In proceedings pursuant to the 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, entered into on 11 December 1990 and the UNCITRAL Arbitration Rules:

BG Group Plc.

Claimant

and

The Republic of Argentina

Respondent

Final Award

24 December 2007

Before the Tribunal comprising:

Alejandro M. Garro, Arbitrator

Albert Jan van den Berg, Arbitrator

Guillermo Aguilar Alvarez C., President

Representing the Claimant:

Freshfields Bruckhaus Deringer
Nigel Blackaby
Lluis Paradell
Sylvia Noury
Andrea Saldarriaga
Marval, O'Farrell & Mairal
Francisco Macías

Representing the Respondent:

Procuración del Tesoro de la Nación
Osvaldo César Guglielmino
Cintia Yaryura
Jorge Barraguirre
Florencio Travieso

Administrative Secretary of the Arbitral Tribunal

Lucía Ojeda

Formal seat of the arbitration: Washington, D.C.

I n d e x

I. The Parties

1. The Claimant in this arbitration is BG Group Plc. (BG), a British corporation located at 100 Thames Valley Park Drive, Reading Berkshire, RG6 1PT, in the United Kingdom. BG has a direct and an indirect ownership interest in MetroGAS S.A. (MetroGAS). MetroGAS is a natural gas distribution company incorporated in Argentina. BG was represented by Nigel Blackaby, Lluis Paradell, Andrea Saldarriaga, and Sylvia Noury of Freshfields Bruckhaus Deringer, and Francisco Macías of Marval, O'Farrell & Mairal.

2. The Respondent in this arbitration is The Republic of Argentina (Argentina), acting through the *Procuración del Tesoro de la Nación*, located at Posadas 1641, Buenos Aires, Argentina. Argentina was represented by Osvaldo César Guglielmino, Cintia Yaryura, Jorge Barraguirre and Florencio Travieso of the *Procuración del Tesoro de la Nación*. At the hearing, however, the following individuals also appeared for Argentina: Adolfo Gustavo Scrinzi (*Subprocurador de la Nación*), Felix Helou, Tomás Braceras, Rodrigo Ruiz-Esquide, Nicolas Stern, Ariel Martins, Ignacio Torterola, Charles Massano, Carlos Winograd, Alicia Federico and Mauricio Longín D'Alessandro.

II. The Tribunal and the Procedure

3. BG filed its Notice of Arbitration of 25 April 2003 pursuant to the *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* of 11 December 1990 (the Argentina-U.K. BIT or the BIT).[1] Article 8 of the Argentina-U.K. BIT provides that:[2]

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the

1. Exhibit J-69.
2. Where available, official English text of quotes shall be used.

competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

> (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
>
> (ii) where the final decision of the afore-mentioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 (footnote omitted) (provided that both Contracting Parties are Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in

> force. The Parties to the dispute may agree in writing to modify these Rules.
>
> (4) 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.
>
> (5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree to consult together as soon as possible so that they can reach a mutually acceptable solution.

4. Because the Parties failed to agree on submission of the dispute to the International Centre for the Settlement of Investment Disputes (ICSID), BG submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Rules).

5. The Parties designated arbitrators in accordance with Article 7(1) of the UNCITRAL Rules. BG appointed Professor Albert Jan van den Berg and the Republic of Argentina appointed Professor Alejandro M. Garro. Messrs. van den Berg and Garro designated Guillermo Aguilar Alvarez as President of the Arbitral Tribunal. The Tribunal was constituted on 22 June 2004. The Arbitral Tribunal appointed Mrs. Lucia Ojeda as its Administrative Secretary.

6. On 29 October 2004 a Preliminary Conference was held in New York City to address issues related with the conduct of the proceedings.

7. The Tribunal sees no need to burden the text of this Award with a recital of correspondence with counsel. Nor is it necessary to set out the content of the procedural orders

issued by the Tribunal,[3] which are all part of the written record of the proceedings. No unresolved procedural issues were extant as of the end of the hearing.

8. On 6 June 2007 Argentina challenged Professor Albert Jan van den Berg pursuant to Article 11 of the UNCITRAL Rules. BG rejected the challenge by letter of 11 June 2007. Professor van den Berg stated his position by letter of 12 June 2007, declining to withdraw from office.

9. Argentina initially refused to submit the challenge to the ICC International Court of Arbitration (ICC Court), the appointing authority under Article 12(1)(b) of the UNCITRAL Rules. Following failure by the Parties to agree on a new authority that would be willing to make a decision on the challenge, Respondent sought the designation of a new appointing authority by the Permanent Court of Arbitration. By letter of 15 August 2007, the Secretary-General of the Permanent Court of Arbitration informed the Parties that it had no power to replace the ICC Court as appointing authority.

10. On 17 September 2007 BG informed the Tribunal of the Parties' joint request for the suspension of the preparation of the award until 1 October 2007. By letter of 3 October 2007 BG informed the Tribunal that the suspension period had expired without the Parties having agreed to an extension and, therefore, that the Tribunal should resume the preparation of the award.

11. On 10 October 2007 Respondent submitted the challenge to the ICC Court. On 21 December 2007 the Secretariat of the ICC Court informed the Parties that, at its session of that same day, the ICC Court had decided to reject the challenge of Professor Albert Jan van den Berg.

12. Respondent filed its *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral* with objections to jurisdiction and admissibility on 24 March 2005. Claimant filed its Counter-Memorial on Jurisdiction on 9 May 2005.

---

3. The Arbitral Tribunal issued procedural orders on 30 June 2004 (Procedural Order No. 1), 8 November 2004 (Procedural Order No. 2, amended on 24 June 2005, 5 July 2005, 13 July 2005, and 12 August 2005), 3 December 2004 (Procedural Order No. 3), 9 June 2005 (Procedural Orders Nos. 4 and 5), 1 July 2005 (Procedural Order No. 6), 10 February 2006 (Procedural Order No. 7), 14 June 2006 (Procedural Order No. 8) , and 23 May 2007 (Procedural Order No. 9).

On 9 June 2005 the Arbitral Tribunal decided not to bifurcate the proceedings (Procedural Order No. 5). Hence, this award affirms the jurisdiction of the Tribunal and it also adjudicates the merits of the dispute.

13. The hearing was held on 5, 6, 7, 10, 11, 12, 13 and 14 July 2006 (the Hearing). The following witnesses appeared before the Arbitral Tribunal:

a) Designated by Claimant

- William Adamson
- Richard Souchard
- Jose Luis Fernández
- John Wood-Collins (expert witness)

b) Designated by Respondent

- Eduardo Ratti
- Gustavo Simeonoff
- Cristian Folgar
- Diego Petrecolla and Federico Molina (expert witnesses)
- Alejandro Gallino and Alejandro Sruoga (expert witnesses)
- Benedict Kingsbury (expert witness)

14. All of the witnesses designated by the Parties filed written statements. The following witnesses, however, did not appear at the Hearing:

a) Designated by Claimant

- Patricio Carlos Perkins

b) Designated by Respondent

- Nouriel Roubini (expert witness)

15. In addition to the submissions referred to in paragraph 12, the Parties filed the following written submissions:

Submission	Date
Claimant	
Statement of Claim	7 February 2005
Reply	6 February 2006
Post-Hearing Brief	28 August 2006
Cost Submission	4 June 2007
Respondent	
Memorial de Contestación	7 November 2005
Dúplica	8 May 2006
Alegato Final	28 August 2006
Reply to Claimant's Cost Submission	11 June 2007

III. Findings of Fact

16. The findings of fact set out in this Chapter of the award are based on the documentary evidence and on the written and oral testimony on the record.

A. BG's Investment in Argentina

1. The Privatization of the Gas Industry

17. In 1989 Argentina took economic measures to reduce inflation and the public deficit. Law 23.696 of 17 August 1989 provided, *inter alia*, for the privatization of certain state-owned companies, including the gas transportation and distribution monopoly *Gas del Estado, Sociedad del Estado* (*Gas del Estado*). Almost two years later, Law 23.928 of 27 March 1991 (the Convertibility Law) established a 1 to 1 fixed parity between the Argentine peso and the US dollar.

18. The gas industry was restructured for the purpose of its privatization as set out in Decree 48/91, Decree 633/91, Law 24.076 (the Gas Law) and Decree 1738/92 (the Gas Decree).

The assets of *Gas del Estado* were divided into two transportation companies and eight distribution companies. One of the gas distribution companies was *Distribuidora de Gas Metropolitana S.A.* This entity's corporate name subsequently changed to MetroGAS.

19. Article 50 of the Gas Law created the *Ente Nacional Regulador del Gas* (ENARGAS), at the time under the responsibility of the *Ministerio de Economía y Obras y Servicios Públicos* (Ministry of Economy, Public Works and Services). ENARGAS was, and remains at the time of the rendering of this award, the regulatory agency charged with the implementation and application of the new legal framework for the privatization of the gas industry in Argentina.

20. The transportation and distribution companies were incorporated by Decree 1189/92 and the privatization process was launched with the publication on 21 July 1992 of Resolution 874/92 of 12 July 1992, which called for an international public tender to sell a controlling interest in the transportation and distribution companies. The terms, conditions and rules governing the public bid were set out in the Bidding Rules issued by the *Ministerio de Economía y Obras y Servicios Públicos* (the Bidding Rules).[4] Resolution 874/92 also provided for the sale of a 70% interest in MetroGAS.

21. The Republic of Argentina promoted the international public tender among foreign investors by means of an English language memorandum dated "September 1992" (the Information Memorandum).[5]

22. On 2 December 1992, Decree 2255/92 approved model licenses for the provision of gas transportation and distribution services by the companies to be privatized.

23. Finally, on 21 December 1992, the President of Argentina issued Decree 2459/92, which granted the predecessor of MetroGAS an exclusive license to distribute natural gas in an area comprising the City of Buenos Aires and the southern and eastern greater metropolitan Buenos Aires (the MetroGAS License).[6] Decree 2459/92 was also

4. Exhibit J-100.
5. Exhibit J-101.
6. Exhibit J-113.

signed by Dr. Domingo F. Cavallo, then Minister of *Economía y Obras y Servicios Públicos*.

2. BG's Participation in the Privatization Process

24. Gas Argentino, S.A. (GASA) was the successful bidder for the 70% ownership interest of MetroGAS that was tendered for sale by Respondent in 1992. GASA was formed by BG, *Compañía Naviera Pérez Companc S.A. Comercial, Financiera, Inmobiliaria, Minera, Forestal y Agropecuaria* (Pérez Companc), *Astra Compañía Argentina de Petróleo S.A.* (Astra) and Invertrad S.A.[7] (the Initial Shareholders) for the sole purpose of holding this ownership interest. BG initially owned 41% of GASA. On 11 August 1998 BG acquired an additional 13.67% interest from Pérez Companc through British Gas International BV, its wholly owned subsidiary (BG International).[8]

25. On 28 December 1992, GASA, the Initial Shareholders, MetroGAS, the *Estado Nacional* and *Gas del Estado* entered into a Share Transfer Agreement.[9] The *Estado Nacional* and *Gas del Estado* were represented by the *Ministerio de Economía y Obras y Servicios Públicos*.

26. After the Share Transfer Agreement, Argentina continued to own 30% of MetroGAS, but it immediately transferred 10% to an employee share program. In 1994, Argentina offered the remaining 20% for sale in 1994 on the Argentine stock market and on the New York Stock Exchange. Between 1994 and 1998, BG increased its investment in MetroGAS from 28.7% (held through GASA) to 45.11% (held through GASA and BG International).[10]

---

7. On 20 January 1993, Invertrad S.A. assigned its 14% interest in GASA to Argentina Private Development Trust Company Limited (APDT). APDT subsequently changed its corporate name to Argentina Private Development Company Limited and assigned all its shares in GASA to YPF.

8. BG International is a wholly owned subsidiary of BG Gas Netherlands Holding BV (BGNH, also a wholly owned subsidiary of BG. On 12 November 1993, BG transferred to BGNH all of its shares in GASA. Subsequently, BGNH's GASA shares were transferred to BG International.

9. Exhibit J-115. MetroGAS and BG also entered into a Technical Assistance Agreement dated 28 December 1992 and renewed on 28 December 2002.

10. BG, through BG International, purchased additional shares in MetroGAS in 1994 (5.5%) and 1998 (1.34%).

B. The Regulatory Framework

27. The Regulatory Framework allegedly relied upon by BG at the time of its investment in Argentina included:

a) Law 24.076 of 20 May 1992 (the Gas Law);

b) The Gas Decree 1738 of 18 September 1992 (the Gas Decree); and

c) The MetroGAS License dated 21 December 1992 (the MetroGAS License).

28. The Tribunal will examine these legal texts *seriatim*.

1. The Gas Law (20 May 1992)

29. One of the stated objectives of the Gas Law was to guarantee that the tariffs to be collected for the regulated services were to be ". . . *justas y razonables de acuerdo a lo normado en la presente ley*".[11]

30. Pursuant to the Bidding Rules and the Information Memorandum, the foundations for the tariff regime are to be found in Title IX of the Gas Law. Thus, the following principles of the Gas Law are relevant to ascertain the expectations of the Parties at the time:

a) gas distributors operating efficiently and prudently were to be given the opportunity to collect ". . . *ingresos suficientes para satisfacer todos los costos operativos razonables . . . impuestos, amortizaciones y una rentabilidad razonable . . .*";[12]

b) to achieve "*rentabilidad razonable*", tariffs would provide for a return commensurate to the return of other activities of equal or comparable risk, and they must be a function of the efficient and satisfactory delivery of service;[13]

c) tariffs would be adjusted by applying a methodology based on international market indicators ". . . *que reflejen los cambios de valor*

11. Article 2(d).
12. Article 38(a).
13. Article 39.

de bienes y servicios representativos de las actividades de los prestadores . . .";[14] and

d) tariffs would be subject to review every five years,[15] or on an extraordinary basis.[16]

31. The Gas Law does not expressly address the currency in which the tariffs were to be calculated or expressed. The transportation and distribution tariffs are the object of regulation in the Gas Decree and in the MetroGAS License, to which this award now turns.

2. The Gas Decree (18 September 1992)

32. Article 41(1) of the Gas Decree introduces the US dollar as the currency in which to assess and calculate the value of transportation and distribution tariffs.

> *En la adecuación normal y periódica de la tarifas que autorice,* [ENARGAS] *se ajustará a los siguientes lineamientos:*
>
> *(1) Las tarifas de Transporte y Distribución se calcularán en Dólares.*[17] *El Cuadro Tarifario resultante será expresado en pesos convertibles según la Ley No. 23.928,*[18] *teniendo en cuenta para su reconversión a pesos la paridad establecida en el Artículo 3 del Decreto No. 2.128/91.*[19]

33. Paragraph 3 of Article 41 of the Gas Decree builds on Article 41 of the Gas Law by requiring incorporation in the respective licenses[20] of a mandatory tariff adjustment methodology based on international market indicators.

---

14. Article 41.
15. Article 42.
16. Upon the request of the service provider (Article 46), or *ex officio* by ENARGAS (Article 47).
17. Article 1(1) of the Gas Decree defines "*Dólar*" as "*. . . la moneda de curso legal en los Estados Unidos de América*".
18. The Convertibility Law (Exhibit J-79).
19. Article 3 of the *Decreto No. 2.128/91* (Exhibit J-86) establishes a 1 to 1 parity between the Argentine peso and the US dollar ("*El PESO será convertible con el Dólar de los ESTADOS UNIDOS DE AMERICA, a una relación de UN PESO . . . por cada Dólar, para la venta, en las condiciones establecidas por la Ley 23.928*").
20. Though Article 41 of the Gas Decree uses the Spanish term *habilitaciones*, Article 4.5 of the Decree provides that such *habilitaciones* take the form of a license.

34. Moreover, Article 42 of the Gas Decree fixes a time limit for ENARGAS to issue rules relating to the methodology for the review of tariffs every five years, as provided in Article 42 of the Gas Law. The Gas Decree offers some guidance to the regulator:

> (. . . .) *La revisión global del método empleado para el cálculo de las tarifas . . . se mantendrá por un nuevo período de Cinco (5) años contados a partir de su vigencia, procurando observar los principios de estabilidad, coherencia y previsibilidad tanto para los Consumidores como para los Prestadores.*
>
> *[ENARGAS] establecerá las normas de procedimiento para la revisión del método empleado en el cálculo de las tarifas que asegure la participación de los sujetos de la Ley* (. . . .)

35. Article 46 of the Gas Decree provides in turn for a set of guidelines to proceed with the extraordinary review of tariffs:

> *[ENARGAS] deberá establecer los requisitos que deberán cumplir los Transportistas, Distribuidores o consumidores en sus solicitudes de modificación de Tarifas o del Reglamento del Servicio a fin de acreditar la necesidad de tales modificaciones.*
>
> *Las modificaciones contempladas en el Artículo 46 de la Ley deberán basarse en circunstancias específicas no previstas con anterioridad, y no podrán ser recurrentes. Las mismas no incluyen el reajuste que contempla el Artículo 42 de la Ley.*

36. This analysis of the Gas Decree concludes by restating one of its opening provisions. Article 4.5 gives reassurance to licensees that their license may not be modified without their consent:

> (. . . .) *Las licencias otorgadas no . . . serán modificadas durante su vigencia sin el consentimiento de los licenciatarios. No se considerarán modificaciones a la licencia (i) las modificaciones que [ENARGAS] introduzca en el Reglamento del Servicio, sin perjuicio del derecho de [ENARGAS] o del licenciatario a requerir el correspondiente ajuste de las tarifas si el efecto neto de tal modificación alterase en sentido favorable o desfavorable, respectivamente, el equilibrio económico - financiero existente antes de tal*

> *modificación; y (ii) los reajustes de la Tarifa que conste[n] como anexo de la licencia y que se practiquen de acuerdo con la Ley, esta Reglamentación y los términos de la respectiva licencia. Al convocar a licitación en caso de extinción de una licencia, [ENARGAS] podrá modificar los términos de la licencia vigente hasta ese momento.*

37. The interpretation of the Gas Law and the Gas Decree was the object of considerable disagreement between the Parties. The Tribunal will address that controversy later in this award. In so doing, the Tribunal will turn to the Bidding Rules and to the Information Memorandum in order to ascertain the understanding of the parties at the time of the conclusion of their agreement.

3. The MetroGAS License (21 December 1992)

38. On 21 December 1992 the President of Argentina issued Decree 2459/92 which granted the predecessor of MetroGAS a 35 year exclusive license to distribute natural gas in the City of Buenos Aires and the southern and eastern greater metropolitan Buenos Aires.[21] As indicated above, Decree 2459/92 was also signed by Dr. Domingo F. Cavallo, then Minister of *Economía y Obras y Servicios Públicos*.

39. The text of Decree 2459/92 is itself brief. It comprises eight Articles over six pages, plus three Annexes setting out in detail the terms of the MetroGAS License: (i) the *Reglas Básicas* (Annex I); (ii) the *Reglamento de Servicio* (Annex II); and (iii) the Tariffs (Annex III). The provisions of the MetroGAS License relevant to the dispute between the Parties are primarily located in Annex I (*Reglas Básicas*).

40. Before an examination of the rules set out in Annex I, the Tribunal records that Article 1 of this Presidential Decree provides that the MetroGAS License is granted under the terms and conditions set out, *inter alia*, in the Gas Law, the Gas Decree, Annex I (*Reglas Básicas*) and Annex III (Tariffs).

21. Exhibit J-113 (the MetroGAS License was subject to a 10 year extension).

41. Section 9.2 of the MetroGAS License[22] confirms the application of the US dollar as the currency of reference for the calculation and adjustment of tariffs:

> *El Anexo III del Decreto que aprueba estas Reglas Básicas contiene la tarifa que puede percibir la Licenciataria.*
>
> *La tarifa se ha calculado en dólares estadounidenses. Los ajustes a que se refiere el punto 9.3. serán calculados en dólares estadounidenses.*
>
> *El Cuadro Tarifario resultante o recalculado se expresará en el momento de su aplicación a la facturación en pesos ($) a la relación para la convertibilidad establecida en el art. 3º del Dto. 2128/91, reglamentario de la [Ley de Convertibilidad] y sus eventuales modificatorios.*
>
> *Dicha tarifa sólo será modificada de conformidad con lo establecido en la Ley [24,076],*[23] *el Decreto Reglamentario,*[24] *estas Reglas Básicas y las disposiciones de la misma Tarifa.*

42. The tables of Annex III (*Tarifas*) setting out the different tariffs indicate in the upper right hand corner that they are expressed "*en $ convertibles ley 23,928*".[25]

43. Section 9.3 of the MetroGAS License sets out a useful recapitulation of the tariff adjustment regime:

> *De acuerdo con los términos de la Ley y su Decreto Reglamentario, se prevén las siguientes clases de ajustes de tarifas:*
>
> *a) Periódicos y de tratamiento preestablecido*
>
> – *Ajuste por variaciones en los indicadores de mercado internacional (artículo 41 de la Ley)*
>
> – *Ajuste por variaciones en el precio del Gas comprado*

22. Unless otherwise specified, all references in the award to Sections of the MetroGAS License are to Sections in Annex I (*Reglas Básicas*).
23. The Gas Law.
24. The Gas Decree.
25. Law 23,928 is the Convertibility Law.

– *Ajuste por variaciones en el costo del Transporte*

b) Periódicos y de tratamiento a preestablecer por la Autoridad Regulatoria

– *Ajuste por la revisión quinquenal de tarifas (artículo 42 de la Ley)*

c) No recurrentes

– *Ajuste basado en circunstancias objetivas y justificadas (artículo 46 de la Ley)*

– *Ajuste por cambios en los impuestos (artículo 41 de la Ley)*

44. To summarize further the adjustment provisions of the MetroGAS License:

a) tariffs would be adjusted every six months in accordance with the US PPI (the US PPI Adjustment);[26]

b) MetroGAS was entitled to a review every five years to maintain tariffs at a level sufficient to provide a reasonable rate of return after covering costs, taking into account the licensees efficiencies and investments (the Five Year Review);[27] and

c) outside the Five Year Review, MetroGAS could also request an "extraordinary review" based on "objective and justified" grounds (the Extraordinary Review).[28]

45. It is a matter of record that only one Five Year Review was completed with respect to MetroGAS (RQT I in 1997), and that a second Five Year Review (RQT II) was in progress in January 2002, but was never concluded. On 8 February 2002, ENARGAS notified MetroGAS that the RQT II process was suspended pending completion of the renegotiation process mandated by Law 25.561 adopted on 6 January 2002 (the Emergency Law).[29]

---

26. Section 9.4.1.1 of the MetroGAS License. The License defines "PPI" as " . . . *el 'Indice de Precios del Productor – Bienes Industriales (1967 = 100) publicado por la Oficina de Estadísticas Laborales del Departamento de Trabajo de los Estados Unidos* . . .".
27. Sections 9.4.1.2, 9.4.1.3 and 9.4.1.4 of the License.
28. Section 9.6.1 of the License.
29. Exhibit J-295.

46. The MetroGAS License also provides for the stability of the Regulatory Framework and its tariff regime.

47. First, Section 9.1 of the MetroGAS License requires that modifications to the *Reglamento de Servicio* be responsive to the evolution and need to improve service, and it calls for consultations with the licensee and a tariff adjustment if the economic and financial equilibrium is disturbed:

> *El Reglamento del Servicio podrá ser modificado periódicamente, después de la fecha de vigencia, por la Autoridad Regulatoria, para adecuarlo a la evolución y mejora del Servicio Licenciado. Cuando tales modificaciones no se deban a la iniciativa de la Licenciataria, corresponderá la previa consulta a la misma. Dichas modificaciones no podrán alterar las presentes Reglas Básicas y, si alteraran el equilibrio económico-financiero de la Licencia, darán lugar* [a la] *revisión de la Tarifa según lo determine la Autoridad Regulatoria.*

48. Section 18.2 of the MetroGAS License further elaborates on the principles of stability and compensation:

> *El Otorgante no modificará estas Reglas Básicas, en todo o en parte[,] salvo mediante consentimiento escrito de la Licenciataria y previa recomendación de la Autoridad Regulatoria.*
>
> *Las disposiciones que modifiquen el Reglamento del Servicio y la Tarifa que adopte la Autoridad Regulatoria no se considerarán modificaciones a la Licencia en ejercicio de sus facultades, sin perjuicio del derecho de la Licenciataria de requerir el correspondiente reajuste de la Tarifa si el efecto neto de tal modificación alterase en sentido favorable o desfavorable, respectivamente, el equilibrio económico-financiero existente antes de tal modificación.*

49. Second, Section 9.8 of the License provides as follows with respect to price controls:

> *No se aplicarán al régimen de tarifas de la Licenciataria congelamientos, administraciones y/o controles de precios. Si a pesar de esta estipulación se obligara a la Licenciataria a adecuarse a un régimen de control de precios que estableciere un nivel menor al que resulte de la Tarifa, la*

> *Licenciataria tendrá derecho a una compensación equivalente pagadera por el Otorgante.*

50. Upon expiration of the license term, MetroGAS would be entitled to receive compensation in cash to the lower of:[30]

a) the net book value of the assets;[31] and

b) the net proceeds of a new competitive bid.

51. Finally, the MetroGAS License is governed by the laws of Argentina and it includes the following jurisdictional clause in Section 16.2:

> *Para todos los efectos derivados de la presente Licencia en su relación con el Otorgante,*[32] *la Licenciataria se somete a la competencia de los tribunales en lo Contencioso Administrativo Federal de la Capital Federal. En las controversias con otras partes relativas a la Licencia, será competente la justicia federal.*

52. The Tribunal will now turn to the crisis which precipitated the dispute between the Parties.

C. The Crisis

53. Starting in 1998, external developments contributed to the demise of the currency regime implemented by, *inter alia*, the Convertibility Law:[33]

a) capitals stopped flowing to emerging markets following the Asian crisis and the Russian default of 1998;

b) demand weakened in Brazil, one of Argentina's major trading partners;

---

30. Section 11.3.1 of the MetroGAS License.
31. *I.e*, the book value net of cumulative amortization of the essential assets, including historical cost (also net of cumulative amortization) of the investments made by the Licensee during the term of the License not challenged by ENARGAS. For purposes of this calculation, (a) investments are to be determined on the basis of the price paid for the essential assets by MetroGAS in 1992, plus the original cost of subsequent investments, converted into dollars and adjusted by US PPI, and (b) amortization shall be calculated in US dollars applying normal rules of useful life of the assets, regardless of the historic cost in Argentine currency or accelerated amortization for fiscal purposes (Section 11.3.1 of the MetroGAS License).
32. Section 1.1 of the License defines *Otorgante* to mean "the National Executive Branch" (*el Poder Ejecutivo Nacional*).
33. Roubini Witness Statement, pp. 7 and 8.

c) the price of Argentina's exports relative to its imports decreased considerably;

d) Argentina lost competitiveness abroad as a result of the devaluation of the Brazilian currency and the appreciation of the dollar; and

e) monetary policy was tightened by the U.S. Federal Reserve in 1999 and 2000.

54. Given the Convertibility Law, Argentina could not apply exchange rate adjustments and it lacked a monetary policy to address the combined effect of these external developments.[34] This led to a slowdown of the economy in 1998 and Argentina eventually plunged into a profound recession.[35] The recession worsened in 2001, precipitating an acute economic, social and political crisis.

55. Between 1999 and 2002, cumulative loss of GDP was about 25% and real *per capita* GDP fell from $8,302 in 1998 to $2,595 in 2002.[36] Public debt and the fiscal deficit increased.[37]

56. On 1 December 2001, Decree 1570/01 imposed exchange controls and severe restrictions on the withdrawal of funds from the banking system (the *corralito*).[38] Argentina subsequently declared a default on its foreign debt and the IMF withheld funds scheduled to be delivered to Argentina by the end of that year. The IMF also publicly withdrew its support of Argentina's economic program.[39]

57. The attack on the peso intensified. In the first days of December 2001 on average 500 million dollars were being withdrawn from the banking system every day. During the last quarter of that year the Central Bank lost 11 billion dollars

---

34. Roubini Witness Statement, pp. 7 and 8.
35. Roubini Witness Statement, p. 8.
36. Roubini Witness Statement, p. 9.
37. Fiscal debt increased to 8% of GDP and the Balance of Payments Current Account showed deficits every year between 1999 and 2001 (Folgar Witness Statement, p. 6).
38. Exhibit J-282. *Corralito* was the informal name for these measures taken in order to stop a bank run. The *corralito* almost completely froze bank accounts and forbade withdrawals from U.S. dollar-denominated accounts. The Spanish word *corralito* is the diminutive form of *corral*, which means "corral, animal pen, enclosure". The term alludes to the restrictions imposed by the measure.
39. *Memorial de Contestación*, paragraphs 46 and 48.

of reserves and 25% of funds on deposit vanished from the financial system.[40]

58. The crisis had social and political repercussions.

59. In May of 2002 unemployment peaked at 21.5% from 18.3% in October of 2001.[41] Average wages decreased almost 70% in 7 months, from US$569.90 in October of 2001 to US$190.00 in May of 2002.[42] By the first quarter of 2002, domestic consumption, including demand for public services, had shrunk 20%.[43]

60. Five Presidents took office within a period of 12 days. On 1 January 2002, Eduardo Duhalde became President and on 6 January 2002 Argentina enacted the Emergency Law, declaring a state of emergency throughout the country.[44] The Parties disagree as to whether the state of emergency has been overcome.[45] The state of emergency is currently set to expire on 31 December 2007.[46]

61. The next Section of the award describes the *corralito*, the Emergency Law and other measures taken by the government of Argentina to address the crisis.

D. The Measures

62. Starting in 1999, Argentina adopted a series of measures to address macroeconomic pressures, social unrest and political instability. These measures had an effect on BG's investment in MetroGAS and their examination is critical to the adjudication of this dispute.

1. Suspension of the Application of the US PPI

63. At the invitation of the Secretary of Energy, on 6 January 2000 all licensees, including MetroGAS, agreed to a six month suspension (until 1 July 2000) of the US PPI adjustments pursuant to the Gas Law (Article 41), the Gas Decree (Article 41) and the MetroGAS License (Section 9.4.1.1

40. *Memorial de Contestación*, pp. 10 and 11.
41. Folgar Witness Statement, p. 6.
42. *Memorial de Contestación*, paragraph 116.
43. *Memorial de Contestación*, paragraph 65.
44. Exhibit J-287.
45. *Dúplica*, paragraph 87. Reply, paragraph 482.
46. See paragraph 73 of this award.

of the *Reglas Básicas)* until 1 July 2000. The *Acta Acuerdo*[47] which formalizes this agreement stated that:

a) the suspension was exceptional "*. . . y por única vez*";[48]

b) the suspension was without prejudice to the integrity of the Regulatory Framework, the licenses and the "*. . . compromisos y contratos celebrados como resultado de la privatización de Gas del Estado*";[49]

c) the licensees would not be indemnified in case of damage suffered as a result of the suspension;[50] and

d) the suspension should not be deemed as a precedent, or as an amendment to the existing legal framework.[51]

64. Argentina did not implement the adjustment upon expiry of the suspension on 1 July 2000. Instead, the government once again invited the licensees to accept a two-year deferral of the adjustment.[52] Pursuant to the new agreement, dated 17 July 2000:

a) tariffs payable as from July 2000 could be increased by the US PPI uplift due in January 2000; and

b) the US PPI adjustments applicable from July 2000 to January 2002 were to be deferred until 30 June 2002.

65. This agreement was formalized by Decree 669/00, signed by the President of Argentina. Decree 669/00 recognized that the licensees had a "*derecho legítimamente adquirido*" to US PPI tariff adjustments.[53] The Presidential Decree also acknowledges that bilateral investment treaties are a part of the legal framework relevant to investments in Argentina.[54]

---

47. Exhibit J-214.
48. Exhibit J-214, paragraph 1.
49. Exhibit J-214, paragraph 2 of the Preamble.
50. Exhibit J-214, paragraph 5 of the Preamble.
51. Exhibit J-214, paragraph 5 of the Preamble.
52. Exhibit J-226.
53. Exhibit J-226, p. 2.
54. Ibidem, p.1.

66. Decree 669/00 and the agreement concluded on 17 July 2000 were challenged before local courts by the Argentine Ombudsman (*Defensor del Pueblo de la Nación*) on grounds that the US PPI adjustment mechanism was unconstitutional and in breach of the amended Convertibility Law. On 18 August 2000, a federal administrative court (the *Juzgado Nacional de Primera Instancia en lo Contencioso Administrativo Federal No. 8*) issued an injunction staying the application of Decree 669/00 and the agreement of 17 July 2000.[55]

67. The injunction was appealed by both MetroGAS and the Argentine authorities. The appeal memorial filed by the Ministry of Economy and ENARGAS sheds light on the purpose of the Regulatory Framework:

> *Cuando en los años noventa se encaró en la Argentina el amplio proceso privatizador, la inflación no había sido derrotada. Para atraer inversores, en ese contexto se decidió ofrecer un marco contractual que asegurara la estabilidad de la ecuación económica inicial, evitando que las tarifas fueran licuadas por el incesante aumento de precios, al punto de hacer inviable la explotación rentable de la actividad.*
>
> *El instrumento elegido, en la mayoría de los casos, fue fijar tarifas en dólares con la cláusula de ajuste según la inflación estadounidense, que históricamente había seguido un curso mucho más estable que la argentina.*
>
> [Exhibit J-233, p. 71]
>
> [*D*]*ebe tenerse en cuenta cuál es el sentido que, en momento del procedimiento licitatorio, se le dio al ajuste en cuestión. . . . Tal sentido está dado en que, en primer lugar, las ofertas económicas de los Consorcios que participaron en la Licitación – teniendo en cuenta las condiciones del Pliego de Bases y Condiciones-, preveían la aplicación del ajuste mencionado durante la vigencia de la habilitación.*
>
> [Exhibit J-233, p. 95]
>
> [Emphasis added]

55. Exhibit J-229.

68. Pending the decision on appeal, in August of 2000 and every 6 months thereafter, ENARGAS ordered MetroGAS to maintain its tariffs at the approved rate for May of 2000.[56]

69. On 5 October 2001, the Federal Court of Appeals upheld the injunction against the application of the US PPI adjustment mechanism.[57] In reaching its decision, the appellate court noted that "dollarized" tariffs protected the licensees against exchange rate fluctuations.[58] An appeal to the Supreme Court was soon to be overtaken by other measures adopted by Argentina in January of 2002. The MetroGAS tariffs have therefore not been adjusted for inflation since July of 1999.[59]

2. The *Corralito*

70. By the end of 2001 Argentina was heavily indebted and with an economy in stagnation. Pegging the exchange rate at one U. S. dollar per Argentine peso further made its exports uncompetitive and it also effectively deprived the state of an independent monetary policy. Fearing an economic crash and a devaluation, many Argentines, especially companies, were transforming pesos to dollars and withdrawing them from the banks in large amounts, usually transferring them to foreign accounts.

71. On 1 December 2001, the government enacted Decree 1570/01 in order to stop this process from further threatening the banking system.[60] This Decree froze all bank accounts, initially for 90 days. Only a small amount of cash was allowed for withdrawal on a weekly basis, initially 250 pesos.

72. The *corralito* had a paradoxical effect. Attempts to withdraw funds from the banks intensified and the cash restrictions exacerbated the recession and angered the public. President Fernando de la Rúa resigned on 21 December 2001

---

56. Exhibits J-238, J-252 and J-285.
57. Exhibit J-253.
58. Exhibit J-253, p. 10 (". . . *si se tiene en cuenta la dolarización de las tarifas y el seguro de cambios que ello implica* . . .")
59. Decree 2437/02 (Exhibit J-371) authorized 5 to 10% increases in the tariffs of MetroGAS. However, the application of this decree was suspended by judicial injunction. Further attempts to increase tariffs were also blocked by injunctive measures adopted by Argentine courts (Exhibits J-398 and J-401).
60. Exhibit J-282.

after violent riots, but the restrictions of the *corralito* were not lifted at the time.

3. The Emergency Law and Ancillary Regulations

73. On 6 January 2002, Argentina enacted the Emergency Law.[61] This Law declared a state of "emergency" for a limited period of time originally due to expire on 10 December 2003,[62] but subsequently extended until 31 December 2004,[63] 31 December 2005,[64] 31 December 2006[65] and 31 December 2007.[66]

74. Among other measures, the Emergency Law:

a) abolished the currency board established by the Convertibility Law which had pegged the peso to the dollar;[67]

b) set aside dollar denominated adjustment clauses;[68]

c) eliminated the US PPI adjustment mechanism by prohibiting indexation clauses tied to international price indices;[69]

d) converted dollar denominated tariffs into pesos at the rate of one peso to one US dollar;[70]

e) prohibited licensees from suspending or altering the performance of their obligations;[71] and

f) prescribed that the law would be applicable irrespective of any "vested rights".[72]

---

61. Exhibit J-287.
62. This is the date which appears in Article 1 of the Emergency Law as submitted by Argentina in its Exhibit A RA-131.
63. Exhibit J-448.
64. Exhibit J-505.
65. Exhibit J-643.
66. Exhibit J-740.
67. Article 3.
68. Article 8.
69. Article 8.
70. Article 8. Thus, while the exchange rate eventually stabilized at 3 Argentine pesos to the US dollar, the devaluation was not transferred to the licensees' tariffs.
71. Article 10. This rule is also included in Article 5 of Law 25.790 of 1 October 2003.
72. Article 19 ("*La presente ley es de orden público. Ninguna persona puede alegar en su contra derechos irrevocablemente adquiridos*".) This

75. The Emergency Law also authorized the Executive Branch of government to "renegotiate" its agreements with public service providers.[73] Originally conducted under the auspices of the *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* which operated from February of 2002 until July of 2003,[74] the renegotiation process was subsequently taken over by the *Unidad de Renegociación de Contratos de Obras y Servicios Públicos* or UNIREN.[75]

76. Article 11 of the Emergency Law and Decree 214/02[76] further (i) ordered that private dollar denominated obligations be converted into pesos at a rate of one peso to one dollar, and (ii) abolished indexation by reference to international indicators. Decree 214/02 also established that "pesified" obligations were to be adjusted by application of a *Coeficiente de Estabilización de Referencia* or CER. Pursuant to Decree 410/02, however, the "pesification" would not apply to obligations governed by foreign law.[77]

77. During the arbitration, BG argued that these and other measures adopted by Argentina after January of 2002 had a discriminatory effect which adversely impacted its investment in Argentina. Chapter VIII of this award shall address the measures in question and their effect in the renegotiation process.

4. The Renegotiation Process

78. The *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* was created by Decree 293/02 of 14 February 2002 to assume responsibility over the

---

provision is in contrast with Decree 669/00 (Exhibit J-226) which had earlier recognized that the licensees had a "*derecho legítimamente adquirido*" to US PPI tariff adjustments.

73. Article 9 ("*Autorízase al Poder Ejecutivo nacional a renegociar los contratos comprendidos en lo dispuesto en el Artículo 8° de la presente ley. En el caso de los contratos que tengan por objeto la prestación de servicios públicos, deberán tomarse en consideración los siguientes criterios: 1) el impacto de las tarifas en la competitividad de la economía y en la distribución de los ingresos; 2) la calidad de los servicios y los planes de inversión, cuando ellos estuviesen previstos contractualmente; 3) el interés de los usuarios y la accesibilidad de los servicios; 4) la seguridad de los sistemas comprendidos; y 5) la rentabilidad de las empresas.*")

74. Exhibit J-297.

75. Exhibit J-424.

76. Exhibit J-292.

77. Exhibit J-300.

renegotiation of public service contracts.[78] Although this Renegotiation Commission was unable to conclude its task within the statutory term of 120 days, it did produce a report dated 24 January 2003 which notes a sharp decline in the economics of the MetroGAS operations:[79]

Net Margin over Sales		**Rate of Return**	
2001	**2002**	**2001**	**2002**
14%	-121%	8%	-142%

79. On 3 July 2003, the administration of President Kirchner replaced the *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* with UNIREN.[80] On 21 October 2003, Congress enacted Law 25.790 governing the renegotiation process.[81] Article 2 of this Law 25,790 expressly authorized UNIREN to depart from the existing Regulatory Framework and licenses:

> *Las decisiones que adopte el Poder Ejecutivo nacional en el desarrollo del proceso de renegociación no se hallarán limitadas o condicionadas por las estipulaciones contenidas en los marcos regulatorios que rigen los contratos de concesión o licencia de los respectivos servicios públicos.*
>
> [. . .]
>
> [Emphasis added]

80. There is no dispute between the Parties that the stated objective of the Emergency Law and the purpose of subsequent legislation, including Law 25.790, was to establish a new deal with the licensees. Return to the original legal framework as presented by the Information Memorandum and the Bidding Rules was accordingly not an alternative.[82] This was confirmed at the hearing by the Executive Secretary of UNIREN, who testified that a return to dollar denominated tariffs was not possible.[83]

---

78. Exhibit J-297.
79. Exhibit J-400, p. 44.
80. Decree 311/03 (Exhibit J-424).
81. Exhibit J-432.
82. Exhibit J-297.
83. Tr. Simeonoff, 10 July 2006, 1048:13-1050:3. Respondent's counsel also confirmed this (Tr. Scrinzi, 6 July 2006, 408:8-409:20).

81. Further, Article 11 of Resolution 308/02[84] and Article 1 of Decree 1090/02[85] expressly exclude from the renegotiation process any licensee that sought redress in an arbitral or other forum.

82. In the circumstances, five years[86] failed to yield a successful settlement of the dispute between the Parties.

IV. Summary of the Contentions of the Parties and Relief Sought

83. The prayer for relief below is presented *verbatim* as submitted by the Parties in their Post–Hearing Brief. Their contentions are summarized here and subsequently analyzed in more detail.

A. BG's Position

84. Claimant argued that Argentina's measures described in Section III.D above have damaged MetroGAS:[87]

> In short, as a result of Argentina's Measures, MetroGAS's business is no longer viable. MetroGAS's tariff revenue is no longer sufficient to cover its costs and provide a reasonable rate of return, as promised in the Regulatory Framework. Some three years after the January 2002 Law was enacted, the absence of a renegotiated Licence or material tariff increase means that MetroGAS remains in a critical financial condition and at the mercy of its creditors.

85. BG's case on the merits is that Argentina has breached the following provisions of the Argentina-U.K. BIT:[88]

a) Article 5, by expropriating BG's (i) shareholding in GASA and MetroGAS and, alternatively, (ii) rights under or related to the MetroGAS License; and

b) Article 2.2 (i) by failing to provide BG fair and equitable treatment and protection and security, (ii) by taking unreasonable and discriminatory measures, (iii) by failing to observe obligations

84. Exhibit J-347.
85. Exhibit J-334.
86. The time elapsed since promulgation of the Emergency Law.
87. Statement of Claim, paragraph 350.
88. Post-Hearing Brief, Chapters V and VI.

entered into with regard to BG's Investments, and (iv) for acts of its judiciary.

86. BG requests that the Tribunal:

a) declare that the dispute is within the jurisdiction of the Tribunal and that all of Argentina's objections to the jurisdiction and competence of the Tribunal and the admissibility of BG' claims be dismissed;

b) declare that Argentina breached Article 5(1) of the [Argentina-U.K. BIT] by expropriating BG's investment without compensation;

c) declare that Argentina breached Article 2(2) of the [Argentina-U.K. BIT] by mistreating BG's investment in violation of the standards of treatment provided therein;

d) order that Argentina compensate BG in an amount of US$238.1 million plus interest at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually;

e) award BG any such additional relief as the Tribunal considers appropriate; and

f) order that Argentina pay the costs of these proceedings, including the Tribunal's fees and expenses, and the cost of BG's legal representation, subject to interest.

B. Argentina's Position

87. Argentina requests the following from the Tribunal:

a) *Se declare la falta de competencia del Tribunal respecto de la controversia planteada por la Demandante, con costas a cargo de BG, incluyendo todos los gastos del Tribunal y los gastos incurridos por la República Argentina en relación con el presente arbitraje;*

b) *Subsidiariamente, se solicita se rechace en forma total la demanda de BG Group plc, con costas.*

88. Argentina's defense on the merits is based on its allegation that it has not breached the Argentina-U.K. BIT and on the doctrine of state of necessity.

V. Applicable Law

89. Both Parties agree that the issue of the law applicable to the dispute is addressed in Article 8(4) of the Argentina-U.K. BIT.[89] Article 8(4) of the BIT provides that:

> The arbitral tribunal shall decide this dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in this 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.

90. This provision points to the application of the treaty itself, Argentine law (including its rules on conflict of laws) and "*the applicable principles of international law*". The Parties do not disagree that these are the relevant sources of law under the Argentina-U.K. BIT.[90]

91. It is undisputed that treaty law determines, for example, who qualifies as an "Investor"[91] as well as the various types of property rights that constitute an "Investment".[92] Equally clear and not subject to dispute by the Parties is that the substantive standards for treatment of investors are matters governed by the treaty, without any need for reference to Argentine law.[93] Indeed, the

---

89. *Alegato Final de la República Argentina (*"Alegato Final"*)*, paragraph 107; Post-Hearing Brief, paragraph 137.

90. See *Alegato Final,* paragraphs 117-21, in particular paragraph 117 ("*...[E]s claro que el Tribunal no podría dejar de aplicar el derecho interno argentino así como tampoco podría dejar de aplicar el TBI o los principios de derecho internacional que resulten aplicables.*"). See also, Post-Hearing Brief, paragraphs 137-40.

91. Argentina-U.K. BIT, Article 1(c)(i)(bb).

92. Argentina-U.K. BIT, Article 1(a).

93. Respondent does not question that breach of the substantive obligations set out in Articles 2.2 and 5 of the Argentina-U.K. BIT is governed by the BIT. See, *e.g.*, *Alegato Final*, paragraph 132 ("[l]*a Argentina sólo podrá ser responsable internacionalmente si el Tribunal, partiendo del análisis de todas las fuentes de derecho aplicables, comprueba que la conducta de la Argentina es incompatible con alguna disposición del TBI*"). See also *ibidem*, paragraph 137. After pointing to the prominent role played by Argentine law in defining the type of property rights making up an "investment", referring to *El Paso Energy International Co. v. República Argentina* (CIADI ARB.03/15/, *Decisión*

preeminence of the BIT as *lex specialis* governing this dispute, on matters expressly covered by this bilateral treaty, is expressly acknowledged by both Parties.[94]

92. It is also beyond dispute that the contours of the concept of "asset" included in the definition of "investment" in Article 1(a) of the Argentina-U.K. BIT, is governed by Argentine law.[95] Article 1(a) of the BIT provides that:

> "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made . . .
>
> [Emphasis added]

---

sobre Jurisdicción 27 April 2006), Argentina highlights the relevance of ascertaining whether the investor's rights may have been illegally restricted and whether such restriction may be imputed to Argentina for having violated "the high standards" set forth in the BIT (*"[e]n conclusión: la República Argentina considera que para determinar qué derechos posee la Demandante, su existencia y extensión, debe aplicarse:*

- *el derecho argentino, a efectos de determinar qué derechos fueron adquiridos mediante la inversión;*
- *una vez determinado esto, debe verse si ese derecho ha sido ilegalmente restringido; y*
- *por último, si tal restricción constituye además una violación a los altos estándares del TBI atribuible al Estado Argentino."*

94. See *Alegato Final*, paragraph 118 ("[*l*]*a primera fuente de derecho contenida en el artículo 8.4 del TBI es el mismo tratado. Es claro que las cuestiones reguladas por el Tratado son ley especial (lex specialis) respecto del derecho internacional general . . .*"; subsequently making the point that the BIT is not a self-contained, stand-alone legal framework but must be "integrated" with underlying principles of international law. BG's Post-Hearing Brief, paragraph 140 (also contending that ". . . *the conduct of the host state [must be] examined on the basis of the substantive standards of treatment set out in the treaty. Thus, the treaty as supplemented by general international law is the applicable law in this phase.*").

95. See *Alegato Final*, paragraph 124 ("*Es decir, el derecho argentino es el que determina cuáles son los derechos adquiridos por la inversión (en otras palabras: cuál es el contenido de la propiedad del inversor*"); Post-Hearing Brief, paragraph140 ("[a]t *the first stage, the tribunal must decide, if it is a matter of contention, whether particular assets or rights constituting the alleged investment exist, their scope and in whom they vest. The law of the host state and/or the investment constitute an investment as defined by the treaty*"). Although Argentine private international law is included within the bodies or sources of law mentioned in Article 8(4) of the BIT, neither Party relied upon it, so the matter under discussion here is the role played by Argentine substantive municipal rules of law.

93. Where Claimant and Respondent disagree is on: (i) whether the Argentina-U.K. BIT requires the Tribunal to follow an order of priority in applying the sources of law set out in Article 8(4) of the BIT; and (ii) whether Argentina's alleged liability is exclusively a function of domestic law, as argued by Respondent, or whether this issue falls squarely under the terms of the BIT and underlying principles of international law, as argued by the Claimant.

94. The Tribunal shall deal first, and only to the extent that it is relevant to settle this dispute, with the interplay between international and Argentine internal law under Article 8(4) of the Argentina-U.K. BIT. Second, assuming that the terms of the treaty and underlying principles of international law are silent regarding the protection to foreign investors in a situation of emergency, as propounded by Respondent, the Tribunal shall discuss whether Argentine internal law may be applied to fill the alleged gap.

95. It must be borne in mind that there is no contract concluded between BG and the Republic of Argentina, and that the dispute between the two focuses on the scope of protection to which BG's investment is entitled. Because this is precisely the purpose of the Argentina-U.K. BIT, in adjudicating its jurisdiction and, if need be, the substance of this dispute, the Tribunal must rely on the terms of this bilateral treaty as the primary source of law.

96. Regarding the remission in Article 8(4) of the BIT to national and international law, the Parties seem to make much of the issue whether international law and Argentine law are to be deemed of equal rank, as proposed by Respondent, or whether the latter ought to yield to the former, as contended by Claimant.[96] In the opinion of the Tribunal this focus is misplaced. In the first place, the doctrinal and jurisprudential authorities brought to the attention of the Tribunal fail to yield any collision or contradiction between the protection to which Claimant's property rights are entitled under Argentine constitutional and administrative law and the protection it receives under international law. If anything, the constitutional

---

96. See *Alegato Final*, paragraph 111, referring to Respondent's expert on this issue, Professor Benedict Kingsbury, for the proposition that when the treaty itself refers to the application of domestic law, such domestic law holds equal rank with international law. See also Claimant's Post-Hearing Brief, paragraphs 138 et seq., to the effect that under fundamental principles of international law, the latter prevails over domestic law.

jurisprudence developed by the Supreme Court of Argentina around Articles 14 and 17 of the Constitution points to the protection of property rights *lato sensu*,[97] giving rise to a duty to provide full compensation in cases where the State deems it fit for reasons of public policy and regardless of whether an emergency is invoked or not, to unilaterally terminate or modify the terms of a deal concluded with a private party.[98] Thus, the question of the hierarchy that one source of law bears with regard to the other fades in relevance in this case, where property rights would be fully protected under Argentine domestic law in any event.

97. More importantly, the interplay between international law and municipal law under Article 8(4) of the BIT should not overlook that the former may be deemed incorporated into the latter, depending on the status conferred to international treaties and international law in general by a particular constitutional system. This is particularly relevant to the case of Argentina, whose constitutional framework and doctrine have traditionally admitted the direct application of international law whenever feasible and, at least since the constitutional reform undertaken in 1994, expressly providing for the principle that international treaties preempt provincial and federal law.[99] Accordingly, the challenge of discerning the role that international law ought to play in the settlement of this dispute, vis-à-vis domestic law, disappears if one were to take into account that the BIT and underlying principles of international law, as "the supreme law of the land", are incorporated into Argentine domestic law, superseding conflicting domestic statutes.[100]

98. In its *Alegato Final*, Respondent relied on the unquestionable gravity of the crisis that exploded in December 2001 to introduce the argument that the measures allegedly affecting BG's investment, which found support in

---

97. See, *e.g.*, Exhibit JL-30 (*Gregorio Guitiérrez v. Compañía Hispano Americana de Electricidad, 158 Fallos 268 (1930)*), holding that the right of property protected by Articles 14 and 17 of the Argentine Constitution refers to all types of interest, tangible or intangible.

98. See, *e.g.*, Exhibit J-14 (*Compañía de Tranvías Anglo Argentina v. Nación Argentina, 262 Fallos 555 (1965)*), where the Supreme Court, making clear that it was not passing judgment on the government's sovereign power to adopt any economic policies it deems appropriate, yet held the State liable for the unilateral modification of the terms of a concession contract insofar as it infringed on the concessionaire's right to raise tariffs in order to secure a reasonable right of return.

99. Argentine Constitution (as adopted in 1994), Article 75(22).

100. Article 75(22) of the Argentine Constitution.

the Emergency Law adopted in January 2002,[101] must be regarded as a suitable response to the "extraordinary and unforeseeable" magnitude of the crisis, fully justified under the doctrine of "unforeseeable changed circumstances" (*teoría de la imprevisión*) of Article 1198 of the Argentine Civil Code.[102]

99. The Tribunal notes that Article 1198 relates to the law of contracts and that the dispute between the Parties does not arise out of contract. More specifically, Article 1198 of the Argentine Civil Code does not apply in the context of an international investment dispute governed by Article 8(4) of the Argentina-U.K. BIT.

100. Although the Tribunal finds that the BIT is the primary source of rules to assess Respondent's liability, the bilateral investment treaty is not a self-contained legal framework, isolated from international and domestic law. Yet, the domestic law defense of unforeseen changed circumstances is of little assistance to Respondent here. The process for the privatization of *Gas del Estado* and the resulting Regulatory Framework clearly demonstrate a concern for economic and currency instability, a systemic and hardly unpredictable occurrence in Argentina's modern history.

---

101. See supra, paragraphs 53 to 62, where this award discusses and acknowledges the extraordinary gravity of the Argentine crisis leading to the adoption of the Emergency Law and ancillary measures.

102. Article 1198, in its current version, was enacted in 1968, incorporating for the first time the "*teoría de la imprevisión*" (or doctrine of unforeseen changed circumstances). Article 1198 provides that:

> "*Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe y de acuerdo con lo que verosímilmente las partes entendieron o pudieron entender, obrando con cuidado y previsión.*
>
> *En los contratos bilaterales conmutativos y en los unilaterales onerosos y conmutativos de ejecución diferida o continuada, si la prestación a cargo de una de las partes se tornara excesivamente onerosa, por acontecimientos extraordinarios e imprevisibles, la parte perjudicada podrá demandar la resolución del contrato. El mismo principio se aplicará a los contratos aleatorios cuando la excesiva onerosidad se produzca por causas extrañas al riesgo propio del contrato.*
>
> *En los contratos de ejecución continuada la resolución no alcanzará a los efectos ya cumplidos.*
>
> *No procederá la resolución, si el perjudicado hubiese obrado con culpa o estuviese en mora.*
>
> *La otra parte podrá impedir la resolución ofreciendo mejorar equitativamente los efectos del contrato.*"

101. The rejection of the concept of *rebus sic stantibus* under the Argentine Civil Code is not a dismissal of Argentina's defense under the international law doctrine of state of necessity. The Tribunal will address this question in Chapter IX of the award.

102. In brief, the Tribunal shall apply:

a) the Argentina-U.K. BIT with respect to the jurisdictional objections raised by Argentina under the treaty itself;

b) to the extent that jurisdiction is affirmed, Argentine law to the determination of the concept of "asset" in Article 1(a) of the Argentina-U.K. BIT;

c) to the extent that jurisdiction is affirmed, the Argentina-U.K. BIT and such other relevant principles of international law as may have been relied upon by the Parties.

103. In addition, the Tribunal will be mindful of the Argentine Regulatory Framework for the transportation and distribution of natural gas, as it was presented to foreign investors at the time of the privatization of *Gas del Estado* and as subsequently modified by Argentina.

VI. Jurisdiction and Admissibility

104. Argentina raised objections to the jurisdiction of this Tribunal and to the admissibility of BG's claims.

105. The Tribunal will address Argentina's objections in the following order:

a) Is BG an "Investor"?

b) Has BG made an "Investment" in Argentina?

c) Are BG's claims admissible?

d) Is the dispute contractual?

e) May BG bring "derivative claims"?

f) Are measures of general application actionable under the Argentina-U.K. BIT?

g) Is the renegotiation process an obstacle to this Tribunal's jurisdiction?

106. Respondent's allegation that Argentine courts have exclusive jurisdiction over this dispute is related with questions (d) and (e) above, and it will be adjudicated in Section E below.

A. Is BG an "Investor"?

107. BG relies on Section 1(c)(i)(bb) of the definition of "Investor" in the Argentina-U.K. BIT:

> "investor" means:
>
> (i) in respect of the United Kingdom:
>
> . . .
>
> (bb) companies, corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12.

108. It is not disputed that BG is a company incorporated and constituted under the laws in force in the United Kingdom. A copy of BG's Certificate of Incorporation, Memorandum and Articles of Association are on the record.[103]

109. BG therefore qualifies as an "Investor" under the Argentina-U.K. BIT.

110. The Tribunal now turns to the question of whether BG made an "Investment" in Argentina within the terms of the Argentina-U.K. BIT.

B. Has BG Made an "Investment" in Argentina?

111. Article 1 of the Argentina-U.K. BIT includes the following definition of "Investment":

> (a) "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the

103. Exhibit J-188.

investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties;

(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments. The term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement, but the provisions of this Agreement shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force;

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.

112. BG contends that it holds the following "Investments" in Argentina:

a) an indirect participation in the Argentine companies MetroGAS (45.11%)[104] and GASA (54.67%);[105]

[Article 1(a)(ii) of the BIT]

b) the following rights over the economic value of the License,[106]

(i) claims to money and performance under contracts entered into by MetroGAS, and

(ii) benefits from the License granted to MetroGAS to carry out gas distribution services in Argentina;

[Article 1(a)(iii) and (v) of the BIT]

c) rights that the MetroGAS License be respected.[107]

[Article 1(a)(v) of the BIT]

113. Initially, Argentina argued that BG had not provided sufficient evidence of its ownership interest in GASA and MetroGAS.[108] In response, BG provided additional explanation and evidence of this participation.[109] Testimony at the hearing further established that BG's interest in GASA and MetroGAS is no longer contested.[110] Additionally, Argentina has not subsequently denied that BG's ownership interest in GASA and MetroGAS are an "Investment" within the meaning of Article 1(a)(ii) of the Argentina-U.K. BIT. On the contrary, Argentina's *Alegato Final* acknowledged that ". . . *BG tiene una única inversión: sus acciones*."[111]

---

104. Held by BG International (i) directly (6.84%), and (ii) through its 54.67% interest in GASA (*i.e.*, 38.27%).
105. Held by BG International. Statement of Claim (paragraph 48) and Post-Hearing Brief (paragraph 169(a)).
106. Statement of Claim (paragraph 50) and Post-Hearing Brief (paragraph 169(b)).
107. Statement of Claim (paragraph 50) and Post-Hearing Brief (paragraph 169(c)).
108. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, pp. 45-52.
109. Counter-Memorial on Jurisdiction, paragraphs 42-58.
110. Testimony of Messrs. Petrecolla and Molina (Tr. Molina, 12 July 2006, 1587:5-1587:18).
111. Paragraph 185.

114. Argentina does, however, argue that shareholders may only bring claims with respect to measures taken by Argentina that directly interfere with their corporate rights. The thread of this argument runs across a number of Argentina's jurisdictional objections and the Tribunal believes that it is best addressed when it turns to the issue of "derivative claims" in Section E.

115. For now, the Tribunal will focus on whether the rights identified in Paragraphs 112(b) and (c) above constitute an "Investment" for purposes of the Argentina-U.K. BIT. A determination on this point requires consideration of Argentina's contentions that:

a) the definition of "Investment" in the BIT requires that the term "asset" be defined by reference to ". . . *the laws and regulations of the Contracting Party in whose territory the investment is made*"; and

b) the Spanish version of the BIT (*títulos de crédito*) prevails with respect to the meaning of the term "claims to money" in Article 1(a)(iii).[112]

1. "Asset" or "*Activo*"

116. Argentina relied heavily on the reference in Article 1(a) of the BIT to ". . . *the laws and regulations of the Contracting Party in whose territory the investment is made*". More specifically, Argentina asserts that:

a) the term "asset" in Article 1(a) of the BIT should be defined by reference to the laws of Argentina;

b) the Spanish version of the treaty (". . . *el término 'inversión' designa todo elemento del activo . . .*") requires construing the term "*activo*" as it is understood in generally accepted accounting principles; and

c) because MetroGAS has not included the MetroGAS License as an "*activo*" in its accounting, rights under the License are not an asset under the definition of "Investment" of the BIT.

---

112. The term used in the Spanish version of the BIT is "*títulos de crédito*".

117. As to the first point, BG conceded that Argentine law governs the issue of "*. . . whether a particular asset exists and in whom it vests*."[113] The Tribunal agrees with both Parties: the *renvoi* of Article 1(a) of the treaty requires this Tribunal to apply the laws of Argentina to the interpretation of this part of the definition of "Investment" in the Argentina-U.K. BIT. As a matter of conventional international law, this *demarche* is necessary to determine whether rights associated with the MetroGAS License are protected under the BIT.

118. A first conclusion emerges from Argentine law. The existence of the MetroGAS License and certain rights associated with it is unquestionable. The Regulatory Framework presented to international investors in order to promote interest in the privatization of *Gas del Estado* is determinative of this issue. This is not a finding as to the precise content of those rights, or as to BG's *ius standi* to exercise them – the award will deal with this issue later - but merely as to whether those assets were in existence as a matter of Argentine law. Argentina has taken a position with respect to the content, ownership and survival of those rights, but it has not denied their existence.[114]

119. The next question is whether Claimant's rights under the Regulatory Framework described in Chapter III.B of this award, including the MetroGAS License, constitute an "*activo*" pursuant to the definition of "Investment" in the Spanish version of the BIT, or an "asset" as set out in Article 1(a) of the English language version of the treaty.

120. Neither Party offered a definition of "*activo*"[115] under any Argentine law of general application. In the absence of a statutory definition, the Tribunal must turn to the interpretive work of the courts.

---

113. "Responses to the Questions of the Arbitral Tribunal of 10 July 2006", p. 3.

114. For this reason alone, Respondent's reliance on Exhibit JL-490 (*Encana Corporation v. The Republic of Ecuador*, Award of 3 February 2006) is misplaced . This matter is inapposite to this case.

115. At the hearing, BG asserted that "*activo*" under Argentine law means "*. . . todo derecho, sea de carácter real o personal susceptible de valor patrimonial*." It did not, however, provide any legal cite as the source of this definition and it is thus of limited assistance to the Tribunal's investigation of Argentine law ("Responses to the Questions of the Arbitral Tribunal of 10 July 2006", p. 3).

121. In *Industria Mecánica S.A. v. Gas del Estado* (*Industria Mecánica*) the court took an ample patrimonial view of the constitutional protection of property rights:[116]

> [S]*egún la jurisprudencia de esta Corte, el término propiedad empleado en los artículos 14 y 17 de la Constitución Nacional ampara todo el patrimonio incluyendo derechos reales y personales, bienes materiales e inmateriales, [. . .] y en general todos los intereses apreciables que un hombre pueda poseer fuera de sí mismo, su vida y libertad, entre ellos los derechos emergentes de los contratos.*
>
> [Emphasis added]

122. Almost 20 years earlier, in *Compañía de Tranvías Anglo Argentina v. Nación Argentina* (*Compañía de Tranvías*), in a situation where certain measures had disturbed the economics of a concession, the Supreme Court focused on damage to the investor's patrimony as a whole:[117]

> [*las*] *normas tuvieron por consecuencia determinar mayores erogaciones para el concesionario; lo cual justificaba indemnización o aumento de tarifas. No debe olvidarse . . . que quien así legislaba era a su vez poder concedente y como tal, tenía la obligación de respetar la economía general del contrato, es decir su ecuación económico financiera.*

123. The property rights protected by the courts in Argentina are not limited to assets registered for accounting purposes, as the Spanish term "*activo*" might suggest. This conclusion is not altered by Argentina's reliance on the contractual definition of "*Activos Afectados al Servicio*" and "*Activos Esenciales*" set out in Section 1.1 of the Share Transfer Agreement.[118] First, this contract does not trump the broader notion of property embraced by *Compañía de Tranvías* and *Industria Mecánica S.A.* Second, the Share Transfer Agreement itself acknowledges that transfer of the physical assets did not entitle MetroGAS to engage in the distribution of gas, as the holding of a license is mandatorily required for that purpose.[119]

---

116. Exhibit JL-154, pp. 859-860.
117. Exhibit J-14.
118. Exhibit J-115.
119. For instance, clauses 4.3(g), 4.4(d) and 6.1(i) (Exhibit J-115).

124. While Argentina was critical of reliance on the *Tranvías* case in a different context,[120] its criticism confirms the need to focus on property rights. For instance, in its *Alegato Final* Respondent argued that Argentina's offer to renegotiate constitutes an acknowledgement of the investor's property rights.[121] Recognition of these rights was not contingent on their registration as an "*activo*" in the books of MetroGAS.

125. Under the circumstances, the Tribunal finds no support for the contention that property rights are an "asset" only to the extent that they are listed as an "*activo*" for accounting purposes in a company's books. There is no question that MetroGAS received, in terms of value, something more than the physical assets inventoried in the Share Transfer Agreement. MetroGAS was granted a license and other statutory rights without which the physical assets could not have been put to use. In fact, the MetroGAS License was to enter into force on the very same day as the transfer of the physical assets.[122]

126. Interpreted in the light of Argentine jurisprudence, the term "*activo*" in Article 1(a) of the Spanish language Argentina-U.K. BIT is not semantically different from the concept of "asset" employed in the English version. Thus construed, both terms are broader than the accounting reading advocated by Argentina and hereby rejected by the Tribunal.

127. The Tribunal consequently finds that the rights conferred under the Regulatory Framework described in Chapter III.B of this award, including under the MetroGAS License, come under the term "*activo*" and "asset" in the definition of "Investment" set out in Article 1(a) of respectively the Spanish and English versions of the BIT.

---

120. Paragraphs 159 to 167 of the *Alegato Final* set out Argentina's position with respect to this case in the context of its allegations of *force majeure* and *imprevisión* under Argentine law.

121. "*No hay afectación sustancial del derecho de propiedad en la medida que existe un reconocimiento de ese derecho a través del proceso de renegociación, y una voluntad de Argentina de readecuar el contrato . . .*" (*Alegato Final*, paragraph 166(d)).

122. Clause 4.2.2 of the Share Transfer Agreement (Exhibit J-115).

2. "Claims to Money" – "*Títulos de Crédito*"

128. Argentina also pointed to a discrepancy between the two authentic language versions of Article 1(a)(iii) of the Argentina-U.K. BIT.[123]

Spanish Version	English Version
(iii) títulos de crédito directamente relacionados con una inversión específica y todo otro derecho a una prestación contractual que tenga un valor financiero.	(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value.

129. Respondent conceded that the laws and regulations of Argentina do not provide a definition of *título de crédito*.[124] Argentina, nonetheless, drew the Tribunal's attention to the narrow legal meaning of the term according to many legal scholars:[125]

> *. . . el documento escrito, firmado, nominativo, a la orden o al portador, que menciona la promesa unilateral de pago de una suma de dinero o de una cantidad de mercadería, con vencimiento determinado o determinable; o de consignación de mercaderías o de títulos especificados y que socialmente sea considerado como destinado a la circulación.*

130. For Argentina, Article 1(a)(iii) of the BIT only extends protection to investors where their "Investment" takes the form of a "*título de crédito*" (*i.e.*, a "negotiable instrument"). Conversely, BG believes that the English term "claims to money" is broader in scope and includes claims to money under contracts entered into by MetroGAS. Simply put, the divergence of the Spanish "*título de crédito*" and the English "claims to money" is semantically irreconcilable.

131. The Tribunal's analysis therefore begins with Article 33 of the Vienna Convention on the Law of Treaties (the Vienna

---

123. The signature page of the BIT indicates that the treaty was done ". . . *in two originals . . . in the English and Spanish languages, both texts being equally authoritative.*"
124. *Alegato Final*, paragraph 181.
125. Argentina did not identify the legal scholars or the source of this definition.

Convention), which specifically addresses the interpretation of multilingual treaties:[126]

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of a treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

132. The presumption of Paragraph 3 is rebuttable where, like here, the difference in meaning is not removed by reference to Articles 31[127] and 32.[128] Paragraph 3 of Article 33

---

126. Exhibit JL-103.

127. "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

128. "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances

directs the interpreter to consider the object and purpose of the treaty.

133. The United Kingdom and Argentina introduced their BIT with the following paragraphs:

> The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina;
>
> Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State;
>
> Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;
>
> Have agreed as follows . . .

134. Adoption of the Spanish term of the BIT as advocated by Argentina would considerably restrict the coverage of the treaty, discourage "greater investment" and defeat the shared aspiration expressed by Argentina and the U.K. in executing this instrument in 1993.

135. The Tribunal is also persuaded by Argentina's expression of its own understanding of the treaty prior to this dispute. As recalled earlier, Decree 669/00 expressly acknowledges that investors in the privatization of Gas del Estado would be entitled to protection under ". . . *Tratados de Protección Recíproca de Inversiones* . . ." entered into by Argentina.[129] It was clear at the time that BG's investment in MetroGAS would not take the form of "*títulos de crédito*" as this term is now understood by Argentina.

136. Likewise, Resolution 308/02[130] and Decree 1090/02[131] excluded from the renegotiation process any licensee seeking to enforce the rights under its license through an investment

---

of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable."

129. Exhibit J-226, p. 2.

130. Article 11 (Exhibit J-347).

131. Article 1 (Exhibit J-334).

arbitration. It is difficult to understand why Respondent would seek to prohibit investment arbitration, if the underlying rights sought to be enforced do not qualify as an "Investment", as now argued by Argentina.

137. For these reasons, the Tribunal adopts the English text of Article 1(a)(iii) of the Argentina-U.K. BIT for purposes of this award.[132]

3. Conclusion

138. The Tribunal finds that BG's ownership interest as described in Paragraph 112(a) of this award is an "Investment" for the purposes of Article 1(a)(ii) of the Argentina-U.K. BIT.

139. The Tribunal also finds that "*claims to money which are directly related to a specific investment or to any performance under contract having a financial value*" squarely fall within the definition of "Investment" of the BIT. Nonetheless, as noted in Paragraph 118, the survival and precise content of those rights, and BG's standing to exercise them, will be taken up by the Tribunal in Sections D and E below.

C. Are BG's Claims Admissible?

140. The Argentina-U.K. BIT provides that recourse to arbitration is possible only where disputes have been submitted for 18 months to the competent tribunal of the State which hosts the investment and: (i) the tribunal has not issued a final decision; or (ii) the parties are still in dispute after the decision. To recall, the text of Article 8(1) and (2) provides:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

---

132. Conventional international law provides further confirmation of this finding. "Claims to money" are an "investment" pursuant to Article 1(6)(c) of the Energy Charter Treaty (ECT). The ECT translation of the term into Spanish is "*créditos pecuniarios*".

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

141. Argentina argued that failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible. It is to be noted that Article 8(1) of the BIT entitles Argentina to trigger domestic litigation of treaty disputes,[133] and there is no evidence on the record that Argentina even attempted to do so.

142. BG argued that this requirement is senseless as there is no chance that in a case of this nature a decision could ever be rendered within the eighteen-month period. BG further contended that the MFN clause of the Argentina-U.K. BIT[134] entitles BG to rely on the more favorable treatment extended by Argentina to US investors. The Argentina-U.S. Bilateral Investment Treaty does not require prior recourse to local courts for a period of 18 months. Finally, BG relied on the customary international law rule that the requirement of

---

133. Article 8 provides that investment disputes under the BIT shall be submitted ". . . *at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.*"

134. Article 3: "(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State. (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."

exhaustion of local remedies may be disregarded in cases where "*. . . the course of justice is unduly slow or unduly expensive in relation to the prospective compensation.*"[135]

143. Customary international law becomes relevant, but only as a point of departure for the Tribunal's analysis of the evolution of international investment law. Under traditional international law, mistreated investors did not have standing to sue the host State of their investment. Instead, they had to rely on their home State's willingness to espouse their claim by offering diplomatic protection. Diplomatic protection, in turn, would only give rise to international proceedings if local remedies were exhausted.[136]

144. Exhaustion of local remedies, however, is not an absolute bar to international adjudication. Article 15 of the International Law Commission Draft Articles on Diplomatic Protection attempts to codify the exceptions:

> Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

145. The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement of their treaty rights by directly bringing action against the State in whose territory they have invested. Investors may seek redress in arbitration without securing espousal of their claim or diplomatic protection. The Argentina-U.K. BIT is a paradigm of this evolution.

---

135. "State Responsibility", Report by Robert Ago, ILC Special Rapporteur, Yearbook of the ILC 1977, vol. II (Part Two, page 48, paragraph 50, footnote 204). Quoted by BG with approval in its Post-Hearing Brief, paragraph 185 (emphasis omitted).

136. The rule is "*. . . an important principle of customary international law . . .*". Exhibit JL-195 (*Case Concerning the Elettronica Sicula S.p.A. (United States of America v Italy)*, Judgment of20 July 1989, ICJ Reports 1989, *E.L.S.I.*).

146. For the reasons mentioned above, BG's reliance on the exceptions to the customary international law rule of exhaustion of local remedies in this matter is difficult to accept. The Tribunal accepts Argentina's position that as a matter of treaty law investors acting under the Argentina-U.K. BIT must litigate in the host State's courts for 18 months before they can bring their claims to arbitration.

147. As a matter of treaty interpretation, however, Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration. Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication.

148. In this case, the regular operation of the courts in Argentina came under significant pressure after promulgation of the Emergency Law. Concerned with judicial decisions which might undermine the full implementation of emergency legislation, the administration of President Duhalde enacted Decree 214/02,[137] whose purpose was to bar recourse to the courts by those whose rights were felt to be violated:

> *. . . la preservación de la paz social como el necesario reordenamiento de las relaciones jurídicas, no se compadece con la masiva concurrencia a los tribunales de quienes procuran la resolución de sus pretensiones, cuando ellas son de imposible satisfacción, sin causar daño irreparable a la economía y al derecho de todos aquellos que no podrían ver satisfechos sus propios derechos de propiedad, de producirse el colapso final del sistema financiero.*

149. As a matter of policy, Decree 214/02 provided for a stay of all suits brought by those whose rights were allegedly affected by the emergency measures adopted by the government:

> *. . . corresponde disponer la suspensión temporaria de la tramitación de todos los procesos judiciales y medidas cautelares y ejecutorias en los que se*

137. Exhibit J-292.

> *demande o accione en razón de los créditos, deudas, obligaciones, depósitos o reprogramaciones financieras que pudieran considerarse afectados por las normas y disposiciones dictadas en el marco de la crisis y la emergencia.*

150. Article 12 is the operative provision which implements the stated policy objective:

> *. . . se suspende por el plazo de . . . (180) días el cumplimiento de las medidas cautelares en todos los procesos judiciales, en los que se demande o accione contra el Estado Nacional y/o las entidades integrantes del sistema financiero, en razón de los créditos, deudas, obligaciones, depósitos o reprogramaciones financieras que pudieran considerarse afectados por las disposiciones contenidas en el Decreto Nº 1570/01, en la [Ley de Emergencia], en el Decreto Nº 71/02, en el presente decreto, en el Decreto Nº 260/02, en las Resoluciones del MINISTERIO DE ECONOMIA y en las Circulares y demás disposiciones del BANCO CENTRAL DE LA REPUBLICA ARGENTINA dictadas en consecuencia y toda otra disposición referida a dicha normativa.*
>
> *Por el mismo lapso se suspende la ejecución de las sentencias dictadas con fundamento en dichas normas contra el Estado Nacional, los Estados Provinciales, los Municipios o la CIUDAD AUTONOMA DE BUENOS AIRES, sus entidades autárquicas o descentralizadas o empresas o entes estatales, en todos los procesos judiciales referidos a dicha normativa.*

151. The Tribunal notes that the Emergency Law remains in full force five years after its promulgation in 2002, and there is no indication on the record that its enforcement has been attenuated since its original promulgation.[138]

152. Decree 320/02[139] provides further insight into the intervention of the Executive Branch of government to prevent judicial adjudication and enforcement of property rights after the adoption of the Emergency Law. The introductory paragraphs of this decree, signed by President Duhalde on 15 February 2002, recall the State's authority to

---

138. Law 26,204 extended the application of the Emergency Law until 31 December 2007 (Exhibit J-740).
139. Exhibit J-298.

restrict the regular exercise of patrimonial rights,[140] and underscore that the policy objectives of the Emergency Law and its regulations may be defeated by unfettered judicial challenge.[141]

153. It is not within the province of this Tribunal to pass judgment on the policy reasons prompting promulgation of Decrees 214/02 and 320/02, nor to question the sovereign prerogative in their adoption. However, it seems fitting to examine the reasonableness of the expectation that judicial remedies should have been exhausted at a time where the Executive Branch was seeking to prevent any judicial interference with the emergency legislation.

154. Later, in June and August of 2002, Argentina provided in Resolution 308/02[142] and Decree 1090/02[143] that any licensee seeking judicial redress would be excluded from the renegotiation process of its license. The relevant provisions in fact create an incentive for licensees not to go to the courts:

> Article 1 of Decree 1090/02
>
> *Los concesionarios que efectuaren reclamos por incumplimiento contractual fuera del proceso de renegociación . . . quedarán automáticamente excluidos de dicho proceso.*
>
> Article 11 of Resolution 308/02
>
> *Las empresas concesionarias o licenciatarias que mientras se desarrolle el proceso de renegociación en curso, efectuaren una presentación en sede judicial o ante un tribunal arbitral, articulada sobre el presunto incumplimiento contractual fundado en las normas dictadas en razón de la emergencia, serán intimadas por el MINISTERIO DE ECONOMIA, como Autoridad de Aplicación del régimen dispuesto por el Decreto 293/02, a desistir de tal acción, bajo apercibimiento de que si no lo hicieran, se instarán los actos para disponer su exclusión de dicho proceso.*

---

140. The eleventh *Considerando* of Decree 320/2002 (Exhibit J-298) relies on the Supreme Court precedent that extraordinary circumstances authorize the State to ". . . *restringir el ejercicio normal de algunos derechos patrimoniales tutelados por la Constitución . . .*".
141. This is the legislative intent expressed in the *Considerandos* of Decree 320/02 (Exhibit J-298).
142. Exhibit J-347.
143. Exhibit J-334.

155. Argentina took the position in this arbitration that, had BG brought its grievance to domestic courts, Argentina would have collaborated to promote achievement of a prompt final judgment.[144] The Tribunal must assume this to be true under normal circumstances. However, the Tribunal is also persuaded that under the dire circumstances surrounding the emergency measures, the Executive Branch sought to prevent the collapse of the financial system by (i) directly interfering with the normal operation of its courts, and (ii) by excluding litigious licensees from the renegotiation process.

156. The Tribunal has given due consideration to Minister Rosatti's opinion that it would take Argentine courts more than six years to reach a decision in a case like this.[145] Yet, this opinion is not central to the Tribunal's finding on this issue. Rather, the Tribunal notes that a serious problem would loom if admissibility of Claimant's claims were denied thus allowing Respondent at the same time to:

a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations;

b) insist that Claimant go to domestic courts to challenge the very same measures; and

c) exclude from the renegotiation process any licensee that does bring its grievance to local courts.

157. The Tribunal consequently finds admissible the claims brought by BG in this arbitration, thus rendering unnecessary the examination of the relevance of Article 3 of the BIT (Most Favored Nation) to determine whether Claimant should have sought relief by the courts of Argentina during at least a period of 18 months before resorting to arbitration.

D. Is the Dispute Contractual?

158. Article 8(2) of the BIT provides for arbitration of certain investment disputes. Argentina argued that:[146]

---

144. *Alegato Final*, paragraph 234.
145. Exhibit J-439.
146. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, pp. 19-28.

a) Argentina did not assume any commitment with respect to BG;[147]

b) the dispute submitted to arbitration by BG is not a "dispute with regard to an investment" within the terms of the treaty;

c) BG's claim is contractual in nature; and

d) a claim for expropriation requires "something more" than a breach of contract.

159. The Tribunal's focus for the moment concerns jurisdiction only and thus Argentina's claim that there has been no expropriation will be addressed below in Chapter VII. Argentina's other objections fall into one of two categories: the existence or not of specific commitments (paragraph 158(a) above) and the nature of BG's claim (paragraph 158(b) and (c) supra). The Tribunal now takes up these issues *seriatim*.

1. Specific Commitments

160. The privatization of the gas industry in Argentina during the 1989-1992 period and the ensuing Regulatory Framework were described earlier in Chapter III of this award. This Section of the award examines the representations directly or indirectly made by Argentina during that process.

161. As mentioned, the concept of *Gas del Estado*'s privatization originated in Law 23696 of 17 August 1989. Shortly thereafter, on 11 December 1990, Argentina and the United Kingdom executed their BIT.

162. As indicated earlier, under the Gas Law enacted on 20 May 1992 tariffs were to be "just and reasonable".[148] While the Gas Law is silent as to the currency for the calculation or expression of the tariffs, it does provide that:

a) prudent and efficient gas distributors would collect ". . . *ingresos suficientes para satisfacer todos los costos operativos razonables* . . .

147. *Alegato Final*, paragraph 247.
148. Article 2(d).

impuestos, amortizaciones y una rentabilidad razonable . . .";[149]

b) tariffs must be such that they provide for "*rentabilidad razonable*" (*i.e.*, a return commensurate to the return of other activities of equal or comparable risk);[150]

c) tariffs would be adjusted by reference to international market indicators;[151] and

d) tariffs would be subject to review every five years,[152] or on an extraordinary basis.[153]

163. The Bidding Rules, the Gas Decree and the MetroGAS License are more explicit about the currency for the calculation and expression of the tariffs.

164. Section 7.1 of Annex F of the Bidding Rules of 20 July 1992 provides that:[154]

> *Las tarifas están expresadas en pesos convertibles según la Ley 23,928 a la paridad de 1 = 1 con el dólar estadounidense. Las mismas . . . serán ajustadas inmediata y automáticamente en caso de variación de la paridad. A estos efectos se considerará la cantidad de moneda argentina necesaria para adquirir un dólar estadounidense en la plaza de Nueva York.*

165. Section 7.5 of the Bidding Rules permits tariff adjustment for inflation in accordance with US PPI:

> *La tarifa del Distribuidor . . . y la tarifa de transporte . . . serán [ajustadas] semestralmente . . . de acuerdo con la variación operada en el índice de precios al por mayor de productos industriales de los EE.UU. . . . según se establezca en la licencia correspondiente y los restantes requisitos que se establezcan en el Reglamento de Tarifas y Condiciones Generales del Servicio. La Autoridad Regulatoria establecerá el mecanismo para el ajuste.*

---

149. Article 38(a).
150. Article 39.
151. Article 41.
152. Article 42.
153. Upon the request of the service provider (Article 46), or *ex officio* by ENARGAS (Article 47).
154. Exhibit J-100.

166. The Gas Decree of 18 September 1992 establishes that the US dollar is the currency for the calculation of transportation and distribution tariffs.

> *En la adecuación normal y periódica de la tarifas que autorice, [ENARGAS] se ajustará a los siguientes lineamientos:*
>
> *(1) Las tarifas de Transporte y Distribución se calcularán en Dólares.*[155] *El Cuadro Tarifario resultante será expresado en pesos convertibles según la Ley No. 23,928,*[156] *teniendo en cuenta para su reconversión a pesos la paridad establecida en el Artículo 3 del Decreto No. 2.128/91.*[157]

167. Further, Article 41(3) of the Gas Decree requires inclusion in the respective licenses of a tariff adjustment methodology based on international market indicators.

168. Article 42 of the Gas Decree mandates ENARGAS to issue rules applicable to the review of tariffs every five years. The Gas Decree offers the following guidance to the regulator:

> (. . . .) *La revisión global del método empleado para el cálculo de las tarifas . . . se mantendrá por un nuevo período de Cinco (5) años contados a partir de su vigencia, procurando observar los principios de estabilidad, coherencia y previsibilidad tanto para los Consumidores como para los Prestadores.*
>
> *[ENARGAS] establecerá las normas de procedimiento para la revisión del método empleado en el cálculo de las tarifas que asegure la participación de los sujetos de la Ley*. (. . . .)

169. Article 46 of the Gas Decree applies to the extraordinary review of tariffs:

> *[ENARGAS] deberá establecer los requisitos que deberán cumplir los Transportistas, Distribuidores o consumidores en sus solicitudes de modificación de Tarifas o del Reglamento del Servicio a fin de acreditar la necesidad de tales modificaciones.*

---

155. Article 1(1) of the Gas Decree defines "*Dólar*" as ". . . *la moneda de curso legal en los Estados Unidos de América*".
156. The Convertibility Law (Exhibit J-79).
157. Article 3 of the *Decreto No. 2.128/91* (Exhibit J-86) establishes a 1 to 1 parity between the Argentine peso and the US dollar.

> *Las modificaciones contempladas en el Artículo 46 de la Ley deberán basarse en circunstancias específicas no previstas con anterioridad, y no podrán ser recurrentes. Las mismas no incluyen el reajuste que contempla el Artículo 42 de la Ley.* (. . . .)

170. Article 4.5 provides reassurance to licensees that their license may not be modified without their consent:

> (. . . .) *Las licencias otorgadas no . . . serán modificadas durante su vigencia sin el consentimiento de los licenciatarios. No se considerarán modificaciones a la licencia (i) las modificaciones que [ENARGAS] introduzca en el Reglamento del Servicio, sin perjuicio del derecho de [ENARGAS]o del licenciatario a requerir el correspondiente ajuste de las tarifas si el efecto neto de tal modificación alterase en sentido favorable o desfavorable, respectivamente, el equilibrio económico-financiero existente antes de tal modificación; y (ii) los reajustes de la tarifa que conste[n] como anexo de la licencia y que se practiquen de acuerdo con la Ley, esta Reglamentación y los términos de la respectiva licencia. Al convocar a licitación en caso de extinción de una licencia, [ENARGAS] podrá modificar los términos de la licencia vigente hasta ese momento.*

171. The Information Memorandum of September 1992 was circulated to raise interest in the privatization of *Gas del Estado* among foreign investors.[158] This Memorandum touted the availability of real dollar tariffs:[159]

> The privatisation of Gas del Estado offers an unique investment opportunity. Outlined below are some of the attractive characteristics of the privatisation.
>
> (. . . .)
>
> **Attractive tariffs, in real dollar terms.** [Emphasis in the original] The initial tariffs have been set at a level intended to provide the new companies with an attractive return on investment, including the investment necessary to renovate the systems. The tariff regulation, which is based on the U.K. style of price capping formula, allows the new

158. Exhibit J-101.

159. Exhibit J-101, p. 8. Appendix A (p. A-9) further confirms that "*[t]ariffs will be calculated in dollars but expressed in convertible Pesos.*"

companies to maintain the real dollar value of their tariffs and provides incentives to invest in improving efficiency.

[Emphasis added.]

172. The Information Memorandum draws attention to the tariff and adjustment regimes of the Gas Law and of the Gas Decree:[160]

> The Gas [Law] provides that:
>
> - tariffs should be at a level which enables the licensee to earn a reasonable rate of return; and
>
> - profitability should reflect the efficiency of the licensee and satisfactory performance of the licensed service.
>
> The Gas [Law] specifies also that Licensees shall adjust tariffs in accordance with a mechanism which refers to appropriate international market indicators, modified by a factor intended to promote efficiency while providing the licensee with an incentive to invest in the system. The adjustment mechanism shall be reviewed every five years by the NGRE, taking account of the two principles stated above. This mechanism has been adopted in a number of other major utilities internationally and is described as "price capping with periodic regulatory review" (also commonly known as "RPI-X").
>
> (. . . .)
>
> The Regulatory Decree sets out the principles of tariff regulation and the licence contains the detailed adjustment formula. The tariffs and prices are calculated in U.S. dollars and expressed in convertible Argentine pesos as provided in the Convertibility Law (No. 23,928 and its Decree No. 2128/91). The allowed adjustments will also be calculated in U.S. dollars.
>
> Licensees may adjust their tariffs semi-annually to reflect changes in the U.S. Producer Price Index (PPI), which will be used as the market indicator mentioned in the Gas [Law] (. . . .)

160. Exhibit J-101, pp. 26 and 27. These principles are restated in Appendix A of the Information Memorandum.

173. MetroGAS received its 35 year License on 21 December 1992. The MetroGAS License:

a) confirms the application of the US dollar as the currency of reference for the calculation and adjustment of tariffs (Article 9.2);

b) Annex III includes an indication that tariffs are expressed "*en $ convertibles ley 23,928*"[161] (Annex III);

c) sets out the different tariff review and adjustment mechanisms (Articles 9.3, 9.4 and 9.6);

d) requires that modifications to the *Reglamento de Servicio* respond to the evolution and need to improve service, and it calls for consultations with the licensee and a tariff adjustment if the economic and financial equilibrium is disturbed (Article 9.1);

e) requires the consent of the licensee to modify the *Reglas Básicas* of the License (Article 18.2); and

f) prohibits price controls and entitles the licensee to compensation in case of departure from this rule (Article 9.8).

174. Finally, on 28 December 1992, GASA, the Initial Shareholders, MetroGAS, the *Estado Nacional* and *Gas del Estado* entered into a Share Transfer Agreement.[162] Clause 4.2.2 of this agrerement provides for the entry into force of the MetroGAS License.

* * *

175. The genesis of Argentina's privatization of *Gas del Estado* and the representations made to foreign investors at every step of the process are irreconcilable with Respondent's defense. While formally the Regulatory Framework and the MetroGAS License apply to MetroGAS, the record unequivocally shows that the entire privatization process was designed to invite the participation of foreign investors. How the investment is structured is frequently a function of regulatory requirements or fiscal considerations. This,

161. Law 23.928 is the Convertibility Law.
162. Exhibit J-115.

however, does not remove the focus from foreign investors as the main target of Argentina's privatization efforts.

176. It is also difficult to square the investment protection paradigm offered by the Argentina-U.K. BIT with Argentina's position that its commitments are to MetroGAS alone. BG is entitled to rely on these commitments in connection with its allegations of breach of the substantive provisions of the BIT with respect to its "Investment" in Argentina. But this is a matter for Section E below.

2. Nature of BG's Claims

177. Under Article 8 of the Argentina-U.K. BIT, treaty disputes with regard to an "Investment" may be submitted to arbitration.

178. As already noted, BG contended that its "Investment" for purposes of the Argentina-U.K. BIT takes the form of (i) an indirect ownership interest in GASA and MetroGAS; and (ii) certain rights. BG's Statement of Claim describes the "Investment" as follows:[163]

> 49. Since article 1(a)(ii) of the UK Treaty defines investment as *inter alia* "shares in stock" and "any other form of participation in a company, established in the territory of either of the Contracting Parties", BG's participations in the Argentine companies MetroGAS and GASA constitute protected investments under the U.K. Treaty.
>
> 50. Moreover, BG has (i) interests in claims to money and performance under contracts entered into by MetroGAS; and (ii) benefits from the Licence granted by the Government to MetroGAS to carry out gas distribution services in Argentina. These also constitute protected investments under Article 1(a)(iii) and (v) of the UK Treaty.

179. BG has thus submitted to arbitration a dispute relating to damage to such ownership interest and rights. This is, according to BG, the dispute "*with regard to an investment*" in the instant matter. BG argued that Argentina breached the BIT with respect to the following "Investments":

a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

---

163. Statement of Claim, paragraphs 49 and 50

b) BG's rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

180. Argentina has objected to this Tribunal's jurisdiction on grounds that Argentina has not consented to the arbitration of this dispute:[164]

> *60 Observe el Tribunal que el desacuerdo planteado en el caso sub examine está referido a las disposiciones contenidas en una licencia otorgada para la distribución de gas natural y en el marco regulatorio respectivo. Tales desacuerdos no están vinculados con la única inversión realizada por BG y en consecuencia no habilitan la jurisdicción arbitral de conformidad con el artículo 8 del TBI. Las alegadas disputas jurídicas que puedan surgir de dicha licencia e instrumentos deberán ser sometidas, conforme se explica infra, a la jurisdicción de tribunales nacionales libremente consentidas por las partes correspondientes. La República Argentina no niega que los contratos puedan constituir inversiones protegidas. Para protegerlos, simplemente, se requiere que los contratos pertenezcan al inversor, lo que aquí no ocurre.*
>
> *61 Conforme lo expresa LA DEMANDANTE en el párrafo 389 de la Demanda, todos los compromisos que supuestamente la República Argentina habría violentado surgen directamente de la licencia y de instrumentos que forman el marco regulatorio del gas. Por ello, debieron ser planteados en el foro pactado, que no es un tribunal del CNUDMI. LA DEMANDANTE, consciente de la prorroga de jurisdicción que libremente había pactado Metrogas, intenta confundir al Tribunal sobre la real naturaleza de sus reclamos.*

181. The fact that claims under a treaty may relate to underlying rights set out in domestic law, or in a concession, license or contract is not, in and of itself, an impediment to adjudication in the treaty forum. The Tribunal finds persuasive support for this proposition in other investment arbitration awards relied upon by Claimant.[165] The Tribunal

---

164. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, p. 23.

165. Exhibit JL-427 (*Enron Corp & Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2004, paragraphs 91 and 93); Exhibit JL-495 (*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006,

refers in particular to the Annulment Committee findings in *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*:[166]

> . . . where 'the fundamental basis of a claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in the contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty.

182. In *Eureko v. Poland* the tribunal followed the *Vivendi Annulment Committee* decision in upholding its authority to "*. . . consider whether the acts of which Eureko complains, whether or not also breaches of* [contract], *constitute breaches of the treaty*".[167]

183. The Tribunal therefore has jurisdiction to determine if the measures complained of by Claimant constitute a breach of the treaty with respect to "Investments" made by BG, regardless of whether or not the same measures are in breach of the MetroGAS License.

184. Still, BG's claims are properly before this Tribunal only to the extent that BG has standing to bring them. In other words, the question is whether BG is entitled to claim that Argentina has breached the Argentina-U.K. BIT with respect to its "Investments" as follows:

a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

b) BG's alleged rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

---

paragraph 76); Exhibit JL- 435 (*Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, paragraphs 180-183).

166. Exhibit JL-371 (*Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, paragraph 101).

167. Exhibit JL-471 (*Eureko B.V. v Republic of Poland*, ad hoc arbitration, Partial Award, 19 August 2005).

185. The next Section of this award examines the issue of derivative claims.

E. May BG Bring "Derivative Claims"?

186. BG argued that Argentina breached the Argentina-U.K. BIT with respect to the following BG "Investments":

a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

b) BG's rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

187. The Tribunal will thus examine the derivative nature of BG's treaty claims with respect to equity (Article 1(a)(ii) of the BIT) and with respect to "Investments" that take the form set out in Article 1(a)(iii) and (v) of the BIT.

1. Article 1(a)(ii) of the BIT

188. Paragraph 113 of this award records Argentina's acknowledgement that BG holds an indirect shareholding interest in GASA and in MetroGAS. This interest falls squarely within the definition of "Investment" in Article 1(a)(ii) of the BIT.[168]

189. In responding to specific Tribunal questions, BG argued that Argentina dismantled the tariff regime applicable to MetroGAS and destroyed the promised economic equilibrium. This, in turn, allegedly abolished its rights to:[169]

a) ". . . tariffs sufficient for [MetroGAS] to pay back interest and capital on its debt to third parties . . .."; and

b) ". . . recover the value of its equity stake (all of the sums spent in MetroGAS on acquiring its shareholding and in growing the business through

---

168. "['I]nvestment' means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes: . . . (ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties; . . .".

169. Post-Hearing Brief, paragraph 245.

> reinvested income), and a reasonable rate of return on those amounts . . ."

190. Thus articulated, BG's claims are derivative. BG does not claim that Argentina's measures were specifically directed against its shareholding in GASA and MetroGAS. BG claims instead that damage to the value of its shares was caused by (or derives from) measures adopted by Argentina which had a negative impact on the activities of MetroGAS and, hence, on the value of its shareholding in GASA and in MetroGAS.

191. Argentina objected to the jurisdiction of this Tribunal on grounds that derivative claims are proscribed by international law and by domestic corporate law.

192. In support for its position under international law, Argentina initially relied on *Barcelona Traction, Light and Power* Co *Ltd*,[170] and it later invoked other more recent decisions, including *GAMI v Mexico*.[171]

193. The Tribunal finds the *GAMI* decision apposite and compelling as it relates generally to derivative claims, and specifically to the significance of *Barcelona Traction*.

194. GAMI, a U.S. investor, owned 14.18% of a Mexican company (GAM) in the business of producing sugar. GAM owned 5 sugar mills which were formally expropriated by the Mexican government in September of 2001.

195. Mexico did not expropriate GAM, nor did it formally seize GAMI's shares in GAM. GAMI's argument was that the formal expropriation of the sugar mills rendered its shares worthless because the mills were GAM's only productive asset.

196. The *GAMI* tribunal framed the issue of derivative shareholder claims as follows:[172]

> The disputing Parties have devoted considerable efforts to the issue whether GAMI is entitled to claim

---

170. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, pp. 84 *et s.*. Exhibit JL-111 (*Barcelona Traction, Light and Power Co Ltd., Belgium v Spain*, Judgment 5 February 1970, ICJ Reports 1970).
171. *Alegato Final*, paragraph 266. Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, UNCITRAL /NAFTA, Final Award of 15 November 2004).
172. Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, (*GAMI*), UNCITRAL /NAFTA, Final Award of 15 November 2004, paragraph 27).

> on account of its derivative prejudice as a shareholder. The heart of this debate is whether governmental acts or omissions that adversely affect GAM may be pleaded as breaches of NAFTA because they had the result of reducing the value of GAMI's stake in GAM.

197. The tribunal found that "[c]*hapter 11* [of the NAFTA] *does not require a claimant shareholder to be a majority or controlling owner for his investment to qualify for protection.*"[173] In its submission to the *GAMI* tribunal, the United States acknowledged that investors like GAMI were entitled to bring action under the North American Free Trade Agreement (NAFTA) on their own behalf. However, the United States argued that they may only do so with respect to damage to their own interest, and not for injuries to the corporation. Both Mexico and the United States relied on *Barcelona Traction* in support for this proposition.[174] The Tribunal disagreed:[175]

> The Tribunal . . . does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection. The ICJ itself accepted in *E.L.S.I.* [footnote omitted] that US shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures *imposed on that entity*.

198. The *GAMI* tribunal found support for its findings in *Goetz v Burundi*:[176]

> *Le Tribunal observe que la jurisprudence antérieure du CIRDU ne limite pas la qualité pour agir aux seules personnes morales directement visées par les mesures litigieuses mais l'étend aux actionnaires de ces personnes, qui sont les véritables investisseurs.*

199. Like the *GAMI* tribunal, this Tribunal relied on *Vivendi* for a more explicit confirmation of the legitimacy of derivative shareholder claims:[177]

---

173. *Id*, paragraph 28.
174. *Id*, paragraph 29.
175. *Id*, paragraph 30.
176. Exhibit JL-289 (*Antoine Goetz et consorts v République du Burundi*, ICSID Case No ARB/95/3, Award 2 September 1998, 15 *ICSID Review – Foreign Investment Law Journal* 457).

> . . . it cannot be argued that CGE did not have an "investment" in CAA from the date of conclusion of the Concession Contract, or that it was not an "investor" in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach . . .

200. The conclusion of the tribunal's reasoning in *GAMI* is directly on point to the instant dispute:[178]

> . . . The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.

201. The Tribunal finds that no authority on the record, including *Consortium Groupement L.E.S.I. DIPENTA v. Algeria*,[179] leads to a different conclusion or presents an interpretation of *Barcelona Traction* that is inconsistent with the findings in *GAMI*.

202. But *Barcelona Traction* is inapposite to this case for other reasons as well:

a) the case does not stand for what Argentina purports - the central legal principle decided in *Barcelona Traction* is that the right of diplomatic protection of a corporate entity should be attributed to the State of incorporation, a point of law not at issue here;

b) the ICJ specifically stated that it was not deciding whether shareholders could bring a claim for

---

177. Exhibit JL-371 (*Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, paragraph 50).
178. Exhibit JL-447 (*GAMI*, paragraph 33).
179. Exhibit JL-457 (*Consorzio Groupement L.E.S.I. – Dipenta v Algerian Democratic Republic*, ICSID Case No ARB/03/08, Award 10 January 2005).

losses to their interests, since the only claim made was for losses to the enterprise;[180] and

c) even if *Barcelona Traction* were somehow relevant to the case at hand, the agreement of Argentina and the U.K., as set out in the BIT would override an international decision from 1970.

203. Under the Argentina-U.K. BIT, BG is clearly an "Investor" and its shareholding interest in GASA and MetroGAS is undoubtedly an "Investment".

204. For this reason as well Argentina's reliance on principles of domestic corporate law must fail. BG's claim is made under the Argentina-U.K. BIT. BG is an "Investor" who has made an "Investment" in Argentina within the definition of Article 1(a)(ii) of the treaty. It is further uncontroverted that BG's shares in GASA and MetroGAS are "assets" within the meaning ascribed to the term in this award pursuant to Argentine law. The meaning of the BIT is to be determined not by analogy with private law rules, but from the words of treaty itself and in the light of the purpose which it sets out to achieve.[181]

205. This Tribunal therefore has jurisdiction to hear BG's claims as they relate to its indirect shareholding in MetroGAS and GASA (Article 1(a)(ii) of the BIT).

---

180. The ICJ held: ". . . The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders have an independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights . . . The Court has noted . . . that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further." Exhibit JL-108 (*Barcelona Traction, Light and Power Co Ltd* (*Belgium v Spain*), Judgment 5 February 1970, ICJ Reports 1970 paragraphs 48 and 49).

181. The *Loewen* tribunal took this view in the context of a NAFTA dispute: Exhibit JL-398 (*The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, *Loewen*, ICSID Case No ARB(AF)/98/3, Award 26 June 2003, paragraph 233).

2. Article 1(a)(iii) and (v) of the BIT[182]

206. Under Article 1(a)(iii) and (v) of the BIT, the term "Investment" also includes:

a) claims to money which are directly related to a specific "Investment";

b) claims to performance under contract having a financial value; or

c) business concessions conferred by law or under contract.

207. BG argued that its "Investment" takes the form of:

a) ". . . *claims to money and performance under contracts entered into by MetroGAS*";[183] and

b) ". . . *benefits from the Licence granted by the Government to MetroGAS to carry out gas distribution services in Argentina.*"[184]

[Emphasis added]

208. BG's grievance is that Argentina breached the BIT causing damage to BG's "claims to money" and "claims to performance" under the MetroGAS License:[185]

> Here BG has an interest in the economic value of the Licence, i.e. the right for MetroGAS to receive a net stream of income allowing it, commercial risks aside, to recover its investment and to obtain a reasonable rate of return. This is the asset that qualifies as a "claim to money" and "a claim to contractual performance under contract having financial value" under Article 1(a)(iii) and thus as a protected investment under the Treaty. [Footnote omitted].

---

182. "['I]nvestment' means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes: . . (iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value; . . . (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."
183. Statement of Claim, paragraph 50.
184. *Id.*
185. Post-Hearing Brief, paragraph 176.

> Further, BG has an interest that the rights of MetroGAS under the Licence (that is, the basic premises of MetroGAS' tariff regime) be respected, since those rights underpin precisely the economic value of the Licence . . . BG's interest in those Licence rights is the asset that qualifies as a protected investment under Article 1(a)(v) of the Treaty.
>
> [Emphasis added]

209. Does BG own "claims to money" and "claims to performance" or other rights under the MetroGAS License? May BG put "claims to money" and "claims to performance" or assert other rights derived from the MetroGAS License before this Tribunal? One of these two questions must be answered in the affirmative in order to establish BG's *ius standi*.

210. The answer to the first question is a matter of record. BG is not a party to the MetroGAS License[186] and Claimant has not established that it can directly assert claims (to money, performance or otherwise) under the MetroGAS License. The question then becomes whether BG can bring those claims before this Tribunal indirectly, acting on behalf of MetroGAS.

211. Argentina correctly noted[187] that some treaties include a mechanism for foreign investors to bring claims on behalf of an entity in the territory of the host State which they own or control. One example is Article 1117 of the NAFTA:[188]

> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

---

186. Counter-Memorial on Jurisdiction, paragraph 91.
187. *Alegato Final*, paragraph 88.
188. Exhibit J-140.

212. Article 25(2)(b) of the Washington Convention addresses standing from the perspective of the entity in the territory of the host State:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
>
> . . .
>
> [Emphasis added]

213. Under both the NAFTA and ICSID treaties the "investor" must own or control the local entity.

214. The Argentina-U.K. BIT is of little assistance to BG. It does not provide a mechanism for BG to bring claims derived from the License on behalf of MetroGAS. "*Disputes with regard to an investment*" may only include "*an investor of one Contracting Party and the other Contracting Party*."[189] BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert other rights, which it is not entitled to exercise directly. There is no authority on the record, including *CMS*,[190] identifying the source of the Tribunal's authority to depart from Article 8 of the BIT.

215. This finding is consistent with BG's analysis of its own alleged damages. BG's expert did not provide a valuation of damage to BG's rights in the MetroGAS License independent of the loss of value of its shareholding interest in GASA and MetroGAS. The theory, of course, is that any damage to MetroGAS will reflect on the value of BG's equity ownership in GASA and MetroGAS. This finding does not disturb the end result.

3. Conclusion

216. This Tribunal has jurisdiction over BG's claims of breach of the Argentina-U.K. BIT relating to its shareholding interest in GASA and MetroGAS.

217. BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert any other right, derived from the MetroGAS License.

218. These determinations and the Tribunal's finding in paragraph 183 of the award are also dispositive of Argentina's contention that domestic courts have exclusive jurisdiction over BG's claims. Any rights which MetroGAS might have under the jurisdictional clause of the MetroGAS License are not an obstacle to the jurisdiction of this Tribunal over the claims of BG as set out in paragraph 216 above.

---

189. Article 8 of the Argentina-U.K. BIT.
190. Exhibit JL-399 (*CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction 17 July 2003.)

F. Are Measures of General Application Actionable under the Argentina-U.K. BIT?

219. Argentina took the position in this arbitration that measures of general application are not actionable under the Argentina-U.K. BIT.

> *Para poder solicitar la aplicación de un tratado de protección de inversiones, las medidas que se alegan perjudiciales deben estar dirigidas específicamente contra aquéllas. Medidas universales que están destinadas a impactar sobre inversiones y sobre no inversiones, sobre nacionales y sobre extranjeros, no constituyen materia para ser consideradas por este Tribunal. Una atribución semejante importaría hacer caer bajo la competencia de este Tribunal una política pública y no un conflicto legal.*
>
> [Emphasis added]

220. Respondent found support for this position in *Methanex Corporation v. United States of America,*[191] a matter under Chapter 11 of the NAFTA (*Methanex I*).

221. Objecting to Argentina's submission, BG contended that it does not complain of economic conditions in Argentina, nor does it take issue with the government's general economic policies or measures. Rather, so BG, its claims relate to the measures that directly and specifically violate concrete commitments that Argentina made to BG as a foreign investor in the privatized gas industry and that the measures infringed specific protections that Argentina owes to UK investors under the BIT.[192]

222. As regards *Methanex I*, BG submitted that the case was based on NAFTA, not on a bilateral investment treaty, and that the jurisdictional threshold set by Article 1101(1) of the NAFTA requires a stronger connection between the measures complained of and the investment than that provided by Article 8 of the BIT. BG contended that in any event, the findings support BG's case rather than Argentina's. Referring in this connection to the decision of the tribunal in *Pope & Talbot v Canada*, BG submitted that the measures need not be primarily directed at the investment as the measures complained of effectively repudiated the specific

---

191. Exhibit JL-372 (*Methanex Corporation v. United States of America*, Partial Award, 7 August 2002).
192. Counter-Memorial on Jurisdiction, paragraph 61.

and fundamental guarantees deliberately provided by Argentina to entice BG's investment and on which BG relied in making that investment.[193]

223. Indeed, the Tribunal notes that the Argentina-U.K. BIT does not include language like the text at issue in *Methanex I* (*i.e.*, Article 1101 of the NAFTA) and the instant dispute is not a NAFTA dispute. However, this decision merits examination as it was heavily relied upon by Argentina.

224. At issue in *Methanex* were measures of general application enacted by the State of California to ban the sale and use of methyl tertiary-butyl ether, or MTBE, a gasoline additive. On 7 August 2002 the *Methanex I* tribunal rendered a partial award addressing whether measures of general application are actionable under the NAFTA. Concretely, the *Methanex I* tribunal interpreted the following provision of the NAFTA:

> Article 1101: Scope and Coverage
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.
>
> . . .
>
> [Emphasis added]

225. Argentina finds support in two *Methanex I* assumptions and findings, (i) that Article 1101(1) creates a restrictive jurisdictional threshold, and (ii) that the "relating to" language of Article 1101(1) of the NAFTA requires some "*legally significant connection*" beyond effect between the complaining investor and the measures that are subject to complaint:[194]

> We decide that the phrase "relating to " in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an

193. Counter-Memorial on Jurisdiction, paragraphs 72-75.
194. Exhibit JL-372, *cit*, paragraph 147.

> investment and that it requires a legally significant connection between them, as the USA contends. Pursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention, we base that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA's Chapter 11. . . .

226. However, the Tribunal is not convinced that the decision in *Methanex I* is of any support to Argentina's objections. First, *Methanex I* was not about the rights of an investor (BG) that is a shareholder injured by measures that also injure the local companies (GASA and MetroGAS) in which it invested. Rather, *Methanex I* had to do with the rights of a producer of an input (methanol) of a product (MTBE), when that final product is banned or restricted.

227. Second, for the reasons set out below, the Tribunal does not believe that *Methanex I* provides a correct interpretation of the NAFTA.

228. The *Methanex I* tribunal viewed Article 1101(1) of the NAFTA as a jurisdictional threshold for an investor seeking to bring an investor-state claim, as opposed to a part of a general "scope and coverage" provision meant to introduce Chapter 11. *Methanex I* turns Article 1101 into a provision that makes the scope and coverage of Chapter 11 vary according to who is the complaining party, an interpretation at odds with the text and context of Article 1101 and the NAFTA.

229. Article 1101(1) is similar to introductory provisions in a number of other Chapters of NAFTA. Like those other introductory provisions, Article 1101 (1) sets out the scope of obligations under Chapter 11, including the obligations of Canada, Mexico and the United States, as well as the obligations of each government to all covered investors and their investments.

230. The context of Article 1101(1), as well as the object and purpose of the NAFTA, demonstrate that the interpretation of Article 1101(1) in *Methanex I* cannot be sustained. Several Chapters of NAFTA have exceptions to obligations that would simply be unnecessary if measures that did not "relate to" other NAFTA investors or their investments were outside the scope of the obligations. These exceptions would also be unnecessary if some "*legally relevant connection*" beyond or in addition to effect were necessary for a measure to be within

the scope of the obligations. For instance, the following NAFTA provisions would be pointless under the interpretation of NAFTA Article 1101(1) in *Methanex I*:

a) Article 1101(4), preserving the right of the State to perform basic social services such as law enforcement and public education;[195]

b) Articles 1109(4) and (5);[196]

c) Mexico's energy reservations in Annex III and other exceptions in Annexes VI and VII of the NAFTA;[197]

d) the reservations listed by Canada, Mexico and the United States in Annexes V and VI;[198]

e) Article 1401(3) allowing NAFTA Parties to exclusively conduct or provide for public pensions plans and social security systems;

f) Articles 1405(5), (6), and (7), concerning equal competitive opportunities;[199]

g) Article 1411 on transparency;[200] and

---

195. Since the exercise of these functions by the state does not "relate" or "refer" to foreign investors or indeed have any other connection other than effect on foreign investors or their investments.

196. The "equitable, non-discriminatory and good faith application of laws relating to . . . bankruptcy" and the other laws mentioned in those provisions would not require exemption from the transfers obligations, since such laws do not refer to foreign investors or their investments nor have a relationship beyond effect.

197. Because the non-discriminatory measures of general application listed there do not "relate or refer to" any investor or investment, and they would thus *ipso iure* escape the coverage of Chapter 11 under *Methanex I*.

198. Because none would be within the scope of the NAFTA if "relating to" meant "referring to" or some other relationship beyond the effect of the measures on foreign investors or their investments.

199. Paragraphs 5, 6 and 7 establish an "equal competitive opportunities" standard to deal with the problem that applying exactly the same measures to all investors and institutions, domestic or foreign, may sometimes result in disparities of treatment (a situation commonly referred to as *de facto* denial of national treatment). Under the *Methanex I* theory, measures that were non-discriminatory on their face but had discriminatory effects would be outside the scope of the Chapter, and there would be no need to have special rules for assessing their legitimacy.

200. This provision would have little meaning if it would only apply to measures that "relate to " or "refer to" foreign investors. The provision

h) the reservations laboriously listed by the three countries in Annex VII.[201]

231. Applied to the instant matter, *Methanex I* would discharge Argentina of its BIT obligations simply because its measures do not, on their face, target any investor, and it would render the promises used to attract foreign investment meaningless.

232. Finally and tellingly, Article 8(1) of the Argentina-U.K. BIT refutes Argentina's position that not all measures come under its application. This provision bans not just direct seizures of an investment, but also ". . . *measures having an effect equivalent to nationalization or expropriation*". If accepted, the *Methanex I* interpretation would largely nullify the prohibition of indirect expropriation and measures tantamount to expropriation.

233. The Tribunal finds no basis for adopting an interpretation that would render the substantive rights and obligations of the Argentina-U.K. BIT ineffective.

G. Is the Renegotiation Process an Obstacle to this Tribunal's Jurisdiction?

234. Argentina's position is quite simple: this Tribunal is precluded from adjudicating BG's claims because the renegotiation process contemplated by the emergency legislation may yield a successful outcome and a new license:[202]

> *157. El corolario de las medidas tomadas por la UNIREN en acuerdo con las Licenciatarias es que resulta inminente la aprobación final de la renegociación de la licencia de Metrogas, garantizándose que la relación contractual seguirá adelante por el prolongado lapso restante.*

---

clearly is intended to be a comprehensive obligation, and not only limited by a strained interpretation of Article 1101(1).

201. For example, the United States has a reservation in Annex VII related to financial services which applies generally to offers on commodity futures and options, thereby affecting both domestic and foreign investors/investments alike. Why would it be necessary for the United States to take an exception to the obligations of the treaty if this is a measure of general application.

202. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral,* paragraphs 157 and 158.

> *158. Mal puede entonces hablarse de expropiación, y mucho menos, de expropiación de una inversión, cuando de lo que se trata es de una improcedente deducción de la controversia arbitral, en pleno proceso de renegociación de los contratos.*

235. More precisely, Argentina took the position that BG should be stripped of standing because MetroGAS might accept a new deal:[203]

> *159. . . . la inminente suscripción de los Acuerdos referenciados con la licenciataria Metrogas, pone en evidencia la total ausencia de legitimación de LA DEMANDANTE para incoar el presente arbitraje, pues ha quedado sin sustento su reclamo, y por ende las alegadas pérdidas que dice haber sufrido, todo lo que se enmarca en una desafortunada decisión empresaria, debiendo asumir el riesgo y cargar exclusivamente con las consecuencias de su decisión.*

236. In opposition, BG contended that the renegotiation process is irrelevant to jurisdiction and, in any event, that Argentina's objection is misplaced, given that the renegotiation process relates to MetroGAS, not to BG. BG has never participated in the renegotiation process and its claims under the BIT are entirely independent of that process. Further, BG submitted that Argentina is trying to use this process to hide the devastating impact of the measures it took.[204]

237. The Tribunal recalls here Argentina's measures adopted during the summer of 2002, attempting to preclude investors from seeking redress in arbitration or before local courts.[205] Coupled with the finding of lack of jurisdiction now sought by Argentina, these measures would yield the following result:

a) only MetroGAS would have standing to appear in the renegotiation process;

b) the exclusive forum to bring grievances would be UNIREN (to the exclusion of the courts and arbitration under the Argentina-U.K. BIT);

---

203. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, paragraph 159.
204. Counter-Memorial on Jurisdiction, paragraphs 77 and 78.
205. Resolution 308/02 (Exhibit J-347) and Decree 1090/02 (Exhibit J-334).

c) the licensees and their foreign affiliates could not expect to enforce the original terms of the Regulatory Framework (including their license); and

d) any substantive right under the BIT would be lost.

238. Argentina, however, has offered no authority and no plausible interpretation of the BIT that would support a result so inconsistent with the object and purpose of the treaty, and so destructive of its representations to BG.

239. More generally, Argentina's argument that BG's claims are subject to the renegotiation process is irrelevant to a determination as to this Tribunal's jurisdiction. The claims are admissible and properly before the Tribunal as set out in Sections C to F above, and any determination as to the merits of BG's claims is a matter of substance. BG's claims under the treaty are independent of the renegotiation process. BG may at any time withdraw them, or even forego enforcement of an award, if the renegotiation were to yield a result to its satisfaction. The *CMS* tribunal properly addressed this issue:[206]

> It is not for the tribunal to rule on the perspectives of the renegotiation process or on what TGN might do in respect of its shareholders, as these are matters between Argentina and TGN or between TGN and its shareholders.

240. Argentina's jurisdictional objection as it relates to the renegotiation process is accordingly dismissed.

H. Conclusion

241. In its examination of BG's claims for breach of Articles 5 and 2.2 of the Argentina-U.K. BIT the Tribunal shall consider Argentina's representations and commitments as set out in Section D above.

242. Subject to paragraph 217 of this award, the Tribunal has jurisdiction with respect to all of BG's claims which are admissible in this arbitration.

---

206. Exhibit JL-399 (*CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction 17 July 2003, paragraph 86).

243. BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert in this arbitration any other right, derived from the MetroGAS License.

VII. Article 5 of the BIT (Expropriation)

244. BG contended that Argentina has breached Article 5 of the BIT as it allegedly expropriated BG's investments without compensation. BG's primary case on expropriation is that Argentina has expropriated its shareholding in MetroGAS through the substantial destruction of the value of that shareholding in breach of commitments in the Regulatory Framework. BG's alternative case is that Argentina has expropriated its rights under or related to the Licence, *i.e.*, BG's interest over the economic value of the Licence and BG's interest that the rights of MetroGAS under the Licence be respected. Argentina objected to BG's contention and submitted that there has been no violation of Article 5 of the BIT.

245. Article 5 of the BIT provides as follows:

> (1) 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 of a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.
>
> (2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituent under the law in force in any part of its

> own territory, and in which investors of the other Contracting Party own shares, the provisions of paragraph (1) of this Article shall apply.

246. The Tribunal summarizes in the following paragraphs the Parties' contention with regard to BG's expropriation claim.

A. Summary of Parties' Contentions

1. BG's Position

247. As to BG's primary case, the substantial destruction of the value of BG's shareholding in MetroGAS, BG contended that it is based on the well-established principle that a substantial deprivation of the value and economic benefit of an investment even without any alteration of formal ownership rights qualifies as an expropriation. In this connection, BG referred to the Wood-Collins Report, demonstrating that the value of BG's investment in MetroGAS has suffered a reduction of 99% in value due to the measures adopted by Argentina, described in Section D of Chapter III above.[207]

248. BG contended that, from a legal standpoint, a finding of expropriation does not require a demonstration that the host State has benefited from the taking. In any event, so argued BG, Argentina has admitted that its measures had a redistributive effect, transferring wealth to which BG was entitled. Further, BG submitted that the purpose for the adoption of the infringing measures is irrelevant: under Article 5(1) of the BIT compensation is due even where the expropriation is "*for a purpose related to internal needs*".[208]

249. In addition, BG submitted that Argentina permanently eliminated the tariff regime guaranteed under the Regulatory Framework, since there is no prospect that BG will be reinstated to the position it enjoyed before Argentina adopted the measures.[209]

250. BG contended that Argentina disregards a wealth of international case law holding that regulatory and/or police power measures constitute expropriation if contrary to specific commitments and assurances granted to investors.

---

207. Post-Hearing Brief, paragraphs 223-225.
208. Post-Hearing Brief, paragraph 226.
209. Post-Hearing Brief, paragraph 227.

This is of particular relevance in the case of indirect expropriation where the investor retains formal title but the value of the rights attached to such title is diminished or destroyed. The measures can be said to, not only affect the value of the business, but effectively "deprive" the value of the business. [210]

251. Under BG's alternative case, BG submitted that its rights under or related to the Licence are assets that qualify as a protected investment under Article 1(a) of the BIT, and in particular sub-paragraphs (iii) and (v) of this provision. BG contended that Argentina's abolition of the right to economic equilibrium and the tariff regime underpinning this principle constitutes an expropriation of BG's rights under or related to the Licence.[211]

2. Argentina's Position

252. Argentina denied that any expropriation under Article 5 of the BIT has occurred. Argentina contended that the reasonableness, proportionality and the purpose of the emergency measures need to be taken into account to ascertain whether there has been an expropriation under the BIT.[212]

253. In contending that only an indirect or *de facto* expropriation may be of relevance to the present dispute, Argentina submitted that the wording of Article 5 of the BIT makes it apparent that the measures must at least produce the same effect as an expropriation.[213]

254. Argentina further indicated that MetroGAS recorded a net income of US$99.3 million during the first semester of 2006. Argentina also argued that the value of MetroGAS shares has increased since the crisis and that this increase is consistent with the term of 35 years for which the MetroGAS License was stipulated.[214]

255. In emphasizing the wide scope of the regulatory and police powers of a State, Argentina insisted that a claim for indirect expropriation calls for a test of proportionality, balancing the lawfulness and significance of purpose of the

---

210. Post-Hearing Brief, paragraphs 228-237.
211. Post-Hearing Brief, paragraphs 238-241.
212. *Alegato Final*, paragraph 313.
213. *Alegato Final*, paragraphs 317-319.
214. *Alegato Final*, paragraphs 321-323; 428.

measures, including whether such purpose could have reasonably been achieved in a less detrimental manner, against the damage suffered as a consequence of the measures.[215]

256. As to BG's expectations under the Regulatory Framework, Argentina contended that the applicable Regulatory Framework is the same as that approved when BG decided to invest, adapted to the new macroeconomic context resulting from the crisis. In analyzing the Regulatory Framework, Argentina contended that contrary to BG's allegations, Argentina had not amended specific regulations concerning the gas industry, but has issued a general rule applicable to the society as a whole. According to the Emergency Law, the goal was "*ordenar el contexto macroeconómico a partir de la crisis, manteniendo las mismas condiciones de previsibilidad para la inversión.*" Further, Argentina drew attention to Sections 18.2 and 18.3 of the MetroGAS License, in which it is held, *inter alia*, that any provisions of the License may be held invalid and unenforceable pursuant to a judgment of the local courts. Thus, the Emergency Law and the provisions adopted as a consequence thereof could not be in breach of the BIT.[216]

257. Further, Argentina submitted that BG's claim for expropriation is inadmissible on grounds of unjust enrichment as, between 1992 and 2001, MetroGAS collected from users an overcharge amounting to between 6% and 7% as prevention of an economic emergency. This means that loss of profitability was anticipated with the payment of the country risk overcharge.[217]

B. The Tribunal's Findings

258. In determining whether Argentina has violated Article 5 of the BIT by expropriating BG's investment, the Tribunal has to define what constitutes expropriation, as it is not defined in the BIT.

---

215. *Alegato Final*, paragraphs 327-329.
216. *Alegato Final*, paragraphs 331-336; 390-398. For Section 18.2 of the MetroGAS Licence, see paragraph 48 above. Section 18.3 of the MetroGAS License provides that: "*Si alguna disposición de esta Licencia fuera declarada inválida o inexigible por sentencia firme del tribunal competente, la validez y exigibilidad de las restantes disposiciones de esta Licencia no serán afectadas. Cada estipulación de la Licencia será válida y exigible en la mayor medida permitida por la ley aplicable.*"
217. *Alegato Final*, paragraphs 369-370.

259. For the purpose of the present dispute, direct expropriation is of no relevance, since it is "*understood as the forcible* appropriation *by the State of the tangible or intangible property of individuals by means of administrative or legislative action*".[218] This is not what has happened in this case because Argentina has not appropriated BG's investment. Rather, the Tribunal has to consider whether Argentina has adopted "*measures having effect equivalent to . . . expropriation*", as provided in Article 5(1) of the BIT, constituting indirect expropriation.[219]

260. Tribunals have defined indirect expropriation as measures that have the effect of "interfering" with or "neutralizing" property.

261. This standard appears in the Iran-U.S. Claims Tribunal's *Starrett Housing Corporation*:[220]

> [I]t is recognized in international law that the measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

262. Subsequent tribunals, including *Impregilo, Lauder*, and *Pope & Talbot*, have likewise applied this standard in determining whether an investor's property has been indirectly expropriated.

263. The *Impregilo* Tribunal provided that:[221]

> . . . all the key decisions relating to indirect expropriation mention the 'interference' of the Host

---

218. *LG&E Energy Corpl, LG&E Capital Corp., LG&E Internacional Inc. V. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 187.

219. For a comprehensive summary of cases and customary international law in general with respect to the definition of expropriation see JL-405 (*Fireman's Fund Insurance Company v The United Mexican States*, NAFTA ICSID Case No. ARB(AF)/02/01, Award dated 17 July 2006, Paragraph 176).

220. JL-157 (*Starrett Housing Corporation v. Islamic Republic of Iran*, Case No 24, Interlocutory Award No ITL 32-24-1, 19 December 1983, 4 Iran-US CTR 122, p. 154).

221. JL-460 (*Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision of the Tribunal on Objections to Jurisdiction, 22 April 2005, paragraphs 278 and 279).

> State in the normal exercise, by the investor, of its economic rights.
>
> Moreover, the effect of the measures taken must be of such importance that those measures can be considered as having an effect equivalent to expropriation.

264. The *Lauder* Tribunal held that ". . . *indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property*." [222]

265. Finally, *Pope & Talbot* held that indirect expropriation required consideration of ". . . *whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from its owner*."[223]

266. Most recently, the tribunal in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Corp. v. The Argentine Republic* summarized as follows the requirements for establishing indirect expropriation under the Argentina-U.S. BIT as follows:[224]

> Generally, the expression "equivalent to expropriation" or "tantamount to expropriation" found in most bilateral treaties, may refer both, to the so-called "creeping expropriation" and to the de facto expropriation. Their common point rests in the fact that the host State's actions or conduct do not involve "overt taking" but the taking occurs when governmental measures have "effectively neutralize[d] the benefit of property of the foreign owner." 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. As to the differences, it is usual to say that indirect expropriation may show itself in a gradual or growing form –creeping expropriation— or through a sole and

---

222. JL-351 (*Ronald S Lauder v Czech Republic*, *Lauder*, UNCITRAL Arbitration, Final Award, 3 September 2001, paragraph 200).
223. JL/326 (*Pope & Talbot Inc v Government of Canada*, Interim Award 26 June 2000, paragraph 100).
224. *LG&E Energy Corpl, LG&E Capital Corp., LG&E Internacional Inc. V. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 188; *see* also Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 September 2001, paragraph 604).

> unique action, or through actions being quite close in time or simultaneous –de facto expropriation.

267. Thus, the question with regard to BG's primary case is whether the measures adopted by Argentina, as described in Chapter III.D above, have had the effect of "interfering with" or "neutralizing" the benefit of BG's property, specifically, of BG's shareholding in MetroGAS.

268. The Tribunal notes that a State may exercise its sovereign power in issuing regulatory measures affecting private property for the benefit of the public welfare. Compensation for expropriation is required if the measure adopted by the State is "*irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that ". . . any form of exploitation thereof. . ." has disappeared. . . .*"[225] Conversely, a measure does not qualify as equivalent to expropriation if the "*investment continues to operate, even if profits are diminished*".[226]

269. Having considered the foregoing, the Tribunal concludes that Argentina has not violated Article 5 of the BIT, as it did not expropriate BG's investment.

270. Specifically, the impact of Argentina's measures has not been permanent on the value of BG's shareholding in MetroGAS. It might well be that the measures adopted by Argentina were severe causing a fluctuation of BG's investment during the crisis. However, MetroGAS' business never halted, continues to operate, and has an asset base which is recovering.

271. Further, in reliance on the set of requirements set forth in *Pope & Talbot*, the Tribunal does not see that a substantial deprivation of BG's shareholding in MetroGAS has occurred, depriving BG of the control of the investment in MetroGAS or managing the day-to-day operations of MetroGAS. Nor have the measures caused the arrest and detention of MetroGAS officials or employees. Nor has Argentina interfered in the administration of the company, impeding the distribution of dividends to MetroGAS' shareholders, or interfering in the appointment of officials and managers.

---

225. Exhibit JL-397 (*TECMED SA v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraph 116).
226. *LG&E* (paragraph 191); *see also Pope & Talbot* (paragraphs 101-102).

272. It follows that BG's alternative case in relation to BG's rights under or related to the License must fail as well, given that the Tribunal does not find that the measures adopted by Argentina caused a permanent, severe deprivation of BG's rights with regard to its investment.

VIII. Article 2.2 of the BIT (Promotion and Protection of Investment)

273. In addition to expropriation, BG argued that Argentina has breached the standards of treatment provided in 2.2 of the BIT. Argentina objected to BG's contention.

274. Article 2.2 of the BIT provides as follows:

> 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.

A. Fair and Equitable Treatment

275. What follows is a summary of the numerous legal and factual contentions of BG and Argentina as presented in the Parties' written and oral submissions with respect to Article 2.2 of the BIT.

1. Summary of Parties' Contentions

a. BG's Position

276. BG contended that Argentina treated BG's investment unfairly and inequitably in failing to provide BG with a stable and predictable investment environment in accordance with its legitimate and reasonable expectations.

277. Referring to the origin of the standard of fair and equitable treatment and its relationship with the international minimum standard of treatment, BG contended that fair and equitable treatment is an overriding general duty

which encompasses other standards and certainly the international minimum standard for the treatment of aliens.

278. In reliance upon recent case law, BG contended that the minimum standard of treatment, also as interpreted by the NAFTA Free Trade Commission in relation to Article 1105(1) of the NAFTA, equating fair and equitable treatment with the customary international law minimum standard of treatment of aliens, has evolved such that it is an autonomous treaty concept to be given its plain meaning, and thus not simply synonymous with the customary international minimum standard. In BG's view, case law has consistently held that fundamentally altering the investment framework against legitimate investor expectations is by definition unfair and inequitable.[227]

279. To the extent that Argentina relied upon its well-intentioned measures to face a state of emergency, BG contended that Argentina ignores that the standard of fair and equitable treatment is an objective standard and that it is not necessary to establish bad faith, as recently held in *Azurix Corp. v. Argentina*.[228]

280. With respect to the factual scenario, BG submitted that Argentina lured investors like BG into investing in its recently privatized gas industry by representing to them that the

---

227. BG's Post-Hearing Brief, paragraphs 258-269 referring to Exhibit JL-495 (*Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 372); Exhibit JL-472 (*Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova*, Award dated 22 September 2005, paragraph 4.2.4); Exhibit JL-471 (*Eureko B.V. v. Republic of Poland*, Partial Award dated 19 August 2005, paragraph 232); Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, UNCITRAL /NAFTA, Final Award of 15 November 2004, paragraph 91); Exhibit JL-431 (*MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004, paragraph 114); Exhibit JL-429 (*Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award dated 30 April 2004, paragraph 98); Exhibit JL-397 (*TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraph 154); Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Partial Award dated 13 September 2001, paragraph 611); Exhibit JL-350 (*Metalcad Corporation v. The United Mexican States*, NAFTA ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000, paragraph 99); Exhibit JL-345 (*Pope & Talbot v. Canada*, NAFTA UNCITRAL, Award dated 10 April 2001, paragraph 111).

228. BG's Post-Hearing Brief, paragraph 271 referring to Exhibit JL-495, *cit*, paragraph 372.

investment would be governed by a stable tariff regime, which would guarantee them a reasonable real-dollar income.

281. BG contended that the tariff regime owed its promised stability to the following main features:

a) that tariffs would provide efficient and prudent operators with sufficient revenue to cover all reasonable costs, including the cost of capital, taxes, amortization and a "reasonable rate of return" (the "economic-financial equilibrium" or the principle of "recovery of costs");

b) that tariffs would be calculated in U.S. dollars and converted to pesos for billing purposes at the applicable exchange rate;

c) that tariffs would be adjusted every six months in accordance with the US PPI;

d) that tariffs would be subject to the Five-Year Review and the Extraordinary Review, which would ensure the continued economic-financial equilibrium of the License;

e) that tariffs would not be frozen or subject to price controls without compensation; and

f) that the tariff regime would not be changed without the Licensees' consent.[229]

282. BG asserted that after enticing BG to invest, Argentina took a series of damaging measures that destroyed the key guarantees of the Regulatory Framework under which BG reasonably expected to operate. These measures were at odds with the stability and predictability of the investment framework required by the principle of fair and equitable treatment. In summary, BG submitted that since August 2000 MetroGAS has operated in an unpredictable and, to a large extent, incomprehensible investment environment, because the government of Argentina:

a) suspended the US PPI adjustment of tariffs, by way of an injunction issued in August 2000 and subsequent decisions of ENARGAS;

---

229. Statement of Claim, paragraphs 12 and 433; Post-Hearing Brief, paragraph 5.

b) flatly abolished the calculation of MetroGAS' tariffs in dollars, as the Convertibility Law of 2002 converted the July 1999 dollar tariffs into pesos at the artificial rate of one to one and definitely abolished the adjustment of those tariffs in accordance with the US PPI;

c) effectively abolished the tariff review mechanisms established under the Regulatory Framework. Both the Five-Year Review and the Extraordinary Review, would have required Argentina to adjust those peso tariffs to cover MetroGAS' drastically increased costs in order to assure its reasonable rate of return; and

d) established a little more than fictitious renegotiation process, which has produced no concrete serious offer to re-establish the guarantees of the tariff regime, or alleviate the imbalance of the License.[230]

b. Argentina's Position

283. Argentina objected to the violation of the standard of fair and equitable treatment under Article 2.2 of the BIT and contended that the impact of the collapse on BG's business is related to a general crisis in which the measures adopted were aimed at maintaining the sustainability of the economy in general, and of the public service companies in particular.

284. Argentina submitted that the fair and equitable treatment is not an independent standard and it argued that this standard only requires treating investors in accordance with the international minimum standard. Argentina criticized that BG's broad interpretation turns the fair and equitable treatment standard into a strict liability standard with negative consequence for both the States and international law. Argentina relied on certain NAFTA and ICSID decisions and suggested that this is also the position held by the United States when approving their several BIT models.[231]

---

230. Statement of Claim, paragraphs 440-442.
231. *Memorial de Contestación*, paragraphs 338 *et seq.*; *Alegato Final*, paragraphs 430-442 referring to Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States,* NAFTA UNCITRAL, Award dated 26 January 2006); Exhibit JL-347 (*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia,*

285. Referring to Article 8.4 of the BIT, Argentina stated that the Parties expressly stipulated the applicability of the law of the State party to the controversy, in this case, the law of the Argentine Republic. Therefore, the Tribunal must take into account the determination of the powers of the State to issue measures tending to protect their public policy, and the acknowledgment of any such powers on the basis of the rules contained in the BIT. In Argentina's view, the well-intended measures taken by Argentina were reasonable and justified in terms of the macro-economic context in which they were adopted to face the state of emergency. Thus, it must be borne in mind that under international law, the fair and equitable treatment standard must be applied differently in normal circumstances and under an emergency situation.[232]

286. In Argentina's view the Regulatory Framework has not been subject to radical change and it has at all times been honored. Contrary to BG's intention, Argentina held that the Regulatory Framework offers no guarantees, including the alleged guarantee to dollar denominated tariffs. Further, BG may not claim a right to annual profitability for 35 years, plus amortizations or short-term profits, as in cases of financial investments, since BG made an investment in public service assets. It has to be noted that the impact of the collapse on BG's business is related to a general crisis in which the measures adopted were aimed at maintaining the sustainability of the economy in which public service companies operate.[233]

287. As to BG's submission that States are to maintain stable investment environments in accordance with the investor's legitimate expectations, Argentina submitted that the Parties did not include a "stabilization clause" in the BIT. Therefore, it is inadmissible for BG to try to achieve the same effect, as it would seem to imply that the State cannot modify the provisions on the basis upon which the investment was made. Emphasizing that the Emergency Law was grounded, Argentina asserted that even if BG's interpretation of the

---

ICSID Case No. ARB/99/02, Award dated 25 June 2001); Exhibit JL-314 (*Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United Mexican States,* NAFTA ICSID Case No. ARB(AF)/97/2, Award dated 1 November 1999); Exhibit JL-329 (*SD Myers, Inc. v. Government of Canada,* NAFTA UNCITRAL, First Partial Award dated 13 November 2000); Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004).

232. *Alegato Final,* paragraphs 444-450.

233. *Alegato Final,* paragraphs 455-465.

standard of fair and equitable treatment were to follow, its claim ought to be dismissed nonetheless.[234]

288. In summary, Argentina submitted that the program which has been applied since 2002 had the following priorities:

a) initiating a path towards the recovery of economic activities;

b) immediately handling the urgent social situation brought about by the economic depression;

c) preventing the collapse of the financial system;

d) precluding the dilution of saving deposits frozen within the financial system;

e) re-organizing the Argentine, provincial and municipal financial systems;

f) facilitating the performance of such contracts as may have been affected by the crisis, precluding the unjust enrichment of certain groups and the resulting poverty of others; and

g) normalizing financial relations with the rest of the world and with multilateral credit organizations affected by the default on public debt.[235]

2. The Tribunal's Findings

289. The Tribunal must determine whether the measures adopted by Argentina and described in Chapter III.D above are in breach of the standard established under the first sentence of Article 2.2 of the BIT:

> 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.

290. The Parties raised the issue of the relationship between the undefined concept of fair and equitable treatment in the BIT and the international minimum standard under general

234. *Alegato Final*, paragraphs 471-474.
235. *Alegato Final*, paragraph 466.

principles of international law. More precisely, BG argued that fair and equitable treatment in the Argentina-U.K. BIT is an overriding general duty which encompasses other standards - and certainly the international minimum standard. Conversely, Argentina took the position that the fair and equitable standard of Article 2.2 of the BIT affords no protection in addition to the international minimum standard. Thus, at the very least, there is no dispute between the Parties that a breach of the international minimum standard automatically yields a violation of the obligation to accord fair and equitable treatment under the Argentina-U.K. BIT.

291. For the reasons set out below, this Tribunal has concluded that the measures adopted by Argentina fall below the international minimum standard and it is consequently not necessary for this award to examine whether the Argentina-U.K. BIT provides a more generous independent standard of protection.

292. The Tribunal's analysis starts with the standard of fair and equitable treatment as aptly articulated in *Waste Management II* - drawing from the *SD Myers, Mondev, ADF* and *Loewen* decisions:[236]

> . . . the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.

293. This point of departure is particularly fitting as all of these NAFTA tribunals were under an obligation to consider that the concept of fair and equitable treatment "*. . . does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*"[237]

---

236. Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, paragraph 98).

237. *See* Notes of Interpretation issued by the NAFTA Free Trade Commission in 31 July 2001.

294. But *Waste Management II* is apposite to the instant for one more reason: its unambiguous statement that commitments to the investor are relevant to the application of the minimum standard of protection under international law:

> In applying [the] standard it is relevant that treatment is in breach of representations made by the host state which were reasonably relied on by the claimant.

295. As illustrated by *Generation Ukraine v. Ukraine*, this principle is also recognized in the context of litigation under bilateral investment treaties:[238]

> . . . the protection of [legitimate expectations] is a major concern of the minimum standards of treatment contained in bilateral investment treaties.

296. And as illustrated by *Revere Copper and Brass, Inc. v. Overseas Private-Investment Corp.*, the importance of assurances given to investors predates the BIT generation:[239]

> We regard these principles as particularly applicable where the questions is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.

297. In this connection, the tribunal in *LG&E* summarized the nature of the investor's expectations as follows:[240]

> 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 . . .

298. The duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest. This does not

---

238. Exhibit JL-407 (*Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003, paragraph 20.37).
239. Exhibit JL-135 (*Revere Copper and Brass, Inc v Overseas Private - Investment Corp.* award of 24 August 1978, 56 *International Law Reports* 258, at 1331).
240. *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 130).

imply a freezing of the legal system, as suggested by Argentina. Rather, in order to adapt to changing economic, political and legal circumstances the State's regulatory power still remains in place. As previously held by tribunals addressing similar considerations, ". . . *the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.*"[241]

299. Similarly, the tribunal in *CMS* concluded that:[242]

> It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made.

300. The words of the President of Argentina in his presentation of the BIT to the Argentine Congress in 1992 highlight the need to establish a climate of stability and confidence to attract investments:[243]

> . . . *A través de ellos, los estados aceptan mantener inalterables durante su vigencia ciertas normas de tratamiento de inversiones, con lo que se espera establecer un clima de estabilidad y confianza para atraer inversiones*.
>
> [Emphasis added]

301. As to the requirement of bad faith, Argentina relies on the findings in *Genin*[244] and *Waste Management II*.[245] In the

---

241. *Saluka Investments v. Czech Republic* (UNCITRAL Partial Award dated 17 March 2006, paragraph 304); see also Exhibit JL-374 (*Marvin Feldman v. The United Mexican States,* NAFTA ICSID Case No. ARB(AF)/99/1 Award dated 16 December 2002, paragraph 112): "[g]overnments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue."

242. Exhibit JL-464 (*CMS Gas Transmission Company v. the Argentine Republic,* ICSID Case No ARB/01/8, Award dispatched to the parties on 12 May 2005, paragraph 277).

243. Exhibit J-108.

244. Exhibit JL-347 (*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/02, Award dated 25 June 2001, paragraph 367).

former decision, the tribunal held solely that a violation of the minimum standard "*would include acts showing a willful neglect of duty . . . or even subjective bad faith*" (emphasis added). In the latter, the tribunal found that the standard set forth in the *Neer* case, involving willful neglect of duty and bad faith, has been rejected. Therefore, the Tribunal holds that, in concurrence with prior arbitral findings, the violation of the standard of fair and equitable treatment does not require bad faith by the host State.[246]

302. The Tribunal is mindful of the evolution of the international minimum standard. The NAFTA tribunal in *Thunderbird* summarized this evolution as follows:[247]

> The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law. Notwithstanding the evolution of customary law since decisions such as [the] *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a

---

245. Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, paragraphs 93 and 98).

246. Exhibit JL-373 (*Mondev International Ltd. v. The United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 October 2002, paragraph 116); Exhibit JL-398 (*The Loewen Group, Inc. and Raymond Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003, paragraph 132); Exhibit JL-433 (*Occidental Exploration and Production Company v The Republic of Ecuador*, London Court of International Arbitration, Administered Case No UN 3467, Final Award of 1 July 2004, paragraph 186); Exhibit JL-397 (*TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraph 153); Exhibit JL-429, *cit*, paragraph 93; Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic*, ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 280); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 129); Exhibit JL-495 (*Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 372); Exhibit JL-435 (*Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, paragraphs 293-300).

247. Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA UNCITRAL Award dated 26 January 2006, paragraph 194); see also *e.g.*, Exhibit JL-435, *cit*, paragraphs 299-300; Exhibit JL-495, *cit*, paragraphs 361-372; Exhibit JL-373, *cit*, paragraph 116; Exhibit JL-329 (*S.D. Myers, Inc. v. Government of Canada*, NAFTA UNCITRAL, First Partial Award dated 13 November 2000, paragraphs 259 *et seq*.).

> breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.

303. In the instant matter, the measures adopted by Argentina fall below the international minimum standard for several reasons.

304. Faced with the economic crisis of inflation and public deficit of the late 1980s, Argentina sought to attract in particular foreign investors to invest in formerly state-owned gas companies. The Gas Law, Gas Decree and MetroGAS License, described in detail in Chapter III.B above, were all part of an attractive Regulatory Framework addressing specific risks with the emphasis on an efficient, just and reasonable tariff regime. It is not a mere coincidence that the different regulations were enacted within two years after the BIT was signed.

305. Of predictable interest to foreign investors were those parts of the Regulatory Framework in conjunction with the specific commitments represented by Argentina, as described in Chapter VI.D.1 above, in which Argentina guaranteed, *inter alia*, (i) to apply U.S. dollars as the currency of reference for the calculation of tariffs before their conversion in Argentine pesos for billing purposes (Article 41(1) of the Gas Decree and Section 9.2 of the *Reglas Básicas* of the MetroGAS License); (ii) semi-annual adjustment regime of the tariffs in accordance with the US PPI (Section 9.4.1.1 of the *Reglas Básicas* of the MetroGAS License; (iii) the entitlement of the revision of the tariffs every five years, and, upon request an "extraordinary review" on "objective grounds" to maintain that tariffs are at a sufficient level to provide a reasonable rate of return (Article 38 of the Gas Law); and (iv) the reassurance that the licenses may not be modified without the consent of the licensees, entitling the investor to compensation in case the Government changed the tariff regime (Sections 9.8 and 18.2 of the MetroGAS License). The availability of real-dollar tariffs was specifically highlighted in the Information Memorandum circulated by Argentina to promote the privatization amongst foreign investors.[248]

---

248. See paragraphs 160-176 above.

306. These conditions appealed to BG, and resulted in its investment in MetroGAS. Considering also the incorporation of provisions relating to the stability of the Regulatory Framework in the MetroGAS License,[249] BG could reasonably rely on the Regulatory Framework.

307. Argentina, however, entirely altered the legal and business environment by taking a series of radical measures, starting in 1999, as described in Chapter III.D above. Argentina's derogation from the tariff regime, dollar standard and adjustment mechanism was and is in contradiction with the established Regulatory Framework as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment. In so doing, Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment.

308. In this connection it bears emphasis that the second suspension of the US PPI, formalized by Decree 669/00, recognized that the licensees had "*derecho legítimamente adquirido*" to the US PPI tariff adjustments[250] and acknowledged that Bilateral Investment Treaties are a part of the legal framework relevant to investments in Argentina.[251] As it turns out, the gas distribution tariffs have not been adjusted for inflation since July 1999 and, thus, have remained frozen at pre-crisis values.

309. 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

---

249. See paragraphs 48-51 above.

250. Exhibit J-226, Decree 669/00, page 2: "*Que dicho sistema de ajuste constituye una premisa básica, condición de los pliegos licitatorios y de las ofertas adjudicadas que fueron su consecuencia, y por lo tanto importa un derecho legítimamente adquirido por parte de las Licenciatarias adjudicatarias de cada licencia.*"

251. Exhibit J-226, Decree 669/00, page 1: "*Que el proceso privatizador y las inversiones resultantes encuentran amparo legal en la normativa vigente, y en especial, también en los Tratados de Protección Recíproca de Inversiones suscriptos por al REPUBLICA ARGENTINA y ratificados por diversas leyes.*"

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.

310. In summary, when the situation of currency devaluation materialized, Argentina fundamentally modified the investment Regulatory Framework, which, as stated above, provided for specific commitments that were meant to apply precisely in a situation of currency devaluation and cost variations. Thus, Argentina reversed commitments towards BG, when BG relied the most on its legitimate and reasonable expectations of a stable and predictable business and legal investment environment.

B. Protection and Constant Security

311. Further, the Parties are in dispute about the scope and application of the second part of the first sentence of Article 2.2 of the BIT, which reads *"Investments of investors of each Contracting Party . . . shall enjoy protection and constant security in the territory of the other Contracting Party"*.

312. BG submitted that the measures taken by Argentina were at odds with Argentina's active protection and constant security obligation of BG's investments, as required under the first sentence of Article 2.2 of the BIT.

1. Summary of Parties' Contentions

a. BG's Position

313. BG follows the decision of the tribunal in *Azurix,* by linking the standard of fair and equitable treatment to the general duty to protect investments.[252]

314. In reliance on the findings in *AAPL*[253] *AMT*[254] and *CME*,[255] BG submitted that the standard of protection and constant security provided in the BIT is one of due diligence, requiring Argentina to exercise reasonable care and actively protect BG's investment. Thus, the duty of protection and

---

252. Post-Hearing Brief, paragraph 275.
253. Exhibit JL-208 (*Asian Agricultural Products Ltd v. Sri Lanka,* ICSID Case No. ARB/87/3, Award dated 27 June 1990 (AAPL)).
254. Exhibit JL-275 (*American Manufacturing & Trading Inc v. The Republic of Zaire,* ICSID Case No. ARB/93/1, Award dated 21 February 1997 (AMT)).
255. Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic,* UNCITRAL, Partial Award dated 13 September 2001, paragraph 613).

security of investments is infringed by government measures that fail to apply the rules specifically designed to govern and protect the investment by withdrawing protection and security previously granted to an investment, regardless of whether property is physically destroyed or whether judicial remedies may be available.[256]

315. More specifically, BG contended that in accordance with *AAPL* the duty to ensure the protection and security of the investment embodies an "*objective standard of vigilance*" which is violated by the "*mere lack or want of diligence, without any need to establish malice or negligence.*"[257]

316. Referring to the decision in *AMT*, BG submitted that the tribunal interpreted the standard as requiring the active conduct of the host State in taking "*all measure of precaution to protect the investments.*"[258]

317. As to the scope of the standard, BG relies on *CME*, which found that:

> The 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.[259]

318. With respect to BG's factual contentions concerning the violation of Argentina's protection and constant security obligation, BG submitted that Argentina's duty involved, in particular, and at the very least, the application of the Regulatory Framework that it set up for the specific purpose of ensuring the viability, legal and economic protection and security of the investment. BG asserted that Argentina did exactly the opposite, in complete disregard for the protection and constant security of BG's investment.[260] The detailed factual contentions of BG are set forth in paragraphs 276-282 above. Although they relate to the standard of fair and equitable treatment, they are relevant with regard to the standard of protection and constant security as in BG's view

---

256. Statement of Claim, paragraphs 421 *et seq.*; Post-Hearing Brief, paragraphs 273 *et seq.*
257. Post-Hearing Brief, paragraph 273 quoting *AAPL* (paragraphs 48, 77 and 85).
258. Post-Hearing Brief, *ibid*., quoting *AMT* (paragraph 6.05).
259. Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 September 2001,paragraph 613).
260. Post-Hearing Brief, paragraph 276.

the duty of protection and constant security of investments is part of the standard of fair and equitable treatment.

b. Argentina's Position

319. Argentina denied that it has violated the standard of protection and constant security under the BIT and criticized that BG does not specify which duty to act it has violated. Argentina contended that BG has neither a factual nor a legal basis to make Argentina responsible for having omitted due diligence.

320. In contesting the relevance of the case law relied upon by BG, Argentina stated, without the benefit of any references, that jurisprudence and doctrine are unanimous in conceiving that the standard of protection and security is a standard of "physical protection". BG, however, has not invoked any act of physical violence against its investment.[261]

321. Relying on *Tecmed*, Argentina highlights that "*the security and protection guarantee is not absolute and that it does not impose upon the Government issuing it strict liability*." In the context of the present case, Argentina submitted that MetroGAS had all the possibilities of resorting to the legal system in force in Argentina in order to protect its contractual rights under the same terms and conditions as any other litigant.[262]

322. Finally, Argentina relies on the notion of emergency and draws attention to the fact that, during the period under examination, the country was undergoing the worst economic, social and institutional crisis of its history.[263]

2. The Tribunal's Findings

323. The Tribunal can be relatively brief in relation to the allegations of BG. BG's claim with respect to the standard of protection and constant security must fail.

324. The Tribunal observes that notions of "protection and constant security" or "full protection and security" in international law have traditionally been associated with situations where the physical security of the investor or its

261. *Memorial de Contestación*, paragraph 574.
262. *Memorial de Contestación*, paragraphs 575 and 576.
263. *Memorial de Contestación*, paragraph 577.

investment is compromised. Indeed, the authorities relied upon by BG confirm this:

a) in *AAPL* the tribunal had to determine under the Sri Lanka-U.K. BIT whether the physical destruction of property of AAPL and the killing of a farm manager and permanent staff members were in violation of the provision of protection and security under Article 2.2 of the Sri Lanka-U.K. BIT; [264]

b) in *AMT* the tribunal found that under the U.S.–Zaire BIT, Zaire had violated the protection and security standard required by the treaty in relation to lootings carried out against AMT's investment.[265]

325. Similarly at issue in *E.L.S.I* was the occupation of the investor's plant by its workers following its requisition by the Mayor of Palermo[266] and *Wena Hotels Limited v. Arab Republic of Egypt* relates to the forceful seizure of property.[267]

326. The Tribunal is mindful that other tribunals have found that the standard of "*protection and constant security*" encompasses stability of the legal framework applicable to the investment. By relating the standards of "*protection and constant security*" and "*fair and equitable treatment*" such tribunals have found that the host State is under an obligation to provide a "*secure investment environment*".[268] However, in light of the decisions quoted above, the Tribunal finds it inappropriate to depart from the originally understood standard of "*protection and constant security*".

---

264. *AAPL* (paragraphs 28 and 53).
265. *AMT* (paragraphs 6.05-6.12).
266. Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy)*, 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989).
267. Exhibit JL-331 (*Wena Hotels Ltd v A RA-b Republic of Egypt*, ICSID Case No ARB/98/4, Award of 8 December 2000, paragraphs 84-95).
268. Exhibit JL-495 (*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 408); *Siemens v. The Argentine Republic*, ICSID Case No ARB/02/8, Award of 6 February 2007, paragraph 303, referring to the Argentina-Germany BIT which includes, however, the qualified term of ¨legal security¨ in the relevant provision.

327. Considering the facts of this dispute and the Parties' submissions, the Tribunal notes that BG has not alleged physical violence or damage in the implementation of the measures adopted by Argentina, nor does the Tribunal see that such violence or damage has in fact occurred.

328. Accordingly, the Tribunal concludes that Argentina has not breached the standard of protection and constant security set out in Article 2.2 of the Argentina-U.K. BIT.

C. Unreasonable and Discriminatory Measures

329. BG also contended that, in violation of the second sentence of Article 2.2 of the BIT, Argentina impaired BG's use and enjoyment of its investment by unreasonable and discriminatory measures, by placing a disproportionate and discriminatory burden on MetroGAS and BG. Argentina objected to BG's allegations.

330. The second sentence of Article 2.2 of the BIT provides as follows:

> 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.

1. Unreasonable Measures

(a) Summary of Parties' Contentions

(i) BG's Position

331. BG contended that Argentina's measures are unreasonable because they dismantled the entire tariff regime of the gas distribution industry.

332. As the term "unreasonable measures" is not defined, BG relies on the following definition provided by the commentator R. Happ that,

> [I]t is possible to understand 'unreasonable' in two different ways: Either as a procedural concept, that is whether the governmental measure furthers the government's objectives (sic.) is the less restrictive measure and whether the impairment is proportional to the achieved end; or as a substantive concept. However, since it is always in the eye of the beholder

> whether the measure is substantially reasonable or not, the substantive concept approach must be rejected."[269]

333. BG submitted that Argentina's unreasonable measures of dismantling the entire tariff regime of the gas distribution industry are "*contrary to the expectations of BG and of any reasonable and impartial person*". According to BG, Argentina's Regulatory Framework created and fuelled legitimate expectations which were specifically incompatible with the sorts of measures that it subsequently adopted. It was, thus, unreasonable to strip BG of the key guarantees upon which its investment was based.[270]

334. Further, BG contended that the measures are unreasonable, because, in comparison to BG, other sectors were excluded from the scope of the *pesificación* and freezing of prices and tariffs, or otherwise benefited from compensatory and mitigating measures, or were at least permitted to increase their prices in accordance with inflation.[271]

(ii) Argentina's Position

335. In its defence, Argentina contended that the measures adopted where justified and proportional to the aim sought and within the context of the collapse of the Argentine economy.

336. In equating the legal meaning of "unreasonable" with "arbitrary",[272] Argentina contended that the arbitrariness standard demands the verification of certain extremes: (i) the capricious violation of the legal system in force without reason or justification; and (ii) the determination of the context which gives rise to the adoption of the government measures. For Argentina, measures are not arbitrary absent a

---

269. Statement of Claim, paragraph 449, quoting R. Happ, "Dispute Settlement under the Energy Charter Treaty", (2002) 45 German Yearbook of International Law 331.
270. Statement of Claim, paragraphs 450-451; Post-Hearing Brief, paragraph 277.
271. Statement of Claim, paragraph 452.
272. The Tribunal notes that the Spanish versions of Argentina's submissions refer also to "*medidas arbitrarias*" and not only to "*medidas irrazonables*" (see, *e.g.*, *Alegato Final*, paragraph 476).

premeditated intent to breach the rules in force and to act in a way contrary to the law.[273]

337. Argentina submitted that by respecting the law, it took adequate steps to safeguard the general welfare of all players in the Argentine economy, including foreign investors. Explaining in detail the aim of each measure taken by it, Argentina contended that the actions taken were reasonable and proportional to the purpose sought. Argentina's goal was that companies could continue to operate, to obtain revenues and make a profit. Argentina puts special emphasis on the commenced renegotiation process of utility contracts to which MetroGAS is part as well.[274]

338. In the alternative and in reliance on *E.L.S.I.*, Argentina contended that an action taken by the host State may be considered illegal and yet not be arbitrary under international law.[275]

(b) The Tribunal's Findings

339. The Tribunal has to determine whether the measures taken by Argentina, described in Chapter III.D above, are unreasonable in a way that impairs the ". . . *management, maintenance, use, enjoyment or disposal . . .*" of BG's investment in Argentina.[276]

340. The term "unreasonable" is not defined in the BIT. Therefore, the Tribunal has to look at its ordinary meaning for international law.

341. While there might be some overlap, the Tribunal does not deem it appropriate to equate "unreasonableness" and "arbitrariness". First, the term "arbitrary" does not appear in Article 2.2 of the Argentina-U.K. BIT. Moreover, one connotation of "arbitrariness" under international law involves a breach beyond the ordinary meaning of "reason" seemingly calling for ". . . *a willful disregard of due process of*

273. *Alegato Final*, paragraphs 476-479.
274. *Memorial de Contestación*, paragraphs 420-469; 510-525; *Alegato Final*, paragraphs 471-482.
275. *Memorial de Contestación*, paragraph 516.
276. Article 2.2 of the Argentina-U.K. BIT.

law, an act which shocks, or at least surprises, a sense of juridical propriety."[277]

342. Like the "fair and equitable treatment" standard, "reasonableness" should be measured against the expectations of the parties to the bilateral investment treaty, rather than as a function of the means chosen by the State to achieve its goals:[278]

> . . . As with the fair and equitable standard, the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behaviour in light of the goals of the Treaty.[279]

343. Thus, withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investments is by definition unreasonable and a breach of the treaty.

344. Argentina adopted certain measures to address its economic, political and social crisis. It is not for this Tribunal to pass judgment on the reasonableness or effectiveness of such measures as a matter of political economy. Rather, this Tribunal is concerned with the interpretation and application of Article 2.2 of the Argentina-U.K. BIT. As indicated above, Argentina unilaterally withdrew commitments which induced BG to make its investment in Argentina and this constitutes unreasonable action and a breach of this provision of the treaty.

345. Argentina guaranteed, *inter alia*:

(a) the application of U.S. dollars as the currency of reference for the calculation of tariffs before their conversion into Argentine pesos for billing purposes;

---

277. Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy)*, 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989).
278. See paragraphs 294 to 300 of this award.
279. Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 September 2001, paragraph 158).

(b) a semi-annual adjustment regime of the tariffs in accordance with the US PPI;

(c) revision of the tariffs every five years;

(d) an "extraordinary review" mechanism based on "objective grounds" to ensure that tariffs provide a reasonable rate of return; and

(d) the reassurance that the licenses may not be modified without the consent of the licensees, entitling the investor to compensation in case the government changed the tariff regime.

The availability of real-dollar tariffs was specifically highlighted in the Information Memorandum circulated by Argentina to promote the public tender amongst foreign investors.[280]

346. Unilateral withdrawal by Argentina of these key components of the Regulatory Framework was from the perspective of the Argentina-U.K. BIT unreasonable and it was therefore in breach of the second sentence of Article 2.2 of the treaty.

2. Discriminatory Measures

(a) Summary of Parties' Contentions

(i) BG's Position

347. BG contended that the measures adopted by Argentina discriminated against BG. BG stressed that in contrast to other sectors of the Argentine economy that were permitted to recover swiftly from the impact of the measures, Argentina consciously placed a disproportionate burden on largely foreign-controlled energy companies like MetroGAS.

348. BG advocated a flexible interpretation of what constitutes a "discriminatory" measure. In reliance on *Feldman* and *Occidental*, BG contended that measures may be discriminatory even if not based on nationality, and even where discrimination is not express or intentional. Rather, it suffices that the measures have a discriminatory effect.

280. See paragraphs 160-176 above.

Further, according to BG, it is not necessary that differential treatment be in the same economic sector.[281]

349. BG submitted that the Argentine Government itself noted the discrimination by stating that *"one sector transfers resources to another."*[282] The measures taken by Argentina to limit the impact of its measures in sectors such as oil and gas production, banking and public contracts, were not made available to gas distributors and transporters. Thus, Argentina's measures were and continue to be discriminatory.[283]

(ii) Argentina's Position

350. Argentina objected to BG's legal and factual contentions and invoked the principle of discriminatory treatment articulated in *E.L.S.I.* and *Genin*: *i.e.*, that discriminatory treatment is to give foreign investors a less favorable treatment than that granted to nationals.[284] Argentina added to this understanding the notion that discrimination is characterized by capricious, unreasonable or absurd criteria.[285]

351. Argentina submitted that the measures were general in nature, aimed at overcoming a period of generalized collapse of the economy and extended equally to all inhabitants, in all sectors. Thus, foreign investors as licensees of public services cannot remain outside this situation. The measures taken by Argentina affected all entities falling within the special category set forth in Article 8 of the Emergency Law, including BG. Argentina explained that each public service is governed by different regulations, agreements and characteristics that provided for different rate adjustments from the ones established in the provisions applicable to the natural gas industry: [286]

> *No puede pretenderse válidamente que el régimen aplicable al agua potable y a las cloacas sea igual al aplicable al gas natural o a los transportes públicos o a la electricidad o al servicio postal: todos ellos son*

---

281. Statement of Claim, paragraph 456.
282. Exhibit J-472.
283. Post-Hearing Brief, paragraph 278.
284. *Memorial de Contestación*, paragraphs 495-502.
285. *Alegato Final*, paragraph 483.
286. *Memorial de Contestación*, paragraphs 530-568; *Alegato Final*, paragraphs 486-495.

servicios públicos pero no por ello están sujetos a las mismas normas o regímenes.[287]

352. Argentina also relied on the renegotiation process, which it portrayed as evidence of equality of treatment of MetroGAS and BG.[288]

353. It was also Argentina's position that at no time did MetroGAS or BG receive unequal treatment within the same sector, as MetroGAS was not subject to a special or more onerous sacrifice.

(b) The Tribunal's Findings

354. The Tribunal notes Claimant's reliance on *Marvin Feldman v. Mexico* and *Occidental v. Ecuador* in support for its claim of discrimination.[289] Both of these cases relate to the alleged breach of an obligation which, in the Argentina-U.K. BIT, is set out in Article 3.[290] Claimant did not argue that Argentina breached Article 3, nor did it provide an explanation of the relationship between Article 2.2 and Article 3.

355. Nonetheless, the Tribunal accepts for the sake of its analysis, that a measure in breach of the national treatment or MFN standards of Article 3 of the BIT would unavoidably also be "discriminatory" in the sense of the second sentence of Article 2.2 of the BIT.

356. In determining whether discrimination has occurred, the Tribunal considers it appropriate to follow the "three-part" test discussed in *Thunderbird v. Mexico.*[291] Under this test, it is necessary to:

---

287. *Memorial de Contestación*, paragraph 531.
288. *Memorial de Contestación*, paragraphs 530-568; *Alegato Final*, paragraphs 486-495.
289. Post-Hearing Brief, paragraph 379.
290. Article 3 of the BIT provides as follows: "(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State. (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."
291. Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States,* NAFTA UNCITRAL, Award dated 26 January 2006, paragraph 170).

a) identify the relevant entities of the national treatment comparison, to determine whether they are in like circumstances;

b) consider the relative treatment received by each such entity so as to ascertain the best level of treatment available to any other domestic or foreign investor; and

c) consider such factors as may be relevant to justify any difference in treatment.

357. It may well be that the measures adopted by Argentina did differentiate gas-distribution companies from other public service providers. However, there is no discussion on the record as to why BG was "in like circumstances" to companies operating, for instance, in the transmission and distribution of electricity.

358. In fact, it would at first glance appear that MetroGAS was not "in like circumstances" relative to other licensees who did not agree to the suspension of the US PPI adjustments at the invitation of the Secretary of Energy on 6 January 2000, and again on 17 July 2000.

359. The Tribunal notes that also by applying the standards set out in *E.L.S.I.* to establish the existence of discriminatory measures, as suggested by BG, it is not apparent that Argentina's measures were "*not taken under similar circumstances against another national.*"[292]

360. Under the circumstances, the Tribunal is not convinced that Argentina's measures discriminated against BG in the sense of the second sentence of Article 2.2 of the Argentina-U.K. BIT.

D. Observance of Obligations Entered Into With Regard to BG's Investments

361. The final part of Article 2.2 of the Argentina-U.K. BIT provides that:

> Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

---

292. JL-195 (*Case Concerning the Elettronica Sicula S.p.A. (United States of America v Italy)*, Judgment of 20 July 1989, ICJ Rep. 1989, pages 61-62).

362. In reply to a question put to the Parties by the Tribunal, BG took the position that Argentina had breached the Argentina-U.K. BIT by violating the MetroGAS License:[293]

> Argentina's violations of the Licence do amount to a violation of the Treaty, and in particular the prohibition of expropriation without compensation, fair and equitable treatment, and all the subordinated standards of treatment of Article 2(2) of the Treaty.

363. This claim must fail in the light of the Tribunal's earlier finding that BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert other rights, derived from the MetroGAS License (see Chapter VI.E.2 above).

364. However, BG also contended that the same principles included in the MetroGAS License were incorporated in the Gas Law, the Gas Decree and the Bidding Rules.[294] Chapters III.A-B and VI.D.1 of this award discuss the genesis of the privatization of *Gas del Estado*. Chapter VI.D.1 focuses in particular on the representations made by Argentina to promote interest in the privatization and attract foreign investors, including BG.

365. The rules announced by Argentina in the Information Memorandum and materialized in the Gas Law, the Gas Decree and the Bidding Rules were clearly not addressed at MetroGAS alone. As indicated in paragraph 176 of this award, BG is entitled to rely on these commitments in connection with its allegations of breach of the substantive provisions of the BIT with respect to its "Investment" in Argentina.

366. In Chapter VIII.A above, this Tribunal has already concluded that the adoption of measures by Argentina which destroyed key elements of the much publicized Regulatory Framework, constitutes a breach by Argentina of its substantive obligation under the Argentina-U.K. BIT to accord BG fair and equitable treatment.

IX. National Emergency and State of Necessity

367. Defending the measures as described in Chapter III.D above, Argentina submitted that the severe economic, social and political crisis it has undergone exempted Argentina from

293. Post-Hearing Brief, paragraph 282.
294. Post-Hearing Brief, paragraph 283.

liability in light of a state of emergency or a state of necessity. Argentina referred in its primary defense to Article 4 of the BIT, contending that it has not violated any standard of the BIT. Alternatively, Argentina resorted to the doctrine of "necessity" under customary international law. To summarize, Argentina argued that even if the Tribunal finds that there has been a violation of the BIT, measures adopted by Argentina to palliate the greatest crisis in Argentine history were justified by a "state of necessity" under both Argentine and customary international law.[295] BG objected to both defenses.

368. The Tribunal will now summarize the Parties' contentions.

A. National Emergency under the BIT

369. Article 4 of the BIT provides as follows:

> 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.
>
> [Emphasis added]

1. Summary of Parties' Contentions

a. Argentina's Position

370. Argentina submitted that Article 4 of the BIT expressly establishes the case of a foreign investor suffering losses by virtue of a state of national emergency. Thus, the BIT legitimates actions taken by the host State, provided that the foreign investor is treated in equality with other investors,

---

295. Initially, Argentina submitted as a separate defence that the measures it had adopted were constitutional under Argentine law (*see Memorial de Contestación*, paragraphs 686-700). However, during the course of the proceedings, Argentina appears to have incorporated this defence in the state of necessity defence under international law.

domestic or foreign, with respect to losses suffered in the territory of the host State.[296]

371. As to the standard required under Article 4 of the BIT, Argentina contended that there should be no discrimination as regards measures established to repair or compensate losses suffered. The term "losses" incurred is used in a broad sense, including any kind of harm. With regard to compensation, Argentina highlighted that Article 4 of the BIT does not demand for payment of compensation, but refers to the treatment given to investors as regards "*restituciones, indemnizaciones, compensaciones u otros resarcimientos.*"[297]

372. Relying on *AAPL*, Argentina submitted that the losses allegedly incurred are not limited to destruction of property due to armed hostilities, insurrections or other uses of force, but refer to any situation of risk or disaster on a national level calling for immediate action.[298]

373. Objecting to BG's comparison drawn on the basis of Article XI of the Argentina-U.S. BIT, which BG submitted was an "exculpatory expression" not contained in the Argentina-U.K. BIT, Argentina contended that the principle enshrined in Article XI of the Argentina-U.S. BIT exists regardless of its inclusion in the BIT. According to Argentina, a bilateral investment treaty cannot prevent a State party from adopting such measures as it deems necessary to maintain the public order and guarantee the protection of its own essential security interests.[299]

374. Following this interpretation, Argentina contended that it acted in accordance with Article 4 of the BIT. The measures adopted by Argentina were due to a state of national emergency, pre-dating the adoption of the measures. Thus, the losses the population suffered were not the result of the measures taken by Argentina, but the result of the combination of factors leading to the state of emergency, including:

---

296. *Memorial de Contestación*, paragraphs 670-671; *Alegato Final*, paragraphs 496-497.
297. *Memorial de Contestación*, paragraph 672; *Dúplica*, paragraph 739; *Alegato Final*, paragraph 506.
298. *Memorial de Contestación*, paragraph 673; *Dúplica*, paragraphs 736-742; *Alegato Final*, paragraphs 499-505.
299. *Dúplica*, paragraph 743.

a) the resignation of the constitutional President of the Argentine Republic amidst an extraordinary political-institutional collapse, followed by a succession of several presidents;

b) the strong devaluation of the national currency in the international markets;

c) the collapse of the Argentine banking system; and

d) the serious social crisis with poverty, indigence and unemployment rates hitting record levels and tens of people killed in the midst of confrontations in the Federal Capital City, as well as in the rest of the country.[300]

375. Argentina stated that in light of these severe circumstances, the enactment of the Emergency Law was a measure to mitigate the damages suffered by society as a whole, by according equal treatment to all national and foreign companies.[301]

b. BG's Position

376. BG disagrees that Article 4 of the BIT has an exonerating effect. The only point of concurrence with Argentina's interpretation of Article 4 of the BIT is that in BG's view this provision does not require Argentina to make reparation to a protected investor on any specific basis. Article 4 provides that if any domestic or third-state investor is accorded any such reparation for loss suffered in a situation of "national emergency", among others, then qualifying investors under the BIT "*shall be accorded . . . treatment . . . no less favourable*".[302]

377. BG objected to Argentina's submission that Article 4 of the BIT is not limited to cases of physical destruction of property caused by force in circumstances of armed conflict. According to BG, Article 4 of the BIT is in the nature of provisions commonly referred to as "war and civil disturbance" clauses or "losses due to war" clauses. The

---

300. *Memorial de Contestación*, paragraph 676; *Alegato Final*, paragraphs 513-515.
301. *Memorial de Contestación*, paragraph 678; *Alegato Final*, paragraphs 520-521.
302. Reply, paragraph 396.

purpose of Article 4 of the BIT was to cover cases in which general international law or insurance contracts exclude state responsibility altogether, or the payment of compensation. BG submitted that in any event, neither Article 4 of the BIT nor any other provision of the BIT "legitimizes" the measures adopted by Argentina, or Argentina's failure to provide compensation.[303]

378. In summary, BG's position is that Article 4 of the BIT operates in situations where: (i) an investor has suffered damages as a result of armed conflict or similar circumstances; but (ii) that investor does not have a specific entitlement to reparation under another provision of the BIT or customary international law; and (iii) 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 such circumstances, Article 4 of the BIT provides that a qualifying investor is entitled to "treatment no less favorable" than that accorded to the investors who have been accorded compensation or other forms of reparation. BG relied also on the findings of the tribunals in *AMT* and *AAPL*.[304]

379. Further, BG submitted that the content of Article 4 of the BIT is clear from the context of the BIT as a whole. In relation to Article 2.2 of the BIT, BG submitted that in the event that the treatment established under Article 2.2 of the BIT is not afforded, and Article 2.2 of the BIT is accordingly breached, reparation is due under general rules of customary international law. Similarly, the right to receive "prompt, adequate and effective compensation" according to Article 5.1 of the BIT requires no support from Article 4 of the BIT in order to operate. Therefore, BG concluded, Argentina cannot invoke Article 4 of the BIT to restrict the distinct obligations incumbent upon it under Articles 2.2 and 5.1 of the BIT.[305]

380. Finally, BG contended that even if Article 4 of the BIT were applicable in the present case, it would only underline the preferential treatment that Argentina accorded to several other sectors and activities. BG submitted that as

---

303. Reply, paragraphs 392(a) and 397 *et seq.*, also referring to the decision in *CMS* where the tribunal analyzed Article XI of the Argentina-U.S. BIT, which includes in BG's view a typical exculpatory language (paragraphs 332 *et seq.*); Post-Hearing Brief, paragraph 292(a)-(b).
304. Reply, paragraphs 406-409, referring to *AMT* (paragraphs 3.04 and 6.4-6.14).
305. Reply, paragraphs 410-414.

compensation for the impact of the Emergency Law, Argentina has adopted special rules with respect to several categories of investors, including gas producers, banks, construction companies, seaport and airport operators.[306]

2. The Tribunal's Findings

381. The Tribunal finds that no state of emergency defense is available to Argentina under the Argentina-U.K. BIT. In the Tribunal's view, neither Article 4 of the treaty, nor the BIT as a whole, exonerate Argentina's breaches on grounds of state of emergency or state of necessity.

382. Applying the interpretive principles of Article 31 of the Vienna Convention, this Tribunal concludes that Article 4 of the BIT does no more than ensure that the State does not treat the foreign investor less favorably than its own investor or investors of any third State with regard to "*restitution, indemnification, compensation or other settlement*" in case the foreign investor suffers losses due to, *inter alia*, a state of national emergency. Article 4 of the BIT provides for a specific expression of the national treatment and most favored nation standard in relation to the compensation of losses resulting from certain actions. Article 4 is merely concerned with the situation where nationals of the host State are indemnified or compensated, or benefit from a settlement. In this context, foreign investors should not be treated less favourably. Liability and compensation are thus expressly mandated, not excused.[307]

383. In this context, the tribunal in *CMS* held under the Argentina-U.S. BIT, which contains a similar provision as the present Article 4 of the BIT, that:

> 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 the applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at

306. Reply, paragraphs 160 and 415-416.
307. Note in this context also the title of Article 4 of the BIT: "Compensation for Losses".

> offsetting or minimizing losses will be applied in a non-discriminatory manner.[308]

384. The fact that Article 4 of the BIT contemplates the state of national emergency as a distinct category of exceptional circumstances is of no assistance to Argentina. This fact was noted by the tribunal in *LG&E* in respect of a similar provision in the Argentina-U.S. BIT (Article IV.3).[309] However, the tribunal in *LG&E* did not accept Argentina's invocation of state of necessity on the basis of Article IV.3 of the Argentina-U.S. BIT, but rather of Article XI for a limited period of time (1 December 2001 – 26 April 2003).

385. The Tribunal notes that the Argentina-U.K. BIT does not include a national security exception analogous to Article XI of the Argentina-U.S. BIT.[310] Consequently, the Tribunal need not express an opinion as to a possible national security exception, or its impact on a State's obligation to pay

---

308. Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic,* ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 375); *see also Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic,* ICSID Case No. ARB/01/3, Award dated 15 May 2007, paragraph 320, referring to Article IV(3) of the Argentina-U.S. BIT, which contains similar wording as Article 4 of the present BIT: "*The Tribunal must note that the only meaning of Article IV(3) is to provide a minimum treatment to foreign investments suffering losses in the host country by the simultaneous interplay of national and most favored nation treatment, and this is only in respect of measures the State "adopts in relation to such losses", that is corrective or compensatory measures.*"; *AMT* (paragraph 6.14), referring to Article IV(1)(b) of the U.S.–Zaire BIT, which wording is similar to Article 4 of the present BIT and stating that Article IV(1)(b) of the U.S.–Zaire BIT "*reinforce*[s] *further the engagement of the responsibility of the State for ensuring the protection and security of the investment made . . . in accordance with . . . the BIT.*"

309. *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v The Argentine Republic* (*LG&E*), ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, paragraphs 243 and 261). Article IV(3) of the Argentina-U.S. BIT provides: "*Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.*"

310. Article XI of the Argentina-U.S. BIT: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*"

compensation for breaches of the BIT, as it was done in the *LG&E* award, rendered under the Argentina-U.S. BIT.

386. Further, there is no support for Argentina's submission that, in the absence of an express provision, Article XI of the Argentina-U.S. BIT should automatically be read into the Argentina-U.K. BIT.

387. Accordingly, the Tribunal concludes that Argentina cannot invoke a state of emergency or state of necessity on the basis of the BIT to excuse liability for the breach of Article 2.2 of the BIT.

B. The State of Necessity under Customary International Law

388. Having reached the above conclusion, the Tribunal turns now to Argentina's alternative defense that it be excused from liability based on the state of necessity under customary international law.

389. As stated above, Argentina has contended in the alternative that in the event the Tribunal should come to the conclusion that there was a breach of the BIT, Argentina should be exempt from liability in the light of the doctrine of state of necessity or state of need under customary international law, as codified in Article 25 of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter the "ILC Draft Articles"). BG objected to the application of the doctrine of necessity in this case and submitted that even if it were applicable, its constituent elements, as set forth in Article 25 of the ILC Draft Articles, are not made out on the facts of this case; ultimately, even if one were to concede Argentina's defense of necessity, the legal consequence would be that Argentina has an obligation to compensate BG for the losses it incurred since the inception of the adopted measures, pursuant to Article 27 of the ILC Draft Articles.

390. The Tribunal finds it useful to quote in full Article 25 of the ILC Draft Articles:

> 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.

1. Summary of Parties' Contentions

a. Argentina's Position

391. Argentina contended that the exoneration of a State from international liability in case of a "state of necessity" is expressly recognized by customary international law, as codified in Article 25 of the ILC Draft Articles. State of necessity, according to Argentina, is a defense contemplated in international law that is binding both for the Argentine Republic and for the United Kingdom. In Argentina's view, a "state of necessity" exists where the State is compelled to depart from an international obligation with another State in order to preserve an essential state interest in a situation of grave or imminent danger. In this connection, Argentina contended that it complied with legal emergency criteria provided for in its National Constitution.[311]

392. Argentina referred to several cases supporting its position that the legal protections accorded to foreign investors under bilateral investment treaties do not deprive States parties of their sovereign powers to maintain public order and address emergencies. Argentina submitted that such cases suggest that State obligations to foreign investors and investments are qualified by non-textual but legally

311. *Memorial de Contestación*, paragraphs 700-716; *Dúplica*, paragraphs 771 *et seq.*; *Alegato Final*, paragraphs 522-525.

operational understandings about the continuation of State emergency powers and other State powers.[312]

393. Following the requirements set forth in Article 25 of the ILC Draft Articles, Argentina contended that the Argentine government was compelled to act due to a serious emergency situation which compromised its essential interests, its economic-financial survival, as well as social and institutional stability. Argentina referred in particular to the statements of Mr. Ratti and Mr. Simeonoff, explaining the budgetary and financial limitations of the Argentine State and the impoverishment of the population causing unprecedented social unrest.[313]

394. Referring to the requirements of Article 25(1)(a) of the ILC Draft Articles, Argentina further contended that the measures adopted amounted to the only way of protecting the essential interests of the State. In this regard it is Argentina's position that "the only way" criterion for a plea of necessity can best be met by introducing a proportionality and rational alternative test. Argentina expanded on its view of the appropriate test to be applied by the Tribunal: (i) whether the measures had a legitimate objective; (ii) whether the measures were adapted to the pursuit of such objective; and (iii) whether the government adopted the less disruptive alternative. In Argentina's view the *pesification* of dollar-denominated obligations and the restructuring of the private and public obligations was a proportionate and reasonable solution within the context of the very serious emergency in Argentina. Argentina pointed out that the existence of diverging points of views as to whether the adopted measures were the only way to cope with the crisis in late 2001 is not an impediment to the application of the "state of necessity" defense, as there will always be controversy regarding governmental, economic and financial measures.[314]

---

312. Kingsbury Report (paragraphs 28-34), referring to, *inter alia*, Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy)*, 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989, *E.L.S.I.* paragraphs 74 and 127) and Exhibit JL-397 (*TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraphs 118, 133, 139).
313. *Alegato Final*, paragraphs 527-530.
314. *Memorial de Contestación*, paragraphs 726-753; *Alegato Final*, paragraphs 531-536; Kingsbury Report (paragraph 39).

395. Argentina also submitted that the measures it adopted did not seriously affect any essential interest of any other State, or of the international community.[315]

396. In addition, Argentina contended that none of the international obligations invoked by BG exclude the state of necessity, especially in the light of Article 4 of the BIT, which foresees situations which may constitute a state of necessity.[316]

397. Further, Argentina submitted that it has not contributed to the occurrence of the "state of necessity". Argentina points to external factors that decisively led to the emergency situation, including the rise in interest rates, the crisis in other emerging markets, the devaluation in Brazil, and the ensuing decline in exports. Argentina supported its view by reference to the statement of its expert witness Prof. Roubini.[317]

398. Finally, Argentina rejected BG's contention that should the defense of a state of necessity be accepted, the State invoking it is indefectibly bound to redress the damages suffered. Argentina contended that on the contrary, it would make no sense to accept that the State acted in a state of necessity, protecting its essential interests, and to demand reparation, thus risking the very essential interests that the State intended to protect. Objecting to BG's reliance on Article 27 of the ILC Draft Articles, Argentina referred to its expert witness Prof. Kingsbury, stating that the ILC Draft Articles do not set forth that compensation should be granted in all cases where the state of necessity is alleged.[318]

b. BG's Position

399. BG objected to Argentina's contentions.

400. As a preliminary point, BG submitted that the U.K. formally opposed to the inclusion by the ILC of a provision on "*necessity*" (*i.e.*, the present version of Article 25 of the ILC Draft Articles). BG highlighted that the ILC Draft Articles are a non-binding codification of customary international law. As a consequence, Article 25 of the ILC Draft Articles can have

---

315. *Alegato Final*, paragraph 537.
316. *Alegato Final*, paragraph 538.
317. *Memorial de Contestación*, paragraphs 718-725; *Alegato Final*, paragraphs 539-542.
318. *Alegato Final*, paragraphs 543-548.

no application in bilateral relations involving the U.K., and therefore no role in a claim under the present BIT. BG characterized the U.K. as a "*persistent objector*" to the rule set forth in Article 25 of the ILC Draft Articles.[319]

401. Further, BG criticized Argentina's understanding that the State's obligations under a BIT become qualified by that State's powers to take measures in a situation of emergency under a national law of general application. In BG's view this places Article 8(4) of the BIT and Argentine law on a footing of equality, a result that would be inconsistent with Article 27 of the Vienna Convention according to which treaty obligations preempt conflicting national law. Further, the lack of workable definitions of and distinctions between "*emergency*" and "*necessity*" would grant the State a self-judging power to escape its international obligations. BG confirmed, though, that some BITs, including U.K. BITs, do expressly grant a right of derogation in times of "*extreme emergency*", and that right is both explicit and carefully circumscribed in the relevant texts. However, the present BIT grants no such right.[320]

402. As to the content of Article 25 of the ILC Draft Articles, BG submitted that Argentina bears the onus of proving that all requirements of the doctrine of necessity as reflected in Article 25 of the ILC Draft Articles have been met without interruption from January 2002 (when the Emergency Law was enacted) to the present day.[321]

403. In focusing on specific questions with regard to the requirements of Article 25 of the ILC Draft Articles, BG contended that Argentina is debarred from invoking Article 25 of the ILC Draft Articles because it failed to satisfy the general requirements of the second paragraph of this provision. Given the object and the purpose of the BIT, Argentina may not dispose of guarantees freely extended to attract BG's long-term investment on the argument that certain risks have materialized, when the very purpose of the guarantees was to transfer the associated risks to Argentina.[322]

404. Further, BG contended that Argentina contributed to its economic crisis. BG submitted that the evidence shows

---

319. Post-Hearing Brief, paragraphs 296-301.
320. Post-Hearing Brief, paragraphs 302-309.
321. Reply, paragraphs 430 *et seq.*; Post-Hearing Brief, paragraph 310.
322. Reply, paragraphs 441-447.

that Argentina's crisis was largely brought about by successive government failures to address chronic and serious structural economic problems. Relying, *inter alia*, on Professor Roubini's expert report and an IMF study, BG submitted that several endogenous causes contributed to Argentina's crisis, highlighting fiscal problems and labor-market "rigidities". According to the IMF study, for instance, the principal causes for the crisis were home-grown and the "*chief locus of vulnerability [of the Argentine economy] was the increase in public-sector indebtedness.*"[323]

405. BG also took exception with Argentina's understanding of Article 25(1)(a) of the ILC Draft Articles. Specifically, BG disagreed with Argentina's assertion that the words "the only way" are not to be read on their face but should be interpreted as importing a test of "proportionality and rational alternatives". In BG's view the words "the only way" are clearly designed to discourage abuse of the doctrine of necessity. BG further stated that Argentina's reading of Article 25(1)(a) of the ILC Draft Articles confirms the risk of abuse of the doctrine of necessity historically expressed by the U.K.. BG contended that the findings of an ICSID tribunal and the ICJ confirm the only interpretation that is consistent with the express language, negotiating history, and legislative intent of Article 25(1)(a) of the ILC Draft Articles. In any event, BG indicated that the "*pesificación*" and freezing of MetroGAS' tariffs fail Argentina's proportionality test.[324]

406. Finally, BG contended that Argentina was unable to prove the "grave and imminent peril" that allegedly forced Argentina to take the measures it took. Argentina's economic difficulties, acute as they were from December of 2001 to January of 2002, never mounted to a "grave and imminent peril" to an "essential interest" of the Argentine State within the meaning of Article 25(1)(a) of the ILC Draft Articles as illustrated by the fact that: (i) the institutions of Government continued to operate at all times in accordance with the Constitution; (ii) the GDP per capita on purchasing power parity terms remained the highest in Latin America, according to the IMF; and (iii) since May 2002 the economic indices have reached historic records surpassing pre-crisis levels, particularly in the case of GDP and unemployment. It is thus not possible to argue that an "economic crisis"

323. Post-Hearing Brief, paragraphs 313-315.
324. Post-Hearing Brief, paragraphs 316-319.

continues to exist in Argentina and consequently Argentina cannot invoke necessity to excuse the measures it adopted.[325]

2. The Tribunal's Findings

407. In the Tribunal's view, Argentina's defense relating to Article 25 of the ILC Draft Articles fails whether the Tribunal rejects or accepts the application of this provision.

408. Article 25 may relate exclusively to international obligations between sovereign States. From this perspective, Article 25 would be of little assistance to Argentina as it would not disentitle BG, a private investor, from the right to compensation under the Argentina-U.K. BIT.

409. Furthermore, the Commentary to the ILC Draft Articles indicates that a defense based on necessity is precluded "*where the international obligation in question explicitly or implicitly excludes reliance on necessity*."[326] It can be argued that the Argentina-U.K. BIT implies such an exclusion. Thus, Argentina would not be entitled to invoke necessity to unilaterally revoke vested rights (*e.g.*, a dollar denominated tariff and economic equilibrium) designed precisely to operate in situations where a run on the currency would lead to a situation of necessity. There is no question that Argentina is entitled to adopt such measures as it deems appropriate to emerge from the state of emergency. However, it remains obligated to pay compensation. This is one view as to how bilateral investment treaties operate to induce foreign investment. Assuming that necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT.[327]

410. In any event, even if the Tribunal were to apply Article 25,[328] it must be recalled that this "*is a most exceptional remedy subject to the very strict conditions because*

---

325. Reply, paragraphs 453-463; Post-Hearing Brief, paragraphs 320-325.
326 Exhibit JL-358 (United Nations Report of the International Law Commission, 53rd session (2001), A/56/10 at p. 204).
327. Certainly, where the bilateral investment treaty at hand contains an exculpatory provision and such provision finds application, compensation is not payable to the extent that such provision exonerates that party from liability.
328. Dismissing BG's allegation that the U.K. has always been a "*persistent objector*" to this provision (Post-Hearing Brief, paragraphs 296-301).

otherwise it would open the door to elude any international obligation".[329] The tribunal in *LG&E* said it appropriately:

> The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its Draft Articles on State Responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.[330]

411. The Tribunal does not believe that Argentina has met the "very restrictive conditions", given that measures adopted by Argentina included: (i) luring BG and other investors to accept a temporary suspension of the dollar denominated tariff and the adjustment mechanism by indicating that the measures would be temporary; (ii) threatening companies that resorted to arbitration; (iii) attempting to force investors which commenced arbitration to withdraw these proceedings as a condition to negotiations; and (iv) setting up a mechanism for the revision of the concessions that was never intended to restore the conditions of Argentina's initial representations.

412. Accordingly, whether the Tribunal accepts or rejects the application of Article 25 of the ILC Draft Articles, the result is the same: Argentina may not invoke the "state of necessity" doctrine under customary international law to excuse liability for breach of Article 2.2 of the Argentina-U.K. BIT, or its obligation to pay compensation under the treaty.

---

329. *Enron* (paragraph 304).

330. *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v The Argentine Republic* (*LG&E*) (ICSID Case No. ARB/02/1) Decision on Liability dated 3 October 2006 (paragraph 248). The tribunal in LG&E did not rely on the ILC Draft Articles for concluding that Argentina can invoke state of necessity. Instead, that tribunal relied on Article XI of the Argentina-U.S. BIT, a provision which, as noted above, does not exist in the Argentina-U.K. BIT.

X. Damages

413. Considering the Tribunal's findings above that Argentina has breached the BIT with respect to the standard of fair and equitable treatment and by adopting unreasonable measures under Article 2.2 of the BIT, the Tribunal now turns to: (i) the appropriate standard for determining damages; and (ii) the quantification of any such damages.

414. Claimant seeks: "*. . . full compensation for Argentina's breaches of the Treaty, which amounts to the loss in the fair market value of its investment in MetroGAS caused by the Measures.*" [331]

415. Claimant's expert, Mr. Wood-Collins, applied a discounted cash flow (DCF) methodology to calculate ". . . *that the Measures have reduced the value of BG's investment in MetroGAS as at 1 January 2002 by US$238.1 million.*"[332] This is the amount of damages sought by Claimant for the alleged violation by Argentina of Article 2.2 and/or Article 5.1 of the Argentina-U.K. BIT.

416. Argentina took the position that:

a) any liability is excused by "unforeseeable changed circumstances" (*teoría de la imprevisión*) under Article 1198 of the Argentine Civil Code, an issue already addressed by the Tribunal in Chapter V above;

b) the renegotiation process would yield such restitution as BG may be entitled to;[333]

c) BG is not entitled to full reparation;[334] and

d) the Wood-Collins report is flawed.[335]

417. The Tribunal acknowledges that MetroGAS may wish to make its peace with Argentina in the context of the domestic renegotiation process. This, however, has not occurred. This Tribunal continues to be seized in this arbitration with a mandate under the Argentina-U.K. BIT to

331. Post-Hearing Brief, paragraph 327.
332. Wood-Collins Report, paragraph 1.7.
333. *Alegato Final,* paragraph 559.
334. *Alegato Final,* paragraph 567.
335. *Alegato Final,* paragraphs 571-591.

determine the standard and quantum of damages to which BG might be entitled.

418. The Tribunal has concluded that Argentina did not breach Article 5 of the BIT and so this award deals only with reparation for the breach of Article 2.2 of the BIT.[336]

A. Standard

419. Unlike Article 5 (Expropriation), Article 2 of the Argentina-U.K. BIT does not provide a standard for compensation. Claimant relied on international law and the awards of prior tribunals in support for its position that it is entitled to the fair market value of its investment in MetroGAS.

420. BG argued that the reparation standard for expropriation set out in Article 5 of the Argentina-U.K. BIT applies equally to a breach of Article 2.2 of the treaty. BG found support for the automatic extension of the standard of Article 5 in *CMS v Argentina*. The argument appears as follows in BG's Post-Hearing Brief (footnotes omitted):[337]

> Article 5(1) of the Treaty defines such compensation in the event of an expropriation as the genuine, or fair market, value of the investment, immediately before the expropriation, plus interest until the date of payment. The Treaty contains no such provision for compensation payable in respect of a breach of Article 2(2). However, when faced with a similar case of cumulative breaches of treaty, the tribunal in CMS v Argentina resorted to the same standard of "fair market value" to determine the compensation due, noting that:
>
> "while this standard figures prominently in respect of expropriation, it is not excluded in other cases where the effect of the breach results in important long term losses."

421. This reasoning is scant. In fact, principles of treaty hermeneutics militate for the conclusion that one should not read into Article 2.2 of the BIT a standard which Argentina and the U.K. expressly confined to Article 5 of the BIT.

---

336. As found by the Tribunal in Sections A and C of Chapter VIII of this award.
337. Post-Hearing Brief, paragraph 331.

422. For other reasons, however, "fair market value" can be relied upon as a standard to measure damages for breach of the obligation to accord investors treatment in accordance with Article 2.2 of the BIT. While the Tribunal is disinclined to automatically import such standard from Article 5 of the BIT, this standard of compensation is nonetheless available by reference to customary international law.

423. BG's analysis of international law focuses on the principle established in 1928 by the Permanent Court of International Justice in the *Case Concerning the Factory at Chorzów*.[338] This matter addressed the issue of compensation for the expropriation of a nitrate factory at *Chorzów* in Upper Silesia.

424. In its decision on jurisdiction of 26 July 1927, the Permanent Court found that reparation is due for failure to apply a convention even where the convention itself is silent on the issue:[339]

> It is a principle of international law that a breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.

425. The Permanent Court elaborated further on the standard of reparation in adjudicating the merits of the dispute on 13 September 1928:[340]

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss

---

338. Exhibit JL-26 (*Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland), Factory at Chorzow*, Judgment on the Merits, 13 September 1928, PCIJ Series A, No. 21). Post-Hearing Brief, paragraph 330.
339. *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland),* Jurisdiction, 26 July 1927, PCIJ Series A, No. 9, p. 21.
340. Exhibit JL-26, p. 47.

> sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

426. As stated above, *Factory at Chorzów* is also about expropriation. However, its vitality was energized and its scope broadened beyond the law of takings by Article 31 of the ILC Draft Articles:[341]

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

427. Under this rule, which seeks to codify customary international law, the obligation of the responsible State to make full reparation relates to the "*. . . injury caused by the internationally wrongful act.*" The injury, as stated by paragraph 2 of Article 31, includes any material damage caused by the wrongful act. Material damage here "*. . . refers to damage to property . . . which is assessable in financial terms.*"[342]

428. The damage, nonetheless, must be the consequence or proximate cause of the wrongful act.[343] Damages that are "*too indirect, remote, and uncertain to be appraised*" are to be excluded.[344] In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of "full reparation" under the ILC Draft Articles.

---

341. Exhibit JL-482. (James Crawford, "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002)
342. Exhibit JL-482, *cit*, p. 202.
343. United States-Germany Mixed Claims Commission, Administrative Decisions No. II, R.I.A.A., vol. VII, p. 23 (1923) (quoted by James Crawford in Exhibit JL-482; "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002, note 488).
344. *Trail Smelter* arbitration, R.I.A.A., vol. III, p. 1931 (1938, 1941), at p. 1931 (quoted by James Crawford in JL-482; "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002, note 489).

429. The Tribunal will be guided by these principles. Provided that the damage is not speculative, indirect, remote or uncertain, the Arbitral Tribunal may have recourse to such methodology as it deems appropriate in order to achieve the full reparation for the injury caused to BG by Respondent's breach of Article 2.2 of the Argentina-U.K. BIT.

B. Calculation

430. BG's expert Mr. Wood-Collins:

a) assessed the loss in the fair market value of BG's investment in MetroGAS as at 1 January 2002;

b) adjusted the result of (a) above to account for the part of the loss which might be borne by the creditors of GASA and calculated BG's "historical loss" for the period of January 2002 to December 2005.[345]

431. The Tribunal now turns to these calculations.

1. The GASA Debt Restructuring

432. As indicated above, GASA owns 70% of MetroGAS and BG owns 54.7% of GASA. Thus, BG's share of MetroGAS owned through GASA is 38.3%. Combined with the 6.8% of MetroGAS that BG owns directly, BG's share of MetroGAS is 45.1%.[346]

433. At the time that the Emergency Law was promulgated, GASA had US$70 million in outstanding debt. This debt was purchased in 2004 and 2005 by two investment funds, Ashmore and Marathon. On 7 December 2005, GASA entered into an agreement with the Ashmore and Marathon Funds to restructure its debt.[347]

434. Pursuant to this agreement, GASA's debt was to be cancelled in exchange for: (i) the issue by GASA and/or transfer by its shareholders to Ashmore Funds of 30% of GASA's shares; (ii) the transfer to Ashmore Funds of approximately 3.65% of shares in MetroGAS held by GASA; (iii) the transfer to Marathon Funds of approximately 15.35 %

345. The Post-Hearing Brief updates the calculation to 1 September 2006 (paragraph 456).
346. 45.11% more exactly.
347. Exhibit J-604. "Ashmore Funds" and "Marathon Funds" are terms defined in the Master Restructuring Agreement.

of shares in MetroGAS held by GASA. After the restructuring, BG's investment in MetroGAS would be reduced by 18.8%, from 45.1% to 26.3%.

435. This transaction is subject to approvals in Argentina. Section 4.2(i) of the Master Restructuring Agreement provides that:

> 4.2 Conditions Precedent to the Consummation of the Restructuring. The Closing is subject to the satisfaction or waiver of the following conditions:
>
> [. . .]
>
> . . . Governmental Approvals. (i) The Company and each of the Creditors shall have received a certified copy of each authorization, consent, order, approval, license, ruling, permit, exemption, filing or registration specified on Schedule 1 hereto. . . . (ii) The New GASA By-Laws and the issuance by the Company of New Equity shall have been approved by the Comisión Nacional de Valores.

436. It is a matter of record that not all required approvals have been issued by the Argentine authorities and that none have been waived. The transactions contemplated by the Master Restructuring Agreement have therefore not closed and the restructuring of the GASA debt has not been consummated. In addition, the creditors are now entitled to terminate under Section 7.2 of the Master Restructuring Agreement:

> 7.2. Termination.
>
> [. . .]
>
> b) Termination by the Creditors. Each of the following events and circumstances shall be a "Creditor Event of Terminator" hereunder:
>
> [. . .]
>
> (vii) The Closing shall not have occurred by one year from the Execution Date [7 December 2006] other than as a result of non-compliance by a Creditor with its obligations hereunder.

437. Under the circumstances, this award cannot assume that the necessary approvals will be secured and there is no guarantee that the Master Restructuring Agreement will remain in force. The Arbitral Tribunal will therefore proceed

on the basis that no restructuring of the GASA debt has been successfully completed.

2. Loss in Fair Market Value

438. Using DCF analysis, Mr. Wood-Collins valued BG's 45.1% investment in MetroGAS immediately before and after promulgation of the Emergency Law.[348] The difference between the two valuations, adjusted to consider GASA debt, yields the following result:[349]

Damages to BG's investment in MetroGAS as at 1 January 2002
Total Loss at 1 January 2002

Future value of BG's MetroGAS shares		
Without Measures	US$277.7 m	
With Measures	US$2.3 m	
Damage		US$275.4 m
GASA adjustment		
Without Measures (Note 1)	(US$38.3 m)	
With Measures (Note 2)	(US$1.0 m)	
Impact of damage		(US$37.3 m)
Total BG interest in MetroGAS on 1 January 2002		
Without Measures	**US$239.4 m**	
With Measures	**US$1.3 m**	
Damage		**US$238.1 m**

Notes
1. Cost of discharging BG's 54.7% share of GASA's US$70.0 m debt.
2. Cost of reducing BG's share in MetroGAS from 45.1% to 26.3%.

439. This Tribunal has reached the conclusion that the Wood-Collins Report leads to a result which is uncertain and speculative. Specifically, the Tribunal is not persuaded by Mr. Wood-Collins' US$1.3 million valuation of BG's investment in Argentina in his "With Measures" scenario.

440. The Wood-Collins Report dismisses valuations of US$21.3million and US$18.8 million with little explanation.[350] More importantly, during testimony, Mr. Wood-Collins failed to satisfactorily reconcile his valuation of

---

348. Although Mr. Wood-Collins refers to "With Measures" and "Without Measures" scenarios, his "Without Measures" valuation does not consider any of the pre-Emergency Law measures listed in his Letter of Instruction (Annex A, Wood-Collins Report).
349. Table 1 of the Wood-Collins Report, p. 2.
350. Wood-Collins Report, paragraphs L.27 and L.28, p. 104.

US$1.3 million with the implied value of the Ashmore/Marathon transaction, whereby US$38.2 million of debt was cancelled in exchange for an 18.8% interest in MetroGAS.[351] Regardless of the motivations of these funds, BG was willing to relinquish an 18.8% indirect interest in MetroGAS in exchange for a US$38.2 million write-off. This transaction would result in a post-Emergency Law value of BG's 45.11% interest in MetroGAS of US$91,825,244.15.[352] In the Tribunal's view this transaction provides an objective indication of the value of BG's investment after the Emergency Law.

441. The record also includes evidence of a transaction involving an interest in MetroGAS before the enactment of the Emergency Law.[353] Mr. Wood-Collins considered this transaction:[354]

> 4.22 On 12 July 1998, Perez Companc sold 25% of GASA for US$75 million. This implies that 100% of GASA was worth US$300 million. At that time GASA had debts of US$130 million and its sole asset was 70% of the shares of MetroGAS. As such, those shares in MetroGAS must have been valued at US$430 million.
>
> 4.23 Consequently, 100% of the MetroGAS shares must have been valued at US$614.3 million and therefore BG's 45.1% share of MetroGAS had an implied value of US$277.0 million.

442. Considering that BG's exact total (direct and indirect) ownership interest in MetroGAS is 45.11%, the implied value of such interest is actually US$277,110,730. It is the Tribunal's view that this is also a better proxy of the value of BG's investment before promulgation of the Emergency Law.

443. Consequently, the Tribunal's calculations based on actual transactions yield the following damage to BG's investment:

---

351. Tr. Wood-Collins 1265:13 to 1279:16, 1291:13-1293:13.
352. (1) $70,000,000 (BG's share of the GASA debt) x 54.67% (BG's ownership in GASA) = $38,269,000; (2) $38,269,000 (value to BG of cancellation of its share of the GASA debt) / 18.8% (capitalization of the GASA debt to Ashmore and Marathon) = $203,558,510.64; (3) $203,558,510.64 (total implicit value of MetroGAS) x 45.11% (total BG interest in MetroGAS) = $91,825,244.15
353. Exhibit J-183.
354. Wood-Collins Report, Section 7, pp. 34 and 35 (footnotes omitted).

Without Measures	US$277,110,730.00	
With Measures	US$91,825,244.15	
Damage		US$185,285,485.85

444. Argentina shall thus pay BG damages in the sum of US$185,285,485.85.

445. In its Reply, BG articulated its prayer for damages as follows:[355]

> (. . .) In view of the foregoing, BG requests that the Tribunal:
>
> (. . .)
>
> (d) Order that Argentina compensate BG in the sum equivalent to $238.1 million, plus interest at the average interest rate applicable to US six month certificates of deposit, compounded semi-annually;
>
> (. . .)

446. It is noteworthy that BG's Reply does not include an independent claim for historical loss. In its Post-Hearing Brief, BG further stated the following with respect to historical loss:[356]

> (. . .) the historical loss forms an important component of BG's total loss, and has not been challenged.

447. Thus, because the Tribunal has already adjudicated BG's claim as articulated, there is no need for the award to independently address historical loss. Nonetheless, to the extent that BG's pleadings could be interpreted as asserting an independent claim for historical loss, the Tribunal records that there is no support for any such claim.

448. Mr. Wood-Collins' calculation of historical loss results from certain projections prepared by MetroGAS in September of 2001 (the MetroGAS 2001 Projections). The date of these projections is unclear. Claimant stated that they were prepared by MetroGAS on 21 September 2001.[357] Mr. Wood-

355. Reply, paragraph 535.
356. Reply, paragraph 535.
357. Post-Hearing Brief, footnote 473.

Collins dates them on 27 September 2001.[358] However, the actual "MetroGAS spreadsheet" that Mr. Wood-Collins used as a source for his calculations is not on the record.

449. The MetroGAS 2001 Projections as presented by Annex E of the Wood-Collins Report are oblivious to the economic crisis that preceded the measures adopted by Argentina in January of 2002. Annex E projects a historical spike in the payment of dividends by MetroGAS (*i.e.*, over US$280 million for the 2002-2005 period)[359] precisely at a time (September 0f 2001) where internal and external shocks rendered the Argentine economy particularly vulnerable. As indicated in paragraph 54 of this award, Argentina could not address the combined effect of these shocks through exchange rate or monetary policies.

450. This is a fact that the business community could not ignore even in the absence of the measures that Argentina adopted a few months later. The Tribunal recalls here that the MetroGAS 2001 Projections were prepared by MetroGAS at a time when the adjustment of tariffs for US inflation had already been suspended and was subject to challenge before the Argentine courts.

451. From a legal perspective, there is no evidence on the record of a dividend policy approved pursuant to the corporate procedures set out in the By-Laws of MetroGAS.[360]

452. For these reasons, to the extent that Claimant has made an independent claim for historical loss, the Tribunal finds that it is not reasonable to rely on the MetroGAS 2001 Projections in support for any such claim. In addition, the Tribunal notes that implicit in the valuation of the Pérez Companc and Ashmore/Marathon transactions discussed above is an expectation of cash flow to equity.

453. For these reasons, the Tribunal does not enter any decision for payment of damages in excess of the sum set out in paragraph 444 above.

---

358. Wood-Collins Report, Annex E.
359. These payments also exceed the 95% dividends policy adopted by MetroGAS in its "2001 Plan Assumptions" set out in Exhibit CRA-10 of the Wood-Collins Report.
360. Exhibit J-117.

C. Interest

454. This Tribunal agrees with BG that interest at a reasonable commercial rate is appropriate to compensate BG in full for Argentina's breach of the Argentina-U.K. BIT. The Tribunal further finds, however, that interest should run from 6 January 2002, the date of promulgation of the Emergency Law, and not from 1 January 2002, as argued by BG, until payment of this award by the Republic of Argentina.

455. The rate of interest is a function of the instrument in which BG could have reasonably invested funds available to it on 6 January 2002. The Tribunal agrees with Mr. Wood-Collins that investment in a highly secure, dollar denominated, liquid and short-term instrument would have enabled BG to rapidly redeploy its funds.[361] The Tribunal further accepts that US Treasury six-month certificates of deposit meet these criteria and that interest should be compounded semi-annually. The Tribunal finally notes that Argentina did not address BG's claim to interest or the reasonableness of assuming US Treasury certificates of deposit, and it did not challenge the authorities relied upon by BG in support for its position on compound interest.[362] The Tribunal finds that these authorities are persuasive.

456. The Tribunal notes in particular that the standard of "full reparation" articulated in Section X.A above would not be achieved if the award were to deprive Claimant of compound interest. If invested in January of 2002, the sums awarded would have earned compound interest – investment in six month certificates of deposit involves earning compound interest.

---

361. Wood-Collins Report, paragraph 8.2.

362. Exhibit JL-190 (FA Mann, "Compound Interest as an Item of Damage in International Law" (1988), 21 *University of California Davis Law Review* 577); Exhibit JL-268 (JY Gotanda, "Awarding Interest in International Arbitration", (1966), 90 *American Journal of International Law* 40); Exhibit JL-350 (*Metalclad Corp v The United Mexican States,* Case No ARB(AF)/97/1, Award of 30 August 2000, paragraphs 128 and 131); Exhibit JL-328 (*Emilio Agustín Maffezini v The Kingdom of Spain,* ICSID Case No ARB/97/7, Award of 13 November 2000, , paragraphs 96-97); Exhibit JL-322 (*Compañía del Desarrollo de Santa Elena, SA v The Republic of Costa Rica,* Case No ARB/96/1, Final Award of 17 February 2000, paragraphs 97-107); Exhibit JL-331 (*Wena Hotels Ltd v A RA-b Republic of Egypt,* ICSID Case No ARB/98/4, Award of 8 December 2000, paragraphs 128-130); Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic,* ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 471).

457. For these reasons, the Tribunal finds that Respondent shall pay Claimant interest on the sum of US$185,285,485.85 from 6 January 2002 until the date of payment, at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually.

XI. Costs

458. BG brought a claim for US$238.1 million plus interest. This award finds for BG in the amount of US$185.3 plus interest. BG therefore prevailed with respect to 78% of the amount it claimed.

459. As to jurisdiction and admissibility, while this Tribunal has entered an affirmative finding on jurisdiction, it also concluded that BG does not have standing to bring "claims to money" and "claims to performance", or to assert other rights, derived from the MetroGAS License (see paragraph 217 above).

460. Under the circumstances and pursuant to Article 40 of the UNCITRAL Rules, the Tribunal finds that it is reasonable for Argentina to bear 70% of: (i) the costs of the arbitration as fixed in paragraph 462 below; and (ii) BG's legal fees and expenses.

461. Pursuant to Article 38 of the UNCITRAL Rules, the fees of the Tribunal are hereby fixed as follows:

a) Guillermo Aguilar Alvarez,

US$323,168.13

b) Albert Jan van den Berg,

US$328,308.14

c) Alejandro Garro,

US$197,095.17

462. In addition, the expenses of the Arbitral Tribunal amount to US$261,907.82. This sum includes the fees and expenses of the Administrative Secretary, the costs of translating the award, and the administrative fee of $59,312.50 paid to ICSID as custodian of the funds deposited by the Parties pursuant to Article 41 of the UNCITRAL Rules (Section 16 of Procedural Order No. 2). Moreover, the costs of

the Preliminary Conference and of the evidentiary hearing are US$126,020.74. This yields a total for the costs of the arbitration, including Tribunal fees and expenses, and costs of the Preliminary Conference and evidentiary hearing, of US$1,236,500.00.

463. The Parties paid the deposit fixed by the Tribunal to cover its fees and expenses (Article 41 of the UNCITRAL Rules) as follows:

a) Claimant:

US$618,250.00

b) Respondent:

US$618,250.0

Total: US$1,236,500.00

464. There was a shortfall for payment of arbitral fees after 16 July 2006, caused by events set out in the Tribunal's letter to the Parties of 25 September 2007. All three arbitrators and the Tribunal's Administrative Secretary have waived a portion of their fees in order not to burden the Parties with a request for supplemental payments. Accordingly, nothing remains payable.

465. In addition, BG submitted a claim for legal fees and expenses in the sum of US$624,390.00[363] and GB£3,448,773.00. In the Tribunal's view, these sums are reasonable.

466. Accordingly, to comply with the Tribunal's order as set out in paragraph 460 above, Respondent shall pay Claimant:

a) the sum of US$247,300.00 for costs of the arbitration as fixed in paragraph 462 above; and

b) the sum of US$437,073.00 and GB£2,414,141.10 as legal fees and expenses incurred by Claimant in this arbitration.

---

363. This comprises the amounts set out in paragraphs 461 to 464, as updated in BG's costs submission of 4 June 2007.

XII. Decision

467. For the foregoing reasons, the Arbitral Tribunal unanimously renders the following award:

(1) Subject to decision number (2) below, this Arbitral Tribunal has jurisdiction with respect to all of BG Group Plc.'s claims which are admissible in this arbitration.

(2) BG Group Plc. does not have standing to seize this Tribunal with "claims to money" and "claims to performance" under the Argentina-U.K. BIT, or to assert in this arbitration any other right derived from the MetroGAS License.

(3) The Republic of Argentina breached Article 2.2 of the Argentina-U.K. BIT.

(4) The Republic of Argentina shall pay BG Group Plc. the sum of US$185,285,485.85 (one hundred and eighty five million two hundred and eighty five thousand four hundred and eighty five US dollars and 85/100) for damages to BG Group Plc.'s investment claimed in this arbitration.

(5) The Republic of Argentina shall pay BG Group Plc. interest on the sum set out in decision (4) above from 6 January 2002 until the date of payment, at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually.

(6) The Republic of Argentina shall pay BG Group Plc. the sum of US$247,300.00 for costs of the arbitration.

(7) The Republic of Argentina shall pay BG Group Plc. the sums of US$437,073.00 (four hundred thirty seven thousand and seventy three US dollars) and GB£2,414,141.10 (two million four hundred and fourteen thousand one hundred and forty one British Pounds and 10/100) for legal fees and expenses incurred by BG Group Plc. in this arbitration.

(8) All other claims are rejected.

Done in Washington D.C., on 24 DECEMBER 2007 in equally authoritative English and Spanish versions.

Albert Jan van den Berg
Arbitrator

Alejandro M. Garro
Arbitrator

Guillermo Aguilar Alvarez C.
President