-65).

²⁵ Article 5.1 of the Concession Contract.

42. In March 2001, as part of its efforts to deal with the crisis, the government imposed new taxes on bank accounts, with the effect of raising the Concession's costs of operation. In response, AASA wrote a letter of 29 March 2001 to the regulatory authority, ETOSS, requesting an extraordinary review of the applicable tariff pursuant to the provisions of the Concession Contract and regulatory framework. In the face of a deteriorating situation, during the succeeding months of 2001, it sent subsequent letters to ETOSS seeking a review of the applicable tariff because of its increased difficulty in meeting its commitments to its lenders for the financing of its investments. In October 2001, ETOSS responded by requesting more information but without acceding to the request for consideration of a tariff revision. In its Memorial, Respondent explains the ETOSS reaction by arguing that the risks associated with financing the Concession were to be borne by the Concessionaire, not the consumers or the Argentine State.²⁶ Nonetheless, the Concessionaire persisted in its attempts to obtain a tariff revision.

43. As the crisis deepened at the end of 2001 and the beginning of 2002, the Argentine government adopted a series of measures of increasing severity. In December 2001, it enacted Decree No 1570/01 of 3 December 2001, which imposed a "*corralito*" or "little fence" on bank accounts, limiting the amounts of cash withdrawals by account holders.²⁷ The resulting negative public reaction and disturbances prompted by this measure forced then President de la Rúa to resign on 20 December. There followed in succession the appointment of four presidents during the following ten days until the election of President Eduardo Duhalde who would serve out the remainder of the presidential term until May 2003.

F. *Attempts to Renegotiate the Concession*

44. Under President Duhalde, Argentina enacted a series of emergency legislative measures that to a significant extent repealed or modified previously important provisions of Argentine law. One of the most important of these was the Emergency Law No. 25,561 of 6 January 2002²⁸ that: (i) abolished the currency board that had linked the Argentine Peso to the U.S. dollar, resulting in a significant depreciation of the Argentine Peso; (ii) abolished the adjustment of public service contracts according to agreed upon indexations; and (iii) authorized the Executive branch of government to renegotiate all public service contracts. Under Article 9 of the Law, the

²⁶ Respondents' Counter Memorial, para. 200.

²⁷ Exh. C-82.

²⁸ Law No. 25,561 (*Ley de Emergencia Pública y de Reforma del Régimen Cambiario*) of 6 January 2002 (the "Emergency Law") (Exh. C-85).

renegotiation of public service contracts was to take account of the following criteria: 1) the impact of tariffs on economic competitiveness and income distribution; 2) the quality of service and investment plans; 3) the interests of the consumers and the accessibility of services; 4) the safety of the system; and 5) the profitability of the enterprises. Article 10 stated that in no case were the provisions of the Law to authorize a suspension or alteration of the contractual obligations incurred by the affected public services. Claiming that these measures injured their investments in violation of the commitments made to them in securing the Concession, the Claimants sought to obtain from the government adjustments in the tariffs that AASA could charge for water distribution and waste water services, as well as modifications of other operating conditions.

45. On 10 January 2002, AASA sent a letter to the regulatory authorities, again requesting an extraordinary tariff review pursuant to the Concession's legal framework. On 30 January, it submitted an emergency plan for operating the Concession during the crisis.

46. Shortly after the enactment of the Emergency Law, President Duhalde issued a decree that created a Renegotiation Commission within the Ministry of Economy, and specifically transferred to the Ministry the task of renegotiating the AASA Concession Contract.²⁹ On 14 February 2002, ETOSS rejected the proposed tariff adjustments requested by AASA. On 6 March, AASA sent a new request for a tariff revision to the undersecretary of water resources.

47. In April 2002, the Ministry of the Economy issued a resolution prohibiting all regulatory agencies, including ETOSS, from taking any measures that directly or indirectly affected the tariffs of any entities subject to their regulatory supervision until the end of the renegotiation period.³⁰ On 16 May 2002, the Renegotiation Commission rejected an Emergency Plan requested by AASA.

48. In the meanwhile, AASA's financial situation became increasingly difficult so that in July it decided to pay its creditors only part of the accrued interest it owed on a *pari passu* basis. On 4 December 2002, AASA submitted a new proposal requesting that the tariff regime be modified to allow the attainment of the originally contemplated balance or equilibrium of revenues and expenditures. On 26 February 2003, ETOSS issued its final report on AASA,

²⁹ Decree No. 293/02, of 14 February 2002 (Exh. C-90).

³⁰ Resolution No. 38/02, of 10 April 2002 (Exh. C-97).

which failed to take account of AASA's proposal of the previous December, of which AASA complained in a subsequent letter of 10 April. On 17 April 2003, AASA and the Claimant shareholders filed requests for arbitration with ICSID.

49. During this time, through its representatives, AASA continued to participate in the renegotiation process established by President Duhalde and to attend numerous meetings relating thereto, which was to continue without result until the election of President Néstor Kirchner, who would take office on 25 May 2003. Shortly thereafter, President Kirchner issued a decree redefining the renegotiation process and creating a new administrative unit, the Renegotiation and Public Services Contract Analysis Unit (*Unidad de Renegociación y Análisis de Contratos de Servicios Públicos - UNIREN*) of the Ministry of Economy and the new Ministry of Federal Planning, Public Investments and Utilities, to reinstate the renegotiation process.³¹ A subsequent law in October of 2003 extended the renegotiation period and set down additional rules to guide the process, including the principle in Article 2 that “the decisions made by the Executive Branch in the course of renegotiation shall not be limited or conditioned by the regulatory frameworks that govern the concession or license agreements for the relevant public services.”³² AASA continued to operate the water and sewage concession in question and to participate in the renegotiation process created by the government. Despite various proposals advanced by both parties, the renegotiation process proved fruitless. At the same time, in July 2003, AASA was required by the government to provide water and sewage services to areas that were not originally within its Concession.

50. Negotiations between AASA and the government on the future of the Concession continued with varying degrees of intensity over a period of four years but the parties were unable to resolve their differences, despite occasional hopeful signs from time to time. The effective devaluation of the Argentine peso meant that AASA's costs increased substantially and the government's refusal to allow a revision of the tariff in these circumstances meant that AASA began to sustain losses. For example, it is alleged that by February 2003 AASA's costs of operation had increased 63% with no increase in tariffs. A particular source of increased costs and therefore losses was the fact that by virtue of the loans it had secured from multilateral lending agencies it was required to make loan service payments in United States Dollars, the costs of which in Argentine pesos had tripled. Ultimately, AASA's failure to make timely loan

³¹ Decree No. 311/03, of 4 July 2003 (Exh. C-127).

³² Law No. 25,790 of 22 October 2003 (Exh. C-134).

servicing payments led to the purchase of AASA's loans by the Claimant shareholders from the Multilateral lending agencies in March of 2006.

51. At the same time, ETOSS and the Argentine government were insisting that AASA comply fully with its investment obligations under the Concession Contract. Failure to meet specified investment targets resulted in fines imposed on AASA by the regulator.

52. During the renegotiation process, Argentina also alleged certain performance failures on the part of AASA. Among others, these included allegations of high levels of nitrates in the water being distributed by AASA. AASA rejected these allegations and at the ICSID hearing on the merits intimated that they were merely pretexts for the failure of the Argentine government to revise the tariffs as required by the Concession Contract and ultimately for the government's abrupt termination of the Concession.

G. *The Termination of the Concession*

53. AASA's deteriorating financial situation and its increasingly troubled relationship with the government ultimately led the AASA shareholders to request the termination of the Concession Contract on 22 September 2005, a request that would eventually be denied three months later.

54. In February 2006, as part of an Agreement with the government, AASA asked to withdraw as a party to this case and the Tribunal approved that request.

55. On 17 March 2006, the government of Argentina opened a formal investigation into the nitrate levels in the water distributed by AASA.

56. Four days later, on 21 March 2006 the government of Argentina terminated the Concession, alleging various faults committed by AASA and demanded payment of the performance bond established by the project sponsors at the time they assumed responsibility for the Concession. The water distribution and sewage system was immediately transferred to Agua y Saneamientos Argentinos S.A. (AySA), an entity owned, financed, and managed by the Argentine State, thus bringing to an end Argentina's thirteen-year experience with the privatization of the Buenos Aires water and sewage system.

57. A corporate insolvency proceeding (*Concurso Preventivo*) with respect to AASA was begun in May 2006 in an Argentine court to settle the various rights and obligations arising out of the termination. In the meanwhile, the Claimants withdrew from the water and sewage business in Buenos Aires, having sustained large alleged losses which they claim amounted to US\$1.0192 billion as of June 2008, and for which they now seek redress in this proceeding. In response, Argentina asserts that it sustained injuries valued at \$2.4 billion as a result of various alleged failures by the Claimants to fulfill their obligations under the Concession. This Tribunal now has the duty to determine and adjudicate the parties' respective rights and obligations according to the applicable law.

III. The Law Applicable to This Dispute

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

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

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

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

62. Article 8(4) of the Argentina-United Kingdom BIT provides: “The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific Agreement concluded in relation to such an investment and the applicable principles of international law. The arbitration decision shall be final and binding on both Parties”.

63. These provisions make it clear that the relevant BIT shall primarily govern the investors’ claim. They further provide that Argentine domestic law as well as international law may apply to every extent relevant. The provisions of the Argentina-France BIT and the Argentina-Spain BIT further allow for the application of the private and/or specific agreements concluded in relation to investments, which certainly includes the Concession Contract. However, claims for breach of the Concession Contract are not within the jurisdiction of the Tribunal, whose jurisdiction is limited to claims arising under the BITs. In assessing these latter claims, the Tribunal will therefore primarily apply the BITs themselves as well as any relevant rules of international law. It may also refer to domestic laws or to the provisions of the Concession Contract relevant for the evaluation of the claims arising under the BITs, for instance as a reflection of the Claimants’ expectations in applying BIT provisions on fair and equitable treatment.

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

65. Indeed, in accordance with Article 27 of the Vienna Convention on the Law of Treaties (VCLT), a party may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations. Thus, Argentina may not avoid its treaty commitments with respect to the treatment to be accorded the Claimants by invoking the provisions of its internal laws, regulations, or administrative acts.

IV. The Legal Framework of the AASA Concession

66. An analysis of this investment dispute must begin with an understanding of the legal framework of the Concession granted to AASA, the company created by the Claimants, since that framework is an important source of the rights, obligations, and expectations of the Parties to the dispute. Moreover, the Concession Contract at the heart of this dispute expressly provides that its text is to be interpreted according to specified laws and regulations constituting that legal framework and that in the event of conflict between the text of the Concession Contract and such other elements of the legal framework, the latter are to prevail.³³ We therefore proceed to examine briefly the various individual elements of that legal framework as it existed under Argentine law. One may group the elements of the legal framework into two parts: 1) the legislative and regulatory measures establishing the legal framework; and 2) the Concession Contract with AASA. The Argentina-France BIT, the Argentina-Spain BIT, and the Argentina-United Kingdom BIT, which form an important part of the international legal framework of this dispute, will be considered in subsequent sections of this Decision.

A. *Legislative and Regulatory Measures*

67. **The State Reform Law.** The legal impetus and foundation for the Concession that is the subject of these cases was **Law No. 23,696 (*Ley de Emergencia Administrativa y Reforma del Estado*) of 23 August 1989**,³⁴ an act of the Argentine State declaring public services and enterprises to be in a state of emergency (Art. 1) and authorizing the Argentine President, referred to in the text as the National Executive Power (*Poder Ejecutivo Nacional*), to take specified remedial actions, particularly the privatization of State enterprises by various means, including the granting of concessions to private and foreign investors and to enterprises to operate individual public services (Art. 17). The Law also defined the procedure by which such privatizations were to be accomplished. This law, known as “**the State Reform Law**,” is

³³ Article 1.6 of the Concession Contract (Exh. C-44).

³⁴ Exh. C-5.

therefore the basic authorizing legislation for the various acts leading to the establishment of the AASA Concession.

68. **The Privatization Decree.** Subsequent to this basic law, the Argentine President issued various decrees to set in motion the development of a legal and regulatory process to govern the granting of concessions. One of these was **Decree No. 2074/90 of 5 October 1990**³⁵, providing that various State entities then under the jurisdiction of the Ministry of Public Works and Services, including OSN, the State entity then entrusted with providing water distribution and waste water services to the Buenos Aires area, were to be privatized. Article 3 of the Decree called for a concession to be granted over the services operated by OSN and directed that bidding rules and conditions be prepared to govern a public, national, and international competitive bidding process by which the future concessionaire was to be selected.

69. In order to begin the execution of the above indicated Decree, the Ministry of Economy issued **Resolution No. 97/91 of 10 May 1991**,³⁶ creating the *Comisión Técnica de Privatización de Obras Sanitarias de la Nación*, known as the “Privatization Committee,” to draft the rules to govern the privatization process, international bidding, and the provisions that were to be part of the Concession Contract.

70. **The Convertibility Law.** Although Argentina had thus initiated a privatization process in 1989, the envisioned regulatory framework was not to emerge for another three years. In the meanwhile, Argentina continued to experience severe inflation and monetary instability, factors which negatively affected the investment climate in the country. In an effort to curb inflation, Argentina, at the initiative of a new Minister of the Economy (Domingo Cavallo), enacted **Law No. 23,928 (Ley de la Convertibilidad del Austral) of 28 March 1991**.³⁷ Known as the “Convertibility Law,” this legislative act, effective from 1 April 1991, basically did two things. First, under Article 1, the law tied or “pegged” the exchange rate of Argentine currency to the U.S. dollar by guaranteeing that the Central Bank of Argentina would exchange a fixed amount of Argentine currency for a fixed amount of U.S. dollars. At the time of its enactment, the law provided that the Central Bank would exchange 10,000 Argentine Australs for one U.S. dollar. Shortly thereafter, **Decree No. 2128/91 of 17 October 1991**³⁸ replaced the Austral with the Peso

³⁵ Exh. C-7.

³⁶ Exh. C-13.

³⁷ Boletín Oficial, 28 March 1991, p. 6 (Exh. C-12).

³⁸ Exh. C-17.

as the national currency, so that until the financial crisis of 2001 the Peso was pegged to the U.S. dollar at a rate of one peso per dollar. Second, the Convertibility Law placed various limitations on the actions of the Central Bank in an effort to prevent it from increasing the monetary supply to meet internal government fiscal needs, which in the past had led to severe inflation in the country. Thus, the Convertibility Law required the Central Bank to hold an amount of dollars, gold, or foreign exchange at least equivalent to 100% of Argentina's domestic monetary base, the effect of which was to strictly limit the legal authority of the Central Bank to increase the supply of pesos, a limitation intended to reduce inflation and foster the monetary stability necessary to encourage investment.

71. As these measures began to have effect and inflation in the country began to abate, the Argentine government accelerated work on the privatization of the water distribution and sewage system in the capital of Buenos Aires. An important step in this direction was the issuance by the Ministry of Works and Public Services of **Resolution No. 178/91 of 13 December 1991**,³⁹ specifying the prequalification bidding rules, the purpose of which was to establish minimum standards that interested parties had to meet to bid for the concession. Among other qualifications, eligible bidders were to have a minimum net worth of US\$1 billion and were required to include an operator who had experience in operating a water and waste water service in a city with a minimum of 500,000 inhabitants and to demonstrate that it had served at least two million persons.

72. **The Water Decree.** A further major step in constructing a legal framework for the Concession took place when the President of the Republic, acting under the authority granted him by Law No. 23,696, cited above, issued **Decree No. 999/92 of 30 June 1992**,⁴⁰ generally known as the "**Water Decree**," which formally approved a legal and regulatory framework (contained in Annex I of the Decree) for the privatization of the water distribution and sewage system in the Federal capital of Buenos Aires and various other municipalities in the Province of Buenos Aires, which were then under the authority of OSN. The regulatory framework thus created had according to Article 3 of the Water Decree five basic objectives: 1) to guarantee the maintenance and to promote the expansion of the system for potable water distribution and the collection of household and industrial sewage; 2) to establish a normative system that guaranteed the continued quality of the regulated public service; 3) to regulate and protect the rights, obligations and

³⁹ Exh. C-24.

⁴⁰ Exh. C-33.

attributions of the users of the system, the conceding authority, the concessionaire, and the Regulatory Entity; 4) to guarantee the operation of current services and those provided in the future at a level of quality and efficiency indicated in the legal framework; and 5) to protect public health, water resources, and the environment.

73. In order to achieve these objectives, specific chapters of the Water Decree provided for: the definition of the nature and extent of the service and area covered by the concession and the definition of various terms used in the Decree (Chapter I), general rules governing the Concession (Chapter II), the Regulatory Entity (*Ente Regulador*) (Chapter III), the Concessionaire (Chapter IV), protection of service users (Chapter V), quality of service (Chapter VI), the tariff regime (Chapter VII), payment for services (Chapter VIII), plans for service expansion (Chapter IX), the property regime (Chapter X), termination of the concession (Chapter XI), dispute settlement (Chapter XII) and complementary and transitional norms (Chapter XIII). We will briefly review each chapter of the Water Decree.

74. Chapter II of the Water Decree, entitled “*Concesión del Servicio*,” set down important general principles to govern the concession. Thus, Article 6 required that the public services subject to the concession must obligatorily be provided in conditions that assured its continuity, regularity, and quality, as well as in a manner that assured its efficient provision to users and the protection of the environment. Moreover, it was to employ the system of the public service concession, and its legal regime was to consist of Law No. 23,696, the provisions of the Water Decree, the Concession Contract, and, supplementarily, the general principles governing public service concession contracts (Art. 7). These provisions made clear that the Buenos Aires water and sewage system, although managed under a concession with a private operator, nonetheless remained a public service.

75. As a public service, the concessionaire and the water and sewage service were subject to the control of the Regulatory Entity, whose organization, duties, and powers were specified in Chapter III of the Water Decree.⁴¹ The Regulatory Entity, known as the “*Ente Tripartito de Obras y Servicios Sanitarios* (ETOSS),⁴² was created by Law No. 23,696. Integrating the three concerned jurisdictions of the city of Buenos Aires, the Province of Buenos Aires and *Obras Sanitarias de la Nación*, the federal entity theretofore charged with providing water and sewage

⁴¹ Article 13 of the Water Decree (Exh. C-33).

⁴² Articles 1 and 15 of the Water Decree (Exh. C-33).

services to the concerned area, ETOSS was an autonomous legal entity having broad powers to control and regulate the concessionaire. Its powers included approving tariffs, verifying the application of the tariff regime, sanctioning the Concessionaire for violations of the Concession Contract, and approving expansion plans of the Concessionaire.⁴³

76. Chapter IV of the Water Decree listed the responsibilities and obligations of the Concessionaire in operating the water and sewage system and also specified the procedure by which the Concession contract with the Concessionaire was to be made.

77. Chapter V of the Water Decree sought to provide for the legal protection of the users of the water and sewage services operated by the Concessionaire by defining the rights of both actual and potential users, including the right to service according to the provisions of the Water Decree, the right to required levels of service quality, the right to make claims against the Concessionaire for inadequate service, and the right to bring complaints against the Concessionaire before the Regulatory Entity, among others⁴⁴. In order to give effect to complaints by users, the Concessionaire would be required to maintain a Complaints Office (*Oficina de Reclamos*) staffed by competent persons and accessible to users.

78. Service quality being an important goal of the water decree, Chapter VI defined in general terms the quality obligations of the Concessionaire with respect to the operation of the service. The principal objective of the quality provisions of the Water Decree was to assure the provision of adequate service with respect to population and area coverage, water quality, water pressure, continuity of service, minimal service interruptions, effective treatment of sewage effluents, and responsiveness to the needs of the users.⁴⁵

79. The basic elements of the tariff regime of the Concession were set out in Chapter VII of the Water Decree, as well as in the Concession Contract. These elements concerned: (a) the “initial tariff regime” (*Régimen Tarifario inicial*), that is, the tariff regime established at the commencement of the Concession; and (b) programs and rules for periodic tariff revisions and the mechanism for such revisions. Any revisions to the tariff regime had to accord with the provisions of the Water Decree and required the intervention of the Regulatory Entity.⁴⁶ The

⁴³ See Article 17 of the Water Decree (Exh. C-33).

⁴⁴ Article 34 of the Water Decree (Exh. C-33).

⁴⁵ Articles 38 and 42 of the Water Decree (Exh. C-33).

⁴⁶ Article 43 of the Water Decree (Exh. C-33).

general principles governing the tariff regime were elaborated in Article 44 of the Water Decree, portions of which the Claimants rely on heavily in presenting their case. Because of its role in this dispute, it is worthwhile examining the whole of Article 44 in detail.

80. Article 44 states that the tariff regime of the Concession is to be adjusted (*se ajustará*) according to the following five principles:

- a. Its propensity to offer a rational and efficient use of the offered services and the resources involved in its provision;
- b. The possibility of a consistent balance between the supply and the demand for services. The Concessionaire may not voluntarily restrict the supply of services;
- c. Attaining the health and social objectives directly linked to its provision;
- d. “The prices and tariffs shall *tend (tenderán)* to reflect the economic cost of the water and wastewater services, including a margin of profit for the Concessionaire and incorporating all costs arising from the approved expansion plans.” (emphasis added),⁴⁷ and
- e. It shall be permitted that the tariff applied to any category of users shall balance the economic cost specified in paragraph d) by other users of the system, thus providing for the possibility of cross-subsidies among user categories.

Article 44 concludes with the following general principle to be followed by the tariff system: “The amount resulting from the tariffs charged to users shall (*deberá*) permit the Concessionaire, when operating efficiently, to obtain sufficient income to cover the implicit costs of the operation, maintenance and expansion of the services provided.”⁴⁸

81. The Water Decree in Article 45 further states the basic elements of the tariff structure, providing for tariffs based on measured or metered usage and tariffs based on a fixed cost, while specifying the types of users to which each system applied. Under its provisions, the following

⁴⁷ The original Spanish version of Article 44(d) reads as follows: “(d) Los precios y tarifas tenderán a reflejar el costo económico de la prestación de los servicios de agua potable y desagües cloacales incluyendo el margen de beneficio del Concesionario e incorporando los costos emergentes de los planes expansión aprobados.” (Exh. C-33).

⁴⁸ The original Spanish of this provision of Article 44 reads as follows: “El monto resultante de las tarifas facturadas a los Usuarios deberá permitir al Concesionario, cuando éste opera eficientemente, obtener ingresos suficientes para satisfacer los costos implícitos en la operación, mantenimiento y expansión de los servicios prestados.” (Exh. C-33).

types of users must be subject to measured (metered) usage: (a) non residential users; (b) “block water sales”; (c) other cases at the option of the Concessionaire; and (d) at the option of users, cases not covered by (a) or (b) above. It appears that one of the goals of Article 45 was the progressive installation of measured or metered usage throughout the system.

82. Under Article 46 of the Water Decree, the actual tariffs applicable under the Concession were initially to be fixed in the Concession Contract and later might be adjusted in two ways: (a) as part of plans for expansion and improvement of the service approved by the Regulatory Entity within the framework of periodic revisions provided in the Concession Contract or (b) in accordance with provisions on “extraordinary revisions.” The Regulatory Entity was empowered under Article 47 to regulate tariffs on the basis of an analysis of improvement and expansion plans submitted periodically by the Concessionaire. In setting tariffs in such case, the Regulatory Entity was to be guided by the following principle: “The tariff regulation variable shall be the amount of income that the Concessionaire receives per year for the services provided in relation to the number of users served and the efficiency conditions proposed in each plan.”⁴⁹ The term “tariff regulation variable” (*la variable de regulación tarifaria*) is not defined in the text in the Water Decree and is not completely clear in its own terms, but it would appear to mean that the amount of income to be received by the Concessionaire each year is to be based on the number of users and the efficiency of the plans proposed.

83. In view of the fact that the Concession was to continue over thirty years, it was important and expected that the Water Decree include a mechanism to revise tariffs in the light of changing circumstances. Article 48 of the Water Decree provides for such mechanisms. It specified two types of tariff revisions: periodic revisions and extraordinary revisions. Periodic revisions are those arising from expansion plans approved by the Regulatory Entity and necessary for satisfying or exceeding the quality and coverage standards stipulated in the Concession Contract. Extraordinary tariff revisions are those arising from four specified events: a) significant variations in the Concessionaire’s costs according to the provisions of the Concession Contract; b) substantial and unforeseen changes in the conditions for the provision of services and in the quality standards of drinking water and waste water, such changes being justified in relation to investments in and costs of operation of the service; c) when such efficiency conditions conflict

⁴⁹ The original Spanish of this provision in Article 47 reads as follows: “La variable de regulación tarifaria será el monto de ingresos que el Concesionario reciba por los servicios que preste en función del números de Usuarios servidos en cada año, y las condiciones de eficiencia que se propongan en cada plan.” (Exh. C-33).

with the objectives of Article 44 and the requirements of Article 47 the Concessionaire or the Regulatory Entity may request an exceptional revision according to the Concession Contract; and d) when another regime is proposed that will permit the attainment of increases in efficiency and result in a better application of the principles of Article 44. Article 48 provides that no revision may be used to penalize a Concessionaire for past profits or operations nor may it be used as compensation for losses arising from business risk (*riesgo empresario*) or to compensate for inefficiencies in the delivery of services. Thus losses incurred by the Concessionaire from normal operations of the system would not justify a tariff increase under the Water Decree.

84. Chapter VIII of the Water Decree concerned the principles governing payment for service. In general terms, the Concessionaire had the right and obligation to collect payment for services provided, and the Water Decree imposed an obligation on users, including the State, its subdivisions, and State entities, to pay for services. If the Concessionaire was directed by the government to provide free or subsidized services to certain classes of consumers, payment for them was to be made from the National Treasury.

85. Chapter IX deals with the process for preparing and approving plans to expand and improve service. In developing such plans, the Concessionaire was to consult with users, local and national authorities, and the Regulatory Entity. The Concessionaire had the obligation to execute approved plans and failure to do so under Article 57 was considered a “serious fault (*falta grave*).”

86. Chapter X of the Water Decree governed the Property Regime of the Concession. The Decree applied to all property transferred to the Concessionaire as well as to property that the Concessionaire later acquired or constructed for the purpose of meeting its obligations arising out of the Concession Contract. Such property constituted a unity (*unidad de afectación*). The Concessionaire had the right to administer them according to the provisions of the Concession Contract, but it did not own them. The Concessionaire also had an obligation to maintain and protect such property. At the end of the Concession, the Concessionaire was required to transfer to the State without charge, all property and assets used in the service in good condition (*buenas condiciones*) as an integrated system in a correct state of operation.

87. Chapter XI treated the termination of the Concession Contract in general terms. The Contract was to terminate upon completion of the contractual period or by its cancellation through action of the President and with the intervention of the Regulatory Entity.

88. Chapter XII of the Water Decree concerned disputes affecting the Concession and provided that the National Administrative Procedure Law was to apply to such disputes without prejudice to the rights of the parties to seek a judicial remedy. For disputes not arising out of the exercise of police power under Article 17, conflicts between the Regulatory Entity and the Concessionaire might also be settled by arbitration or amicable means by agreement of the parties.

89. **The Bidding Rules.** To put in motion the required public international competitive bidding process to select a concessionaire, Argentina issued Bidding Rules (*Pliego de Bases y Condiciones*)⁵⁰ on 24 June 1992. The Bidding Rules defined in detail the procedure by which OSN was to be privatized and the standards to be used in evaluating bids. The Bidding Rules consisted of 4 parts: (i) general aspects of the Concession, including its purpose, term, and rules of interpretation; (ii) the bidding procedure; (iii) rules regarding the Concession Contract, including the tariff regimes, the obligations and rights of the parties, its investments, and financing; and (iv) annexes that included a Model of the Concession Contract for the service.

90. The Bidding Rules⁵¹ expressly provided that potential bidders could ask for clarifications of its provisions. In fact, they did so, and Argentina responded to these questions in documents referred to as *Aclaratorias al Pliego* (clarifications to the Bidding Rules). Many of these questions concerned the tariff system, particularly the elements to be considered in making tariff revisions. Ultimately, as a result of the clarification process, Argentina issued new bidding rules, referred to in Claimants' pleadings as **Revised Bidding Rules**,⁵² which contained changes and clarifications requested or recommended by potential bidders. In the text of the Revised Bidding Rules, as issued in the Secretariat of Public Works and Communications Resolution No. 249/42 of 24 August 1991, such modifications are indicated in italics, and Annex XI of the Revised Bidding Rules, which includes a Model Concession Contract, provided that all modifications of the original bidding rules would have direct application to the Model Contract contained in the

⁵⁰ Exh. C-32.1.

⁵¹ Article 2.5 (Exh. C-32).

⁵² Resolution S.O.P. y C. No. 249/42 of 24 August 1992 (Resolution of the Secretariat of Public Works and Communications) (Exh. C-36).

Revised Bidding Rules. The Tribunal's analysis will focus in particular on the Revised Bidding Rules as an element in the legal framework of the AASA Concession.

91. The Revised Bidding Rules began with a lengthy "Introduction", which explained the background to the decision to grant a concession to a private operator to provide water and waste water services previously provided by OSN, and provided that the concessionaire would be subject to a regulatory regime concerning the charges, quality, and payment for the services provided to the users. The Introduction gave a very general description of the existing service but it also noted that the quality of available information about the existing service was limited due to its lack of a modern system of controls and metering.

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

93. Section II of the Revised Bidding Rules defined the procedure for the bidding and tendering process that was to determine the future concessionaire. It provided that the bid was to consist of two parts or "envelopes," one addressing the technical aspects of the bid and the second the economic and financial aspects.

94. Of particular importance were the rules concerning the economic and financial bid, since it was that bid which, all other things being equal, would determine the winner of the Concession Contract. Annex X to the Revised Bidding Rules contained a description of the Tariff Regime, which was expressed as a numerical value, referred to as the "K" factor, which was a reference tariff. Each economic and financial bid was to contain a number, carried out to three decimal places, either greater than, less than, or equal to one. This number was referred to in the Revised Bidding Rules as the K Factor Coefficient of Adjustment, otherwise known as the CAFK Coefficient. The CAFK, when multiplied by the K Factor would result in the tariff regime to be applied throughout the period of the Concession.⁵³ Thus, a low CAFK would result in a low proposed tariff and a high CAFK would result in a high proposed tariff.

⁵³ Article 4.4.1, Revised Bidding Rules (Exh. C-36).

95. In the evaluation process, the bids received were to be rank ordered according to increasing proposed CAFK. The offer with the lowest proposed CAFK was to be considered the winner of the bidding tender and preliminarily determined to be capable of being awarded the Concession.⁵⁴ Thus, the Revised Bidding Rules appeared to have been designed in order to secure a Concessionaire that would operate the system at the lowest possible tariff rate.

96. The Revised Bidding Rules further stipulated in some detail the nature of the documentation and information required to accompany the bid, the procedure by which the bid would be analyzed and evaluated, the method by which a decision would be made to decide on the winning bid, and the process for resolving any challenges to such decision. They also stipulated that the winning bidder must form a company (*sociedad anónima*) under Argentine law and that such concessionary company must have certain specified legal characteristics, including a minimum capital of US\$120,000,000, that the operator of the Concession hold at least 25% of such capital, that the domicile and seat of the company be located in the City of Buenos Aires, and that the object of the company be the performance of the Concession exclusively.

97. Section III of the Revised Bidding Rules specified the provisions to be included in the Concession Contract, particularly the obligations of the Concessionaire with regard to service quality, development and investment in the water and waste water system, relations with the Regulatory Entity, studies and plans for the development of the system, five year investment plans, the property regime, the regimes governing Concession property and personnel, and the tariff regimes. These principles were for the most part incorporated into the Concession Contract, usually verbatim, and will be discussed in detail below. It is to be noted that the Revised Bidding Rules also contained 21 annexes, including a Model Concession Contract, an inventory of existing property and installations to be taken over by the future concessionaire, the tariff framework of the Concession, and the applicable regulatory framework, among others.

B. *The Concession Contract*

98. **The Concession Contract.** A lengthy and detailed document of 129 pages, plus annexes, the Concession Contract between the Argentine State, referred to in the Contract as “the Conceding Authority” (“el Concedente”) and Aguas Argentinas S.A., referred to as “the Concessionaire” (“el Concesionario”), was signed on 28 April 1993 and became effective at

⁵⁴ Article 4.6, Revised Bidding Rules: “Las ofertas, cuyo Sobre 2 hubiese sido descalificado según 4.5, serán ordenadas según coeficientes CAFK crecientes. De entre ellas, aquella oferta de menor CAFK será considerada ganadora de la licitación y pre adjudicataria, susceptible de ser adjudicada.”(Exh. C-36).

midnight on 1 May 1993, when AASA took possession of the conceded water and waste water system in the Buenos Aires area. The purpose of the Concession Contract was to specify the respective rights and responsibilities of the parties concerning the transfer, operation, and development of that system during the term of the Concession, a period of thirty years that was to terminate on April 30, 2023. As indicated above, the Concession by its terms was to be interpreted and applied within a stated hierarchy of legal norms set down in Article 1.6. These norms included: 1) Law No. 23,696 (the State Reform Law; 2) the Water Decree; 3) the Bidding rules and the various related clarifications; and 4) the bid offer by AASA as approved by act of the Privatization Committee.

99. The Concession Contract is divided into twelve chapters. Chapter 1 on General Aspects states the purposes of the Concession, defines important terms used in the Contract, sets down rules of interpretation, and specifies the duration of the Concession as thirty years from the date of AASA's taking possession of the system. It is also to be noted that the Concession Contract states that the Concession is granted to AASA free of any required payment or "canon" by AASA.⁵⁵ Many of the provisions in the Concession Contract are particularized versions of the principles stated in the Water Decree and the Bidding Rules.

100. Chapter 2 entitled "Concessionary Company" (*Sociedad Concesionaria*) concerns the concessionary company and, as required by the Revised Bidding Rules, established basic principles concerning its minimum capital (US\$120,000,000), requires its domicile to be the city of Buenos Aires, and states that the purpose of the company throughout the period of the concession to be exclusively the performance of the Concession Contract. Moreover, it requires the Operator (then Lyonnaise des Eaux, now Suez) to hold 25% of the Company's capital, in addition to other rules affecting its shareholders. An annexed Management Contract governed the rights and responsibilities of the Operator.

101. Chapter 3 of the Concession Contract defined the process by which AASA was to take possession of the system and set down certain rules to be followed during this transitional phase of operations, including those governing the continuing status of existing personnel, contracts, credits, and obligations of OSN. AASA, the Concessionaire, was not to assume the debts of OSN;⁵⁶ however, the Contract gave AASA the option to assume a \$98 million loan, approved but

⁵⁵ Article 1.4 (Exh. C-44).

⁵⁶ Article 3.11 of the Concession Contract (Exh. C-44).

not yet executed, by the Inter-American Development Bank, to the Argentine State for capital improvements in the drinking water system, if certain specified conditions were met.

102. In Chapter 4, the Concession Contract stated the service norms to be followed by AASA in carrying out the water and sewage concession. These norms dealt with the continuity, regularity, quality and generality of service to be provided by the Concessionaire to the users. Specific provisions concerned area coverage of the systems, specified water pressure requirements, required water flow volumes, service cuts, waste water overflows, treatment of effluents, and required levels of customer relations.

103. As a public service, the Concession was subject to close regulation by the Regulatory Entity, and Chapter 5 of the Concession Contract sought to define the principles governing the relationship between the Concessionaire and the Regulatory Entity. As a general principle, the two parties were "... to establish and maintain a fluid relationship that facilitates the performance of this Concession Contract."⁵⁷ The Concessionaire by the terms of the Concession Contract had an obligation to cooperate with the Regulatory Entity, and the nature of that required cooperation was specified in some detail. At the same time, the Concession Contract required the Regulatory Entity to cooperate with the Concessionaire by among other things "... exercising its police, regulatory, and control powers in a reasonable manner, considering especially the rights and interests of the users."⁵⁸

104. The fact that the Concessionaire was to be transferred the possession of an existing water and sewage system with its personnel for which it would have the responsibility for effective management, development, and expansion during a fixed period of time and further that it had the obligation to transfer that system back to the Argentine State upon the termination of the Concession required special rules concerning the property and personnel of the system and any contracts made by the Concessionaire during the life of the Concession. Accordingly, Chapter 6 of the Concession Contract defines the rules governing the property regime (*régimen de bienes*), specifying the various categories of property subject to the Concession and the rules governing their acquisition, use, protection, amortization, and disposal. Among other things, it provided that at the end of the thirty-year term of the Concession, the Concessionaire was to transfer without financial payment back to the Argentine State all assets of the Concession, including those it had

⁵⁷ Article 5.1 of the Concession Contract (Exh. C-44).

⁵⁸ Article 5.3 of the Concession Contract (Exh. C-44).

subsequently acquired or constructed.⁵⁹ Chapter 7 on the Personnel Regime (*Régimen de Personal*) governs basic rights of Concession employees. Chapter 8 on the Tax Regime (*Régimen Tributario*) makes the Concession liable for the payment of various taxes and government charges, while Chapter 9 on the Contractual Regime (*Régimen de Contratos*) provided for a system by which the Concession, a public service, is to make contracts with third parties.

105. In order to assure the performance of the Concession and the provision of the crucial public services it governs, the Concession Contract in Chapter 10 required the Concessionaire to establish a bank guarantee of US\$150,000,000, subject to periodic readjustment on the basis of inflation and changes in investment plans, in favor of the Argentine State.⁶⁰ Chapter 10 of the Concession Contract, entitled “Guarantees and Insurance” (*Garantías y Seguros*), defined the nature of this guarantee, the contingencies and risks that it covered, and the conditions under which it might be executed. Chapter 10 also specified the type of insurance (primarily liability insurance, worker accident insurance, property damage, and life insurance), which the Concessionaire must maintain throughout the period of the Concession Contract.

106. The Concession Contract’s provisions on tariffs, contained in Chapter 11 (“The Economic and Tariff Regime” (*Régimen Tarifario y Económico*)), as well as in Annex VII, are central to the present dispute between the Parties. The first part of Chapter 10, and its related Annex VII, established the tariffs to be charged to users at the beginning of the Concession. Article 11.3 stipulates that such tariff shall remain in force throughout the period of the Concession, without prejudice to the application of Article 11.11, which concerned tariff revisions. Article 11.11 authorized and defined the procedures for revising tariffs by the Regulatory Entity. Under the Concession Contract, tariff revisions could not be used to penalize the Concessionaire for past profits earned nor might it be used to compensate the Concessionaire for losses arising out of business risks.⁶¹ The Concession Contract specifically stated in Article 11.11.1.3: “The Concession is based on the principle of business risk.”⁶² In considering requests for tariff revisions, the Regulatory Entity was always to take into account the principles of Article 44 of the Water Decree,⁶³ discussed above.

⁵⁹ Article 6.9.2 of the Concession Contract (Exh. C-44).

⁶⁰ Article 10.1.1 of the Concession Contract (Exh. C-44).

⁶¹ Article 11.11.1.2 of the Concession Contract (Exh. C-44).

⁶² “La Concesión está basada en el principio del riesgo empresario.”(Exh. C-44).

⁶³ Article 11.11.1.5 of the Concession Contract (Exh. C-44).

107. Following the principles of the Water Decree and the Revised Bidding Rules, the Concession Contract provided for three types of tariff revisions: 1) Ordinary revisions (*Revisiones Ordinarias*), covered in Article 11.11.3 of the Concession Contract; 2) Extraordinary Revisions for Change of Costs (*Revisión Extraordinaria por Modificación de Costos*), covered in Article 11.11.4; and 3) Other Extraordinary Revisions (*Otras Revisiones Extraordinarias*), covered in Article 11.11.5.

108. Ordinary revisions were to take place only due to changes in the five-year investment plans proposed by the Concessionaire. Pursuant to the Revised Bidding Rules, bidders were required to submit an investment plan for the thirty-year period of the Concession divided into individual five-year plans (*Plan Quinquenal*). The winning bidder was to execute its proposed thirty-year investment plan and presumably its proposed tariff was to take account of these long-term investment requirements. Because of changing circumstances and needs, the Concession Contract recognized that such investment plans might have to be modified and the prevailing tariff revised accordingly. Article 11.11.3 of the Concession Contract established the standards and processes for effecting such ordinary tariff revisions.

109. Extraordinary Revisions for Change in Costs were to take place whenever an increase or decrease of more than 7% occurred in the costs of a specified and exclusive list of elements needed in the operation of the Concession, as follows: fuel, chemical products, electricity, insurance, personnel, construction materials, spare parts, vehicles, debt payments, and financial costs⁶⁴ Article 11.11.4.2 specifies the methods for calculating such increases or decreases in the cost of these items, usually by reference to particular indices.

110. In addition to an Extraordinary Revision for Changes in Costs, the Concession Contract provided for possible extraordinary revisions of tariffs on the happening of certain specified events in Article 11.11.5. These specified events are as follows: 1) changes in applicable required standards that result in substantial change in the conditions of providing service; 2) the need to make substantial changes in the provision of service or the works needed for the provision of such service; 3) legal changes in the currency parity fixed by the Convertibility Law, the creation of new taxes, or the modification or elimination of existing taxes that directly affect the Concessionaire; and 4) the enactment of new environmental laws or changes in the provision of

⁶⁴ Article 11.11.4.2 of the Concession Contract (Exh. C-44).

those in force that directly affect the provision of service by the Concessionaire. For both types of Extraordinary tariff revisions, the Concession Contract requires the Regulatory Entity to make a decision within thirty days.⁶⁵

111. The remaining provisions of Chapter 11 set down various principles governing the modification of the tariff regime, one of which was that while the Regulatory Entity is authorized to make changes in the tariff regime in order to achieve social objectives such changes could not result in a variation in the total amount of tariff revenue invoiced by the Concessionaire.⁶⁶

112. Throughout the period of the Concession, the Concessionaire had an obligation to undertake studies, develop expansion and improvement plans, maintain records, and make information available on the details of the service that it was providing. Chapter 12, entitled “Studies, Plans and Reports” (*Estudios, Planes, e Informes*) specified in detail the nature of the Concessionaire’s obligations with respect to these matters. In particular, it had to prepare Service Improvement and Expansion Plans (*Plan de Mejora y Expansión del Servicio*), known as a PMES, and Five-Year Plans (*Planes Quinquenales*) to guide the development of the water and waste water systems so as to meet the needs of the area served.

113. Chapter 13 of the Concession Contract deals with the obligations of the Concessionaire in providing service under the Concession, with non-performance, and resulting sanctions that may be imposed on the Concessionaire. Article 13.1 stated the basic nature of the Concessionaire’s responsibility: the Concessionaire was to assume the Concession at its own technical, economic, and financial risk and was responsible to the Argentine State and to third parties for the obligations and requirements from the beginning of the service as of the time it took possession. Neither the Conceding Authority (*i.e.* the Argentine State) nor the Regulatory Entity was responsible to third persons for the obligations assumed by the Concessionaire. Failure to meet its obligations could result in one of three sanctions: warning (*apercibimiento*), fines, or rescission of the contract. The Regulatory Entity had the power to apply the first two, but only the President could rescind the Concession Contract.⁶⁷ Chapter 13 defined the norms to be applied in judging and sanctioning the Concessionaire, the procedure to be followed, and the nature of warnings and fines to be imposed by the Regulatory Entity.

⁶⁵ Article 11.11.6 of the Concession Contract (Exh. C-44).

⁶⁶ Article 11.12.4 of the Concession Contract (Exh. C-44).

⁶⁷ Article 13.3 of the Concession Contract (Exh. C-44).

114. Chapter 14 concerned the Termination and Extension of the Concession (*Extinción y Prórroga de la Concesión*). Article 14.1 stated that termination of the Concession Contract may be caused by the expiration of the period of the Contract, cancellation due to the fault of the Concessionaire, cancellation due to the fault of the Conceding Authority, cancellation for act of God or force majeure (*caso fortuito o fuerza mayor*), bankruptcy (*concurso preventivo*), dissolution or liquidation of the Concessionaire or recovery (*rescate*) of the service. It then defines in detail the nature of each of these causes for termination. For example, among the thirteen specified faults of the Concessionaire justifying termination of the Concession contract are service failures to carry out the legal provisions or regulatory provisions either of the Regulatory Entity or the Contract and repeated and unjustified delays in making agreed annual or projected investments⁶⁸

115. At the same time, the Concession Contract gave the Concessionaire the right to terminate the contract for fault committed by the Conceding Authority. On this point, Article 14.4 provided as follows: “The Concessionaire may rescind the contract for fault of the Conceding Authority whenever a normative provision, legal action, act or omission of the Regulatory Entity or the Conceding Authority (*Concedente*) results in a serious failure to perform an obligation assumed by the Conceding Authority in this contract.”⁶⁹

116. The consequences of termination by fault of the Concessionaire and termination by fault of the Conceding Authority are set out in Articles 14.8.2 and 14.8.3 of the Concession Contract, respectively.

117. In the event of termination by fault of the Concessionaire, Article 14.8.2. stated that three basic consequences would result. First, the Contract performance guarantee established by the Concessionaire will be lost (*se perderá*), without prejudice to the obligation of the Concessionaire

⁶⁸ Articles 14.3.1 and 14.3.2 of the Concession Contract (Exh. C-44).

⁶⁹ The original Spanish version of section 14.4 reads as follows:

“14.4 Culpa del Concedente

El Concesionario podrá rescindir este Contrato de Concesión por culpa del Concedente, cuando de una disposición normativa, acto, hecho o omisión del Ente Regulador o del propio Concedente, resulte un incumplimiento grave de las obligaciones asumidas por al Concedente en este Contrato.”

to indemnify all damage and injuries caused to the Conceding authority or the service.⁷⁰ Second, the unamortized value of the assets and property dedicated to the service by the Concessionaire, which was to be reimbursed to the Concessionaire, will be retained until the final liquidation of the reciprocal credit and debts and until the settlement of all judicial actions by the Conceding authority or the Regulatory Entity against the Concessionaire.⁷¹ Thus, the Concessionaire's right to be paid the unamortized value of its investment in the service was deferred until a final accounting could be performed. Third, the Regulatory Entity had the right to effect a provisional liquidation of the credits and debts arising from the Concession in order to satisfy the pending claims of the Regulatory Entity or of the Argentine State.

118. In the event of termination of the Contract through the fault of the Conceding Authority, the Concessionaire was to recover the Contract performance guarantee and the value of the unamortized assets acquired or constructed by the Concessionaire pursuant to approved Five-Year Investment Plans, as well as damages arising directly out of the termination, and these will be credited directly. The Concessionaire was also to be indemnified for lost profits (*lucro cesante*), not to exceed the amount of profit made by the company during its last five financial years or, failing that, during as many financial years as preceded the expiration of the term of the Concession. In the event that termination takes place before the end of the fifth financial year, indemnifiable lost profits shall not be greater than five times the average of the profits earned by the company during the period that the Concession lasted.⁷²

⁷⁰ The first paragraph of section 14.8.2 states as follows in the original Spanish:

“En caso de rescisión por culpa de Concesionario, se perderá automáticamente la Garantía de Cumplimiento del Contrato sin perjuicio de la obligación de Concesionario de indemnizar todos los daños y perjuicios causados al Concedente y al servicio.”

⁷¹ The original Spanish version of the second paragraph of section 14.8.2 reads as follows:

“El valor de los bienes afectados al servicio, adquiridos o construidos por el Concesionario y no amortizados totalmente, que correspondiera ser restituido, se retendrá hasta el momento de realizarse una liquidación definitiva de los créditos y deudas recíprocas y hasta que se extinga cualquier demanda judicial indemnizatoria promovida por el Concedente o el Ente Regulador contra el Concesionario.”

⁷² Article 14.8.3, Termination for Fault of the Conceding Authority, states as follows in the original Spanish:

“En caso de rescisión por culpa del Concedente, o de rescate, se restituirá la Garantía de Cumplimiento del Contrato, el valor de los bienes no amortizados adquiridos o construidos por el Concesionario, conforme los Planes Quinquenales aprobados y se indemnizará al mismo los daños emergentes de la rescisión, y que se acrediten debidamente.

El lucro cesante, si es que el mismo existiera, solo será indemnizado en caso de culpa del Concedente. En ningún caso el lucro cesante indemnizable será superior a la suma de las utilidades de la

119. The various procedures applicable to each type of termination of the Concession Contract are specified in Article 14.9 of the Concession Contract.

120. Chapter 15, the last chapter in the Concession Contract, concerned “Final Provisions” (*Disposiciones Finales*). Of note here is that the parties to the Contract agreed to submit any matter concerning the interpretation and application of the Concession Contract to the exclusive jurisdiction of federal administrative courts in the City of Buenos Aires.⁷³

121. **Subsequent Revisions.** The legal framework of the Concession, as described in the preceding paragraphs, remained stable from the date that the Claimants assumed responsibility for the water and waste water system in Buenos Aires on 1 May 1993 until the Argentine crisis of 2001-2003. Throughout those more than seven years, the parties appeared to accept that framework as the basis of their relationship. During that time, in order to deal with changing circumstances, the parties agreed to a modification of the framework on two occasions – in 1994 and in 1999.

122. In 1994, ETOSS, the Regulatory Entity, undertook and approved an extraordinary tariff review, pursuant to the provisions of the Water Decree and the Concession Contract, that mandated certain additional investments by the Concessionaire not provided for in existing plans and at the same time permitted an increase in tariffs.⁷⁴

123. In 1997, the Argentine government by Decree No. 149/97 of 20 February 1997⁷⁵, formally opened a renegotiation process of the Concession Contract with AASA in order to address certain issues that had arisen since the Contract was signed, including the effect of new

sociedad durante los últimos cinco (5) ejercicios, o durante tantos ejercicios inmediatos anteriores como faltaran para la expiración del plazo de la Concesión, lo que fuere menor. En caso que la extinción se opere antes de finalizado el quinto ejercicio el lucro cesante indemnizable no será superior a cinco (5) veces el promedio anual de las utilidades de la sociedad obtenidas durante el período que hubiere durado la Concesión.”

⁷³ Article 15.4 of the Concession Contract. The original Spanish text of Article 15.4 reads as follows:

“15.4 Jurisdicción

A los efectos de la interpretación y aplicación de este Contrato las partes se someten a la jurisdicción exclusiva de los tribunales en lo contencioso administrativo federal de la Ciudad de Buenos Aires.”

⁷⁴ ETOSS Resolution No. 81/94 of 30 June 1994 (Exh. H-6).

⁷⁵ Exh. C-53.

environmental laws, the adoption by Argentina of a treaty prohibiting maritime disposal of effluents, complaints against the infrastructure charge that AASA imposed in connecting new users to the system, and the need to develop a more efficient financial model for the Concession. The renegotiation process took place during the period 1997-1999 and as matters were decided upon they were approved by various decrees and resolutions.⁷⁶ The renegotiation was formally closed by Decree No. 1,369/99 of 29 November 1999.⁷⁷

C. *General Considerations*

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

125. A second important objective of the legal framework was to assure the efficient provision of water and sewage service at low cost. Toward this end, the legal framework gave the Argentine governmental authorities a certain degree of regulatory discretion in setting tariffs and in determining other important matters relating to AASA's activities. Although the Claimants assert that the tariff regime of the Water Decree was based on the "Equilibrium Principle"

⁷⁶ See Decree No. 1,167/97 of 20 November 1997, approving Agreement of 30 October 1997, in Exhibit C-56 of the Claimants' Memorial; Secretariat Resolutions No.1,103/98 of 29 January 1999, approving Agreement of 21 November 1998, in Exhibit C-60 of Claimants' Memorial; Secretariat Resolution No. 601/99 of 8 July 1999 (Exh. C-61); Secretariat Resolution No. 602/99 of 8 July 1999 (Exh. C-62); Secretariat Resolution No. 1,111/99 of 22 October 1999 (Exh. C-64).

⁷⁷ Exh. C-65.

guaranteeing the Concessionaire a recovery of all costs plus a return on invested capital, it is important to note three features of the legal framework at this point: 1) the term “Equilibrium Principle” appears nowhere in the text of the Water Decree; 2) the Water Decree conditions tariffs on the attainment of service efficiency by the Concessionaire; and 3) the Concessionaire was to assume the business risks of the operation.

126. Moreover, the Concession’s legal framework did not contain certain elements that were found in Argentina’s privatized concessions in other economic sectors. Thus, the legal framework to which AASA was subject 1) did not allow the payment or conversion of tariffs in US dollars or other convertible currencies; 2) did not provide for the adjustment of tariffs at fixed times according to an agreed upon index; and 3) did not specifically exempt the Concession from price controls.⁷⁸ Moreover, instead of specifically mandating that the tariff was to provide for all costs and a reasonable return to the investor, Article 44 (d) of the Water Decree adopted a more flexible standard in stating, as noted above :

“The prices and tariffs shall *tend (tenderán)* to reflect the economic cost of the water and wastewater services, including a margin of profit for the Concessionaire and include all costs arising from the approved expansion plans.”
(emphasis added).

On the other hand, it is clear that the legal framework of the Concession sought to protect the Concessionaire from changes in the legal parity of the Argentine peso and from significant increase in costs. The operation and development of a water and sewage system in a large metropolitan area in a country that had experienced significant economic and financial difficulties in the past involved numerous risks. The Concession’s legal framework sought to apportion those risks between the private investors and the Argentine State. That is to say, neither the Claimants nor Argentina alone assumed all of the risks that such an enterprise would face.

⁷⁸ See, e.g. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability (3 October 2006), for a discussion of the legal framework applicable to a gas transmission project.

V. The General Nature of the Claimants' Claims and Argentina's Defenses

127. In submitting their cases to this Tribunal, the Claimants rely on specific treaty rights which they claim that Argentina has failed to respect. In effect, they allege that Argentina's treatment of the Claimants' investments violates three specific treaty provisions: 1) guarantees against direct and indirect expropriation of their investments; 2) guarantees to accord their investments full protection and security; and 3) guarantees to accord their investments fair and equitable treatment. In response, Argentina argues that none of its actions violate treaty provisions. Moreover, it advances two affirmative defenses based on international law: 1) that the defense of necessity under international law excuses any failure to satisfy its BIT commitments and 2) that the provisions in the Argentina-France BIT and the Argentina-United Kingdom on national emergencies pre-empt the application of other BIT provisions as a result of the situation arising out of the Argentine crisis and the measures taken by the government to address them. The Tribunal will next examine the nature and validity of the three alleged treaty violations, as well as Argentina's affirmative defenses under international law.

VI. Responsibility for Direct or Indirect Expropriation

A. *The Applicable Treaty Provisions*

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

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

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

Any such dispossession measures taken shall give rise to the payment of prompt and adequate compensation the amount of which, calculated in accordance with the real value of the investments in question, shall be assessed

on the basis of the normal economic situation prior to any threat of dispossession.”

Article V of the Argentina-Spain BIT provides:

“Nationalization and Expropriation

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

And finally, Article 5(1) of the Argentina-U.K. BIT states:

ARTICLE 5

Expropriation

“Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘expropriation’) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt, adequate and effective compensation....”

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

130. A first question then is whether the Claimants had an investment susceptible of expropriation under the three BITs applicable to these cases. In its Decision on Jurisdiction in these cases, this Tribunal held that the Claimants had made an investment for purposes of both Article 25 of the ICSID Convention and the relevant provisions of the three applicable BITs.⁷⁹ For the purpose of assessing the Claimants' expropriation claim, the Tribunal must now determine the specific assets allegedly expropriated. The Claimants, as shareholders in AASA, had an indirect interest in the Concession to operate the water and sewage system of Buenos Aires for a period of thirty years. Neither AASA nor its shareholders owned or had any legal interest in the physical assets of the system. Those assets, whether existing at the time of the granting of the Concession or constructed or introduced into the system thereafter, were the property of the Argentine State. AASA as holder of the Concession had only a legal right to receive a stream of revenue from the operation of the system for a period of time under the conditions specified in the legal framework of the Concession described above. That right owned by AASA falls within the treaty definition of "investment", which by the terms of the applicable BIT, includes "claims and rights to any benefit having any economic value" (Article 1.1(c) of the French Treaty), "rights derived from any kind of contribution made with the intention of creating economic value" (Article I.2 of the Spanish Treaty), and "claims to money which are directly related to a specific investment" (Article 1(a)(iii) of the U.K. Treaty). As shareholders in AASA, the Claimants had an indirect interest in those same rights. Company shares are considered "investments" under the Argentina-France BIT (Article 1 (b)), the Argentina-Spain BIT (Article 1(b)(2), and the Argentina-U.K. BIT (Article 1(a)(ii)). The economic value of such shares would be directly affected by any action taken against the assets of AASA. Thus, the Claimants had investments capable of protection from expropriation.

131. None of the treaties applicable to these cases defines the noun "measure."⁸⁰ A dictionary definition of the term states that a measure is "a plan or course of action taken to achieve a particular purpose."⁸¹ Thus, the various legislative, regulatory, and administrative actions taken by the Argentine authorities prior to, during, and following the country's financial crisis certainly qualify as "measures." Such measures undoubtedly had an effect on the Concession. Many may have complicated and made difficult the Claimants' operation of the Concession and reduced the profitability of their investment. Others, such as Article 2 of Law No. 25,790 of 1 October 2003,

⁷⁹ Decision on Jurisdiction, 6 August 2005, paras. 29 and 49.

⁸⁰ Compare section 201 of the North American Free Trade Agreement, which states that "measure includes any law, regulation, procedure, requirement or practice."

⁸¹ Oxford English Dictionary.

which among other things directed that decisions of the executive branch not be limited by the regulatory framework of the Concession, may have abrogated or limited AASA's and the Claimants' rights under Argentine law. But whether any or all of such measures constitute expropriation or have the effect of expropriation is quite a different matter. It is that question that this tribunal must address.

132. The treaty provisions quoted above cover both direct expropriations and indirect expropriation. In the former situation, a host government uses its sovereign powers to seize assets by depriving an investor of its title to or control over those assets. In case of an indirect expropriation, sometimes referred to as a "regulatory taking,"⁸² host states invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or canceling investors' legal title to their assets or diminishing their control over them.⁸³ While determining the existence of a direct expropriation is usually not difficult because of the usually obvious physical manifestations that come with depriving an investor of title and control, identifying an indirect expropriation is often a much more complicated matter which requires an inquiry into whether a regulatory measure has the effect of an expropriation on an investment or is a valid exercise of a State's regulatory power. As the tribunal in the NAFTA case of *Feldman v. Mexico* acknowledged, recognizing a direct expropriation is not difficult but '...it is much less clear when governmental action that interferes with broadly-defined property rights...crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line.'⁸⁴ As will be seen below, the Claimants assert that Argentina took both direct and indirect expropriatory measures.

133. An initial problem in applying the above-quoted treaty provisions to these cases is that none of the three BITs specifically define the term "expropriation." However, Article 5(2) of the Argentina-France BIT, quoted above, provides some elaboration of the term when it refers to "...similar acts of dispossession..." and "...such dispossession measures..." Thus, expropriation, at least in the Argentina-France BIT, requires a "dispossession" of the investor. The requirement

⁸² S.R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AJIL 475 (2008).

⁸³ See e.g. R Dolzer & Ch Schreuer, *Principles of International Investment Law* (2007) 89-92; A. Reinisch, *Expropriation* in P. Muchlinski et al.(eds) *The Oxford Handbook of International Investment Law* (2008) 407-412.

⁸⁴ *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1); Award (16 December 2002), at para. 100.

of “dispossession” as an element of expropriation is supported by scholars and jurisprudence in previous cases in which tribunals had to determine whether an expropriation had taken place. That inquiry is directed particularly at the “effects” of the measure on an investment, rather than at the intent of the government enacting the measure. Each of the BIT articles quoted above specifically refers to the “effects” of an expropriation measure and thus affirms the importance of evaluating the effects of a measure on the investment in determining whether an expropriation has taken place.

134. International tribunals treat the severity of the economic impact caused by a regulatory measure as an important element in determining if the measure constitutes an expropriation requiring compensation. One question often asked is whether the challenged governmental measure resulted in “substantial deprivation” of the investment or its economic benefits. Thus, the tribunal in *Occidental v. Ecuador*⁸⁵ applied “the criterion of substantial deprivation” in determining whether the imposition of an Ecuadorian tax constituted an indirect expropriation. In *CMS v. Argentina*,⁸⁶ which also relates to the Argentine crisis of 2001-2003, the claimant, an investor in a gas transportation company, alleged that Argentina’s decision to suspend a tariff adjustment formula for gas transportation during the crisis constituted an indirect expropriation. In evaluating this claim, the tribunal, after reviewing the relevant arbitral jurisprudence, stated that ‘the essential question is to establish whether the enjoyment of the property has been effectively neutralized,’ because ‘the standard where indirect expropriation is contended is that of *substantial deprivation*.’ (emphasis added) Moreover, such deprivation must have permanent or lasting results. For example, in *LG&E v. Argentina*, the tribunal found that the effects of Argentina’s measures on the claimants’ investment were not permanent, stating that such measures could not constitute expropriation “without a permanent, severe deprivation of LG&E’s rights with regard to its investment, or almost complete deprivation of the value of LG&E’s investment.”⁸⁷ Thus, in applying the provisions of the three BITs applicable to these cases, this Tribunal will have to determine whether they effected a substantial, permanent deprivation of the Claimants’ investments or the enjoyment of those investments’ economic benefits.

⁸⁵ *Occidental Exploration and Production Company v. the Republic of Ecuador*, LCIA Case No UN3467 (Final Award) (1 July 2004), at para. 89.

⁸⁶ *CMS Gas Transmission Company v. the Argentine Republic* (ICSID Case No ARB/01/8) (Award) (12 May 2005), at para. 262.

⁸⁷ *LG&E supra* note 78 at para. 200.

135. The Claimants in their pleadings complained against Argentina's "Measures," referring collectively to numerous actions taken by Argentina from the time that the crisis began to emerge in 1999 until the Concession was terminated in 2006. In order to evaluate the expropriatory nature of these numerous measures, the Tribunal must examine them individually. Basically, the measures of which the Claimants complain fall into three categories: 1) acts of a general legal or regulatory nature, not directed specifically at AASA or the Claimants, enacted to cope with the financial crisis and its aftermath; 2) the failure of the Argentine government in response to AASA's repeated requests to revise the tariff charged to users by the Concession during and after the crisis; and 3) the actions taken by the Argentine government at the time of the termination of the Concession. The Tribunal will examine the nature of these three categories of measures to determine whether they constituted measures of expropriation under the applicable BITs.

B. *Argentina's Measures to cope with the Crisis.*

136. Beginning in 2001, the Argentine government enacted various measures in an effort to cope with the financial crisis descending on the country. Among these measures of which the Claimants complain are Decree No 1570/01 of 3 December 2001 which imposed a "corralito" or "little fence" upon bank accounts so as to limit the amounts of cash withdrawals by account holders, the imposition of new taxes, and most of all Emergency Law⁸⁸ No. 25, 561 of 6 January 2002, which i) abolished the currency board that had linked the Argentine Peso to the U.S. dollar, resulting in a significant depreciation of the Argentine Peso; ii) abolished the adjustment of public service contracts according to agreed upon indexations; and iii) authorized the Executive branch of government to renegotiate all public service contracts and led to various other measures surrounding the efforts by the Argentine government to renegotiate public service contracts. These measures certainly made the operation of the Concession more difficult, reduced its profitability significantly, and appear to have abrogated or modified certain acquired rights of the Claimants. However, they did not affect the possession by AASA of the Concession. AASA remained in possession of the Concession through this period and continued to provide water and sewage services to Buenos Aires and surrounding municipalities. Moreover, the Claimants as AASA shareholders continued to control AASA and to retain possession of their AASA shares undisturbed. Thus, the Tribunal finds that no overt taking of the Concession's rights during this period occurred as a result of these measures and therefore no direct expropriation, as that term is understood under the BITs and in international law, took place.

⁸⁸ *Supra* note 28.

137. Did these measures constitute an indirect expropriation or a measure tantamount to expropriation? The fact that the effect of such measures may have diminished the value of an investment does not in and of itself constitute an indirect expropriation. In *LG&E*,⁸⁹ which considered the effect on investors in the gas sector of the measures that Argentina took to deal with the crisis, the tribunal found that such measures did not constitute either a direct or an indirect expropriation under the Argentina-U.S. BIT. Citing *CME Czech Republic B.V. v. Czech Republic*, the *LG&E* tribunal stated that a measure tantamount to expropriation occurs when governmental measures “effectively neutralize[d] the benefit of the property of the foreign owner.” It then stated: “Ownership or enjoyment can be said to be “neutralized “where a party no longer is in control of the investment or where it cannot direct the day-to-day operations of the investment.”⁹⁰ The *LG&E* tribunal ultimately found that no expropriation, direct or indirect, had taken place as a result of the measures taken by Argentina. Similarly in *CMS*, noted above, although the tribunal recognized that the measures under dispute had an important effect on the investor’s business, it found no substantial deprivation and thus no breach of the expropriation provision of the Argentina-US BIT. It also pointed out that “the investor is in control of the investment; the government does not manage the day-to-day operations of the company...and the investor has full ownership and control of the investment.”⁹¹ The same can be said of the Claimants in the present cases with respect to the measures taken by Argentina to cope with the crisis. The events surrounding the termination of the AASA Concession are a different matter that will be discussed below.

138. Claimants in several other investor-State arbitrations arising out of the 2001-2003 crisis have alleged that Argentina’s measures to deal with the crisis constituted acts of indirect expropriation. In nearly all of those cases, the tribunals rejected that claim on the grounds that those measures did not amount to a permanent, substantial deprivation of the economic substance of the investment.⁹² In only one case, *Siemens v. Argentina*⁹³ did a tribunal find that Argentina’s actions constituted expropriation. In that case, the tribunal did not find that general measures enacted by Argentina to deal with the crisis were expropriations but rather that a specific

⁸⁹ *LG&E supra* note 78, Award (25 July 2007).

⁹⁰ *Ibid.*, at para. 188. Citing *Pope & Talbot, Inc. v. Canada*, Interim Award (26 June 2000), at para. 100.

⁹¹ *CMS supra* note 86 at para. 263.

⁹² *LG&E supra* note 78; *CMS supra* note 86; *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Award (14 July 2006); *Enron Corp. and Ponderosa Assets S.A. v. Argentine Republic* (ICSID case No. ARB/01/3), Award, (22 May 2007).

⁹³ *Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/8), Award (6 February 2007).

government decree terminating Siemens' contract with the Argentine government was an expropriation.

139. As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation. The *American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States* underscores this point when it states that "... a State is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action that is commonly accepted as within the police power of States, if it is not discriminatory..."⁹⁴ In the context of investment disputes, the doctrine of police powers has been referred to, for instance, in *Methanex v. United States*⁹⁵ and *Saluka v. the Czech Republic*.⁹⁶ In this latter decision, the tribunal noted that "the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary law today."

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

⁹⁴ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, Vol. 1, sec. 712, comment g.

⁹⁵ *Methanex Co. v. United States of America* (UNCITRAL), Award (3 August 2005), pt. IV, ch. D, para. 7

⁹⁶ *Saluka Investments B.V. v. the Czech Republic* (UNCITRAL), Partial Award (17 March 2006), at para. 262.

C. *Argentina's Refusal to Revise the Tariff*

141. The Claimants also assert that Argentina's failure to revise the tariff in response to AASA's repeated requests constitutes direct or indirect expropriation. In making a literal interpretation of the BITs, one encounters an initial question with respect to the Claimants' assertion. All three treaties require the existence of a governmental "measure" in order to found a claim for expropriation. Can a *failure* to take action, such as to revise a tariff, constitute a "measure"? In *Olguín v. Paraguay*, the tribunal expressed the opinion that "[e]xpropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place."⁹⁷ A "measure," which is not defined in any of the three BITs, is usually interpreted to mean an action taken to achieve a particular purpose. In this case, although Argentina refused to revise the tariff that action of refusal was not an omission but the result of a carefully considered decision formally communicated to AASA and that decision constitutes a measure within the meaning of all three treaties. The decision not to revise the tariff in response to AASA's requests was certainly teleologically driven.

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

143. Argentina denies that its refusal to revise the tariff was a measure of expropriation or constituted a regulatory taking. It argues that it was not obligated to increase the tariff under the

⁹⁷ *Eudoro A. Olguín v. Republic of Paraguay* (ICSID Case No ARB 96/5), Award, (26 January 2001), at para. 84.

legal framework of the Concession, that the principle of financial equilibrium was not embodied in the Concession, that AASA, as concessionaire, had assumed certain risks incident to the operation of the Concession which Argentina, as the conceding authority, was not obligated to protect AASA against. It points to the fact that its refusal to revise the tariff did not result in a taking necessary for an expropriation and that any complaints by AASA concerning the application of the tariff regime were in effect contract claims to be settled according to the dispute resolution mechanism of the Concession, not treaty claims to be resolved in international arbitration.

144. In support of its expropriation claims arising out of Argentina's exercise of its regulatory powers or failure thereof, the Claimants rely particularly on the cases of *CME* and *Vivendi II*. In both of those cases, the Claimants had lost their investments as a result of State measures, and the tribunals in both cases found that expropriations had taken place. With respect to the former case, the present Tribunal notes that *Lauder v. Czech Republic*,⁹⁸ which the Claimants did not discuss in their pleadings, dealt with identical facts to those of the *CME case* and a similar BIT, but concluded that the Czech government's measures in that case did not constitute an expropriation, thus significantly diminishing the precedential value of *CME*. Moreover, in *CME*, the challenged Czech government action was an affirmative action by the government whereas in the present cases the Claimants are complaining of Argentina's failure to exercise its regulatory powers affirmatively in favor of AASA. With respect to *Vivendi II*, which did not arise out of the Argentine crisis of 2001-2003, the provincial government undertook a series of deliberate actions, such as forbidding the collection of unpaid waters and sewage bills in the courts, which had the effect of depriving the concessionaire of the means of enforcing legitimate monetary claims necessary for the economic viability of its enterprise. In the present case, the governmental authorities took no such similar actions against AASA or the Claimants.

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

⁹⁸ *Ronald S. Lauder v. the Czech Republic* (UNCITRAL), Final Award, (3 September 2001).

D. *Argentina's Termination of the Concession*

146. On March 21, 2006, Argentina abruptly took measures to terminate the Concession granted to AASA in 1993 and to retake possession of the water distribution and waste water systems that had been the subject of the Concession. Moreover, Argentina also liquidated the performance bond which AASA and the Claimants had established to guarantee their performance under the Concession. Did such measures constitute either a direct or indirect expropriation of the Concession?

147. The Claimants assert that such measures which resulted in a complete deprivation of AASA's rights in the Concession constituted a clear case of not just an indirect expropriation but also a direct expropriation. They argue that such termination makes their situation different from the situations that prevailed in *CMS v. Argentina*, *LG&E v. Argentina*, *Azurix v. Argentina*, and the other cases cited above in which tribunals deciding cases arising out of the Argentine crisis determined that the measures taken by Argentina to cope with the crisis did not constitute either a direct or indirect expropriation. The key difference, according to the Claimants, was that in those cases, the investors remained in ownership and control of their investments but that the Claimants in the present case, because of Argentina's abrupt termination of the Concession, did not. As a result of the termination, the Claimants assert that Argentina gained a much improved and expanded water and sewage system without having to pay compensation for it. In support of their position, the Claimants cite the cases of *CME*⁹⁹ and *Vivendi II*.¹⁰⁰ In both of those cases, the Claimants had lost their investments as a result of State measures and the tribunals in both cases found that expropriations had taken place.

148. In order to determine whether an expropriation has taken place as a result of Argentina's termination of the Concession, the Tribunal must examine and analyze the rights held by AASA in the Concession. Neither AASA nor its shareholders owned or had any property rights in the physical assets of the water and sewage system of Buenos Aires. Had they owned the system, a seizure of that system by the Argentine government would have constituted an expropriation and the Claimants would have been entitled to protection under the expropriation provisions of the BITs applicable to these cases. Instead, AASA held contractual rights as a Concessionaire to operate that system and to derive income from that operation. That Concession gave AASA

⁹⁹ *CME Czech Republic BV (The Netherlands) v. the Czech Republic*, (UNCITRAL), Partial Award, (13 September 2001).

¹⁰⁰ *Supra* note 10, Award (20 August 2007).

certain rights, which included the right to collect revenues generated by tariffs paid by consumers during a period of thirty years. But AASA's rights to that revenue and to continue to operate the water and sewage system of Buenos Aires were by no means absolute, as the Claimants seem to suggest in their pleadings. Those rights were subject to various conditions concerning such matters as efficiency, adequacy of service, and achievement of investment commitments for improvement and expansion of the system, among others. Moreover, as discussed above, the Concession Contract specifically granted the Argentine government the right to terminate the Concession due to the fault of the Concessionaire and to retake possession of the water and sewage system.

149. In September 2005, AASA itself had sought to abandon the Concession. Argentina denied that request. AASA's request placed a certain pressure on Argentina to plan for the eventuality of AASA's unilateral withdrawal. Subsequently, faced with a deteriorating situation and confronted with the overwhelming need and public duty to assure the continued provision of water and waste water services to millions of people in a vast urban area, the Argentine government invoked its rights under the Concession Contract and terminated the Concession, alleging various deficiencies of the Concessionaire, in particular excessive levels of nitrates in the water being delivered by the Concessionaire. Argentina argues that under the Concession Contract it had the right to terminate the Concession for serious fault and that alleged high levels of nitrates constituted such a serious fault. During the attempt to renegotiate the Concession Contract, the Argentine regulatory authorities had also imposed various high fines on AASA for certain deficiencies in operation.

150. In response, the Claimants assert that Argentina's claim of high nitrate levels is untrue and a mere pretext to allow termination of the Concession for other reasons and that the fines were essentially a pressure tactic used by the Argentine government to secure AASA's agreement to unjustified new Concession terms.

151. International law has recognized that contractual rights may be the subject of expropriation at least since the *Norwegian Shipowners' Claims case*.¹⁰¹ The *Chorzów Factory case* would come to a similar conclusion.¹⁰² Although the three treaties applicable to the present cases do not specifically so state, the inference is clear from the fact that their definitions of

¹⁰¹ *Norwegian Shipowners' Claims (Nor v U.S.)*, (Perm Ct Arb 1922) 1 RIAA 307.

¹⁰² *Case Concerning the Factory at Chorzów (FRG v. Pol)* (1927) PCIJ Series A No 9.

investments include concessions conferred by law or contract that contractual rights in a concession, like rights in physical assets, are protected from expropriation. But just as in a case of the expropriation of physical assets, a tribunal must first understand the nature of the rights allegedly expropriated before proceeding to determine whether they have been expropriated under international law. To assess the nature of these rights, in a case of alleged expropriation of contractual rights one must look to the domestic law under which the rights were created. AASA's and the Claimants' contractual rights in the Concession, which the Claimants allege were expropriated, were created by the legal framework and the Concession Contract described above.

152. Under that legal framework, Argentina had a right to terminate the Concession Contract upon certain conditions, mentioned above. In January 2006, it purported to exercise its contractual rights when it terminated the Concession with AASA. In this regard, the situation was different from that existing in *the Norwegian Shipowners Claims Case*, the *Chorzów Factory Case*, and the *CME v. Czech Republic Case*, on which the Claimants rely. In those cases, the respondent State was interfering in a contract between the claimants and a third party. In the present case, the Respondent was taking action with respect to a contract to which it was a party and whose terms gave it a right to terminate under certain conditions. The Tribunal also notes that *Lauder v. Czech Republic*,¹⁰³ which the Claimants did not discuss in their pleadings, dealt with identical facts to those of the *CME case* and a similar BIT, but which concluded that the Czech government's measures in that case did not constitute an expropriation.

153. In investor-State arbitrations which involve breaches of contracts concluded between a claimant and a host government, tribunals have made a distinction between *acta iure imperii* and *acta iure gestionis*, that is to say, actions by a State in exercise of its sovereign powers and actions of a State as a contracting party. It is the use by a State of its sovereign powers that gives rise to treaty breaches, while actions as a contracting party merely give rise to contract claims not ordinarily covered by an investment treaty. As pointed out in *Siemens v. Argentina*, "... for the behavior of the State as a party to a contract to be considered a breach of an investment treaty, such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract."¹⁰⁴ In *Siemens*, the tribunal found that Argentina took a series of measures based not on its contract with the Siemens subsidiary but on

¹⁰³ *Supra* note 98.

¹⁰⁴ *Supra* note 93, at para. 248.

the exercise of its public authority, one of which was a governmental decree not based on contract but which terminated the contract. It therefore found that Argentina had expropriated Siemens' contractual rights. A similar finding was reached in *Vivendi II*, where the tribunal concluded that the measures taken by the Province of Tucumán amounted to an expropriation of the investor's contractual rights.¹⁰⁵ However, the mere fact that there is some government involvement in the events that lead to the termination of a contract does not necessarily mean that such termination is the result of an exercise of sovereign powers, as noted recently by the tribunal in *Bayindir v. Pakistan*.¹⁰⁶

154. In the present cases, did Argentina act in the exercise of its sovereign powers (*acta iure imperii*) or as an ordinary contracting party (*acta iure gestionis*) when it terminated the Concession Contract with AASA? If the former, then Argentina may have expropriated the contractual rights of AASA and the Claimants. If the latter, then no expropriation has taken place and the Claimants have only contractual claims under the legal framework described above. While Argentina exercised its public authority on various occasions during the crisis, the Tribunal does not consider that its termination of the Concession Contract was an exercise of such authority. Rather, its actions were taken according to the rights it claimed under the Concession Contract and the legal framework. Indeed, Argentina's behavior in ending the Concession Contract seems not unlike the behavior of a private contracting party faced with the threatened termination of an important long-term supply contract: it quickly made other provisions for supply of the needed commodity or service and then took steps to end the deteriorated contractual relationship itself.

155. This Tribunal views the dispute between the Claimants and Argentina concerning the termination of the Concession as essentially contractual in nature. Indeed, Argentina's action in terminating the Concession purportedly in accordance with the Concession's terms was not an act of expropriation but rather the exercise of its alleged contractual rights. Even its liquidation of the Performance Bond was based on an alleged contractual right since Argentina was the beneficiary of that bond. Whether such alleged exercise of contractual rights was legally in accord with the Concession Contract and the Performance Bond is a matter for the dispute settlement processes applicable to that Contract and the Performance Bond. The Tribunal does

¹⁰⁵ *Supra* note 10, Award (20 August 2007), at para. 7.5.34.

¹⁰⁶ *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29), (hereafter "*Bayindir v. Pakistan*") Award (27 August 2009), at paras. 128-129, 315.

not ignore that, under certain circumstances, the unlawful exercise of a contractual remedy may support the conclusion that there has been a treaty breach. As noted in an award recently rendered by another ICSID tribunal:

“[...] in assessing whether there has been a treaty breach a tribunal may review contract matters [...] These considerations do not imply that the assessment of a treaty breach in the context of a contractual relationship requires a determination that the contract has been breached. Breach of contract and breach of treaty are separate questions giving rise to separate enquiries [...] Because the enquiries are different, the fact that a State exercises a contract right or remedy does not in and of itself exclude the possibility of a treaty breach.”¹⁰⁷

156. In its assessment of the existence of a treaty breach, the Tribunal has taken into account, insofar as relevant, the contractual conduct of Argentina. It concludes, however, that measures taken by Argentina to terminate the Concession were ostensibly an exercise of its contractual rights but not measures of expropriation. Therefore, irrespective of the conclusions that the dispute settlement processes applicable to the Concession Contract and the Performance Bond may yield, the Tribunal concludes that Argentina’s conduct in this regard was not in breach of the expropriation clauses of the BITs.

E. *The Tribunal’s Conclusions*

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

VII. Responsibility for Failure to Provide Protection and Security

A. *The Applicable Treaty Provisions*

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

¹⁰⁷ *Id.*, par. 136-138.

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

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

Article III
PROTECTION

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

And finally, Article 2(2), entitled “Promotion and Protection of Investment” of the Argentina-United Kingdom BIT states:

Investments of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

159. At the outset, it should be noted that whereas the Claimants’ pleadings refer to these treaty provisions as guaranteeing “full protection and security,” a term found in many bilateral investment treaties, that specific phrase appears nowhere in the three BITs applicable to these cases. The Argentina-France BIT promises that investments will be “fully and completely protected and safeguarded...”; the Argentina-Spain BIT promises only that the Contracting Parties “shall protect” investments; and the Argentina-United Kingdom BIT promises “protection and constant security.” It remains to be seen whether these three BITs are in effect promising

differing levels of protection and whether the level of protection they provide is different from that offered by the many treaties employing the terminology of “full protection and security”.

B. *Analysis and Jurisprudence*

160. In seeking to apply these provisions, this Tribunal is confronted initially with two basic questions: Protection from whom? Protection against what? In other words, from whom is a Contracting Party to protect an investor and against what specific actions by such person is a Contracting Party to secure protection? The Claimants argue that in withdrawing certain alleged guarantees made to the Concessionaire and its investors Argentina withdrew “...the legal protection and security previously granted to an investment...”.¹⁰⁸ Thus, Claimants’ interpretation of the above-quoted treaty provisions is that Argentina promised to protect the investments of the other Contracting Party from actions that Argentina itself might take in the exercise of its legal and regulatory authority. The Respondent, on the other hand, takes the position that the provisions on protection and security apply primarily to protection from physical acts against an investor or investment and that only in exceptional circumstances should they be applied to other situations.

161. The origin of the terms “full protection and security”, “constant protection and security,” or simply “protection and security” appears to lie in the bilateral commercial treaties that countries concluded in the nineteenth and early twentieth centuries, such as the friendship, commerce and navigation (FCN) treaties made by the United States during that period.¹⁰⁹ For example, of twenty-two early commercial treaties concluded by the United States before 1920, fourteen contained reference to “special protection” and the remaining eight specified “full and perfect protection” of persons’ private property.¹¹⁰ As an illustration, Article 3 the FCN treaty that the United States concluded with Brunei in 1850 provided that His Highness the Sultan of Borneo “...engages that such Citizens of the United States of America shall as far as lies within in his power, within his dominions enjoy *full and complete protection and security* for themselves

¹⁰⁸ Claimants’ Post-Hearing Submission, para. 361.

¹⁰⁹ K. Vandavelde, “*The Bilateral Investment Treaty Program of the United States*,” 21 Cornell Int’l L.J. 203, 204. (1988).

¹¹⁰ W. Wilson, R., “*Property-protection Provisions in United States Commercial Treaties*,” 45 Am. J. Int’l L. 84, 92-96(1951).

and for any property which they may acquire...” (emphasis added).¹¹¹ A number of bilateral treaties of other countries also employed this term.¹¹²

162. Traditionally, courts and tribunals have interpreted the content of this standard of treatment as imposing a positive obligation upon a host State to exercise due diligence to protect the investor and his property from physical threats and injuries, not as imposing an obligation to protect covered investments and investors from all injuries from whatever sources. In the *ELSI case*,¹¹³ in which the United States brought a claim against Italy on grounds that the requisition of a U.S. investor’s factory by the Mayor of Palermo, Italy, violated Article V(1) of the United States-Italy FCN treaty obligating the Contracting Parties to provide investors “the most constant protection and security,” the International Court of Justice Chamber stated that: “The reference in Article V to the provision of ‘constant protection and security’ cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.”¹¹⁴

163. With the development of bilateral investment treaties, whose texts were influenced by the language of the earlier of FCN treaties, the drafters of BITs incorporated the term “full protection and security,” or some variation thereof, in this new legal instrument designed to protect and promote foreign investment in a new era. Early interpretations of BIT provisions on full protection and security applied them essentially to protect investors and investments from physical injuries and threats, particularly from actions, usually unauthorized, by a country’s army units or individual soldiers, or from disgruntled workers.¹¹⁵ In each of these cases, the tribunals stressed that the treaty provision was not a guarantee against all injuries that might befall an investment but only required the host country to exercise due diligence. On the meaning of due diligence, tribunals and scholars have often referred to the statement of Professor A.V. Freeman in his lectures at the Hague Academy of International Law: “The ‘due diligence’ is nothing more nor less than the reasonable measures of prevention which a well-administered government could

¹¹¹ Treaty of Friendship, Commerce and Navigation with Brunei, 10 Stat. 909; Treaty Series 331 (entered into force July 11, 1853).

¹¹² See for example the bilateral treaty between Italy and Venezuela, stating that “citizens of each State should enjoy in the territory of the other ‘the fullest measure of protection and security of person and property, and should have in this respect the same rights and privileges accorded to nationals.’” Quoted in the *Sambiaggio* case, Italy-Venezuela Mixed Claims Commission, U.N. Reports of International Arbitral Awards, vol.X, p. 512.

¹¹³ *Elettronica Sicula S.p.A. (ELSI)*, (U.S. v. Italy), I.C.J. Reports 1989.

¹¹⁴ *Ibid.* § 108, p.65.

¹¹⁵ See e.g., *Asian Agricultural Products Limited v. Sri Lanka* (ICSID Case No. ARB/ 87/3) Award (27 June 1990); *American Manufacturing and Trading, Inc. v. Zaire* (ICSID Case No. ARB/93/1) Award (21 February 1997).

be expected to exercise under similar circumstances.”¹¹⁶ The late Professor Ian Brownlie observed that the decisions of tribunals give no definition of ‘due diligence’, but that ‘obviously no very dogmatic definition would be appropriate, since what is involved is a standard which will vary according to the circumstances.’¹¹⁷

164. The fact that the “full protection and security” standard implies only an obligation of due diligence, as opposed to strict liability, has also been widely recognized in more recent arbitral case decisions.¹¹⁸ On the other hand, there seems to exist no consensus as to the extent to which the full protection and security standard may exceed the State’s obligation to provide mere physical security to the investor and his assets.

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

166. In recent years, a few arbitral tribunals have sought to expand the scope and content of the “full protection and security” clause beyond protection from physical injury, and have interpreted it to apply to unjustified administrative and legal actions taken by a government or its subdivisions that injured an investment’s alleged legal rights. It is on these decisions that the Claimants rely, particularly *CME v. the Czech Republic*¹¹⁹ and *Azurix Corp. v. Argentina*.¹²⁰ For example, in *CME*, which Claimants cite in support of their argument, the tribunal stated: “The

¹¹⁶ AV Freeman, *Responsibility of States for the Unlawful Acts of Their Armed Forces*; 88 Recueil des Cours (1956) 261.

¹¹⁷ I. Brownlie, *Principles of Public International Law* (1990) 454.

¹¹⁸ See, among others, *Saluka supra* note 96; at para. 483; *Rumeli Telekom A.S and Telsim Mobil Telekomunikasyon Hizmetleri A.S v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award (29 July 2008), at para. 668; *Waguih Elie George Siag & Clorinda Vecchi v. the Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award (1 June 2009), at para.447.

¹¹⁹ *Supra* note 99.

¹²⁰ *Supra* note 92.

host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.”¹²¹

167. However, the precedential effect of the *CME* case might be reduced by the fact it was not a unanimous decision, and that the tribunal did not conduct a detailed analysis of this particular point. Furthermore, as is well known, the tribunal in the *Lauder* case, which was very closely related to the *CME* case, reached a diametrically different conclusion. With respect to the application of the full protection and security clause in the U.S.-Czech BIT, the tribunal in *Lauder* held that “... none of the facts alleged by the Claimants constitutes a violation by the Respondent of the obligation to provide full protection and security under the Treaty.”¹²²

168. The *CME* tribunal was interpreting Article 3(2) of the Netherlands-Czech Republic BIT, stipulating that “each Contracting Party shall provide to such investments full security and protection” (emphasis added). That treaty formulation is somewhat different from the BIT provisions applicable to the present case. Notably the Argentina-Spain and Argentina-U.K. BITs refer only to “protection” and to “protect” without the qualifying word “full” or “fully,” while the Argentina-France BITs states that investors shall be “fully protected.” Does the difference in formulation affect the scope of protection afforded by the BITs? The tribunal in *Azurix Corp. v. Argentina* implied that it did, for it justified on that basis a finding that the Argentina-United States BIT providing for “full protection and security” applied to measures taken by a government and was not limited to physical actions. It stated: “However when the terms 'protection and security' are qualified by full and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”¹²³ Thus, *Azurix* seemed to suggest that the omission of “full” or “fully,” as is the case with two of the applicable BITs in the present cases, restricted the scope of protection only to physical security and protection. The tribunal in *Biwater* adhered to the same line of argument and noted that full protection and security “implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to

¹²¹ *Supra* note 100 at para. 613.

¹²² *Supra* note 99, at para.309.

¹²³ *Supra* note 92, at para. 408.

confine the notion of “full security” only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.”¹²⁴

169. Other tribunals have given less weight to the precise language used in the treaty when determining the scope of the full protection and security standard. For example, in *Parkerings v. Lithuania*¹²⁵ the tribunal found that: “It is generally accepted that the variation of language between the formulation ‘protection’ and ‘full protection and security’ does not make a difference in the level of protection a State is to provide.”¹²⁶

170. With regard to the third treaty in the present cases, the Argentina-France BIT requires that investors are to be “... fully and completely protected ...in accordance with the principle of just and equitable treatment mentioned in Article 3...” The interpretation of this treaty provision raises questions as to the interplay and scope of the two standards of “full and completely protected” and “fair and equitable treatment.” If the Tribunal should find that a breach of the fair and equitable treatment standard has taken place, does that mean that a breach of the guarantee of full and complete protection has also taken? Some tribunals in the presence of a formulation like the language employed in Article 3 quoted above have found that both breaches take place simultaneously.¹²⁷

171. The present Tribunal, however, takes the view that under Article 3, quoted above, the concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than the fair and equitable treatment. Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the French BIT. On the other hand, all violations of fair and equitable treatment are not automatically also violations of full protection and security. Under the French BIT, it is possible for Argentina to violate its obligation of fair and equitable treatment toward the Claimants without violating its duty of full protection and security. In short, there are actions that violate fair and equitable treatment that do not violate full protection and security.

¹²⁴ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, (24 July 2008), at para. 729.

¹²⁵ *Parkerings-Compangiet AS v. the Republic of Lithuania* (ICSID Case No. ARB/05/08), Award (August 14, 2007).

¹²⁶ Para. 354, citing Rubins N., Kinsella S., *International Investment, Political Risk and Dispute Resolution* (2005) to justify this proposition.

¹²⁷ *National Grid plc v. Argentine Republic* (UNCITRAL), Award (3 November 2008).

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

173. In this respect, this Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm. This said, this latter standard may also include an obligation to provide adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor.

174. The *Enron* tribunal discussed the more limited scope of the full protection and security standard by noting that “there might be cases where a broader interpretation could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation.”¹²⁸ Generally, this Tribunal also believes that an overly extensive interpretation of the full protection and security standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable.

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

176. The importance of the precise legal formulation used in a BIT provision is further illustrated in the *Siemens* award.¹²⁹ In that case, the investor initiated the arbitration under the German-Argentina BIT, alleging *inter alia* that Argentina breached its obligation to accord full

¹²⁸ *Supra* note 92, at para. 286; see also *PSEG Global et al. v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award (19 January 2007), at para. 259.

¹²⁹ *Supra* note 93.

protection and security through the conduct that led to the frustration of the investor's contract. The respondent and the claimant had opposing positions on the scope of the protection under the BIT standard. According to Argentina, "security" implied only physical security, while the investor attributed to this term a wider meaning, in particular because the Treaty referred to "legal security." Thus, the tribunal had to interpret whether "security" referred merely to physical security or to security in a wider sense. Having noted that the definition of investment included tangible and intangible assets, the tribunal said that "the obligation to provide full protection and security is wider than 'physical' protection and security." It provided the following reasoning:

It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, "security" is qualified by "legal". In its ordinary meaning "legal security" has been defined as "the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application." It is clear that in the context of this meaning the Treaty refers to security that it is not physical. In fact, one may question given the qualification of the term "security", whether the Treaty covers physical security at all. Arguably it could be considered to be included under "full protection", but that is not an issue in these proceedings. [§303]

Based on this understanding of 'full protection and security', the tribunal concluded that Argentina's initiation of the renegotiation of the contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens' investment, and thus constituted a violation of its obligations under the BIT. In these cases, none of the three BITs concerned refers to "legal security". Therefore, this Tribunal is of the opinion that the various formulations of protection and security employed in the present BITs cannot extend to an obligation to maintain a stable and secure legal and commercial environment.

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

178. A few awards since *CME* have maintained the more traditional approach to interpreting the notion of full protection and security. In *Saluka*,¹³⁰ the tribunal determined that the Czech Republic did not violate the Czech Republic-Netherlands BIT which promised investors “full security and protection” when it took measures to stop trading in the claimant’s securities. The tribunal stated: “The practice of arbitral tribunals seems to indicate however that the ‘full protection and security clause’ is not meant to cover just any kind of impairment of an investor’s investment but to protect more specifically the physical integrity of an investment against interference by the use of force.”¹³¹ More recently, a similar rationale has been applied by arbitral tribunals in *BG v. Argentina*, *PSEG v. Turkey* and *Rumeli v. Kazakhstan*.¹³²

C. *The Tribunal’s Conclusions*

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

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

A. *The Applicable Treaty Provisions*

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

¹³⁰ *Supra* note 96.

¹³¹ *Ibid.* at para. 484.

¹³² *BG Group Plc v. the Argentine Republic* (UNCITRAL), Award (24 December 2007), at paras. 323-328; *PSEG v. Turkey*, *supra* note 128, at paras. 258-259; *Rumeli v Kazakhstan*, *supra* note 118, at para. 669.

Article 3

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

Article 5

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

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

Article IV *TREATMENT*

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

182. And finally, the Claimants argue that Argentina has violated Article 2(2) of the Argentina-United Kingdom BIT:

ARTICLE 2 Promotion and Protection of Investment

2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant protection in the territory of the other Contracting Party...

183. Each of the three BITs requires Argentina to accord “fair and equitable” (Argentina-Spain BIT and Argentina-U.K. BIT) or “just and equitable” treatment (Argentina-France BIT) to the investments of the Claimants. For purposes of these cases, the Tribunal finds that “fair and

equitable” treatment and “just and equitable treatment” mean the same thing, and it therefore will use the term “fair and equitable treatment” to refer to both treaty formulations of the standard. The Tribunal also notes that the relevant provision of the Argentina-France BIT differs from that of the Argentina-U.K. and Argentina-Spain BITs in that Article 3 of the former BIT requires the Contracting Parties to accord to protected investments “...just and equitable treatment, in accordance with the principles of international law...” (“*un traitement juste et équitable, conformément aux principes du droit international...*”; “*un tratamiento justo y equitativo conforme a los principios de Derecho Internacional...*”), but that neither the Argentina-Spain nor the Argentina-U.K. BITs include a similar reference to “the principles of international law.” None of the parties in either their written or oral pleadings has suggested that this difference in treaty language requires the Tribunal to give a different meaning to the fair and equitable standard in applying the Argentina-France BIT from that reached in applying the other two BITs applicable to these cases. The Respondent has argued, however, that the reference to “the principles of international law” in the Argentina-France BIT explicitly limits the content of the fair and equitable treatment obligation to the international minimum standard and that such limitation is also implicit in the other two BITs applicable to these cases.¹³³ The Respondent’s argument raises two questions that the Tribunal must answer: 1) Does the reference in the Argentina-France BIT to “the principles of international law” mean that the fair and equitable treatment standard is limited to the minimum international standard? and 2) Even though the other two BITs contain no specific reference to international law or the minimum international standard, should the term “fair and equitable treatment” in those BITs be also limited to the international minimum standard?

184. As this Decision will later discuss, the meaning of “fair and equitable treatment” has been the subject of extensive and differing commentary by scholars and arbitral tribunals. A threshold question in its interpretation concerns the legal sources to which a tribunal should look in applying the concept of fair and equitable treatment to a specific fact situation. A survey of practice and scholarship on this question reveals three views: 1) that fair and equitable treatment must be measured only against the minimum standard required by customary international law; 2) that it must be measured against international law including all sources; and 3) that it must be measured against an independent self-contained treaty standard.¹³⁴ In making a decision on this

¹³³ Respondent’s Counter-Memorial para. 875.

¹³⁴ OECD, *Fair and Equitable Treatment Standard in International Investment Law* (Working Paper on International Investment 2004/3, September 2004) p. 8.

question in the present cases, the Tribunal is of course bound by the specific language of each of the applicable BITs. With respect to the Argentina-France BIT, it is to be noted that the text of the treaty refers simply to “the principles of international law,” not to “the minimum standard under customary international law.” The formulation “minimum standard under customary international law” or simply “minimum international standard” is so well known and so well established in international law that one can assume that if France and Argentina had intended to limit the content of fair and equitable treatment to the minimum international standard they would have used that formulation specifically. In fact, they did not.

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

186. With regard to the other two applicable BITs, which contain no specific reference to the principles of international law, there is even less plausible justification to limit the interpretation of fair and equitable treatment to the international minimum standard. Consequently, the Tribunal rejects the Respondent’s argument that the fair and equitable treatment standard as embodied in the Argentina-Spain BIT and the Argentina-U.K. is implicitly limited by the

minimum international standard. The Tribunal also concludes that the reference to “the principles of international” included in the Argentina-France BIT does not entail a different content in said treaty from that found in the other two BITs. In interpreting the words “fair and equitable treatment” and “just and equitable treatment” found in the other two BITs and in applying them to determine the responsibility of the Respondent, the Tribunal, as it stated above in paras. 60-62 in its discussion of the applicable law, is bound to apply the principles of international law.

187. The term “fair and equitable treatment” has certain characteristics that must be recognized in applying it in these cases. First, it is a vague and ambiguous expression on its face and is not defined in any of the treaties applicable to these cases. Second, it has been widely used in hundreds of investment treaties throughout the world over the years with the result that numerous arbitral tribunals have interpreted and applied it to investor-State disputes arising in a wide variety of circumstances. Third, it is a flexible term that applies to all kinds of investments in all industries and economic endeavors.¹³⁵ Indeed, it is invoked so often in contemporary investor-State arbitration that one scholar has labeled it “an almost ubiquitous presence” in investment litigation.¹³⁶

188. A fourth important characteristic of the term is that its application is crucially dependent on an evaluation of the facts of each case. As the tribunal in *Mondev* pointed out “[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case”¹³⁷ Similarly, the tribunal in *Waste Management (II)* stated “the standard is to some extent a flexible one which must be adapted to the circumstances of each case.”¹³⁸ A fifth and final characteristic, evidenced by its wide use, generality, and flexibility, is that the term “fair and equitable treatment” seems to be viewed by Contracting States as a basic standard of treatment to be accorded to investors. The fundamental purposes of investment treaties, as stated in their titles, are to promote and protect investments. Certainly, neither of those purposes could be achieved if treaties promised foreign investors treatment that was less than fair and less equitable. Indeed, to borrow the terminology of Hans Kelsen,¹³⁹ it is no exaggeration to say that

¹³⁵ See C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 JWIT 3, pp. 357-386.

¹³⁶ Rudolph Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 *The International Lawyer* 87 (2005).

¹³⁷ *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, (11 October 2002), at para 118, 6 ICSID Reports 192, at para. 118.

¹³⁸ *Waste Management Inc. v. United Mexican States*, (ICSID Case No. ARB(AF)/00/3) Award (30 April 2004), at para. 99.

¹³⁹ Hans Kelsen, *The Pure Theory of Law* (1934).

the obligation of a host State to accord fair and equitable treatment to foreign investors is the *Grundnorm* or basic norm of international investment law.

189. In interpreting this vague, flexible, basic, and widely used treaty term, this Tribunal has the benefit of decisions by prior tribunals that have struggled strenuously, knowledgeably, and sometimes painfully, to interpret the words “fair and equitable” in a wide variety of factual situations and investment relationships. Many of these cases arose out of Argentina’s economic crisis of 2001-2003. Although this tribunal is not bound by such prior decisions,¹⁴⁰ they do constitute “a subsidiary means for the determination of the rules of [international] law.”¹⁴¹ Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that ‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.

B. *The Claimants’ Position*

190. The Claimants assert that Argentina failed to accord their investments fair and equitable treatment as required by the three applicable BITs. Drawing on several arbitral decisions, many of which arose out of the Argentine crisis, as did the present dispute, the Claimants argue that the principle of fair and equitable treatment protects foreign investors from the fundamental alteration of the investment framework which defeats the investor’s legitimate expectations. The bedrock concepts advanced by the Claimants are that Argentina actions (1) made fundamental alterations of the investment framework and (2) defeated the legitimate expectations of the Claimants as investors. They argue that Argentina actively encouraged the Claimants to invest in the water and sewage systems of Buenos Aires, and that important elements of that inducement were the various commitments that Argentina made to them in the legal framework governing the investment. For Argentina to make unilateral, fundamental alterations in that framework and

¹⁴⁰ Article 53(1) of the ICSID Convention states: ‘The award shall be binding on the parties...’ Schreuer suggests that this provision may be interpreted as “...excluding the applicability of the principle of binding precedent to successive ICSID cases.” He also notes that there is nothing in the preparatory work of the Convention suggesting that the doctrine of precedent should be applied to ICSID arbitration. C Schreuer, *A Doctrine of Precedent?* in P. Muchlinksi *et al* The Oxford Handbook of International Investment Law (2008) 1190.

¹⁴¹ Statute of the International Court of Justice, Article 38(1)(d).

thereby frustrate the legitimate expectations of the Claimants is a denial of the fair and equitable treatment that Argentina promised to accord to investors in each of the three BITS applicable to this dispute. They note that fair and equitable treatment is separate from the international minimum standard which in any case also sanctions conduct altering the investment framework in breach of legitimate investor expectations. Bad faith or malicious intent by a respondent State is not required to establish violation of the treatment standard.

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

1. Measures Altering the Investment Framework

192. The Claimants assert that Argentina took numerous measures in 2002 that were fundamental alterations of the investment framework contrary to their legitimate expectations. These measures, include, in summary: (i) the January 2002 Law, formally altering the Regulatory Framework by abolishing the automatic annual tariff adjustments for costs in accordance with international indices (Article 8), setting aside the tariff regime while establishing a binding renegotiation process (Article 9), and requiring all companies affected to continue observing all obligations under the relevant contracts and regulatory frameworks (Article 10); (ii) Decree 293/02, dated 14 February 2002, establishing the process for the mandatory renegotiation of contracts in lieu of promised tariff reviews; (iii) letter of ETOSS to AASA, dated 14 February 2002, confirming that the January 2002 Law had set aside AASA's tariff regime, which would otherwise have required the adjustment of tariffs given the alteration of the Argentine Peso – U.S. Dollar parity, and thereby refusing any tariff adjustments and reminding AASA of its obligation not to suspend or alter its compliance with all obligations pursuant to Article 10 of the January 2002 Law; (iv) MoE Resolution No 38/02 dated 10 April 2002, which prohibited regulatory authorities such as ETOSS from taking any measure that would increase tariffs under their supervision until the end of the renegotiation process, thereby preventing the ETOSS from applying any of the tariff adjustment provisions of the Regulatory Framework and effectively

abolishing AASA's tariff regime; and (v) Decree No 1,090/02, dated 26 June 2002 and MoE Resolution No 308/02, dated 20 August 2002, by which Argentina threatened public service companies, including AASA, not to pursue their legitimate rights and remedies by submitting any claims to any court or tribunal, including international arbitration, on pain of exclusion from the renegotiation process.

193. The Claimants also allege that Argentina placed a disproportionate and discriminatory burden on AASA contrary to its duty to actively protect the Claimants' investments under the fair and equitable treatment standard. Prices were not frozen in all other sectors of the economy, for example the gas production and banking sectors. For example, Hidrovía S.A., a joint venture between a Belgian and an Argentine company, which manages the concession of a navigation channel in the Paraná River, obtained a 45% guaranteed tariff increase.¹⁴²

2. Imposed Renegotiation

194. The Claimants also assert that numerous actions taken during the imposed process to renegotiate the AASA Concession violated the Respondent's obligation to accord the Claimants' investments fair and equitable treatment.

195. In the first phase of those efforts at renegotiation, Argentina kept extending the deadline for renegotiation, or in the words of the Claimants, made "...endless and mechanical extensions of the unfruitful renegotiation process from June 2002, when the initial 120-day period for the renegotiation ended, to the date of eviction from the Concession in March 2006 without any relief for AASA's grave economic and financial imbalance."¹⁴³

196. A second phase of the attempted renegotiation, beginning in May 2003 with the election of President Kirchner, according to the Claimants, also included numerous instances of unfair and inequitable treatment by Argentina. These included (1) a sharp increase in the penalties imposed, (2) the unilateral extension of the *Fideicomiso*, *i.e.* the trust account set up and into which certain tariff increases would be paid to finance part of the projected investments in the Service, (3) the requirement that AASA provide service in areas not previously within the Concession. These measures were implemented by (i) the letter from the Renegotiation Commission to AASA of 2 April 2003, attaching the first proposal for a transitory agreement, which according to the

¹⁴² Claimants' Memorial, 525, 366.

¹⁴³ Claimants' Reply, 307.

Claimants reflected none of the issues discussed during the previous 14 months of renegotiation. This proposal only granted AASA five days to conduct its analysis and respond. Further, the proposal would not have relieved pressure on AASA's situation, but would have aggravated it; (ii) the letter from ETOSS to AASA No 17,407/03, of 27 June 2003, by which Argentina required that AASA execute an agreement for the *Fideicomiso*, which according to the Claimants further aggravated the financial situation of AASA; (iii) Decree 311/03, dated 4 July 2003, by which Argentina changed the rules of the renegotiation process, creating a new entity, UNIREN, in charge of the renegotiation and thus effectively recommenced the renegotiation process from the beginning; (iv) ETOSS Resolution 86/03, dated 6 August 2003, by which Argentina forced AASA to set up the *Fideicomiso* and transfer to it the amounts corresponding to the 3.9% tariff increases applied by AASA in 2001 and 2002, without regard to AASA's difficulties, and which threatened the call of the Performance Bond and the imposition of penalties in the event of AASA's failure to comply; (v) Law No 25,790, dated 22 October 2003, providing that the process of renegotiating public contracts was "not limited or conditioned" by the provisions of their regulatory frameworks, *i.e.* that Argentina could completely derogate from or ignore them, and that the jurisdiction of the regulators on tariff reviews could only be exercised subject to the renegotiation process; (vi) Disposition of the SSRH¹⁴⁴ No. 76, dated 2 December 2003, and Disposition of the SSRH No. 58, dated 29 December 2004, unilaterally extending the *Fideicomiso* for 2004 and 2005, and thus once again aggravating the financial situation of the Concession.

197. A third phase of the renegotiation, which began at the end of 2003 with the resumption of negotiations with the Government, resulted in the 2004 Transitory Agreement¹⁴⁵ signed with the UNIREN on 11 May 2004. Its effect was not an immediate tariff adjustment but it did provide some "breathing space and the promise of a final agreement by the end of 2004"¹⁴⁶. As a result, the arbitration was suspended until December 2004 (hence showing the Claimants' cooperation), AASA made a further investment of US\$ 230 million, and its debt was to be restructured before June 30, 2004. An interim financial agreement was reached on July 15, 2004 in which AASA obtained a discount of US\$ 145 million on its debts. AASA's debt restructuring occurred in March 2006.

¹⁴⁴ Subsecretaría de Recursos Hídricos

¹⁴⁵ Claimants' Exhibit 148.

¹⁴⁶ Claimants' Reply, ¶ 210.

198. A fourth phase of the renegotiation began in 2004 with the expiry of the 2004 Transitory Agreement, without any improvement in the renegotiation process. The Claimants allege that the Argentine Government failed to comply with its obligations under the Transitory Agreement. Moreover, at that point, according to the Claimants, Argentina's attitude towards AASA is said to have "turned hostile."¹⁴⁷ The Government imposed another unilateral extension of the Trust Agreement with an allocation of ARS 42 million per year to finance certain expansion investments specified by the State. On January 11, 2005, AASA was asked to comply with all its obligations under the Contract including payment of pending penalties (ETOSS Resolution No 1/05).

199. The same day it was fined ARS 2 million for an emergency shutdown. The Claimants complain more particularly of (i) the ETOSS Resolutions 1/05 and 2/05, dated 11 January 2005, respectively forcing AASA to comply with all its obligations under the Concession Contract and fining AASA for failing to inform the authorities of an emergency shutdown (which was initiated due to public health concerns; (ii) UNIREN's proposal on 25 July 2005 of a renegotiated transitory agreement which failed to reflect previous discussions, and failed to spell out basic aspects of the future agreement, while requiring the Claimants to withdraw their ICSID claims and waive all past and future claims, prior to any of the ratifications and authorizations being provided by the Executive Branch; (iii) the letter from the Sub-Secretary of Water Resources to AASA, dated 29 July 2005 once again ignoring AASA's request formulated on 26 July 2005 for the reestablishment of the equilibrium of the Concession and denying AASA's right to seek the termination of the Concession Contract; (iv) the constant vilifying of AASA in the press which increased in intensity in the second half of 2005; and (v) Argentina's thwarting of AASA's shareholders' attempts, in late 2005 and early 2006, to transfer shares in AASA to local investors.

3. Unilateral Termination of the Concession

200. The Claimants also assert that the abrupt termination by Argentina of the Concession in 2006 violated the Respondent's treaty promises of fair and equitable treatment. Specifically, they complain of Decree 303/06, dated 21 March 2006, by which Argentina unilaterally and under false pretences terminated the Concession without compensation, ignoring its responsibility for the repudiation of the Equilibrium Principle. They point to the fact that after the termination the Secretary of Public Works announced that ARS 349 million would be immediately invested in the new State-owned operator in contrast to its previous assertions of inability to revise the tariff for

¹⁴⁷ Claimants' Reply, ¶ 211

reasons of financial stringency. They allege that under the fair and equitable treatment standard, Argentina was required actively to protect the Claimants and their investments but that instead, Argentina “refused to cooperate with AASA and its shareholders for over four years, and then terminated the Concession unilaterally and without any regard for the losses incurred by AASA and its shareholders.”¹⁴⁸

C. *The Respondent’s Position*

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

202. Argentina argues that the Tribunal must analyze the conduct of the parties, taking into account all the circumstances of the case. In all the circumstances, it asserts that it “acted in a reasonable, responsible, non discriminatory and proportionate manner in the light of its responsibility to the population within AASA’s Concession area in the extraordinary economic circumstances that prevailed,”¹⁴⁹ the provision of drinking water and sewage services being of the highest of public purposes. It therefore argues that all the measures it took during the financial crisis were within its police powers as a sovereign State. Specifically, with respect to the termination of the Concession, Argentina asserts that it acted reasonably in the circumstances, that the Claimants had declared their intention to abandon the Concession, and that Argentina had a responsibility to assure the continuation of a public service that was vital to the health and well-being of its population.

¹⁴⁸ Claimants’ Reply ¶465.

¹⁴⁹ Respondent’s Counter Memorial ¶ 892.

203. Secondly, Argentina argues that its actions were entirely foreseeable and that it therefore did not frustrate the legitimate expectations of the investors. According to Argentina, it was foreseeable that the Argentina government would adopt special measures in the event of a crisis, that in a crisis situation Argentina would seek to renegotiate concession contracts, and that in the face of the Claimants' threat to abandon the Concession it would have to take measures to assure the continuation of a vital public service. Further, regarding the Claimants' legitimate expectations, Argentina argues that if the State made any representations or commitments, it was to AASA and not to its shareholders. The fair and equitable standard cannot generate expectations that have no grounding in the contractual documents regulating the relation between the State and the investor. Since there were no extra contractual guarantees regarding automatic tariff adjustment either to AASA or to the Claimants, it was wholly unreasonable for the Claimants to expect that the Republic would endorse a massive tariff increase given the severity of the crisis. As discussed by the *ad hoc* committee in *MTD v Chile*,¹⁵⁰ and as confirmed in *MCI v. Ecuador*,¹⁵¹ the *Tecmed*¹⁵² standard that converts investor's expectations into international obligations is questionable.

204. With respect to the efforts to renegotiate the Concession Contract in light of the crisis, Argentina contends that it acted reasonably and that AASA and the Claimants were unreasonable and uncooperative during that process. For example, Argentina asserts that after the enactment of the Emergency Law, AASA's first attitude was to disregard the latter and ask for tariff reviews. Its emergency plan presented in February 2002 aimed at suspending many of its duties. The Renegotiation Commission of contracts for public works and services created on February 12, 2002 made its comments on AASA's emergency plan on May 16, 2002. The commission prepared a preliminary report on the Concession in June 2002 and rendered its final report on October 31, 2002. The Commission pointed out that the 1997-1999 tariff review system was not feasible in the light of the macroeconomic context, and that AASA's proposals implied a deep renegotiation of the agreement instead of a mere tariff increase. The Commission offered negotiation alternatives. The parties agreed to an emergency agreement in the short term and a final and integral renegotiation of the Concession contract. AASA was asked to file an economic

¹⁵⁰ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment (21 March 2007), at para. 67.

¹⁵¹ *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Award (July 31, 2007) at para. 278.

¹⁵² *Técnicas Medioambientales TECMED S.A. v. United Mexican States* (ICSID Case No. ARB(AF)00/2), Award (29 May 2003).

financial plan and a service improvement and expansion plan. Submissions were made on December 4, 2002.

205. Although the Claimants allege that the renegotiation process was coerced, Argentina asserts that in its submission to the Renegotiation Commission on December 4, 2002, AASA expressed its agreement with the renegotiation process. It accepted to adapt the agreement to the new economic reality to achieve a new economic financial balance. It is therefore unreasonable to say that the Claimants were forced to renegotiate. They voluntarily ratified the 2004 memorandum. Argentina denies that the renegotiations were unnecessarily long, pointing to the fact that negotiations of 1997, in which AASA fully participated and from which it secured requested revisions, took three years to complete.

206. Throughout the renegotiations, AASA failed to adapt its attitude to one of cooperation. According to Argentina, the final renegotiation failed due to AASA's behavior. Not only did AASA fail to restructure its debt, but it also failed to provide important documents' requested as of August 2004. Other acts by AASA contributing to the failure of the renegotiation were the fact that AASA "... (a) [f]ailed to submit the model company; (b) Failed to submit the regulatory accounting in due time; (c) Failed to submit an analysis of the impact of the tariff increase alternatives on users; (d) Failed to determine the tariff increases it expected and to submit the proposal for a new tariff regime; (e) Failed to submit an assessment of the impact on the resources of the Concession"¹⁵³

207. In spite of these failures by AASA, UNIREN presented a draft memorandum of agreement on 14 June 2005, providing that AASA was to recover its capital base through tariff income and through a final payment to be made by the State at the end of the Concession. AASA rejected this offer on 1 August 2005 and by September 2005 negotiations had broken down.

208. In general, Argentina asserts that the renegotiation process was open and transparent. It did not entail an obligation of result but simply one of means. It also pursued an equitable outcome. Toward this end, Argentina made concessions to AASA. Specifically it asserts that "[s]ome of the Concessions made by the State for the purpose of reaching an agreement are: a) authorization to give a Performance Bond in Argentine Pesos refraining from imposing penalties for the time being, in spite of the company's continuous breaches; b) 'pesification' of loans

¹⁵³ Respondents' Rejoinder ¶664.

obtained in US dollars from Argentine financial entities; c) elimination, at that time, of Concessionaires' filing for reorganization or bankruptcy proceedings, as a ground for termination of Concession agreements. Again, agreements having failed, nothing prevented the State from exercising such contractual and statutory power of Termination of the Concession contract due to AASA's fault"¹⁵⁴.

209. Following a shareholder's meeting of 22 September 2005, authorizing AASA to terminate the Concession, AASA asked the Argentine authorities for the termination and requested provisional acceptance of the Concession assets as soon as possible, as well as the restitution of the agreement Performance Bond. The Under-Secretariat of Water Resources refused the request since there was no cause of termination due to the conceding authority's fault as required by the Concession Contract and the legal framework.

210. With respect to AASA's efforts to terminate the Concession, Argentina notes that Banco de Galicia, which held 8.26% of AASA's shares, instituted proceedings in Argentina to declare the decision of the shareholders' meeting of 22 September 2005 void because it was made to the detriment to the corporate interest and in breach of the companies law. It adds that, in its opinion, the Claimants used the Argentine crisis as an excuse to flee the country because the AASA Concession was insufficiently profitable.

D. *Analysis*

211. In order to evaluate the arguments of the Claimants and the Respondent, this Tribunal must interpret and apply the above-quoted BIT provisions concerning Argentina's obligations to accord covered investments fair and equitable treatment. In this task, it is guided by Article 31(1) of the Vienna Convention on the Law of Treaties pursuant to which: "(1) [a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given the terms of the treaty *in their context* and in *light of its object and purpose*" (emphasis added). Thus three elements are of particular importance in interpreting the relevant treaty provisions: (1) the ordinary meaning of the term "fair and equitable," (2) the context in which the term "fair and equitable" is used; and (3) the object and purpose of the three BITs.

212. At the outset, it should be noted that none of the BITs applicable to these cases define the three key words: "fair," "equitable," and "treatment." "Treatment," according to the Oxford

¹⁵⁴ Respondents' Rejoinder ¶645.

English Dictionary, is “Conduct, behaviour; action or behaviour towards a person.” In its decision on jurisdiction in these cases, the Tribunal stated the following with respect to the meaning of “treatment:” “The word “treatment” is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.” The Tribunal will continue to employ that definition for purposes of this Decision on Liability. It should also be noted that under the terms of all three BITs the subject of the promised fair and equitable treatment is not the investor, but rather the investments made by the investor.

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

The “ordinary meaning” of the “fair and equitable treatment” standard can only be defined by terms of almost equal vagueness. In *MTD*, the tribunal stated that: “In their ordinary meaning, the terms “fair” and “equitable” [...] mean “just”, “even handed”, “unbiased” “legitimate.” On the basis of such and similar definitions, one cannot say more than the tribunal did in *S.D. Myers* by stating that an infringement of the standard requires “treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective.”¹⁵⁵

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

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

¹⁵⁵ *Supra* note 96, at paragraph 297.

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

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

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

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

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

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

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

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

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

217. And finally, the Preamble to the Argentina-U.K. BIT states as follows:

Desiring to create favorable conditions for greater investment by investors of one State in the territory of the other State;

Recognizing that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual initiative and will increase prosperity in both States...

This BIT also has as general goals the stimulation of business initiative and the increase in the prosperity of both Argentina and the United Kingdom.

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

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

220. Although the Argentina-U.K. BIT does not refer to economic cooperation as a stated goal, the emphasis that it places on the desire “to create favorable conditions for investment” and “the stimulation of individual initiative” implicitly emphasizes the importance of fair and

equitable treatment of investments, for none of these goals could be achieved if a Contracting Party granted investments from the other Contracting Party anything less than treatment that is fair and equitable.

221. What, then, is the meaning of “fair and equitable treatment” with respect to the investments undertaken by the Claimants? Philosophers and scholars have devoted tomes to the subject of fairness.¹⁵⁶ While their work is helpful in understanding the abstract concept and its implications, it does not answer a fundamental and practical question that every arbitral tribunal must answer: By what criteria, standard, or test is an arbitral tribunal to determine whether the specific treatment accorded to the investments of a particular foreign investor in a given context is or is not “fair and equitable.”? To say that “fair and equitable” means “just,” “even-handed,” “unbiased,” or “legitimate,” as some tribunals have done,¹⁵⁷ is quite frankly to state a tautology. Such formulations are not judicially operational in the sense that they lend themselves to being readily applied to complex, concrete investment fact situations, like those found in the present cases.

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

¹⁵⁶ See, e.g. John Rawls, *Justice as Fairness* (2001); Thomas Franck, *Fairness in International Law* (1995).

¹⁵⁷ See for example the tribunal in *MTD v. Chile* (*supra* note 150) stating the standards as follows “... in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.” para. 113; approved by the Annulment Committee, Decision on Annulment, 21 March 2007, para. 71 (“Thirdly, a standard formulated in the terms of paragraph 113 is defensible.”)

“calculability.”¹⁵⁸ An investor’s expectations, created by law of a host country, are in effect calculations about the future.

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

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

The standard of ‘fair and equitable treatment’ is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the “fair and equitable treatment” standard included in [the treaty] the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors’ legitimate and reasonable expectations.¹⁵⁹

224. Numerous other tribunals have also linked the concept of fair and equitable treatment to the host state’s respect of the legitimate expectations which the investor had at the time of the investment. For example, in the *Tecmed* award, cited by subsequent cases,¹⁶⁰ the tribunal stated:

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

It is true that certain elements of the *Tecmed* standard have come under criticism for being too broad. Yet, its main components, and especially the importance of the parties’ legitimate and reasonable expectations have been confirmed in later decisions. For example, the Annulment Committee in *MTD v. Chile*, which questioned certain aspects of *Tecmed*, specifically stated: “...legitimate expectations, generated as a result of the investor’s dealings with the

¹⁵⁸ Max Weber, *Economy and Society* 847, 855 (1922). See also David Trubek, “Max Weber and the Rise of Capitalism” *Wisconsin Law Review* 720-53 (1971) and Richard Swedberg, “Max Weber’s Contribution to the Economic Sociology of Law” 2 *Annu. Rev. Law Soc. Sci.* 61–81 (2006).

¹⁵⁹ *Supra* note 96, at paras.301-302.

¹⁶⁰ E.g. *LG&E supra* note 78, at para. 127; *MTD supra* note 150, at para 114; *Occidental supra* note 85 at para. 185; *CMS supra* note 86, at para 279.

competent authorities of the host State may be relevant to the application of the guarantees contained in an investment treaty.”¹⁶¹ The *MTD* Annulment Committee criticized the *Tecmed* decision for its “apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations (such as the obligation to compensate for expropriation)” as being “questionable,” stating the obvious fact in any investor-State dispute under a BIT that “[t]he obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have.”¹⁶² In the present case, this Tribunal affirms that the source of Argentina’s obligations toward the Claimants reside only in the BITs and that the Tribunal’s task is to interpret the nature and scope Argentina’s obligation to accord the Claimants’ investments ‘fair and equitable treatment’ within the context of the facts presented in these cases.

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

The Tribunal agrees with *Bayindir* when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment.¹⁶³

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

¹⁶¹ *Supra* note 152 at para. 69.

¹⁶² *Ibid* at para. 67.

¹⁶³ *Supra* note 106, at para. 178, and references cited therein.

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

228. However, in keeping with the BITs' basic goal of fostering economic cooperation and prosperity, one must not look single-mindedly at the Claimants' subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view. It must ask a fundamental question: What would have been the legitimate and reasonable expectations of a reasonable investor in the position of the Claimants, at the time they made their investment in 1993, about a proposed water and sewage concession investment that was to continue over a period of thirty years in Argentina, in view of the concession's legal framework and bearing in mind that country's history and its political, economic, and social circumstances?

229. Of course, a Contracting Party under a BIT's fair and equitable treatment standard is not required to satisfy all of an investor's expectations. It is required to respect only those expectations that are legitimate and reasonable in the circumstances. What specifically are the characteristics of such expectations? The tribunal in *LG&E v. Argentina* tried to answer that question. It stated: "It can be said that the investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regulatory patterns."¹⁶⁴

230. In a similar vein, the tribunal in *Duke v. Ecuador* stated that "[t]he stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must

¹⁶⁴ *LG&E supra* note 78, at para.130.

be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.”¹⁶⁵

231. The Concession Contract and the legal framework of the Concession described above clearly meet the conditions proposed in the cases just referred to. They set down the conditions offered by Argentina at the time that Claimants made their investment; they were not established unilaterally but by the agreement between Argentina and the Claimants; and they existed and were enforceable by law. Like any rational investor, the Claimants attached great importance to the tariff regime stipulated in the Concession Contract and the regulatory framework. Indeed, their ability to make a profit was crucially dependent on it. The importance of the tariff regime was underscored even before the bidding took place, as shown *inter alia* by the redrafting of Articles 18.11.4.1 and 18.11.5.1 of the Original Bidding Rules relating to extraordinary tariff revisions to take into account changes in financial costs and a legal modification of the exchange rate parity provided by the Convertibility Law. These revisions were later included in the Concession Contract, a document which certainly embodies the Claimants’ legitimate expectations, as well as those of Argentina. In view of the central role that the Concession Contract and legal framework placed in establishing the Concession and the care and attention that Argentina devoted to the creation of that framework, the Claimants’ expectations that Argentina would respect the Concession Contract throughout the thirty-year life of the Concession was legitimate, reasonable, and justified. It was in reliance on that legal framework that the Claimants invested substantial funds in Argentina. And Argentina certainly recognized at the time it granted the Concession to the Claimants that without such belief in the reliability and stability of the legal framework the Claimants – indeed no investor – would ever have agreed to invest in the water and sewage system of Buenos Aires.

1. Argentina’s Measures Altering the Investment Framework

232. Argentina’s persistent refusal to revise the tariff in accordance with the legal framework and the Concession Contract frustrated the expectations of the Claimants. Indeed, ETOSS, the

¹⁶⁵ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award (18 August 2008), at para. 340.

regulatory authority, acknowledged that fact in its letter of 14 February 2002 to AASA when it wrote: “The Law 25.561, therefore, modifies the terms of the Annual Revisions and of the Extraordinary Revision which, had this [the Law] not been passed, would have applied under the terms of clause 3.3 of Res. SRNyDS No 602/99, under clause 11.11.5.1 third paragraph of the Concession Contract and clause 3.6 of the Agreement approved by Decree 1167/97, by virtue of the modification of the parity 1\$ = 1US\$.”¹⁶⁶

233. Beyond the specific words and commitments of the regulatory framework and the Concession Contract, the Claimants, having entered into a thirty-year relationship with Argentina, were entitled to expect that Argentina would manage that relationship in a cooperative manner, that is to say, that they would “work together” so that the relationship was mutually advantageous. Indeed, Article 5.1 of the Concession Contract required the Concessionaire and ETOSS “...to use all means at their disposal to establish and maintain a fluid relationship that facilitates the performance of this Concession Contract.”¹⁶⁷ In effect, the legal framework seemed to envision a relationship between the Concessionaire and the Argentine authorities that would be a concrete example of the economic cooperation that the BITs sought to promote. During the first eight years, such a cooperative relationship seemed to prevail. With the economic crisis and subsequent changes in government and in policies, that cooperative relationship clearly evaporated and all signs of fluidity disappeared. Indeed, as is further discussed below, the Argentine authorities demonstrated extreme rigidity in their dealings with AASA and the Claimants.

234. The argument that the Claimants could not reasonably expect that in the context of an economic and financial crisis Argentina would not be led to act as it did in the light of the history of economic instability of the country is not compelling. It was largely because of the country’s history of instability that the Claimants insisted on incorporating the specific clauses on extraordinary tariff adjustment reviews mentioned above. Moreover, a country cannot persuasively allege its historic instability to avoid its responsibility to foreign investors when it specifically endeavored to remove this disincentive to foreign investment by providing specific assurances in a Concession Contract and in bilateral investment treaties. Indeed, one can say without exaggeration that Argentina’s various actions toward foreign investors in the 1990s were

¹⁶⁶ Exh. C-91

¹⁶⁷ Exh. C-44 “El Concesionario y el Ente Regulador deben arbitrar todos los medios a su alcance para establecer y mantener una relación fluida que facilite cumplimiento de este Contrato de Concesión.”

intended to overcome its negative economic history in the minds of the international financial and business community.

235. Moreover, there is strong evidence that Argentina might have employed more flexible means that would have protected both its interests and those of the Claimants. For example, if Argentina's concern was to avoid an increase in tariffs during a time of crisis, it might have relieved AASA, at least temporarily, of investment commitments that were placing a crippling burden on the Concession so long as tariffs did not increase. If Argentina's concern was to protect the poor from increased tariffs, it might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor, a solution clearly permitted by the regulatory framework. There is evidence that governmental agencies were among the consumers with the largest unpaid invoices owing to AASA. Argentina might have taken measures to assure that its own governmental organizations paid their legitimate debts to AASA. All of these options were suggested to the Argentine authorities and all were rejected. In short, there appears to have been very little desire or effort after the outbreak of the crisis for Argentina to "work together" with AASA and the Claimants. Once the crisis had ended and economic growth returned to the Argentine economy, the government showed no greater willingness to find a way to work together with AASA and the Claimants. While Argentina seems to suggest that there was nothing else that it could have done in its relationship with AASA and the Claimants, the Tribunal is not persuaded that an amicable solution could not have been reached.

236. In interpreting the concept of fair and equitable, the Tribunal must also bear in mind that the Concession by its terms was subject to the regulatory authority of the Argentine State, which had a reasonable right to regulate. Thus in interpreting the meaning of fair and equitable treatment to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service. As the *Saluka* tribunal stated, "[t]he determination of a breach of Article 3.1 by the Czech Republic [which required fair and equitable treatment of investors] therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."¹⁶⁸ What this means in the context of the present cases is that the legitimate and reasonable expectations of the investors in AASA must have included the expectation that the Argentine government would exercise its legitimate

¹⁶⁸ *Supra* note 96, at para. 306.

regulatory interests with respect to the AASA Concession throughout the period of thirty years and in response to unpredictable circumstances that might arise during that time.

237. There is no question that under the legal framework Argentina had the right to regulate the activities of the Concession concerning a broad range of matters, including the tariff structure, investment standards, and performance. But AASA and the Claimants, as participants in any regulated industry, had the legitimate expectation that the Argentine authorities would exercise that regulatory authority and discretion within the rules of the detailed legal framework that Argentina had established for the Concession. But when faced with the crisis, Argentina refused to do this. It still refused once the crisis had abated. Indeed, it enacted various measures directing the regulatory authorities not to respect important elements of the legal framework. Such actions were outside the scope of its legitimate right to regulate and in effect constituted an abuse of regulatory discretion.¹⁶⁹

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

2. Argentina's Measures to Renegotiate the Concession

239. The Claimants also assert that Argentina denied them fair and equitable treatment when it forced them to engage in a renegotiation of the Concession. The Claimants allege that they never accepted the renegotiation process unilaterally imposed by the Argentine government in 2002, and that they could not oppose the process. Argentina, on the other hand, argues that AASA participated and indeed had requested previous renegotiation before the crisis, that it agreed to participate in the renegotiation process begun in 2002, and that it did not object to that process.

240. There is reason to believe that AASA did willingly participate at first in the renegotiation process and that, while it might have objected to the process, in fact it did not. However, the Tribunal does not believe that these factors override the argument that taken as a whole Argentina's treatment of the Claimants during that process was unfair and inequitable or that by participating in the process without objection the Claimants somehow waived their right under the treaty to fair and equitable treatment by Argentina. Indeed, if AASA had refused to

¹⁶⁹ Exh. C-85, C-90, C-91, C-97, C-101, C-108

participate in the renegotiation process launched by the Argentine government, AASA might have been accused of failing to meet the requirements of Article 5.1 of the Concession Contract, quoted above, requiring parties "...to use all means at [its] disposal to establish and maintain a fluid relationship that facilitates the performance of [the] Concession Contract."

241. In examining the nature of the renegotiation process, the Tribunal finds that it differs significantly from the various revisions or renegotiation processes provided by the Concession legal framework and from the Concession renegotiations and revisions that had previously taken place in 1994 and 1997-1999. For one thing it had an extremely forceful character quite different from what the legal framework provided and from the way previous negotiations had taken place. The forceful character of the renegotiation process is apparent *inter alia* from the following elements referred to by the Claimants: (i) Resolution No. 38/02 of the MoE, of 10 April 2002, prohibiting all regulatory agencies, including ETOSS, from taking any measures that directly or indirectly affected tariffs of any entities subject to their regulatory supervision until the end of the renegotiation period¹⁷⁰; (ii) the letter from the Renegotiation Commission to AASA, of 2 April 2003, attaching the first proposal for a Transitory Agreement, which did not reflect the issues discussed during the previous 14 months of renegotiation and granted AASA only five days to conduct its analysis and respond¹⁷¹; (iii) Decree 311/03, dated 4 July 2003, by which Argentina changed the rules of the renegotiation process, creating a new entity, UNIREN, in charge of the renegotiation and effectively recommenced the renegotiation process from the beginning¹⁷²; (iv) ETOSS Resolution 86/03, dated 6 August 2003, by which Argentina forced AASA to set up the *Fideicomiso* and transfer to it the amounts corresponding to the 3.9% tariff increases applied by AASA in 2001 and 2002, and which threatened the call of the Performance Bond and the imposition of penalties in the event of AASA's failure to comply¹⁷³; (v) Law No 25,790, dated 22 October 2003, providing that the decisions adopted by the Executive Power in the process of renegotiating public contracts were "not limited or conditioned" by the provisions of their regulatory frameworks, so that Argentina could completely derogate or ignore them, and that the jurisdiction of the regulators on tariff reviews could only be exercised subject to the renegotiation process¹⁷⁴.

¹⁷⁰ Exh. C-97.

¹⁷¹ Exh. C-124.

¹⁷² Exh. C-127.

¹⁷³ Exh. C-130.

¹⁷⁴ Exh. C-134.

242. In light of the severity of these measures, the Tribunal questions whether in reality the process thus established constituted a “renegotiation” in reality or whether it was actually an effort to compel changes in the Concession under that label. The essence of a renegotiation is that the parties freely agree to revise or amend an existing agreement. As the tribunal in *Enron* stated: “[a]ny process of negotiation requires of course that the parties genuinely agree on the outcome and this cannot be imposed or forced upon one party”¹⁷⁵ It appears that Argentina sought to structure the “renegotiation” process in such a way as to severely limit or indeed curtail the contractual freedom of AASA in order to arrive at a predetermined result desired by Argentina. In the opinion of the Tribunal, such a process cannot in fairness be said to constitute a renegotiation as that term is generally understood. It was certainly not the kind of renegotiation or revision process that AASA and the Claimants were led to expect by the legal framework of the Concession and the events of the first eight years of the Concession.

243. The Tribunal finds that Argentina’s treatment of AASA and the Claimants during the renegotiation process that began in 2002 was a breach of its promise of fair and equitable treatment under the three BITs in question. It finds support for this conclusion in the decision in *BG Group v. Argentina*, in which the Tribunal noted, in this regard, that “Argentina also breached the international minimum standard in relation to UNIREN’s authorization to renegotiate the Government agreements with public service providers. As stated at paragraph 80 above, the Emergency Law and subsequent legislation were enacted to promote a new deal with the licensees, impeding the application and execution of the original Regulatory Framework. Also, Argentina enhanced the violation of the standard of fair and equitable treatment under the BIT by formalizing in Resolution 308/02 and Decree 1090/02 the exclusion from the imposed renegotiation process of any licensee that sought redress in an arbitral or other forum”.¹⁷⁶

3. Argentina’s Termination of the Concession

244. Argentina’s termination of the Concession was abrupt, and its reasons for such action are not completely clear. It alleged that high levels of nitrates in the water were a justification for the termination. Argentina not only ended the Concession but it also demanded payment of the Performance Bond posted by the Claimants to guarantee AASA’s performance on ground that high nitrate levels in the water justified payment as a failure of satisfactory performance. While the regulatory authorities had previously expressed their concern to AASA about high nitrate

¹⁷⁵ *Enron, supra* note 92, at para. 186.

¹⁷⁶ *BG Group, supra* note 132, at para. 309. See also *LG&E, supra* note 78, at paras. 136-139.

levels, Argentina first opened a formal investigation of the matter only on 17 March 2006. Four days later, on 21 March 2006, before that proceeding could come to a proper conclusion according to the legal framework, Argentina abruptly terminated the Concession for fault of the Concessionaire. The shortness of time between the commencement of the investigation and the abrupt cancellation of the Concession raises possible inferences that the nitrate issue may have been a mere pretext for an action that the Argentine authorities had already decided to take.

245. On the other hand, the Tribunal is not unmindful of the difficult position in which Argentina found itself as a result of the Claimants' own request to terminate the Concession made the previous September. Argentina's refusal at that time was no doubt prompted in part by the fact that while it had the ultimate responsibility to provide vital water and waste water services to the population of greater Buenos Aires, it was not then in a position to actually assume operational responsibility for those services. At that time and in those circumstances, it was not beyond the realm of possibility from Argentina's perspective that the Claimants might abruptly quit the country, leaving an unprepared Argentine government to provide a basic service to nearly ten million people in a large metropolitan area. It is likely that Argentina felt that it had to prepare for that eventuality while still causing AASA to provide the needed service under the Concession. Thus, to a certain extent it may be said that AASA's request to terminate the Concession may have been a factor in prompting Argentina's decision to act suddenly to terminate the Concession itself a few months later. At the same time, it must be noted that it was the actions of the Argentine authorities in refusing to revise the tariff according to the legal framework and in forcing a renegotiation of the Concession – actions which this Tribunal has judged to be a violation of the fair and equitable standard – that put the Claimants in the position where they felt that had to give up the Concession.

246. Argentina's termination of the Concession was done pursuant to its contract with AASA. This Tribunal, as stated above, has no jurisdiction to judge whether Argentina's termination of the Concession breached the Concession Contract. The alleged high nitrate levels in the water may indeed have been an unjustified pretext. Nonetheless, there is evidence in the record that such high levels may have existed. Whether Argentina breached the Concession Contract by terminating it is a matter for the dispute resolution procedures provided in that contract. In viewing the circumstances as a whole and the situation that existed at the time of the termination, the Tribunal finds that the record is insufficient to establish that Argentina's treatment of the

Claimants' investments in terminating the Concession attained the level of violating the fair and equitable standards required by the three applicable BITs.

E. *The Tribunal's Conclusions*

247. The Tribunal concludes that Argentina's actions in refusing to revise the tariff according to the legal framework of the Concession and in pursuing the forced renegotiation of the Concession Contract contrary to that legal framework violated its obligations under the applicable BITs to accord the investments of the Claimants fair and equitable treatment. For purposes of the forthcoming determination of the legal consequences of such breaches, the Tribunal further concludes that the first abovementioned breach took place on 6 January 2002, date of the enactment of the Emergency Law, which was the first of a series of measures frustrating the investors' legitimately protected expectations, whereas the second abovementioned breach took place on 10 April 2002, date of the adoption of MoE Resolution No. 38/02, which was the first of a series of measures making the renegotiation process an unfair and inequitable one.

248. A State may violate an investment treaty's fair and equitable treatment standard in many ways and with many differing consequences. The majority's finding in the present cases that Argentina's various actions violated the fair and equitable treatment standard by frustrating the Claimants' legitimate and reasonable expectations is by no means a rejection of the conclusions of our esteemed colleague Professor Nikken in his separate opinion to the effect that Argentina failed to exercise due diligence in certain elements of its treatment of the Claimants' investments. The majority agrees that Argentina failed to exercise due diligence, as that concept is generally understood, and that such failure resulted in a violation of the treaties' fair and equitable treatment standard. As discussed earlier in this Decision, the majority of the Tribunal finds that Argentina's actions also frustrated the Claimants' legitimate expectations and it has concluded that it is more appropriate to base its decision on that rationale.

IX. Argentina's Defense of Necessity

A. *The Nature of the Defense*

249. Argentina argues that even if certain of its actions may have breached individual BIT provisions applicable to these cases it is absolved of liability by virtue of the defense of necessity under customary international law. Both the Claimants and Argentina agree that the current state of the law on the defense of necessity is reflected in Article 25 of the International Law

Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (2001), which provides as follows:

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

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

B. *Argentina's Position*

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

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

The essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic

survival, to the possibility of maintaining its essential services in operation and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In these circumstances an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.¹⁷⁷

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

C. *The Claimants' Position*

253. The Claimants reject Argentina's defense of necessity as not being grounded in either law or fact. According to the Claimants' interpretation of the ILC Articles and customary international law, three conditions must be present before a State may invoke necessity as a defense to liability for an international obligation: 1) the possibility of invoking the defense must not be excluded by the international obligation that the State is seeking to avoid; 2) the State must not have contributed to the situation of necessity; and 3) the State's measures in question must have been the only way for the state to safeguard an essential interest against a grave or imminent risk. Moreover, the Claimants remind the Tribunal of the admonition of the International Court of Justice in the *Gabčíkovo-Nagymaros Project Case* that Article 25 "...is a most exceptional remedy subject to the very strict conditions because otherwise it would open the door to elude any international obligation."¹⁷⁸

254. Claimants further argue that in fact Argentina satisfies none of the three conditions necessary to invoke the defense of necessity. They assert that the BITs in question were intended

¹⁷⁷ *Supra* note 78 at para. 257.

¹⁷⁸ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) Judgment, 25 September 1997, ICJ at paras. 51-52.

to protect investors in times of economic difficulties and thus excluded the invocation of the doctrine of necessity. Secondly, they argue that by its policies and actions Argentina contributed to the economic crisis that struck the country, thus further preventing it from raising the defense of necessity. And finally, they assert that the measures Argentina took to deal with the crisis and of which the Claimants complain were not the only means to safeguard an essential interest of the country from a grave or imminent peril. Indeed it argues that while the crisis was severe it did not compromise the existence of the State, as Argentina argues, and did not constitute a threat to an essential interest. Moreover the crisis was not a grave and imminent peril as evidenced by the fact that the Argentine economy began to recover in the second quarter of 2002. Further, the Claimants assert that there were a variety of other measures that Argentina might have taken with respect to the Concession, such a cross subsidies, temporary relief of AASA's investment obligations, or differentiated freezing of certain tariffs among different categories of consumers, which would have allowed it to deal with the crisis and still respect its commitments to AASA's investors.

255. With respect to the role of human rights as argued by Argentina and the *amici curiae*, to which the Tribunal will refer below, the Claimants respond that they have never questioned the right of the population to water. They point out that Argentina's decision to privatize the Buenos Aires water service and to promote the creation of AASA was precisely to make that right more effective for larger numbers of Argentine inhabitants as the service was expanded through AASA's efforts. They further argue that it was the Argentine government's actions during the crisis, not AASA and the Claimants, that put the population's right to water at risk since AASA was denied the means, as promised by the Concession's regulatory framework, which compromised water and sewage service quality. Finally, the Claimants argue that what is at issue in these cases is whether Argentina breached its legal commitments under the BITs and that human rights law is irrelevant to that determination.

D. *Amicus Curiae Submissions*

256. The Tribunal also received the benefit of an *amicus curiae* submission, dated 4 April 2007, filed by five non-governmental organizations¹⁷⁹ that further developed the relationship of the human rights law to water and to the issues in this case. That submission pointed out that

¹⁷⁹ As noted in para. 13, *supra*, the five NGOs were Asociación Civil por la Igualdad y la Justicia, Centro de Estudios Legales y Sociales, Center for International Environmental Law, Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores.

human rights law recognizes the right to water and its close linkages with other human rights, including the right to life, health, housing, and an adequate standard of living. Human rights law, the NGOs contend in their submission, required that Argentina adopt measures to ensure access to water by the population, including physical and economic access, and that its actions in confronting the crisis fully conformed to human rights law. Since human rights law provides a rationale for the crisis measures, they argue that this Tribunal should consider that rationale in interpreting and applying the provisions of the BITs in question.

E. The Tribunal's Analysis and Conclusions

257. The crisis into which Argentina fell in 2001-2003 was undoubtedly one of the most severe in its history. It was characterized by extreme social disturbance, riots, violence, and almost total breakdown of the political system. Evidence in the record in the present cases clearly shows its severity. Previous tribunals deciding disputes arising out of the crisis have also recognized and underscored its severity. For example, the tribunal in *CMS v. Argentina*, which would ultimately deny Argentina's plea of necessity, stated that it was "convinced that the crisis was indeed severe and the argument that nothing happened is not tenable."¹⁸⁰ The tribunal in *LG&E v. Argentina* found that "...from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and to protect its essential security interests,"¹⁸¹ describing the conditions in the country at the time as "devastating."¹⁸²

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

259. Article 25 imposes four conditions on the application of the defense of necessity. The first two relate to the nature of the State's act in violation of its obligations. Thus such act (1)

¹⁸⁰ Para. 320.

¹⁸¹ Para. 226.

¹⁸² Para. 237.

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

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

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

262. *The third condition for the defense of necessity: Treaty obligation does not exclude necessity defense.* The texts of the three BITs in question do not specifically exclude or allow the admissibility of a defense of necessity. The *LG&E* case, upon which Argentina relies, involved the application of the U.S.-Argentina BIT which contained a clause stating that nothing in the treaty precluded a Contracting Party from taking "...measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of

international peace or security, or the protection of own essential security interests”¹⁸³ None of the three BITs applicable to the present cases contains such a “non-precluded measures clause.”¹⁸⁴ Argentina and the *amicus curiae* submissions received by the Tribunal suggest that Argentina’s human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations. Viewing each treaty as a whole, the Tribunal does not find that any of them excluded the defense of necessity. Therefore Argentina must be deemed to have satisfied the third condition for the defense of necessity.

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

264. The Tribunal finds that a combination of endogenous and exogenous factors contributed to the Argentine crisis at the beginning of this century. Among Argentina’s contributing factors

¹⁸³ Article XI.

¹⁸⁴ See WW Burke-White & A von Staden, *Investment Protection in Extra-Ordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 *Virginia J of Intl L* 307 (2008).

to the crisis were excessive public spending, inefficient tax collection, delays in responding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making. In listing these factors, the Tribunal does not by any means intend to minimize the substantial external forces that were buffeting the Argentine economy. Its intent is to show that Argentina itself contributed to its situation of emergency. In this regard, this Tribunal must agree with the tribunal in *CMS v. Argentina*, which stated that “[t]he issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.”¹⁸⁵ One might also suggest if external, global factors alone had created Argentina’s crisis, it is surprising that other countries did not experience a crisis of equal magnitude at the time.

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

X. The BIT Provisions on Armed Conflict and State of Emergency

266. Argentina finds a further defense to liability for failure to respect the general treatment provisions discussed above in the special BIT provisions in the Argentina-France and the Argentina-U.K. BITs with respect to emergency situations that may arise in the territory of a Contracting Party. Specifically, Article 5(3) of the Argentina-France BIT states:

Investors of either Contracting Party whose investments have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency or uprising in the territory or maritime zone of the other Contracting Party shall be accorded by the latter Party treatment which is no less favorable than that accorded to its own investors or to investors of the most-favored nation.

¹⁸⁵ Para. 329.

Similarly, Article 4 (entitled “Compensation for Losses”) of the Argentina-U.K. BIT also provides:

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

Although the Argentina-Spain BIT does not contain a similar provision, Argentina argues that the above-quoted treaty provisions, since they are included in so many BITs, constitute customary international law and therefore the principles that they embody are also applicable to the Spanish Claimant AGBAR.

267. The essence of Argentina’s argument in this respect is that the above-quoted BIT provisions constitute a special regime applicable to investors in situations of emergency and that in such emergency situations the only treatment that Argentina owes to investors is to treat them no less favorably than it treats its own investors or investors from any third country. Argentina argues that during the time of the actions of which AASA’s investors complain, Argentina was in a state of emergency. Therefore its only duty under the BITs was to treat the Claimants’ investments no less favorably than it treated investments from Argentina or from any third country. Since the Claimants have not proven the existence of any such discrimination, Argentina argues that its treatment of the investor have violated none of the treaty provisions.

268. The Claimants reject Argentina’s argument on this point. They assert first that the treaty provisions upon which Argentina relies contain no exculpatory language that absolves Argentina from liability that it may incur from breaching other provisions of the treaty. In support, they cite the language of the *CMS v. Argentina* tribunal, which considered the same issue:

The plain meaning of the Article [Article IV(3)] is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.”¹⁸⁶

¹⁸⁶

Supra note 86 at para. 375.

269. The Claimants therefore argue that the above-quoted BIT provisions apply only in situations where: (a) an investor has suffered damage as a result of armed conflict or similar circumstances; but (b) that investor does not have a specific entitlement to reparation under another provision of the Treaty or customary international law; and (c) another investor, whether domestic or foreign, has been granted reparation, whether by operation of another treaty, domestic law, or simply on a discretionary basis. In short, by their terms and structure these BIT provisions create an additional legal cause for compensation; they do not establish an excuse for measures that otherwise breach the BITs. Moreover, as a matter of treaty interpretation, the Claimants point out that the clear intent of the BIT provisions is to apply to physical damage caused by war, revolution or civil disturbance, not to injuries caused by a state's regulatory measures.

270. The Tribunal cannot agree with Argentina's interpretation of the above-quoted BIT provisions. The clear meaning of those provisions is to impose on Contracting Parties an obligation of equality of treatment of investments for losses resulting from war, civil disturbance, and national emergencies. The provision contains no reference whatsoever to other obligations imposed by the BITs on Contracting Parties, let alone to provide for an exemption from such obligations. Had the Contracting Parties, after carefully negotiating a complex set of legal obligations to protect and promote investments, intended that such obligations would not apply in times of war, civil disturbance, or national emergency, they certainly would have so stated specifically. Indeed, in many other BITs, contracting parties have included exception provisions to provide for limited exemptions from BIT obligations in particular situations. The Contracting Parties of the BITs in question in these cases could also have done so if they had wished, but they did not.

271. The Tribunal considers that the above-quoted BIT provisions mean what they say: they impose on Argentina an obligation of equality of treatment with respect to investment losses sustained as a result of war, civil disturbance, and national emergency. They do not exempt Argentina from its other treaty obligations under the BITs. The Tribunal therefore rejects Argentina's interpretation of the applicable BIT provisions and its claimed defense to its liability for violating such other provisions.

XI. Further Procedure; Cost and Expenses

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

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

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

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

XII. The Tribunal’s Conclusions with respect to the Respondent’s Liability

276. After examining the respective cases of the Claimants and the Respondent, the Tribunal:
- a. Rejects the Claimants’ claim that the Respondent has directly or indirectly expropriated the investments of the Claimants;
 - b. Rejects the Claimants’ claim that the Respondent has denied the Claimants’ investments full protection and security;

- c. Finds that the Respondent has denied the Claimants' investments fair and equitable treatment;
- d. Rejects the Respondent's defense of necessity to the claims of the Claimants; and
- e. Rejects the Respondent's defense that Article 5(3) of the Argentina-France BIT and Article 4 of the Argentina-United Kingdom BIT, as well as international law, exempts Argentina from its BIT obligations during times of emergency;
- f. The decision on damages for breach of fair and equitable treatment and the decision on costs are deferred to the Tribunal's award on damages;
- g. All other claims are dismissed.

Jeswald Salacuse

Prof. Jeswald W. Salacuse

President

Gabrielle Kaufmann-Kohler
Prof. Gabrielle Kaufmann-Kohler
Arbitrator

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