

## MEMORANDUM OF DETERMINATIONS

### Inconvertibility Claim of First Trust of New York, National Association Argentina – OPIC Contract of Insurance No. F181

#### I. CLAIM

By letter dated February 11, 2002 (Annex 1), First Trust of New York, National Association, as holder of the TGN Note<sup>1</sup> and financial trustee of TGN CRIBs Financial Trust I (the “Financial Trustee” or the “Insured”), filed a Draft Application for Compensation under the OPIC Insurance Contract for the inconvertibility of scheduled payments of interest on the TGN Note and the premium due on the OPIC Insurance Contract in the aggregate amount of U.S. \$9,800,000.<sup>2</sup>

In the Draft Application<sup>3</sup>, the Financial Trustee claimed that passage of the Argentine Public Emergency Exchange Reform Act on January 6, 2002, and subsequent regulations resulted in an Inconvertibility Event (as defined in the Indenture between TGN and the TGN Trustee, et al, dated July 25, 2000 (the “Indenture”)) and that the inconvertibility of payments on the TGN Note entitled the Insured to compensation under the OPIC Insurance Contract. Upon reviewing the Draft Application, subsequent correspondence, and the relevant regulations of the Argentine Central Bank, OPIC finds that a Triggering TGN Scheduled Payment did not occur on January 25, 2002, and that even if a Triggering TGN Scheduled Payment had occurred, no compensation would be payable under the OPIC Insurance Contract

#### II. SUMMARY OF DETERMINATION

The OPIC Insurance Contract deems inconvertible Local Currency or U.S. dollars held by or for the account of the Foreign Enterprise in a Deposit Account to pay a TGN Scheduled Payment if the Foreign Enterprise is unable to convert such Local Currency into U.S. dollars in the manner and at the exchange rate provided in the OPIC Insurance Contract or is unable to transfer such U.S. dollars to the United States. The response of the Insured to OPIC’s Information Request states that no Local Currency was held in such a Deposit Account for such purpose, nor was Local Currency for such purpose deposited into a TGN Peso Inconvertibility Account (as defined in the Indenture) as required by the Indenture. Therefore, no compensation is payable under the OPIC Insurance Contract.

Further, the OPIC Insurance Contract requires the Insured to make all reasonable efforts to convert or cause the Foreign Enterprise to convert Local Currency into U.S. dollars and to transfer to the United States the U.S. dollars held for the purpose of making the Triggering Scheduled Payment. Except for two brief periods during the Waiting Period, i.e., the period

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<sup>1</sup> All terms capitalized herein for other than grammatical purposes and not defined herein have the meaning set forth in the OPIC Insurance Contract.

<sup>2</sup> A Completed Application was timely filed.

<sup>3</sup> See Exhibit “A” of Annex I.

commencing on the Triggering TGN Payment Date and ending on the Subsequent TGN Payment Date, at all times during the Waiting Period, Local Currency that needed to be converted to U.S. dollars to make an interest payment on the TGN Note was convertible into U.S. dollars and the U.S. dollars were transferable to the United States, for a short period with the consent of the Central Bank of Argentina and, thereafter, at least to the date hereof, without the consent of the Central Bank.<sup>4</sup> Thus, if there had been Local Currency or U.S. dollars held by or for the benefit of the Foreign Enterprise in a Deposit Account on the Triggering TGN Payment Date, such Local Currency was convertible into U.S. dollars and U.S. dollars were transferable to the United States for the purpose of making the Triggering TGN Scheduled Payment during the Waiting Period, and reasonable efforts on the part of the Insured or the Foreign Enterprise would have resulted in payment of the Triggering TGN Payment<sup>5</sup>. Therefore, no compensation is payable under the OPIC Insurance Contract.

### III. FACTUAL SUMMARY

#### A. *The Project and the Insured*

Transportadora de Gas del Norte S.A. (“TGN”) is one of two principal natural gas transportation companies operating in Argentina. On July 14, 2000, TGN issued the TGN Note to finance an increase in the capacity of TGN’s Centro Oeste gas pipeline between Loma La Lata in Neuquen Province and Aldea Brasileria. Merrill Lynch (the “Grantor”) purchased the TGN Note and transferred ownership thereof to the Financial Trustee in exchange for the proceeds of sale of the CRIBs. The CRIBs were issued to Noteholders pursuant to the CRIBs Indenture. Payments on the CRIBs are dependent on payments on the TGN note.

The OPIC Insurance Contract covers the inconvertibility of scheduled payments of principal and interest on the TGN Note.

TGN is required to make scheduled payments on the TGN Note every six months beginning January 25, 2001. On January 7, 2002, TGN informed OPIC that the Argentine Government had enacted Decree No. 1570/2001<sup>6</sup> and adopted Communications “A”3382<sup>7</sup> and “A”3394<sup>8</sup>. TGN stated that these regulations contained provisions requiring the Argentine Central Bank’s (the BCRA’s) approval prior to transferring U.S. dollars from Argentina or converting Local Currency into U.S. dollars for purposes of servicing financial debt. As a result, TGN cautioned that these laws could render OPIC liable under the OPIC Insurance Contract. On January 25, 2002, TGN notified the TGN Trustee that it would not be able to make the January 25<sup>th</sup> scheduled payment, referring to the enactment of Emergency Law 25-561<sup>9</sup> and Decree 71/2002<sup>10</sup> as reasons for its incapacity to render the payment<sup>11</sup>. TGN

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<sup>4</sup> There is no indication or information to suggest that, where Central Bank approval is required to convert Local Currency into U.S. dollars for the purpose of paying foreign debt, the Central Bank does not routinely provide such approval for bona fide transactions.

<sup>5</sup> In the instant case, the payment would have replenished the TGN Reserve LC.

<sup>6</sup> Decree No. 1570/2001, Dec. 1, 2001, B.O. No. 29.787.

<sup>7</sup> Communication A-3382, Dec. 7, 2001, Circular CAMEX 1 – 320, B.O. No. 29.798.

<sup>8</sup> Communication A-3394, Dec. 13, 2001, Circular CAMEX 1 - 321, B.O. No. 29.799.

<sup>9</sup> Emergency Law No. 25-561, Jan. 6, 2002, B.O. No. 29.810.

subsequently failed to make the January 25, 2002 scheduled payment of interest due on account of the TGN Note and of the required OPIC Insurance Contract premium.

Upon TGN's failure to make the January 25, 2002, payment on the TGN Note, the TGN Trustee called on the TGN Reserve LC in an amount equivalent to the TGN Scheduled Payment and the OPIC Insurance Contract Premium and made the payment on the OPIC Premium and the TGN Note. After such payment was made, on February 1, 2002, the TGN Trustee notified TGN that a drawing under the TGN Reserve LC had been made and informed TGN that it was obligated to replenish the amount of the TGN Reserve LC unless an Inconvertibility Event had occurred, in which case TGN would be obligated to deposit the Local Currency equivalent of U.S. dollars in an Inconvertibility Account.<sup>12</sup> However, TGN neither replenished the TGN Reserve LC nor deposited the Local Currency equivalent of U.S. dollars or U.S. dollars in an appropriate Inconvertibility Account. Subsequently, the Insured filed a claim for compensation under the OPIC Insurance Contract.

#### *B. Argentine Decrees and Regulations Relating to Convertibility and Transferability*

Since 1991, the Argentine economy has functioned under a convertibility system that permitted both the peso and dollar to be circulated in Argentina and traded at a peso-dollar rate of 1-to-1. However, on January 6, 2002, the Argentine Congress passed the Economic Emergency Law No. 25-561, which replaced the original convertibility system with a dual exchange rate system and resulted in a 29% devaluation of the Argentine peso. Under the new system, transactions involving trade were to be channeled through the Official Exchange Market at a rate of 1.40 Argentine peso to 1.00 US dollar. All other transactions were subject to the Free Exchange Market, as described in the BCRA regulations.

In addition to passing the Emergency Law, the Argentine Government also ratified a number of decrees and regulations relating to the convertibility and transferability of the Local Currency. These decrees and regulation included: Decree No. 1570/2001<sup>13</sup>, which provided that transfers abroad concerning financial obligations would be subject to BCRA's authorization; Communication A-3444<sup>14</sup>, which provided, in relevant part, that only transactions channeled through the Official Exchange Market would require the approval of the BCRA; Decree No. 260/2002<sup>15</sup>, which abolished the dual exchange rate system and set up a single free floating foreign exchange market; Communication A-3471 as amended<sup>16</sup>, which required the private sector to obtain the BCRA's approval prior to making payments of principal and interest on financial loans, except, among others, debt with official credit agencies and debt guaranteed by them<sup>17</sup>; and Communication A-3627<sup>18</sup>, which exempted the private sector from obtaining BCRA prior approval in cases involving debt with or

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<sup>10</sup> Decree No. 71/2002, Jan. 9, 2002, B.O. No. 29.813.

<sup>11</sup> See Attachment "B" of Annex II, letter dated January 25, 2002.

<sup>12</sup> See Annex III, letter dated March 11, 2002.

<sup>13</sup> See footnote No. 6 above.

<sup>14</sup> Communication A-3444, Jan. 23, 2002, Circular CAMEX 1 – 323, B.O. No. 29.828.

<sup>15</sup> Decree No. 260/2002, Feb. 8, 2002, B.O. No. 29.834.

<sup>16</sup> Communication A-3471, Feb. 8, 2002, Circular CAMEX 1 – 326, B.O. No. 29.842.

<sup>17</sup> Section 5 of Communication A-3471.

<sup>18</sup> Communication A-3627, June 5, 2002, Circular CAMEX 1 – 378, B.O. No. 29.923.

guaranteed by members of the International Credit Union and Investment Insurers (Union de Berna) that are official credit agencies or export credit insurers.

#### IV. DETERMINATIONS UNDER THE CONTRACT

*A. No Compensation is payable under the OPIC Insurance Contract even if an Inconvertibility Event did exist throughout the entire Waiting Period because TGN did not deposit the peso equivalent of U.S. dollars into an Inconvertibility Account or Deposit Account, as required by the Indenture and the OPIC Insurance Contract.*

As noted above, Local Currency is deemed inconvertible if the Foreign Enterprise is unable to convert Local Currency into US dollars or to transfer U.S. dollars to the United States and no compensation is payable if the Insured has not made all reasonable efforts to convert Local Currency into U.S. dollars and to transfer out of Argentina to the United States U.S. dollars or to cause the Foreign Enterprise to do so.

In addition, the OPIC Insurance Contract provides that as a condition precedent to OPIC's obligation to pay compensation under the Contract, the Insured must or cause the Foreign Enterprise to either deliver or cause to be delivered to OPIC (A) inconvertible Local Currency, in an amount equal to the Insured Portion of the Subsequent TGN Scheduled Payment or (B) non-transferable U.S. dollars, equal to the Subsequent TGN Scheduled Payment, in either case in the form of funds immediately available to OPIC in the Host Country or, at OPIC's option, in cash.

Thus, under the OPIC Insurance Contract, for an Inconvertibility Event to occur, TGN is required to hold inconvertible Local Currency or non-transferable U.S. dollars in a Deposit Account<sup>19</sup>. Both TGN and the Insured allege that an Inconvertibility Event occurred. However, in its response letter to OPIC, dated March 13, 2002, the Financial Trustee stated that no funds were deposited into a Deposit Account. Additionally, the TGN Trustee disclosed in its letter<sup>20</sup> dated March 11, 2002, that TGN had failed to deposit any funds into a TGN Inconvertibility Account. Finally, TGN acknowledged, in a letter<sup>21</sup> addressed to the TGN Trustee dated March 12, 2002, that it was unable to make the deposit required under Section 6.1(x) of the Indenture because the "substantial devaluation" of the Argentine Peso had caused "a material adverse impact on its capacity to serve its foreign currency denominated debt." Thus, based on statements made by TGN and the Insured in correspondence with OPIC, it is evident that TGN failed to hold Local Currency or U.S. dollars in an appropriate Inconvertibility or Deposit Account as required by the TGN Indenture and OPIC Insurance Contract. Accordingly, no compensation is payable under the OPIC Insurance Contract on July 25, 2002, the Subsequent TGN Payment Date.

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<sup>19</sup> Section 6.1(x) of the TGN Indenture also provides (in part) that the following event is an Event of Default under the TGN Indenture: failure by the Issuer to make any deposit required to be made by it (i) to the TGN Reserve Account or (ii) during the continuance of an Inconvertibility Event, to the applicable Inconvertibility Account...

<sup>20</sup> See Attachment "B" of Annex II.

<sup>21</sup> Id.

*B. The decrees enacted by the Argentine Government and the regulations adopted by the BCRA notwithstanding, reasonable efforts on the part of TGN to convert Local Currency and transfer U.S. dollars to the United States during the Waiting Period would have been successful in that such decrees and regulations neither prevented the transfer of U.S. dollars from Argentina nor rendered the Argentine Peso inconvertible except for two brief periods during the Waiting Period.*

The OPIC Insurance Contract provides that Local Currency is deemed inconvertible if the Foreign Enterprise (“TGN”) is unable legally to convert Local Currency into US dollars or to transfer U.S. dollars to the United States. Further, the OPIC Insurance Contract provides that no compensation is payable if the Insured has not made all reasonable efforts to convert Local Currency and transfer to the United States U.S. dollars or to cause the Foreign Enterprise to do so. Accordingly, in order for the Argentine Peso to be deemed inconvertible, the Insured or TGN, using reasonable efforts, must not have been able to convert Local Currency into U.S. dollars or to transfer U.S. dollars out of Argentina to the United States between January 25, 2002 and July 25, 2002. OPIC would only be obligated to pay compensation under the OPIC Insurance Contract if such reasonable efforts would have failed.

In a letter<sup>22</sup> addressed to OPIC, TGN asserted that an Inconvertibility Event occurred when the Argentine Government passed Decree No. 1570/2001 and the BCRA adopted Communications A-3382 and A-3394. Decree No. 1570/2001, enacted on December 1, 2001, required that transfers abroad concerning financial obligations be subject to BCRA authorization. Presumably, this included the kind of payments evidenced by the TGN Note. Similar to Decree 1570/2001, Communications A-3382 and A-3394, enacted on December 7, 2001 and December 13, 2001, respectively, also presumably obligated TGN to obtain BCRA prior approval for the purpose paying financial debt. Specifically, the Annex to Communications A-3382 listed those categories of debt that were subject to BCRA approval. While the type of debt attributable to the TGN Note was not expressly mentioned, Section 2.2.26 of the Annex stated that obligations not expressly contemplated in the Annex were subject to BCRA approval. Likewise, Regulation A-3394, which modified A-3382, contained the same provision as Section 2.2.26 of the Annex to A-3382. Therefore, Communications A-3382 and A-3394 presumably did require that TGN obtain BCRA prior approval for the purpose paying financial debt. However, whereas Decree 1570/2001 and Communications A-3382 and A-3394 were enacted prior to the commencement of the Waiting Period and establishment of the dual exchange rate system (on December 1, 2001, December 7, 2001, and December 13, 2001, respectively), Communication A-3444 was adopted on January 23, 2002, after the establishment of a dual exchange rate system consisting of an Official Exchange Market and a Free Exchange Market. Communication A-3444 limited BCRA approval to transactions that were to be channeled through the Official Exchange Market. Communication A-3444 did not, however, require that interest payments on account of financial loans, such as the indebtedness evidenced by the TGN Note, be channeled through the Official Exchange Market. Thus, had TGN attempted to make an

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<sup>22</sup> See Attachment “B” of Annex II.

interest payment on account of the TGN Note after January 23, 2002, such payment could have been channeled through the Free Exchange Market and would not have been subject to any prior approvals. Therefore, while there may have been a period of inconvertibility between December 1, 2001 and January 23, 2002, prior to the commencement of the Waiting Period, such inconvertibility ended with the adoption of Communication A-3444 on January 23, 2002.

Communications A-3460<sup>23</sup> and A-3466<sup>24</sup> established a foreign exchange holiday from February 4, 2002 through February 8, 2002, resulting in an Inconvertibility Event during the Waiting Period. Another foreign exchange holiday occurred from April 19<sup>25</sup><sup>26</sup>, 2002 through April 26<sup>27</sup>, 2002. However, these foreign exchange holidays were, once again, temporary measures. On days prior and subsequent to the foreign exchange holidays, TGN had the ability to convert Local Currency into U.S. dollars and to transfer U.S. dollars out of Argentina to the United States.

TGN's ability to convert Local Currency or transfer U.S. dollars to the United States was further reinforced by the BCRA's adoption of Communication A-3471 and A-3627 on February 8, 2002 and June 5, 2002, respectively. Communication A-3471 exempted the private sector from obtaining BCRA prior approval in cases involving debt with official credit agencies or debt guaranteed by them. Communication A-3627 modified Section 5(c) of Communication A-3471 to exempt the private sector from obtaining BCRA prior approval in cases involving debt with or guaranteed by members of the International Credit Union and Investment Insurers (Union de Berna) that are official credit agencies or export credit insurers. The scheduled payments on the TGN Note were insured by OPIC, which is an official credit agency and a member of the Bern Union. Hence, the TGN Note evidences a debt guaranteed by an official credit agency that is a member of the Bern Union. Therefore, the convertibility of TGN payments was exempt from the BCRA's prior approval. Consequently, except for the periods February 4, 2002 through February 8, 2002 and April 19, 2002 through April 26, 2002, Argentine pesos held by TGN for the purpose of making a scheduled payment of interest on account of the TGN Note and paying the premium on the OPIC Insurance Contract were fully convertible into U.S. dollars, and the U.S. dollars were transferable to the United States during the Waiting Period, and reasonable efforts by the Insured or TGN to so convert and transfer would have resulted in replenishment of the TGN Reserve LC. Accordingly, no such reasonable efforts having been made, no compensation is payable under the OPIC Insurance Contract on July 25, 2002, the Subsequent TGN Payment Date.

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<sup>23</sup> Communication A-3460, Feb. 5, 2002, Circular RUNOR 1 – 515, B.O. No. 29.837.

<sup>24</sup> Communication A-3466, Feb. 7, 2002, Circular RUNOR 1 – 517, B.O. No. 29.839.

<sup>25</sup> Communication A-3571, Apr. 19, 2002, Circular RUNOR 1-541, B.O. No. 29.890.

<sup>26</sup> Communication A-3576, Apr. 22, 2002, Circular RUNOR 1-542, B.O. No. 29.894.

<sup>27</sup> Communication A-3580, Apr. 25, 2002, Circular RUNOR 1-546, B.O. No. 29.896.

V. Conclusion

For the foregoing reasons, no compensation is payable under the OPIC Insurance Contract by reason of the events set forth in the claim of the Insured filed with OPIC on February 11, 2002.

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Peter S. Watson  
President & CEO

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(Date)