

**CONCURRING AND DISSENTING OPINION OF JUDGE CHARLES N. BROWER**

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## I. INTRODUCTION

1. I concur with the Award (“Award”) insofar as it 1) rejects Respondent’s objections to this Tribunal’s jurisdiction and 2) finds i) that Argentina violated its obligation under Article 2(2) of the Argentina-Italy BIT to accord Claimant fair and equitable treatment and ii) that Claimant must be compensated for the harm it suffered as a result. With all due respect to my Tribunal colleagues, however, I disagree with their deferential attitude towards several Government actions that, in my view, also constituted violations of Argentina’s fair and equitable treatment obligation. In addition, I part ways with them with respect to Claimant’s claim of expropriation, which the Award dismisses on grounds that I find incapable of being reconciled with the facts in light of the applicable law. Finally, the standard of compensation adopted by the Award does not, as I see it, reflect the appropriate valuation of Claimant’s venture, while the interest on damages should have been applied over a longer period of time.

## II. FAIR AND EQUITABLE TREATMENT

2. I agree with the Award’s holding that, whether evaluated under the “minimum standard” of general international law,<sup>1</sup> or the higher standard employed in several investor-State cases,<sup>2</sup> Argentina’s conduct of which Claimant complains amounted to unfair and inequitable treatment of Claimant.<sup>3</sup> The Award’s analysis focuses, however, only on a limited array of events that include i) the emergency legislation (Federal Law No. 25,561 and Provincial Law

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<sup>1</sup> The minimum standard is usually traced to the *Neer Case (US v. Mexico)*, IV RIAA 60 (1925) and has been espoused by NAFTA tribunals but also by other investor-State panels. See, e.g., *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Partial Award (Nov. 13, 2000) ¶ 259 available at [www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersMeritsAward.pdf](http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersMeritsAward.pdf); *Alex Genin, Eastern Credit Ltd, and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001) ¶ 367, available at [icsid.worldbank.org](http://icsid.worldbank.org).

<sup>2</sup> See, e.g., *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/01, Decision on Liability (Oct. 3, 2006) ¶ 131 (holding that “the fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”), available at [icsid.worldbank.org](http://icsid.worldbank.org); *Siemens AG v. Argentina*, ICSID Case No. ARB/02/08, Award (Feb. 6, 2007) ¶ 299 (holding that the fair and equitable treatment standard is “unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question.... [T]he conduct of the State has to be below international standards but [in addition to the minimum standard requirements] ... the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment”), available at <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>; see also *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award (July 14, 2006) ¶ 372 (same), available at [icsid.worldbank.org](http://icsid.worldbank.org).

<sup>3</sup> See Award ¶¶ 289-97.

No. 12,858) that pesified utilities contracts at parity level and froze tariffs, with devastating effect for those contracts, including AGBA’s Concession Contract;<sup>4</sup> ii) the New Regulatory Framework, a corollary of the emergency legislation that imposed additional burdens on AGBA;<sup>5</sup> and iii) Argentina’s persistent refusal to restore the concession’s equilibrium.<sup>6</sup> As detailed further below, this approach, while yielding a correct result, fails to recognize the full panoply of administrative and regulatory acts and omissions of Argentina that harmed Claimant’s investment. Careful scrutiny of all these acts and omissions is important in that it can both affect the measure of compensation due and better confirm the effectiveness and legitimacy of the arbitral process.

3. The Award notes correctly that “many of the acts complained of by Impregilo concern the contractual relationship between AGBA and the Province”<sup>7</sup> and that the relevant criterion for the evaluation of those acts is whether Argentina’s “alleged contractual breaches ... could affect Argentina’s responsibility under the BIT because they were a misuse of public power or reveal a pattern directed at damaging AGBA and, indirectly, Impregilo, as one of its shareholders.”<sup>8</sup> The Award errs, however, in my view, in giving Argentina a “free pass” on several acts that frustrated Claimant’s expectations, arbitrarily disrupted the Contract’s balance of benefits and obligations, and fit comfortably into a “pattern directed at damaging AGBA.”<sup>9</sup>

4. Specifically, the Award mentions only in passing the “inaccuracies in the data bases handed over to AGBA as concessionaire” and takes at face value Argentina’s position that

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<sup>4</sup> Award ¶¶ 316-25.

<sup>5</sup> Award ¶ 328.

<sup>6</sup> Award ¶¶ 326-27; 329-30.

<sup>7</sup> Award ¶ 298.

<sup>8</sup> Award ¶ 299.

<sup>9</sup> See, e.g., *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (Nov. 8, 2010) ¶ 420 (“[T]he principle of fair and equitable treatment includes the obligation not to upset an investor’s legitimate expectations and the obligation to avoid arbitrary government action, regardless of whether there is any discriminatory element involved.... This means, in part, that governments must avoid arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor.”), available at [icsid.worldbank.org](https://icsid.worldbank.org); *PSEG Global Inc. v. Turkey*, ICSID Case No. 02/5, Award (Jan. 19, 2007) ¶ 250 (holding that “the fair and equitable treatment obligation was seriously breached by what has been described ... as the ‘roller-coaster’ effect of the continuing legislative changes”) (citations omitted), available at [icsid.worldbank.org](https://icsid.worldbank.org).

it reviewed and corrected any database errors.<sup>10</sup> In fact, the problem was more complex—and Argentina’s acts less innocuous. The customer database AGBA received from AGOSBA listed certain properties as vacant plots of land (“*baldíos*”). These “vacant plots” were in fact covered by buildings that required more water services. The Province had dealt with such a database disparity before: in March 2000 ORAB had issued Resolution No. 15/00, which allowed Azurix (the other water concessionaire in the Province) “to recategorize the users ... in those cases in which property is categorized as vacant lot and charged the tariff applicable to vacant lots, but the real estate valuation process carried out by the Province of Buenos Aires shows that there are constructions in such property.”<sup>11</sup> The Province refused, however, to provide AGBA with the same benefit by arguing that under Annex Ñ of the Concession Contract AGBA could not apply a higher “tariff” than that applied by AGOSBA in its last billing period.<sup>12</sup> AGBA objected, arguing that Annex Ñ concerns the “tariff” due AGBA and not the “price” of water services to customers, and that it was inappropriate to rely on that Annex to resist property re-categorizations that would affect only the price of the water services rendered. The Province never responded. By leaving unresolved a question that bore directly on the profitability of AGBA, and relying on a facially inapplicable provision to justify its position, the Province violated Argentina’s obligation to accord fair and equitable treatment to Claimant.

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<sup>10</sup> Award ¶ 301. Another customer database issue that harmed AGBA’s profitability was the non-inclusion of more than 80,000 customers who had been connected just prior to the privatization of AGOSBA. When AGBA attempted to collect from those customers, they were very reluctant to pay their bills, since they had not had to do so previously, resulting in non-collection rates of 70% to 80%. Walck and Giacchino Second Expert Report ¶ 95 (citations omitted); *see also* ¶ III.24 & n.63 *infra*. Respondent has argued, without supporting its argument with any evidence, that prospective bidders had access to the 1998 Schrodgers Report, which referred to collectability problems in the concession area, including the number of non-paying customers. *See* Schrodgers, *Information Memorandum, Privatization of Administración General Obras Sanitarias de la Provincia de Buenos Aires (“AGOSBA”)* (Dec. 1998) Exh. C-41 (“Schrodgers Report”). Therefore, according to Respondent, Claimant should have been aware of the approximately 80,000 connected but non-paying customers. *See* Tr. Day 1, 144:20-24; Tr. Day 8, 146:20-147:4. In light of the testimony of Claimant’s expert Dr. Giacchino, however, that the Schrodgers Report was not in fact supplied to prospective bidders, Respondent, in my view, has not met the burden of showing that Claimant was or should have been aware of the 80,000 habitually delinquent customers. *See* Tr. Day 5, 69:22-70:19 (Claimant’s expert Dr. Giacchino testifying that the Schrodgers Report was not supplied to bidders for the Concession Contract).

<sup>11</sup> ORAB Resolution No. 15/00 art. 1, Mar. 17, 2000, Exh. C-83.

<sup>12</sup> ORAB Letter No. 478/01 to AGBA, Mar. 30, 2001, Exh. C-85.

5. The Province's failure to construct and maintain the so-called UNIREC plants<sup>13</sup> dealt a further serious blow to AGBA's profitability and undermined its efforts to secure financing in 2000-2001. As the Award explains,<sup>14</sup> the terms of the concession included an obligation on the Province to construct two new waste treatment plants (Ferrari and Las Catonas) and renovate a third one (Bella Vista). Those plants, which would allow AGBA to build and expand sewer connections in accordance with the POES, were to become operational in 2001 and eventually to be transferred to AGBA at no cost. Despite these commitments, when AGBA took over the operation of the concession neither the works for construction of the Ferrari and Las Catonas plants, nor those for the reconditioning and enhancement of the Bella Vista Plant had begun. Indeed, as of mid-2000, the Province had not even launched the bidding process. The Award unfortunately does not recognize that the Province either rejected or ignored AGBA's requests to restore the contract equilibrium in light of the resulting disruption of its expectation by revisiting the POES goals (which were partially based on the plants being in service) and assessing other ways waste treatment could be addressed.<sup>15</sup> In fact, the Province even attempted to shift responsibility for the Bella Vista plant onto AGBA.<sup>16</sup>

6. The Award's rejection of Claimant's claims with respect to the UNIREC plants downplays their significance.<sup>17</sup> The serious financial difficulties faced by Argentina in 2001 appear to have been at the root of the Province's failure to deliver those plants. Yet, Argentina has not pled successfully any defense (e.g. necessity) that would justify or excuse that failure, much less the Province's uncooperative and occasionally hostile stance vis-à-vis AGBA. It is entirely gratuitous to dismiss the impact of that failure on Claimant's concession by arguing that "the sewer connections that poured water into such plants amounted to *merely* 34.7% of all the

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<sup>13</sup> The term "UNIREC" refers to the *Unidad de Coordinación del Proyecto Río Reconquista*, the Argentine State-controlled entity responsible for the construction and maintenance of the three waste treatment plants.

<sup>14</sup> Award ¶ 197.

<sup>15</sup> AGBA Letter to ORAB, Aug. 8, 2001, Exh. C-68; AGBA Letter to ORAB, Oct. 25, 2001, Exh. C-61.

<sup>16</sup> *See, e.g.*, ORAB Letter to AGBA, Nov. 12, 2001, Exh. C-69.

<sup>17</sup> *See* Award ¶ 218. The Award admits that the Province's failure to deliver the UNICREC plants "may also have been a relevant factor affecting" AGBA's financing prospects (Award ¶ 366), but does not take this finding into account for liability purposes. Claimant should not have to absorb as "business risk" the losses caused by the non-delivery of the UNIREC plants. There was no reason for AGBA (or Claimant) to assume that the Province would renege on its important contractual obligation to make these three plants available as scheduled, and then attempt to shift onto Claimant additional costs relating to these plants.

connections to be made by AGBA during the first five years”.<sup>18</sup> A “mere” third of all connections is hardly an insignificant proportion for a project trying to “get off the ground.”<sup>19</sup> More critically, the Province’s failure to deliver the plants, combined with the inconsistent and uncooperative behavior of the Ministry of Public Works and the ORAB with respect to other charges and fees, signaled to AGBA’s potential lenders that Argentina was not fully behind the project, and that the conditions on which AGBA’s business plan had been devised could prove unrealistic, throwing into doubt the company’s financing plan.<sup>20</sup> Accordingly, the Award’s recitation of the acts and omissions constituting unfair and inequitable treatment should have included the Province’s failure to deliver the UNIREC plants.

7. The Award performs a similarly cursory and unpersuasive review of the issue of “work charges,” i.e., fees that customers paid to AGBA at the time they were connected to the water and sewage services system, pursuant to Article 10 of Annex Ñ.<sup>21</sup> The Province effectively prevented AGBA from collecting these charges by conditioning collection on the production of voluminous information with respect to all customers who were assessed such charges. In a series of communications, the ORAB requested extraordinary amounts of detailed information about the works performed, and suspended AGBA’s right to collect work charges until it had reviewed all pertinent information.<sup>22</sup> Claimant’s experts have confirmed that the requested information went well beyond evidence that regulatory authorities reasonably would require under the circumstances,<sup>23</sup> while Argentina has failed to justify the breadth of the Province’s requests. The evidence shows that a plausible explanation for the Province’s behavior lies in the political pressure that property owners exerted on the Province to resist the

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<sup>18</sup> Award ¶ 218 (emphasis added). This “mere” one-third of all connections translated into 378,000 customers (98,000 at Ferrari, 200,000 at Las Catonas and an additional 80,000 at Bella Vista), plus an additional 300,000 people who were not connected to the sewage network but, instead, were served by septic trucks. Walck and Giacchino Second Expert Report ¶ 507.

<sup>19</sup> This infraction alone, according to Impregilo’s experts, caused the Net Present Value of AGBA to decrease \$51,764,000 in July 2006 dollars, of which Impregilo’s share would be \$22,045,000. *See* Walck and Giacchino Expert Report ¶ 275.

<sup>20</sup> *See* ¶ II.13 *infra*.

<sup>21</sup> *See* Award ¶ 303.

<sup>22</sup> *See, e.g.*, ORAB Letter to AGBA, July 10, 2001, Exh. C-100; Cerruti Witness Statement ¶¶ 93-94 (recounting ORAB’s numerous information requests); ORAB Resolution No. 14/02, Feb. 18, 2002, Exh. C-102.

<sup>23</sup> Walck and Giacchino Second Expert Report ¶ 301.

work charges.<sup>24</sup> Thus, far from being “a typical contractual dispute which cannot involve responsibility under the BIT,”<sup>25</sup> the Province’s substantial interference with AGBA’s ability to collect work charges amounted to nothing less than deliberate abuse of administrative power with a political motive—and therefore a breach of Argentina’s fair and equitable treatment obligation.

8. The Award again averts its gaze from the Province’s bureaucratic maneuvers on the issue of the sewage coefficient. Article 4 of Annex Ñ to the Concession Contract conditioned the increase of the coefficient for each concession year on the satisfaction of the expansion goals in the POES for the preceding year. On August 27, 2001, the ORAB’s Technical Division issued a report, complete with underlying reasoning and factual findings, concluding that AGBA had complied with the POES goals for the year 2000.<sup>26</sup> This determination entitled AGBA to seek an increase of the sewage coefficient to the level set for year 2001. Six weeks later, however, on October 10, 2001, the ORAB’s Technical Division issued a letter, signed by the same persons as the August report, stating that AGBA had *not* complied with its 2000 POES obligations.<sup>27</sup>

9. After reversing itself without adequate justification, the Province requested additional information regarding works performed by AGBA. According to the testimony of Claimant’s experts, the requested information was uncommonly and unduly extensive;<sup>28</sup>

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<sup>24</sup> See AGBA Letter to ORAB, July 18, 2001; see also AGBA Letter to ORAB, July 20, 2001, both at Exh. C-277; Cerruti Witness Statement ¶ 90, Exh. C-60. The charges were fairly significant (US\$150 for water and US\$ 350 for sewage), and were to be paid not by individual customers but by the owners, possessors or holders of the properties that benefited from the work. Concession Contract Annex Ñ, § 10, Exh. C-11.

<sup>25</sup> Award ¶ 303.

<sup>26</sup> Opinion by ORAB Technical Division, Aug. 27, 2001, Exh. RA 277.

<sup>27</sup> Letter from ORAB Technical Division to AGBA, Oct. 17, 2001, Exh. C-105. Regrettably, the Award’s characterization of these events is incomplete and therefore misleading. According to the Award, “the Argentine authorities showed a considerable degree of *indulgence and tolerance* towards any deficiencies that existed in AGBA’s performance. On August 27, 2001, ORAB’s Technical Department declared that AGBA’s performance during the first year of the concession had shown an acceptable degree of compliance with the POES....” Without mentioning any subsequent events, the Award continues: “Even one year later, on December 2, 2002, the Technical Department of ORAB, in a Report to the President of ORAB, declared that AGBA had essentially satisfied the goals established for the first concession year 2000.” Award ¶ 253 (emphasis added).

<sup>28</sup> Walck and Giacchino Second Expert Report ¶ 306, Exh. C-368.

effectively it amounted to a full audit of AGBA.<sup>29</sup> Compounding the delay caused by its broad requests, the Province rejected information that AGBA supplied, adding further requests in the process.<sup>30</sup> Eventually, in December 2002, the Province again reached the conclusion that AGBA had complied with the 2000 POES, 15 months after its original determination to the same effect.<sup>31</sup> This would prove a hollow victory for AGBA, for when AGBA sought to apply the increased sewage coefficient to the period between August 2001 and December 2002, the Province refused by shifting the blame for its belated determination onto AGBA's untimely furnishing of information, instead of its own expansive and ever-changing information requests. This decision directly harmed AGBA's profitability. In light of the above facts, I am unable to accept the Award's conclusion that there is "no basis for concluding that ... [the Province's] assessment was unjustified or that it was in any way a misuse of State power."<sup>32</sup> Administrative capriciousness and indifference, let alone deliberate delay that undermines the profitability of an investment, are well-established grounds for finding a fair and equitable treatment violation.<sup>33</sup>

10. The Award's analysis of Claimant's right to interrupt service for non-payment is also deficient. The Award notes correctly that under Article 29 of Annex Ñ the Province was

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<sup>29</sup> For example, regarding renovation and reconditioning work, the ORAB asked for:

the precise location of every renovation and or reconditioning performed and the meters involved. The format of the requested information should include, at a minimum, the type of service, location, street, pavement (even or odd), between streets, diameter of piping, material, length of brackets, renovation or reconditioning (indicating if it was one or the other), partial summaries, and total summaries.

The ORAB made similarly extensive requests regarding expansion of service; infrastructure works; and water pressure. ORAB Letter to AGBA, Jan. 17, 2002, Exhibit to Molinari AM50 at 405.

<sup>30</sup> On April 3, 2002, the ORAB's Technical Division wrote to the ORAB rejecting the method that AGBA used to calculate the length of renovated piping, finding that the expansion and infrastructure information was incomplete, and declaring that the format of the provided information was incorrect. Only two months later, on June 11, 2002, did the ORAB finally forward the April 3, 2002 letter to AGBA, which made additional efforts to comply with the Technical Division's additional requests. ORAB Letter No. 1509/02, June 11, 2002, Exhibit to Molinari AM50 at 412.

<sup>31</sup> The Award refers to this 15-month delay as "a long period of reflection" on the part of the Province. Award ¶ 313. The Award fails to recognize the delay, costs, and uncertainty introduced by the ORAB's inconsistent behavior and is content to note only that "[t]he position ... adopted by the authorities appears ... to be somewhat ambiguous." Award ¶ 368.

<sup>32</sup> Award ¶ 304.

<sup>33</sup> See, e.g., *PSEG Global Inc. v. Turkey*, ICSID Case No. 02/5, Award (Jan. 19, 2007) ¶¶ 246, 248-49 (holding that regulatory inaction and delay, along with inconsistent treatment of the investment, can give rise to a breach of the fair and equitable treatment standard), *available at* [icsid.worldbank.org](http://icsid.worldbank.org).

entitled in “extraordinary circumstances” to direct AGBA to continue service despite non-payment.<sup>34</sup> Implicitly reasoning that the 2001 Argentine crisis constituted such “extraordinary circumstances,” the Award simply absolves Argentina of any wrongdoing, while ignoring the fact that Argentina did *not* reinstate AGBA’s right to interrupt connections of non-paying customers after the economic crisis ended—which it would have been expected to do if the suspension of that right occurred pursuant to the Contract.<sup>35</sup> The sources relied upon by Argentina’s own experts show that the inability to interrupt service for non-payment affects adversely a water utility operator’s ability to collect fees.<sup>36</sup> Consequently, the Province’s failure to reinstate AGBA’s right to cut off service to non-paying customers should have been included in the Award as yet another instance of unfair and inequitable treatment of Claimant under the BIT.

11. Furthermore, the Award finds nothing “inconsistent with any rule in the Concession Contract” in the Province’s decision to obligate AGBA to install service meters upon customer request, apparently because “AGBA ... was subject to the control and regulation of ORAB as Regulatory Agency.”<sup>37</sup> This cursory holding oversimplifies the problem, however, and obscures the extent to which the Province misused its power to undermine Claimant’s investment. In directing AGBA to install meters upon request,<sup>38</sup> the Province relied on Article 29 of the Regulatory Framework, which provided that after meters are installed “according to the periods of time established in the concession agreement” the Concessionaire would bill the user on the meter.<sup>39</sup> Thus, the timing of the meter installation would be governed by the Concession

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<sup>34</sup> Award ¶ 306.

<sup>35</sup> AGBA protested ORAB Resolution No. 56/02 of 27 August 2002, in which ORAB suspended this right, but the objection, as the Award itself notes in paragraph 258, was not answered by the Undersecretary of Public Services until 25 August 2005 – nearly three years later. Although there seems to be no broad consensus as to the precise moment the Argentine crisis ended, it has been placed as early as April 2003, nearly two years before Argentina’s response. *See LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) ¶ 244 (holding that “the Tribunal has determined, as a factual matter that the grave crisis in Argentina lasted from 1 December 2001 until 26 April 2003”), *available at* [icsid.worldbank.org](http://icsid.worldbank.org). Similarly, Claimant’s tariffs remained pesified until the end of the Concession, *see* n.73 *infra*.

<sup>36</sup> Dapena and Coloma First Expert Report ¶ 85 (citing OFWAT, *Industry-level detail on household revenue outstanding and associated recovery costs* (London, Office of Water Regulation, 2008)).

<sup>37</sup> Award ¶ 307.

<sup>38</sup> ORAB Resolution No. 85/00 (Nov. 21, 2000), art. 23.

<sup>39</sup> Law No. 11,820 art. 29(II), Exh. C-9.

Contract. The Contract in turn provides that meters will be installed according to the POES, which was designed and implemented by AGBA. Because of the Province's actions, however, AGBA had to invest in metering mechanisms in accordance with customers' whims. The inability to control the timing and location of meter installation severely disrupted AGBA's investment plan because it introduced unpredictability of expenditures. More importantly, it hindered the collection of customer accounts, because customers with low consumption had an incentive to install meters first, while those with high consumption were better off waiting—and delaying the proper assessment of their charges. It follows that the Province's decision as to meter installation was so unsupported by either the Contract or applicable regulations as to be considered arbitrary and therefore violative of Argentina's obligation to treat Claimant's investment fairly and equitably.

12. There are additional events that likewise fit into the pattern of the Province's disruptive actions, but receive no treatment in the Award. Specifically, the Award does not mention the reversal of position of the Ministry of Public Works with respect to a Memorandum of Understanding requested by AGBA in May 2001 aimed to restore the contract equilibrium, which had been disrupted by the Province's failure to deliver the UNIREC plants and its obstruction of AGBA's efforts to collect several fees it was due under the Concession Contract. The MOU was critical to AGBA's efforts to obtain financing.<sup>40</sup> While in May 2001 the Minister appeared amenable to cooperating with AGBA,<sup>41</sup> in August 2001 he notified AGBA that the Ministry would no longer be able to conclude the MOU because of ongoing negotiations with Azurix.<sup>42</sup> Notably, as discussed above, during the same month (August 2001) the ORAB Technical Division issued the report confirming AGBA's compliance with the terms of the

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<sup>40</sup> The Award notes that in May 2001 "AGBA requested that the Concession Contract be renegotiated and its obligations be suspended, claiming as a reason the high uncollectability rate and its difficulties in obtaining financing." Award ¶ 216. AGBA's claim seems plausible. As Claimant's witness Mr. Cerruti explains, financing for projects such as the one at issue is finalized after the signing of the Concession, because "it is the Contract itself that gets securitized." Cerruti Supplemental Statement ¶ 20. Thus, performance during the early stages of the concession is critical. Nevertheless, the Award hastily adds without elaboration that "[t]hese were two risks that had been voluntarily assumed by AGBA as concessionaire." Thus, the Award simply discounts the possibility that the "high uncollectability rate" and associated financing problems had been caused at least partially by the Province's obstructive acts and stalling. *See* n.10, *supra*.

<sup>41</sup> Letter from the Undersecretary of Public Works to AGBA, May 30, 2001, Exh. C-144.

<sup>42</sup> Letter from AGBA to the Governor of Buenos Aires, Sept. 13, 2001, Exh. C-145.

POES—a finding that the Technical Division retracted only two months later without adequate justification. Moreover, while the report recommended suspension of AGBA’s POES obligations, that suspension did not become effective for another 15 months due to ever-expanding information requests by the Province.

13. Thus, by October 2001 Argentina had taken a series of steps that raised serious concerns among AGBA’s prospective lenders, thereby jeopardizing AGBA’s financing.<sup>43</sup> Specifically, Argentina had: i) retracted its offer to cooperate with AGBA with respect to financing, while extending cooperation to another foreign investor; ii) cast doubt on AGBA’s compliance with the POES for 15 months, rendering the status of the Contract uncertain; and iii) caused the same 15-month delay in the suspension of the POES requirements, raising questions as to whether AGBA would be able to meet them. Argentina’s obstruction of AGBA’s financing was detrimental to the success of the project and certainly rose to the level of a fair and equitable treatment violation.

14. The Province continued to adopt measures of questionable legal foundation and definitively adverse impact on the project several years after the beginning of the country’s economic crisis. Thus, in April 2005 the Province resolved<sup>44</sup> to prohibit AGBA from enforcing unpaid bills against unemployed customers, based on a January 2005 law that prevented mortgage foreclosures for 180 days if the inhabitant showed he or she was unemployed.<sup>45</sup> The Province not only ignored AGBA’s arguments that the law purportedly underlying the Resolution concerned real estate mortgages and not water services; it also ensured that the law would be misapplied. Thus, in its Resolution the Province turned on its head the law’s requirement that the unemployed customer furnish proof of unemployment, and instead directed AGBA to show that the customers against whom it sought collection were in fact *not*

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<sup>43</sup> An OPIC letter dated 21 September 2001 noted that there was “uncertainty on tariffs,” “regulatory inaction,” and a “lack of commitment” exhibited by Argentina that impacted adversely OPIC’s evaluation of a potential investment in AGBA. *See* Exh. C-214. Meanwhile, independent consultant Halcrow, hired by another prospective lender, the Inter-American Development Bank, identified as an investment risk the ORAB’s accessibility to “political and other interested pressure groups.” Halcrow, *Agua del Gran Buenos Aires Inter-American Development Bank Regulatory Analysis – Draft Report* (2001), Exh. C-147.

<sup>44</sup> ORAB Resolution No. 7/05, §1, Apr. 20, 2005, Exh. C-125.

<sup>45</sup> Law No. 13,302, Exh. C-126. The law subsequently was extended twice; *see* Laws No. 13,590 and No. 13,738, both at Exh. C-127.

unemployed.<sup>46</sup> Such clear contravention of the letter of the law is indeed arbitrary and certainly should have been included among the Award’s grounds for finding that Argentina’s treatment of Claimant was unfair and inequitable.

15. The above review, combined with those acts that the Award *does* consider as fair and equitable treatment violations,<sup>47</sup> reveals a “behavioral pattern” in the form of unreasonable legislative and regulatory burdens, delays, unduly extensive information requests, and cost-raising tactics on the part of the Province—acts that transcend the boundary of mere “contractual violations” and constitute in fact substantial and undue interference with Claimant’s investment that is actionable and indeed compensable under Article 2(2) of the BIT.

16. Subject to the above observations, I concur with the holding of Section V.C.(v) of the Award concerning fair and equitable treatment.

### III. EXPROPRIATION

17. The Award is content to reject Claimant’s expropriation claim because “the Province, *with some justification*, considered that AGBA had grossly failed in fulfilling its contractual obligations and terminated the Concession Contract on this basis.”<sup>48</sup> According to the Award, this fact alone suffices “to exclude that the termination could be regarded as an act of – direct or indirect – expropriation or other appropriation of AGBA’s property or Impregilo’s investment.”<sup>49</sup>

18. With respect, this conclusion is wrong as a matter of law. Given the ample evidence in the record that the termination of AGBA’s concession was a foreordained political decision that Argentina merely sought to carry out in a facially lawful manner, it is decidedly *not* sufficient to determine, without more, that the host State has terminated the Concession Contract lawfully, based on breaches of contract by the Claimant. Nor is the host State’s superficial evocation of a contractual termination clause enough to “sweep under the carpet” a series of

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<sup>46</sup> ORAB Resolution No. 7/05, §1, Apr. 20, 2005, Exh. C-125.

<sup>47</sup> Award ¶ 316 ff.

<sup>48</sup> Award ¶ 283 (emphasis added).

<sup>49</sup> Award ¶ 283.

administrative and regulatory acts and omissions designed to extinguish the project's value and to waylay any chance of success the project had. I set out my criticisms of the Award's holding in greater detail below.

19. Article 5 of the Argentina-Italy BIT provides, in relevant part:

[1](b) Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with:

- the measures are for a public purpose, of national interest or security.
- they are taken in accordance with due process of law;
- they are non-discriminatory or contrary to the commitments undertaken;
- they are accompanied by provisions for the payment of prompt, adequate and effective compensation.

...

2. The provisions laid out in paragraph 1 hereof shall also apply to the returns from an investment as well as, in the event of liquidation, the proceeds thereof.

20. The Award places emphasis on the fact that Claimant never lost title to its property, i.e., its shares in AGBA.<sup>50</sup> This is true, but also irrelevant since the BIT prohibits expropriation committed “directly or indirectly, through measures having an equivalent effect...” unless certain specifically enumerated conditions are fulfilled cumulatively.

21. A substantial body of jurisprudence and scholarly opinion also recognizes that formal appropriation or extinguishment of title to property is not the only way an investor can be deprived of property in contravention of an applicable BIT. Instead, the host State can take actions and enact measures that are tantamount to expropriation, and constitute “indirect” expropriation,<sup>51</sup> which becomes “creeping” expropriation when the expropriatory measures take

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<sup>50</sup> Award ¶ 271.

<sup>51</sup> See, e.g., *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, (Aug. 30, 2000) ¶ 103 (holding that “[expropriation encompasses] not only open, deliberate, and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the economic benefit of the host State”), available at [icsid.worldbank.org](http://icsid.worldbank.org); *Starrett Housing Corp. v. Iran*, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983) (holding that “it is recognised by international law that 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

effect over a period of time.<sup>52</sup> In such cases, the analysis must focus not on the form of the alleged expropriatory measures, but on their actual substance and corresponding cumulative impact.<sup>53</sup> Furthermore, although the government's underlying intentions are not a necessary legal element of an indirect or creeping expropriation claim,<sup>54</sup> such a claim can be bolstered by evidence of a broader policy decision that assigns common purpose to the individual measures leading to the investor's property deprivation.<sup>55</sup>

22. In light of the above legal principles, the Award's analysis of Claimant's expropriation claim is deficient in several ways. It commences with an incomplete description of Article 5 of the BIT, which Article mentions not only "expropriation at the same level as

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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"); *accord Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225-26 (1984); *see also* Restatement (Third) of Foreign Relations Law of the United States § 712 cmt. g (1986) (stating that "Subsection (1) [on expropriation] applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of 'taking' the property, in whole or in large part, outright or in stages.... A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory").

<sup>52</sup> *See Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003) ¶ 20.22 ("Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property."), available at [http://ita.law.uvic.ca/documents/GenerationUkraine\\_000.pdf](http://ita.law.uvic.ca/documents/GenerationUkraine_000.pdf). The tribunal in *Generation Ukraine* ultimately dismissed the case for lack of jurisdiction *ratione materiae*, but this does not affect the validity of its legal analysis of creeping expropriation.

<sup>53</sup> *See, e.g., Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) ¶ 116 ("The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; ...."), available at [icsid.worldbank.org](http://icsid.worldbank.org); W. Michael Reisman and Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 *British Y.B. Int'l L.* 115 (2004) ("[In indirect expropriation cases] the impact of each governmental measure must be analyzed, not in isolation, but cumulatively, because, as the European Court of Human Rights wrote in this context, 'the consequences of [the state's] interference [are] undoubtedly rendered more serious by the[ir] combined use'.") (citing *Sporrong and Lönnroth v. Sweden*, (Series A) 52 E.H.H.R. 26, ¶ 60 (1983)).

<sup>54</sup> *Biloune v. Ghana Investments Centre*, Award on Jurisdiction and Liability of 27 October 1989, 95 I.L.R. 183, 209 (1989) (holding that "[t]he motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the ... [various government measures] had the *effect* of causing the irreparable cessation of work on the project. ... [S]uch prevention of [joint venture partner] MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL....")

<sup>55</sup> *See* Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Rev.—FILJ 1 (2005) ("The fact that intent is unnecessary does not make it irrelevant to the determination of whether or not a government measure is expropriatory.... Where there is evidence of intent to expropriate, it is unlikely that a state could rely on the good faith exercise of its police powers as justification for non-compensation.") (citations omitted).

nationalization, seizure and other appropriation,”<sup>56</sup> but also *indirect* expropriation, which as discussed is different from each of those three. The Award subsequently recognizes, nevertheless, that “restrictions on the use of property [that] go so far as to leave the investor with only a nominal property right ... could in appropriate cases be regarded as indirect expropriation,”<sup>57</sup> but concludes, in my view wrongly, that “none of the [] measures [taken by Argentina] amounted to a loss of the concession. Nor could the joint effect of these measures be considered to be a loss of property rights.”<sup>58</sup>

23. The Award’s main (and implicitly made) argument in support of this conclusion appears to be that while Argentina can be blamed *partially* for the failure of Claimant’s investment, it is not *entirely* responsible for it,<sup>59</sup> and therefore is not liable for expropriation. This argument is fallacious because, similar to the Award’s fair and equitable treatment discussion, it does not accord the relevant facts either sufficient attention or appropriate legal import.

24. In particular, while the Award recognizes that “the Province did not deliver on time the UNIREC plants which it had undertaken to deliver in 2001” and that “[t]his affected AGBA’s ability to expand sewage connections in certain areas,” it hastens to add that there were “other treatment plants which should have been established by AGBA itself but which could not be completed due to insufficient funds.”<sup>60</sup> The Award fails to note, however, that this dearth of funds was at least partially *caused* by the failure to deliver the UNIREC plants, since that failure and other acts and omissions of Argentina created serious misgivings among AGBA’s potential lenders as to the viability of the project.<sup>61</sup> Similarly, the Award’s passing reference to “an unexpected incorporation of a large number of additional users with a particularly low collectability rate” that “made it more difficult for AGBA to live up to some of its

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<sup>56</sup> Award ¶ 269.

<sup>57</sup> Award ¶ 270.

<sup>58</sup> Award ¶ 272.

<sup>59</sup> This “balancing” is revealed more clearly in the Award’s discussion of compensation, Award ¶¶ 376-77.

<sup>60</sup> Award ¶ 280.

<sup>61</sup> *See supra*.

undertakings”<sup>62</sup> downplays both the cause and the magnitude of the problem. In fact, because of Argentina’s incomplete customer databases, AGBA was confronted with more than 80,000 additional unregistered and habitually delinquent users in the early stages of the concession<sup>63</sup>—a development that not only hampered AGBA’s achievement of the POES goals, but also lowered further the attractiveness of AGBA to potential lenders.

25. Furthermore, the Award fails to address as expropriatory others of Argentina’s acts and omissions that cumulatively diminished AGBA’s value. These include the Province’s refusal to re-characterize built-upon land originally listed as “vacant”; the Province’s deliberate diminishment of AGBA’s profitability by obstructing the collection of several fees and charges such as connection charges, the increased sewage coefficient, and service interruption charges; the Ministry of Public Works’ uncooperative stance that derailed AGBA’s financing efforts; the several-months-long delays and elevated costs caused by ORAB’s ever-expanding requests for information; the issuance of several other administrative decisions and decrees directed solely against the investment such as ORAB Resolution No. 4/02 and Law 12,858, which the Award concludes dealt the project a fatal blow by pesifying unilaterally AGBA’s water and sewage concession; Decree No. 878/03 that introduced the so-called “New Regulatory Framework” and was, according to the Award, “clearly disadvantageous to the concessionaire”;<sup>64</sup> Decree No. 1666/06, which terminated on formalistic grounds the Concession Contract and AGBA’s entire corporate *raison d’etre*; and, finally, Decree No. 1677/06, which transferred responsibility over all water and sewage provision in AGBA’s Concession region directly to ABSA, a State-owned enterprise. Applied in succession over a period of years, Argentina’s acts left Claimant in

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<sup>62</sup> Award ¶ 280.

<sup>63</sup> See n.10 *supra*. In response to the question of whether the collection problems were foreseeable, AGBA Manager Mr. Cerruti explained:

Well, actually not, because the problem that AGBA faced as of the second half of 2000 was the problem of unusual lack of credibility, due to the fact that about 80,000 customers had come in, had been brought in. These customers had a payment behavior which was very different from the rest of the customers. To give you an order of magnitude, we had a collectability of about 20% with the new customers, whilst collectability for the rest of the customers was about 65/70%.

Tr. Day 2, 141:11-19.

<sup>64</sup> Award ¶ 328.

possession of shares in an empty corporate shell, which had been deprived of all purpose and value.

26. Instead, the Award merely juxtaposes AGBA's alleged inability to meet the POES goals that the Province cited as the reason to terminate the Contract on the one hand<sup>65</sup> and some of the ways in which the obstruction, delay, and uncertainty introduced by Argentina contributed to AGBA's failure on the other.<sup>66</sup> This presentation showcases a small portion of Argentina's acts that violated the BIT, but fails both to delineate a chain of causation showing which *specific* acts by AGBA contributed to the project's failure, and to set forth the legal basis on which such acts were found to be sufficient to defeat Claimant's claim of expropriation.

27. Significantly, the Award leaves entirely unresolved the issue of whether the Province's 2001 suspension of the POES requirements was meant to endure until the parties re-established the equilibrium of the Contract.<sup>67</sup> It therefore implicitly accepts that AGBA may not have been in breach of the Concession Contract at all, undercutting the formalistic reasoning of the termination decree and leaving Argentina's actions as the only cause of the concession's demise. Yet, in the very next paragraph the Award bypasses this cardinal question by stating that "it is not decisive whether or not the Province had a correct understanding of AGBA's obligations under the Concession Contract."<sup>68</sup> Irrespective of what the Province understood, the Tribunal is required to attain a thorough and well-substantiated understanding of the parties' rights and obligations under the Contract. If, as Claimant has argued, the suspension of the POES goals extended beyond 2001, the "decisive question" of "whether the reasons given for the termination constituted a legally valid ground for termination according to the provisions of the Concession Contract"<sup>69</sup> must be answered in the negative, and the Award's view on expropriation becomes unsustainable even under the Award's own formalistic approach.

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<sup>65</sup> Award ¶¶ 273-74, 279.

<sup>66</sup> Award ¶¶ 280-82.

<sup>67</sup> Award ¶ 282, 369. *But see* Award ¶ 314 (holding that the suspension of the POES was "for the second concession year 2001 with the effect that measures which had not been accomplished during that year should not lead to penalties....")

<sup>68</sup> Award ¶ 283.

<sup>69</sup> Award ¶ 278.

28. Perhaps most importantly, the Award adopts an equivocal and poorly reasoned view with respect to the political motivations quite evidently underlying the termination of the Concession Contract by the Province. While it accepts “that the Argentine administration may have set up as a political goal to transfer water and sewerage services to public entities,” the Award dismisses this important fact by relying on the proposition that “the fact that an issue becomes a political matter ... does not mean that the existence of a rational policy is erased.”<sup>70</sup> The quoted sentence appears out of context from a factually and legally inapposite case.<sup>71</sup>

29. Still, to the extent the Award’s reference to “rationality” alludes to the State’s right to exercise its police power, the Award has failed to explain which of the measures taken by Argentina would constitute exercise of that power, and on what grounds.<sup>72</sup> Moreover, as detailed further below, the Award has ignored a wealth of evidence demonstrating that the gradual “wearing down” and eventual total devaluation of AGBA was a predetermined national political goal that the Argentine authorities sought to achieve while “maintaining appearances” in the hope of avoiding liability. Such behavior hardly meets the standard of *bona fides* that must characterize any legitimate exercise of police powers by the State. Moreover, even if the evidence were not enough to substantiate a political motive behind the termination, the arbitrary and unjustified character of Argentina’s individual acts precludes their legitimacy.

30. If the various prohibitions on collecting service charges and late fees did not clearly illustrate the Province’s hostile stance towards AGBA, the unilateral and targeted pesification of the Concession Contract in 2002 certainly did. The Argentine Government’s Law No. 25,561 that, *inter alia*, abrogated the US dollar tariffs in certain concessions and licenses did not apply to AGBA automatically, because the Argentine federal system delegates public services regulation to the provinces. By January 11, 2002, the Province had not yet enacted a

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<sup>70</sup> Award ¶ 277.

<sup>71</sup> *AES Summit Gen. Ltd. and AES-Tisza Erömü Kft v. Hungary*, ICSID Case No. ARB/07/22 (ECT), Award (Sept. 17, 2010) ¶ 10.3.23, available at <http://ita.law.uvic.ca/documents/AESvHungaryAward.pdf>. The quote stems from the AES tribunal's analysis of the FET standard of the ECT, not a discussion of indirect expropriation under a BIT, where an underlying political motivation may not be required as an element of liability but helps "connect" the steps leading to the substantial or total deprivation of property suffered by claimant.

<sup>72</sup> See *Sedco, Inc. v Nat'l Iranian Oil Co.*, 9 Iran-US Cl. Trib. 248, 275 (1985) (referencing as “an accepted principle of international law that a State is not liable for economic injury which is a consequence of a bona fide ‘regulation’ within the accepted police power of states”).

law mirroring the provisions of Law No. 25,561, yet the ORAB preemptively resolved to pesify AGBA's tariff through Resolution ORAB No. 4/02—although its authority to do so was by no means established.<sup>73</sup> The Province's Congress subsequently enacted Law No. 12,858, which entitled the Provincial Executive Branch to “organize, structure, and/or adjust the regulatory frameworks” *only* of the “sanitation, running water supply, and sewage public services.” With respect to other utilities, Law No. 12,858 provided for the creation of a commission and the conduct of further analysis prior to pesification. In the case of AGBA, it entitled the Province to alter the regulatory framework before any analysis was conducted.<sup>74</sup> These facts are highly suggestive that at least as of early 2002 the Province had resolved to undermine AGBA and resume control of the concession.

31. The heavy political undertones of the concession's termination figured prominently at the hearing on the merits, during the juxtaposition of the witness statement and oral testimony of Mr. Díaz, Chairman of AGBA's Board of Directors, with that of Minister Eduardo Sícario, who at the time the Concession Contract was terminated served as Secretary of Public Services in the Province's Infrastructure Ministry. Specifically, Mr. Díaz's statement described a meeting held at the Ministry's offices in mid-July 2006, at which Minister Sícario informed Mr. Díaz in no uncertain terms that the Province had decided to terminate AGBA's Concession Contract purely for political reasons, namely to fall into line with the Federal Government's termination of the Aguas Argentinas concession.<sup>75</sup> In that discussion Minister

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<sup>73</sup> Claimant's Memorial on the Merits ¶ 249 (citing ORAB Resolution No. 4/02, Jan. 11, 2002, Exh. C-134). The expert report of Claimant's expert Prof. Mairal suggests that this ORAB-driven pesification was highly irregular in its inception and implementation:

AGBA's tariffs were pesified by a resolution of the regulatory agency even prior to the enactment of Law No. 12,858. They remained frozen at that level up to the end of the Concession in 2006, notwithstanding that the provincial emergency legislation was not extended beyond December 31, 2004.

*See* Mairal Expert Report ¶ 105, Exh. C-267.

<sup>74</sup> Law No. 12,858, Article 3 states: “The Province of Buenos Aires adheres to Section 8 of Law No. 25,561 and to Sections 9 and 10 thereof, subject to the previous ratification of the renegotiations and adjustment of public services agreements by the Legislature of the Province of Buenos Aires, as provided in Section 1 above.” (Exh. C-135).

<sup>75</sup> *See* Díaz Witness Statement ¶ 8 (“During this [July 2006] meeting, the Province's representatives stated that, out of consideration for AGBA, they wanted to personally inform us beforehand that the Decree to terminate the concession contract had already been drafted and was going to be formally announced promptly. We were then explained that the motivation of this termination was purely political.”); Tr. Day 3, at 5:7-24 (“[MR. DIAZ:] [At the mid-July 2006 meeting] ... Minister [Sícario] informed us that the decision had been taken on the part of the

Sícaro, according to Mr. Díaz, also rejected as politically unviable AGBA's proposal to end the concession by mutual decision, and assured Mr. Díaz that AGBA would receive compensation through legal action.<sup>76</sup> Mr. Díaz reaffirmed this account during his testimony at the hearing.<sup>77</sup> Mr. Facchinetti, Director and Executive Vice President of AGBA, who also was present at that same meeting, corroborated this account of events in his own witness statement and during the hearing.<sup>78</sup>

32. Minister Sícaro's witness statement was dated more than two and a half months after that of Mr. Díaz.<sup>79</sup> In that statement, Minister Sícaro confirmed expressly Mr. Díaz's

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provincial government to terminate the contract. Obviously, he had the courtesy of letting us know before we found out through an official notification by way of the decree .... [W]e did not agree with that measure, especially inasmuch as the decree provided for termination for the concessionaire's fault ... so in such circumstances the Minister informed us that this was a decision that was, let's say, a political decision.")

<sup>76</sup> Díaz Witness Statement ¶ 8 ("In view of this ... [AGBA] enquired whether it was possible for our contract to be terminated 'by mutual agreement,' compensating AGBA in the process. Minister Sícaro informed us that, unfortunately, that was not going to be possible because no one had the political support to sign an agreement in this respect. Minister Sícaro then stated that the termination had to be due to the Concessionaire's fault. He mentioned that he was also aware that, in this case, AGBA and/or its shareholders would be entitled to file an important claim for damages, but stated that this was a decision taken by the Federal Government and that they had to follow suit.")

<sup>77</sup> Tr. Day 3, 6:17-7:1 ("[MR. DIAZ:] Once we found out that this [the termination decree] was a measure that was irreversible ... we raised the idea of it being termination by mutual consent with compensation that would be accepted by both parts. Very frankly and clearly ... [Minister Sícaro] said that it was impossible to ... come to such an agreement, because in fact there was no official that would have political support to grant a single peso or a dollar by way of compensation....")

<sup>78</sup> See Facchinetti Supplemental Witness Statement ¶¶ 34-35 ("I deem it appropriate to describe the last meeting we held with Minister Sícaro in July 2006 following the announcement of the termination of the Concession Contract . . . Mr. Sícaro told us at the time that in light of the termination of the Aguas Argentinas' contract by the Federal Government, the Province would terminate our contract due to the Concessionaire's fault. Moreover, when Guillermo Diaz suggested that, since the decision was politically motivated, the procedure for termination by mutual consent should be applied and that the Concessionaire should be compensated . . . Mr. Sícaro responded that no one had the political leeway to grant compensation . . . Minister Sícaro informed us that . . . they were well satisfied with AGBA's management [and] would keep most of AGBA's personnel, even management staff . . ."); see also Tr. Day 2, at 108:8-24 ("[MR. FACCHINETTI: ... [In July 2006] in a meeting held at the Ministry of Public Works, Dr Sícaro announced that the provincial officials had decided—the Province had decided to terminate the AGBA contract for the concessionaire's fault. In that meeting, I was present, as well as executives from AGBA. We were asked if we considered that the termination was due to an absolutely political decision on the part of the Province, and if there was any room for working on the -- what the contract stipulated when it came to a termination by mutual consent. The answer was no, there was no political room for that solution. Finally, we were told that very frankly the idea was that once AGBA's contract was terminated, it would be managed within ABSA as a separate business unit from the rest, due to the way in which the work had been carried out and due to the efficiency of the company.")

<sup>79</sup> Addressing the several glaring similarities between his statement and that of Respondent's witness Mr. Seillant Minister Sícaro testified that they were purely coincidental, that he had drafted his statement by himself and that he had not seen Mr. Seillant's witness statement. See Tr. Day 3, 76:7-80:3.

presence at the July 2006 meeting and that Mr. Díaz raised the issue of compensation to AGBA for the termination of its concession by the Province.<sup>80</sup> Surprisingly, Minister Sícario's statement did not even attempt to rebut Mr. Díaz's earlier statement to the effect that the termination of the concession was entirely a political act that was to be "dressed up" as an allegation of breach of contract. Minister Sícario, when confronted with this glaring omission at the hearing, testified that he had not read Mr. Díaz's witness statement either before signing his own, which clearly was submitted in reply to Mr. Díaz's witness statement, or indeed at any time before testifying at the hearing.<sup>81</sup> In response to questions from the Tribunal about the alleged political motivations underlying the termination of the concession, Minister Sícario simply rehearsed the decree's formalistic justifications for the decision and that the Regulatory Framework and the Contract itself provide for termination of the Concession. According to Minister Sícario, the July 2006 meeting had taken place to inform AGBA's representatives of the forthcoming decree—there were no political reasons motivating it.<sup>82</sup> In addition, Minister Sícario said, AGBA had already stated in a letter dated June 14, 2006 (almost a month before the meeting) that it was considering itself terminating the Concession Contract unilaterally, which, according to Minister Sícario, disproved Mr. Díaz's statement that at that July 2006 meeting AGBA proposed terminating the contract by mutual decision.<sup>83</sup>

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<sup>80</sup> Tr. Day 3, 86:14-87:6.

<sup>81</sup> See Tr. Day 3, 89:17-20 ("JUDGE BROWER: It is your testimony, as I understand it, that this is the first time you have seen this [Mr. Diaz's] witness statement. [MINISTER SICARO]: Yes."); 90:1-12 ("JUDGE BROWER: You're quite sure, I take it, from your testimony, that it was not from having seen this witness statement of Mr. Diaz that you referred in paragraph 28 of your witness statement to la consulta of Senor Diaz? [MINISTER SICARO]: No. JUDGE BROWER: Your answer is potentially ambiguous in light of the question.... [MINISTER SICARO]: No, I have not read this document.")

<sup>82</sup> See, e.g., Tr. Day 3, 90:16-91:20 ("JUDGE BROWER: Would you turn to paragraph 8 of Senor Diaz's statement? I call your attention to the text beginning at the second sentence in the English text.... I quote: "We were then explained that the motivation of this termination was purely political. In fact, Minister Sícario informed us that the Province had decided to terminate AGBA's Concession Contract because they had to follow the same course of action that the national government had taken with respect to Aguas Argentinas' Concession Contract.... Is that statement of Mr. Diaz correct or not? [MINISTER SICARO:] No, it isn't correct. It is clear that if we inform them about the motivations of the termination decree, it is not consistent with what Diaz says here. The concession [sic] decree does not speak of the fact that this was as result of Aguas Argentinas' concession ending .... So if we were telling them about the decree, no way could we have said what Mr. Diaz mentions here.")

<sup>83</sup> See Tr. Day 3, 94:25-95:9 ("[MINISTER SICARO]: [I]n this case, AGBA had already told the Province that it wanted to terminate the contract. I don't understand why they say now that they were doing – or they were going to do it by common agreement. So at no time did we speak about that subject, and it is clear that if a compensation would be due, it would have to be done under the terms in which the contract states forth, where compensations

33. Minister Sícario's testimony regarding the termination decree's political character, in my view, was patently evasive and definitely not credible.<sup>84</sup> The superficial reasoning contained in the termination decree, which reasoning Minister Sícario rehashed, is not probative as to the political motivations and decisions underlying the decree. Furthermore, it is true that by mid-June 2006 AGBA had formally requested that the Province provide a response to the issues it raised in its letter and issued an ultimatum; namely, that AGBA itself would terminate the Concession if the Province's obligations had not been duly performed and the terms of the Concession not readjusted within a 45-day period. However, this period had *not* elapsed when the Province terminated the Concession in mid-July. In fact, it is quite likely, in my view, that the Province's termination decree was expedited in order to preempt a termination by AGBA.

34. Finally, the Award's conclusion that the Province's termination decree was legitimately based on the failure of AGBA to meet its Concession Contract obligations cannot be reconciled with its conclusion that Claimant was denied fair and equitable treatment by the 2002 pesification of that Contract. It is common ground that AGBA's POES obligations for the year 2000 were ruled by the Argentinean authorities to have been met. It is also common ground that Claimant's POES obligations for 2001 were suspended. Therefore, no breach of the Concession Contract could be asserted as to either of those years. ORAB pesified the Concession Contract 11 days after the end of 2001, namely on 11 January 2002, which the Award finds, together with the federal and provincial pesification decrees, to have violated Argentina's obligation of fair and equitable treatment. If, as we have ruled, AGBA was subjected to unfair and inequitable treatment in violation of the relevant treaty provision starting

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would be due to them, which is what they are claiming for before the Argentinian courts, and if they have the right to it, they will collect it.”).

<sup>84</sup> Notably, my colleagues have failed to draw *any* inference from the combination of the witness statements and hearing testimony of Messrs. Díaz and Facchinetti on the one hand, and Minister Sícario on the other. I recognize that the cause may lie in their civil law training, which discounts entirely the testimony of party representatives. *See, e.g.,* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 834 (1985) (explaining that German law “distinguishes parties from witnesses” and noting that “German judges are given to marked and explicit doubts about the reliability of testimony of witnesses who previously have discussed the case with counsel or who have consorted unduly with a party.”) (citations omitted). In the context of investment arbitration, however, where witnesses usually are party representatives whose actions lie at the heart of the dispute, rigid application of this approach denies arbitrators (and ultimately the parties) the many benefits of oral evidence by anyone other than designated impartial experts. In the present case, the statements and testimony of Messrs. Díaz and Facchinetti are, in my view, clearly more compatible with the facts of the case, while the written and oral testimony of Minister Sícario cannot at all be reconciled with those facts.

at the beginning of 2002,<sup>85</sup> by what logic can it be possibly be concluded that any subsequent failure of AGBA to meet contractual requirements would be the fault of AGBA, subjecting it to a legitimate termination of the Contract?<sup>86</sup> I believe that to state this question is to answer it.

#### IV. VALUATION METHODOLOGY AND INTEREST

35. The Award relies on its conclusion that “AGBA and the Province have a shared responsibility for the failure of the concession” to hold that it would be “inappropriate to calculate damages on the basis of customary economic parameters such as a cost or asset based method or an income method.”<sup>87</sup> Moreover, because “Impregilo has not shown that the concession was likely to have been profitable, if there had been no interference by the Argentine legislator and the Argentine public authorities” the Award considers “amounts invested” as an appropriate measure of Claimant’s damage,<sup>88</sup> with the applicable interest rate applied as of the date the Concession Contract was terminated by the Province.<sup>89</sup>

36. For reasons I have set out in the “Fair and Equitable Treatment” and “Expropriation” sections above, I cannot endorse the premise of “shared responsibility” that underlies the Award’s reasoning. I believe Claimant has marshaled considerable evidence that demonstrates the viability of AGBA even under harsh economic conditions, but for the interference from Argentina. Consequently, the value of the investment should be its “fair

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<sup>85</sup> In its fair and equitable treatment analysis the Award acknowledges that “AGBA’s activities were to a large extent affected by the emergency measures that were taken to meet the economic crisis” and that pesification “had a dramatic negative impact on the economic prospects of the concession.” Award ¶¶ 316, 318. The Award also notes that “since the new exchange rate ... had highly detrimental effects on AGBA, the Province should have offered AGBA a reasonable adjustment of its obligations under the Concession Contract.” Award ¶ 325.

<sup>86</sup> As the PCIJ held in the *Chorzów Factory* case: “It is ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation ... if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question....” *Case Concerning the Factory at Chorzów (Germany v. Polish Republic)*, Claim for Indemnity (Jurisdiction), Judgment of July 26, 1927, PCIJ 1927, Series A, No. 9 ¶ 87.

<sup>87</sup> Award ¶ 378.

<sup>88</sup> Award ¶ 380.

<sup>89</sup> Award ¶ 384.

market value” as determined by using the well-established Discounted Cash Flow (“DCF”) method, which customarily is applied to ventures that are “going concerns.”<sup>90</sup>

37. While it is often employed in expropriation cases,<sup>91</sup> the DCF method can also be applied to determine compensation for unfair and inequitable treatment. For example, the *CMS* tribunal held:

[T]he Tribunal is persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.<sup>92</sup>

38. The case at bar also entails breaches of a “cumulative” nature” that resulted in “important long term losses”. Since it is undisputed that AGBA operated for the first six out of the projected thirty years of the concession, and was stopped from continuing only by Argentina’s terminating the Concession and transferring all of AGBA’s assets to ABSA, it qualifies as a “going concern” and, similar to *CMS*, Claimant’s damages based on the Concession’s “fair market value” are properly calculated using the DCF method. Although an enterprise need not be profitable from the beginning to qualify as a going concern,<sup>93</sup> it is relevant to the calculation of damages to note that AGBA maintained positive cash flows during its first two years of operation (and even posted a profit during the first year) notwithstanding its mistreatment by Respondent.<sup>94</sup> Since the Tribunal

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<sup>90</sup> In the context of expropriation, the World Bank has defined “going concern” as “an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State.” World Bank, *Report to the Development Committee and Guidelines for the Treatment of Foreign Direct Investment*, adopted Sept. 21, 1992, reprinted in 31 I.L.M. 1363, 1376 (1992).

<sup>91</sup> See, e.g., *ADC v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), available at [icsid.worldbank.org](http://icsid.worldbank.org).

<sup>92</sup> *CMS Gas Transm’n Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8 (May 12, 2005) ¶ 410, available at [icsid.worldbank.org](http://icsid.worldbank.org).

<sup>93</sup> *Compañía del Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) ¶¶ 8.3.3-8.3.4, available at <http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf>.

<sup>94</sup> Walck and Giacchino First Expert Report ¶ 230. For the remaining four years, during which the effect of Argentina’s inequitable and arbitrary actions became more pronounced, AGBA continued to operate with only minimal losses. *Id.* Based on a discount rate on equity of 15%, which is even more conservative than the *CMS* Tribunal’s 14.5%, Claimant’s experts project AGBA’s net present value to equity of \$208,767,000 as of July 2006. *Id.* ¶ 232. Moreover, Claimant’s experts adapted their assumptions to the circumstances by reducing the estimated collection ratios, increasing the length of time over which collections would occur and delaying AGBA’s reaching

enjoys wide discretion to adjust damages depending on the circumstances of the case,<sup>95</sup> use of DCF would have allowed, by means of the discount rate, adjustment of the damage figure to account for any business risk that Claimant would have had to absorb as a result of investing in Argentina.<sup>96</sup>

39. Finally, given the Award’s reasoning on fair and equitable treatment, I am unable to accept the calculation of the applicable interest rate. According to the Award, “[t]here is no precise point in time when the unfair treatment took place, but there were a series of successive events – actions as well as omissions – which cumulatively were unfair to AGBA...”<sup>97</sup> Without mentioning what these “actions” and “omissions” were, the Award observes that “when the Province terminated the concession, its breaches of the BIT had culminated.” Thus, the Award applies interest as of the date of the termination decree, namely July 11, 2006.

40. This holding, however, is in conflict with the basis on which the Award has found that Argentina violated its fair and equitable treatment obligation. Specifically, as explained above, the Award relies on three key facts: the imposition of pesification in January 11 and February 28, 2002; the enactment of the so-called “New Regulatory Framework” on June 9, 2003; and Argentina’s refusal to re-negotiate the terms of the Concession Contract after either of these events, despite AGBA’s repeated requests, until Argentina terminated the Concession Contract on July 11, 2006. With liability so based it is conceptually wrong and patently unfair to reward Argentina for its evasive and stalling tactics by calculating interest as of the later date. On the Award’s own liability conclusion Argentina’s acts damaged AGBA in 2002 and in 2003, and Argentina simply refused to do anything about it for at least three years thereafter. The

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the 90 percent collection level until 2009, all as a result of the economic situation. Tellingly, Argentina’s valuation experts adopt the same DCF methodology, with a discount rate of 16.3%, but arrive at a different outcome due to fundamentally different assumptions. See Dapena & Coloma Expert Report ¶¶ 148-50.

<sup>95</sup> See *ADC v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006) ¶ 521 (holding that “at the end of the day, the Tribunal can stand back and look at the [expert reports submitted by the Parties] and arrive at a figure with which it is comfortable in all the circumstances of the case”), available at [icsid.worldbank.org](http://icsid.worldbank.org).

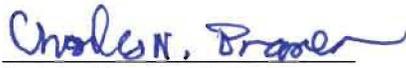
<sup>96</sup> Respondent’s valuation experts have attempted to discredit Claimant’s financial projections by referring to the Schroders Report that, among others, assigned negative net present value to the area eventually granted to AGBA. Respondent has failed to mention, however, that its experts have made selective use of the data in the Schroders Report, while the report was never meant as a thorough, well-substantiated business plan, as illustrated by the fact that it assigned negative values to *all* districts in the Province, including one that was bid out successfully for US\$ 438 million. See Walck and Giacchino Second Expert Report ¶¶ 402-407.

<sup>97</sup> Award ¶ 384.

minimum the Award should have done to compensate Claimant for those three “lost” years is to include them in its interest calculation.<sup>98</sup>

## V. CONCLUSION

41. For the reasons stated above, I agree that we have jurisdiction over Claimant’s claims. In addition, I concur with my esteemed colleagues that Respondent violated its obligation of fair and equitable treatment, for which violation it must compensate Claimant, though I consider the grounds mentioned in support of that holding to be incomplete. Moreover, I dissent from the Award’s analysis of expropriation, its valuation methodology, and the time period it employs to calculate the interest due Claimant.

  
Judge Charles N. Brower

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<sup>98</sup> This conclusion is supported further by the Award’s purported reliance on the *Chorzów Factory* case. Award ¶ 361. In that case, the Permanent Court of International Justice famously held that “[t]he essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” *Case Concerning the Factory at Chorzów (Germany v. Polish Republic)*, Claim for Indemnity (Merits), Judgment of Sept. 13, 1928, PCIJ 1928, Series A, No. 17, ¶ 125. In this case, the only way to “wipe out” the cost of time and opportunity lost by Claimant due to Argentina’s stalling is to award Claimant interest for the duration of the resulting delays. Incidentally, Argentina’s protracted dilatory tactics after it crippled Claimant’s investment essentially distinguish this case from *Azurix*, which the Award seems to follow in holding that “there can be no doubt that, by July 11, 2006, when the Province terminated the concession, its breaches of the BIT had culminated.” Award ¶ 384; *cf. Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award (July 14, 2006) ¶ 418 (“[I]n the Tribunal’s view, there can be no doubt that, by March 12, 2002 when the Province put an end to the Concession, alleging abandonment by ABA, its breaches of the BIT had reached a watershed.”), available at [icsid.worldbank.org](http://icsid.worldbank.org). Unlike this case, in *Azurix* Argentina terminated the concession relatively soon after its unfair and inequitable treatment of Claimant, so it was appropriate in that case to take the termination date as the starting point for compensation purposes. That approach is inappropriate here, since it would unfairly penalize Claimant for Argentina’s deliberate diffidence and non-responsiveness.