

SEPARATE OPINION OF ARBITRATOR PEDRO NIKKEN

1. I agree that the State violated the standard of fair and equitable treatment when it failed to adjust tariffs for services provided by APSF, from the time of the consolidation of the recovery from the economic and social crises suffered by Argentina that started in late 2001 and early 2002.
2. However, I disagree with the reasoning in the Tribunal's conclusions that the violation of fair and equitable treatment was due to the frustration of the legitimate expectations of the Claimants, the modification of the regulatory framework, and the renegotiation of the Concession decided by the State against the background of the 2001-2003 crisis. Despite the fact that my disagreement is in part only and does not exonerate Argentina for the violation of the fair and equitable treatment standard, and despite the scholarly rank and renowned intellectual and moral quality of my colleagues in this Tribunal, for whom I have the utmost respect and esteem, I believe the points on which I dissent are sufficiently relevant to justify this vote. My disagreement with the reasoning in this Decision on Liability (the Decision) extends to recent awards that identify fair and equitable treatment with the protection of so-called "legitimate expectations of the investor," which, in my opinion, goes beyond the normal meaning of the terms of the BITs and the intention of the parties.
3. The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable." Therefore, *prima facie*, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT). In addition, I think that the interpretation that tends to give the standard of fair and equitable treatment the effect of a legal stability provision has no basis in the BITs or in the international customary rules applicable to the interpretation of treaties.
4. "Fair and equitable treatment" is primarily a "treatment," that is, a behavior, a conduct of each State Party when in the position of recipient of investment. That conduct must be "fair and equitable." *In essence* fair and equitable treatment is a standard of *conduct* or *behavior* of the State *vis à vis* foreign investment. The conduct that each State Party to a BIT is willing and obliged to adopt for the promotion and protection of investments and, conversely, what each State is entitled to expect and does expect from the behavior of the other Party in the same situation.¹

¹ I consider this a key aspect of fair and equitable treatment, which is not included in the characteristics as described in the Decision (para.180), with which, incidentally, I agree: a) it is a vaguely and ambiguously defined standard, the scope of which is not defined in investment promotion and protection of foreign bilateral investment treaties (BITs); b) it is a standard widely used in hundreds of BITs worldwide; c) the terms defining the standard are flexible and apply to all types of investments and ventures; d) it is a factual standard, because its implementation is closely linked to the particular facts of each case so that judgment about what is fair and equitable cannot be formulated in the abstract but

5. What is the “ordinary meaning” that States could attribute to their obligation to behave in a “fair and equitable” manner with respect to investments from the other Party? Some arbitral tribunals have sought to adhere to the normal meaning, the ordinary meaning of what is “fair and equitable” in accordance with authoritative dictionaries. The *Azurix* Tribunal, following the *Oxford Dictionary*, concluded that “*the terms ‘fair’ and ‘equitable’ used in Article 3(1) of the BIT mean ‘just,’ ‘even-handed,’ ‘unbiased,’ ‘legitimate.’*” In the Spanish version of the award, the expressions are taken from the Dictionary of the Real Academia Española, with the same result: *fair and equitable* means “*que obra con justicia y razón, ‘arreglado a justicia y razón,’ ‘que tiene equidad’ y de ahí ‘que obra con igualdad de ánimo’.*”² In relation to the same concept, the *MTD* Tribunal added that this obligation regarding behavior of the host State should not be construed as being merely passive or negative, but should include “*treatment in an even-handed and just manner conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement ‘to promote,’ ‘to create,’ ‘to stimulate’ rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.*”³
6. The NAFTA State Parties, for their part, made an interpretative statement on the scope of their obligation to accord a “fair and equitable treatment” to foreign investments they receive. That

depends on the particular facts of the case; e) its extensive use in BITs, its generality and flexibility suggest that this is a standard developed by the Contracting States as the basic standard of treatment they are obliged to mutually grant to foreign investments protected under the BITs.

² *Azurix Corp. v. Argentina* (ICSID Case No. ARB/01/12), Award of July 14, 2006, para. 360. Similarly: *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile* (ICSID Case No ARB/01/7), Award of May 25, 2004, para. 113; *Siemens AG v. Argentine Republic* (ICSID Case No ARB/02/8), Award of February 6, 2007, para. 290.

³ *MTD v. Chile*, para. 113. Professor Schreuer, however, suggests that the fair and equitable treatment does not include positive obligations:

As a matter of substance, the content of two standards is distinguishable. The fair and equitable standard consists mainly of an obligation of the host State’s part to desist from a certain course of action. By contrast, by promising full protection and security the host assumes an obligation to actively create a framework that grants security. The necessary measures must be capable of protecting the investment against adverse action by private persons as well as by State organs. In addition to physical protection, this requires the provision of legal remedies against adverse action affecting the investment and the creation of mechanisms of effective vindication of investors’ rights.

(C. Schreuer: *Fair and Equitable Treatment (FET): Interactions with other Standards*. Transnational Disputes Management. Volume 4, issue #05 – September 2007.

However, while suggesting a reservation, the Ad Hoc Committee that decided on the annulment of the *MTD* award considered acceptable that part of the reasoning of the Tribunal:

“...a standard formulated in the[se] terms[...] is defensible [...] the extent to which a State is obliged under the fair and equitable treatment standard to be pro-active is open to debate, but that is more a question of application of the standard than it is of formulation. In any event, the emphasis in the Tribunal’s formulation is on ‘treatment in an even-handed and just manner’.” (*MTD v. Chile*, Decision on Annulment of February 16, 2007, para. 71. Emphasis added)

statement was a reaction to what they considered an incorrect interpretation by some arbitral tribunals, which went beyond what those States had considered the extent of their obligations under the treaty. This resulted in the binding interpretation of the NAFTA Free Trade Commission of July 21, 2001, which specifically stated that the concept of “fair and equitable” does not require treatment in addition to or beyond that which is required by the *customary international law minimum standard of treatment of aliens*. The practice of some States is in line with this approach, as seen in their model BITs, as in the case of the United States (2004), Canada (2004), and Norway (2007). This has been reflected, for example, in free trade agreements of the United States with Singapore (Art.15.5.2), Chile (Article 10.4), Australia (Art. 11.5), Central America and Dominican Republic (CFTA-DR (Article 10.5), and Morocco (Art. 10.5). Moreover, the US-Rwanda BIT 2008 includes a clarification in “Annex A,” the eloquence of which can only be explained as a prevention against the extravagance of arbitral jurisprudence on fair and equitable treatment and on the crystallization of customary international law:

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5⁴, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.⁵

7. It is safe to assume that many developing countries agree with this interpretation. Conversely, no other State has made any statement to the effect of giving fair and equitable treatment a meaning different from the international minimum standard (let alone linking it to the “legitimate expectations” of investors and the stability of the legal environment for investment). In any event, the importance of NAFTA and of the economies of the United States and Canada cannot be underestimated when it comes to defining the issue. Nor should it be dismissed that the BITs to be negotiated in the future will be in line with the formulation of U.S. and Canadian models.
8. I believe this point is of particular importance in this case, considering the language used in the BIT between France and Argentina. Under Article 3 of that treaty, the Parties undertook to give the investment they received “...*just and equitable treatment, in accordance with the principles of international law...*” (“*un tratamiento justo y equitativo conforme a los principios de Derecho Internacional*”; “*un traitement juste et équitable conformément aux principes du droit international*”). This expression does not appear explicitly in the Argentina-Spain BIT, but cannot be neglected, as it is, in my opinion, a clear reference to the minimum standard, the only standard on “treatment of aliens” in general international law at the time when the treaty was concluded.

⁴ Where it is established that the FET does not require additional treatment or a treatment that goes beyond the minimum standard under customary international law.

⁵ Footnote omitted.

9. Argentina relied on that interpretation in general terms. In its Rejoinder, Argentina argued that “*the obligation of a fair and equitable treatment corresponds to the international minimum standard*” (para. 764 et seq), and, referring to the Argentina-France BIT, said the reference to “*‘fair and equitable treatment in accordance with principles of international law’*”, even “*on Claimants’ own analysis, this would appear explicitly to tie the fair and equitable treatment standard in that Treaty to customary international law and the minimum standard.*” (para. 764). Argentina found no special significance in the difference in language between the two treaties because, although admitting that the Tribunal could conclude that “*the standard of fair and equitable treatment requirement is somehow distinct from the international minimum standard*” but even doing so, “*it must still locate the objective content of that requirement by reference to standards that pertain in customary international law.*”⁶ Although this is a general statement and the Tribunal did not get the help it would have obtained if Argentina had developed a more comprehensive argument on the subject, I think the Tribunal should have not ignored this argument.
10. The Tribunal dismissed the argument based on two reasons that I do not share. The Decision states that the French Treaty “*refers simply to ‘the principles of international law,’ not to ‘the minimum standard under customary international law.’*”⁷ Accordingly, continues the Decision, “*‘in accordance with the principles of international law’ means just what it says: that the tribunal is to interpret fair and equitable treatment under Article 3 of the Argentina-France BIT in accordance with all relevant sources of international and that it is not limited in its interpretation to the international minimum standard.*”⁸
11. I disagree with that reasoning. Admittedly, with the exception of the latest USA, Canada and Norway model BITs, the generality of these treaties, including those that apply to this case, omit a specific relationship between the fair and equitable treatment and the minimum standard in general international law. This has led to the interpretation somewhat *a contrario*, applied by the Tribunal to this case, according to which that omission would prove that both standards are different, since the concept of minimum standard is well known and well established in international law, so that if the parties had intended to refer to it, would have explicitly mentioned.⁹

⁶ Rejoinder, para. 765.

⁷ Decision, para. 178.

⁸ Decision, para. 178.

⁹ This line of reasoning is suggested by Professor Schreuer: “*...it is inherently implausible that a treaty would use an expression such as ‘fair and equitable treatment’ to denote a well-known concept such as the ‘minimum standard of treatment in customary international law’.* If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression.” (C. Schreuer, “Fair and Equitable Treatment in Arbitral Practice,” 6 *J. World Investment and Trade* 357 (2005), p. 360, also in F. Ortino, L. Liberti, A. Sheppard and H. Warner (Ed.), *Investment Treaty Law. Current Issues II. Nationality and Investment Treaty Claims. Fair and Equitable Treatment in Investment Treaty Law.* British Institute of International and Comparative Law. London 2007, pp. 94-95.

12. However, this reasoning does not mind the painful history of the minimum standard for weaker States. Indeed, the question of why in the BITs (except in recent U.S., Canadian and Norwegian models) of the international minimum standard cannot be answered properly if the historical controversy on the concept of minimum standard is completely ignored, as done in the Decision. The concept of minimum standard was rejected by the Latin American countries since the nineteenth century and, in general, by all developing countries that emerged from Decolonization. It should be remembered that Latin America, most notably Argentina, was the birthplace of the Calvo Doctrine¹⁰ under which foreigners would enjoy in a country the same rights as nationals, but not superior rights. The same doctrine was accepted throughout the twentieth century by most developing nations, as evidenced by the Charter of Economic Rights and Duties of States, approved overwhelmingly by the General Assembly of the United Nations on December 12, 1974,¹¹ which accepted national treatment (and not the minimum standard), as applicable to the treatment of foreign investment (Art. 2.2.a) and cases of expropriation (Art. 2.2.c). The underlying claim of weaker States was well expressed, even in 1979, by Judge Padilla Nervo in his Separate Opinion in *Barcelona Traction*:

*The history of the responsibility of States in respect of the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.*¹²

13. One of the consequences or elements of the Calvo Doctrine was the *Calvo Clause*, which according to a contemporary author has been a “hobbyhorse” of Latin American countries for a long time.¹³ Another prominent present-day scholar has recognized that the *Calvo Doctrine* and the *Drago Doctrine* (both of Argentine origin) represented efforts by the Latin American countries “to restrain the domination of the Great Powers.”¹⁴ Similarly, a distinguished European professor has referred to the minimum standard as “a legal disguise under which to protect the interests of powerful countries.”¹⁵ The ICSID Convention and the widespread

¹⁰ C. Calvo: *Le droit international théorique et pratique*. Paris 1896, vol. VI, pp. 231 et seq.

¹¹ (A/RES/ 29/3281).

¹² ICJ, *Barcelona Traction, Light and Power Company, Limited*, ICJ Reports (1970) 3. Separate Opinion of Judge Padilla Nervo, p. 246:

L'histoire de la responsabilité des Etats, en matière de traitement des étrangers, est une suite d'abus, d'ingérences illégales dans l'ordre interne des Etats faibles, de réclamations injustifiées, de menaces et même d'agressions militaires sous le couvert de l'exercice des droits de protection, et de sanctions imposées en vue d'obliger un gouvernement à faire les réparations demandées.

¹³ D. Carreau: *Droit International*. 8^e édition. Pedone. Paris. 2004; p. 472.

¹⁴ A. Cassese: *International Law*. Second edition. Oxford University Press. 2005; pp. 32-34.

involvement of Latin American countries in BITs can be seen, in a way, as an implicit abandonment of the *Calvo Clause*, which is not entirely accurate, since that Clause was directed against diplomatic protection, which in the Latin American experience always resulted in an expression of domination by powerful countries of weaker countries. Theoretically, the system of ICSID and of the BITs is based on a relationship between equals that would not justify the fears that motivated Calvo, Drago, and their followers in Latin America, since in its conceptual design it is the result of treaties negotiated between equal States that agree in advance to submit investment disputes to arbitration.

14. Therefore, it is not so easy to say that the concept of international minimum standard was a *well-established* concept. It certainly was for the capital-exporting countries, but not for the rest of the world. The changes that took place in the last decades of the twentieth century, including the establishment of the internationalization of human rights and its applicable standards irrespective of nationality, well over Neer in 1926, outpaced the relevance of that debate, so the concept of international minimum standard as such, is no longer unacceptable to developing countries.
15. However, although from the late twentieth century the debate on this concept could be considered overcome, the historical burden of its phrasing has not vanished. Clauses on the treatment of foreign investment referring to the “international minimum standard” could hardly be agreed upon, as some of the Parties to those treaties were not willing to accept it *expressis verbis*. “International minimum standard” was a “forbidden phrase” in a treaty for the very many countries that had rejected that standard, because it was associated with unjust international relations, as has been recognized by scholars who have addressed the issue.¹⁶ The explanation suggested by the NAFTA Free Trade Commission interpretation, which reveals the intention of the NAFTA Parties to consider fair and equitable treatment and international minimum standard as identical, was that a formula had to be found for saying the same thing but with different words, neutral words, which were not historically demonized. The phrase “fair and equitable treatment” is a neutral expression in relation to which there was no controversy and it had been used in another context in the Havana Charter signed in 1948 and in the Economic Agreement of Bogota, also signed in 1948.
16. I also disagree with the reasoning in the Decision regarding the link between the fair and equitable treatment standard and the principles of international law referred to in Article 3 of the Argentina-France Treaty. According to the Decision, this is only a general reference to international law and only tells the Tribunal that this standard should be interpreted according to all sources of international law, in the same sense as specified in article 8.4 of the treaty.

¹⁵ J.A. Carrillo Salcedo: *El derecho internacional en un mundo en cambio*. Tecnos. Madrid. 1984, p. 104.

¹⁶ The difficulty of developing countries, especially in Latin America, in accepting that the minimum standard is incorporated from customary international law, is noted by S. Vasciannie: *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, BYIL, Vol. 70, 1999, p. 105. Also: A. Newcombe, L. Paradell: *Law and Practice of Investment Treaties: Standards of Treatment*. Kluwer Law International. The Netherlands, 2009, p. 269.

This ruling negates the effectiveness (*effet utile*) of the reference to principles of international law in Article 3 of that BIT and is consequently unreasonable. Indeed, as the Decision mentions when considering the applicable law to this case, Article 8.4 of the Argentina-France Treaty includes in the applicable law by the Tribunal “*the relevant principles of international law*” (“*los principios del Derecho Internacional en la materia*”; “*des principes de droit international en la matière*”). This expression is to be read as a reference that ***all of the Argentina-France treaty must be construed in accordance with legal principles derived from all sources of international law***. Therefore, the reference to the principles of international law contained in Article 3 cannot be interpreted as a simple and useless repetition of the general rule contained in Article 8.4, but should find a logical reason why the parties made such a specific reference. The most reasonable explanation is that the Parties considered fair and equitable treatment as a standard existing in international law at the time they signed and ratified the BIT, and the only one that existed at the time was the international minimum standard.

17. The significance of type of wording used in Article 3 of the BIT has been noted in arbitral cases¹⁷ and also in legal doctrine.¹⁸ Even an author cited by the Claimants in their *Reply* concurs with the above reasoning:

*It cannot be excluded that a state, which has entered into a [fair and] equitable treatment commitment, would be firmly opposed to any reference to the minimum standard, given the ambiguous analogies this notion has at times allowed. If two states wish to refer to customary law, there is no dearth of established formulations to do so, as we have noted. In this way, a number of Conventions refer to a [fair and] equitable treatment in accordance with the law of nations; **the mutual intention is in this case manifest, and does not present the same difficulties.***¹⁹ (Emphasis added).

¹⁷ *Bewater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of July 24, 2008, para. 590.

¹⁸ Cf. R. Dolzer y C. Schreuer: *Principles of International Investment Law*. Oxford University Press, 2008; p. 121.

¹⁹ Jean-Pierre Laviee, *Protection et promotion des investissements*. Presses Universitaires de France, 1985, p. 94. Reply para. 394, footnote 670. Claimants’ translation, the original reads:

*On ne peut exclure qu’un Etat, qui a souscrit à un engagement de traitement équitable, se serait résolument opposé à toute référence au standard minimum, du fait des analogies ambiguës auxquelles cette notion s’est parfois prêtée. Si deux Etats entendent se référer au droit coutumier, il ne manque pas de formules consacrées pour le faire, comme on l’a noté. En ce sens, quelques Conventions font état d’un traitement équitable, conformément au droit des gens; **l’intention réciproque est alors manifeste, et ne présente pas les mêmes difficultés.*** (Emphasis added).

18. In my opinion, the most reasonable interpretation on the content of fair and equitable treatment should be to give it the same meaning as the *current minimum standard* at the time the pertinent BIT was entered into and not in 1926 (*Neer*). During the twentieth century there was increasingly less tolerance in the face of abuse of power, so that arbitrary treatment need not be hideous, egregious or outrageous to be considered unjust or inequitable.²⁰ In particular, the *objective* arbitrariness of the wrongful act of the State is enough, without any requirement of bad faith or intention to harm. This could be the result of the interaction between investment treaty law and customary law, provided of course that the conditions for crystallization of the latter have been met. In fact, some arbitral tribunals, such as the *Saluka* Tribunal, have suggested that the theoretical discussion on the relationship between the two standards is, in practice, superfluous, and “*when applied to the specific facts of a case, may be more apparent than real.*”²¹ (Emphasis added). More recently, in *Biwater Gauff*, the tribunal concluded that “*the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.*”²²
19. However, even as a *current minimum standard*, and even within the concept that has prevailed in recent doctrine and in decided cases in the sense that fair and equitable treatment is different from and independent of the customary minimum standard, it could never lose its essence as *a standard of conduct or conduct of the State with respect to foreign investments*, which should not automatically translate into a source of subjective rights for investors. The BITs contain a list of the States’ obligations regarding their respective investments, not a declaration of rights for investors. Regardless of what is considered the autonomy of fair and equitable treatment with respect to the minimum standard, fair and equitable treatment represents the degree of *due diligence* that the States Parties to the BIT mutually pledged to observe with respect to the investments from nationals of both States. The language used in the French Treaty reinforces this interpretation, since the reference to the principles of international law can only be understood, at least, by prescribing an obligation of due diligence.
20. How far does the commitment of the States Parties in the BIT to treat the investments of the other Party in a fair and equitable manner go? It is unreasonable to assume that the States would have been willing to commit themselves beyond what the canons of *good governance* would require. With the propriety of the government “*of a reasonably well-organized modern*

²⁰ As the *Mondev* Tribunal stated: “*To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.*” (*Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF) 99/2. Award, October 11, 2002, para. 116)

²¹ *Saluka BV (The Netherlands) v. Czech Republic*, Partial Award of March 17, 2006, para. 291.

²² *Biwater Gauff vs. Tanzania*, cit., para. 592.

*State.*²³ On the contrary, it is illogical to understand that the intention of the Parties was to extend the protection of fair and equitable treatment that they undertook to give to the investments (*not investors*) of the other Party, above what is implied in good governance, just as it would be if treatment below what is expected from good governance were offered. The expectations of investors are not the appropriate instrument for measuring whether a government acted correctly or not according to the canons of a well-organized state. I think it is out of all proportion to interpret the fact that States committed to fair and equitable treatment to mean that they were going to compel their governments to submit to such a *test*.

21. Similarly, the *object and purpose* of BITs is not useful, in my opinion, to give the fair and equitable treatment meaning that is not present in the *terms of the treaty* in accordance with its *ordinary meaning*. Moreover, the international law on investment, as a whole has a purpose of protection which, therefore, invites an interpretation favorable to the protected object, but this does not allow to abandon the wording of the treaties or to redraft them. In my opinion, within the reasoning of the Decision, as with other cases that have followed a similar argumentation, there is an important link missing, because it does not explain why the object and purpose of the BITs can authorize the introduction therein of the concept of *legitimate expectations of investors*, which does not appear in any way, shape or form in the *terms of the treaty* according to its ordinary meaning. In interpreting an international treaty, the primary object of interpretation is to elucidate the meaning of the terms of the treaty so that when doing so in the light of its object and purpose the interpreter should not give these terms a meaning that is clearly outside their normal meaning, without any evidence that the intention of the Parties was to give a *special meaning* to the terms of the treaty (VCLT, Art. 31.4).
22. The concept of legitimate expectations is no stranger to the different legal systems, which, to varying degrees and on the basis of good faith, consider the party to a legal relationship that engages in self-contradiction to the detriment of the other party reprehensible. In human relationships, in general, your word is your bond and whoever betrays the trust of another must be penalized. However, the specific formulation of this concept varies in the different legal systems. Not even the English law concept of estoppel has a uniform wording or matches the same principle in other Anglo-Saxon countries. Neither is the doctrine of *actos propios* (close to estoppel) in the contract law of some civil law countries identical nor the doctrine of *confianza legítima* (*confidence legitime*) in the administrative law of those same countries. One of the areas where there are differences is in the threshold of trust that has to be achieved before the conduct of the party generating it is regarded as having betrayed that trust, for which damages must be paid insofar as the other party is injured thereby. In international law, in relations between States, this principle is embodied in *estoppel*, with which concept attempts have been made to connect fair and equitable treatment. I do not think indispensable to consider here whether, under international law, estoppel may be invoked by an individual who is not a subject of international law, against the State, or whether estoppel is confined to

²³ “...a reasonably well organized modern State.” *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3. Final Award on Merits and Damages. June 27, 1990;) para. 170.

relations between the subjects of international law.²⁴ Accepting for the sake of argument that estoppel could be invoked in the context of investment protection, the threshold required by international law is higher than a mere expectation. This has been established time after time by the jurisprudence of the International Court of Justice. The Court has referred repeatedly to the general requirements for *estoppel* to be invoked, one of these being the *conduct, statements, etc. of a State, that have clearly and consistently (d'une manière claire et constante) evinced the State's acceptance of a particular regime.*²⁵ Or, as the Tribunal in *Duke* said:

... for the conduct or declaration of a state entity to be invoked as grounds for estoppel, it must be **unequivocal**, that is to say, it must be the result of an action or conduct that, **in accordance with the normal practice and good faith**, is perceived by third parties as an expression of the State's position, and as being incompatible with the possibility of being contradicted in the future.²⁶ (Emphasis in original)..

23. I believe that in some cases, ICSID tribunals have applied this principle without explicitly mentioning it,²⁷ but I find that the doctrine of so-called “legitimate expectations” is inconsistent or incorrect with respect to estoppel. If those expectations came from acts that reach the threshold required by international law to compel the State because of estoppel, the concept of legitimate expectations is irrelevant, but if they do not reach that threshold, there

²⁴ In *Duke v. Peru (Duke Energy International Peru Investments No. 1, ltd. v. Republic of Peru)*, ICSID Case No. ARB/03/28. Award of August 18, 2008), the Tribunal applied the principle of estoppel, but the problem to which I refer did not arise because, in the opinion of the Parties (and the Tribunal) in the case, the estoppel was complete correspondence in the *doctrina de los actos propios* applicable in Peruvian domestic law, particularly in Peruvian civil law, which governed the legal stability agreement on which the claim of the Claimants was founded (see para. 231).

²⁵ *North Sea Continental Shelf: Judgment*, I. C. J. Reports 1969, p. 26, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984, p. 392, para. 51; *Land, Island and Maritime Frontier Dispute (El Salvador-Honduras)*, *Application to Intervene, Judgment*, I. C. J. Reports 1990, p. 118, para. 63; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment*, I. C. J. Reports 1998, p. 275, para. 57.

²⁶ *Duke v. Peru*, cit.; para. 249.

²⁷ Although estoppel was not mentioned explicitly in *MTD* or *SPP (Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt)* (ICSID Case No ARB/84/3) Award of May 20, 1992), both cases involve the principle of estoppel. In *MTD*, the investor and the Chairman of the Foreign Investment Committee on behalf of Chile, had executed a contract for a housing development at a given site, after which the investor started the activity in question, but then the government denied permission as not being in conformity with its urban planning policy. In *SPP*, after the investor and Egypt had signed a contract for tourism development in a given site in the Pyramids area, the government canceled the permit because antiquities had been discovered at the site (which should have been foreseen by the government of Egypt, had it acted with due diligence). In both cases the investor had a vested right (not an expectation), which was destroyed for reasons exclusively attributable to the determination of the State. Furthermore, both cases present an inconsistency in the acts of the State in contravention of the general principle *nemo potest mutare consilium suum in alterius injuriam*.

would be no basis in international law to assert a State obligation, because arbitral tribunals have no power to create a kind of *soft* estoppel, nor to assume that the *representation* of the Common Law is a general principle of international law.

24. The Decision is largely based on recent arbitral jurisprudence, which has identified fair and equitable treatment with safeguarding the “legitimate expectations” of investors. I disagree with the reasoning of the Decision according to which that jurisprudence falls within the provisions of Article 38.1.d of the Statute of the International Court of Justice, as “*subsidiary means for the determination of rules of right*”, since it cannot be assumed that The Hague Court will accept as such the investment arbitral jurisprudence. I agree, however, with the notion that like cases should be resolved in the same manner or, as stated by a distinguished scholar and member of this Tribunal, although there is no legal obligation to follow decided cases there is indeed a moral obligation to follow decided cases in order to promote a predictable legal environment.²⁸ However, great caution is needed when identifying cases as alike, especially when dealing with factual issues like fair and equitable treatment and when, moreover, the BITs often contain significant differences despite their similarity. Furthermore, I understand that moral obligation includes looking critically at decided cases, precisely because they are not binding. Or rather, because of that reason they are not binding.
25. In my opinion, arbitral awards linking fair and equitable treatment to the concept of “legitimate expectations” have not substantiated or explained how such an interpretation results from the application of the rules of international law contained in Article 31.1 of the VCLT. This notion arose from the *Tecmed* award in a *dictum* that has been severely criticized, and has been repeated with variations in several decisions of ICSID tribunals in the past five years, as indicated in the Decision. This is not the time or the place to do a detailed critique of that jurisprudence, so I will limit myself to pointing out that, in my opinion, none of these decisions gives convincing reasons why the protection of investors’ legitimate expectations can be considered included in the expression “fair and equitable treatment” by application of Article 31.1 of the VCLT. Neither the term, nor the concept of “legitimate expectations” appears in either BIT. The practice of States has been directed, rather, to rejecting the concept and to identifying fair and equitable treatment with the international minimum standard, as evidenced by the new model BITs of the United States, Canada and Norway as well as the binding interpretation of the NAFTA Free Trade Commission. I cannot find any arbitral decision that enquired about the intention of the parties when they made the commitment to give fair and equitable treatment to investments covered by BITs.
26. Moreover, the very expression “legitimate expectations” is misleading and lends itself to confusion.²⁹ If it means to refer to specific investment-related commitments that are later

²⁸ Cf. G. Kaufmann-Kohler: *Arbitral Precedent: Dream, Necessity or Excuse?* *Arbitration International*, Volume 23 Issue 3; p. 374.

²⁹ In my opinion the definition attempted in *LG&E (LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic)* (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006, para. 130), which the Award seems to accept in this case is far from satisfactory, since it falls into new ambiguities, tautologies, and *petito principii*.

disavowed or disputed by the State, the violation of fair and equitable treatment is based on the improper conduct of the State with regard to the consistency of its actions, which is required by the canons of *good governance*. But if it refers to expectations with regard to general statements or general foreign investment promotion policy, there is no basis in the BITs or in general international law to consider them as a source of legally enforceable obligations.

27. I find, indeed, that the development of the doctrine of legitimate expectations is the result of the interaction of the claims of investors and their acceptance by arbitral tribunals, buttressed by the presumed moral authority of the decided cases. I believe that the standard of fair and equitable treatment has been interpreted so broadly that it results in arbitral tribunals imposing upon the Parties obligations that do not arise in any way from the terms that the Parties themselves used to define their commitments. Indeed, more attention has been paid to what the claimants have considered the scope of their rights than what the Parties defined as the extent of their obligations.³⁰ Unfortunately, I have not had the intelligence or the ability to convince my colleagues in this Tribunal, in discussions that have been comprehensive, respectful and that have enriched our joint opinions, about the irrationality and the weakness of this jurisprudence, of which I am convinced.
28. On another matter, the Decision, also following some earlier decisions, concludes that the standard of fair and equal treatment was infringed because Argentina changed the regulatory framework of the concession as part of the Emergency Law enacted to address the serious economic, social and political crisis that erupted in late 2001 and early 2002. In my opinion, the interpretation that fair and equitable treatment includes an obligation of stability of the legal environment for investment is even more excessive than the doctrine of legitimate expectations.
29. Some Tribunals have concluded that fair and equitable treatment includes stability of the legal framework of the investment, based on an extremely broad interpretation of the Preamble of some BITs concluded by the United States.³¹ I do not intend to formulate in this opinion my specific criticisms of that interpretation of the Preamble of the aforementioned BITs.³² I just

³⁰ Argentina raised the issue as follows: “*This is an overly broad approach. It would establish a novel obligation unrecognisable to the drafters of the Treaties*”, Rejoinder, para. 765.

³¹ For example: *Occidental Exploration and Production Company v. Republic of Ecuador*. London Court of International Arbitration. Administered Case No. UN 3467. Final Award of July 1, 2004, para. 183; *CMS Gas Transmission Company v. República Argentina* (ICSID Case No.ARB/01/18), Award of May 12, 2005, para. 274.

³² As did the Tribunal in *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Award of September 5, 2008):

Stability of the legal framework for investments is mentioned in the Preamble of the BIT. It is not a legal obligation in itself for the Contracting Parties, nor can it be properly defined as an object of the Treaty. It is rather a precondition for one of the two basic objects of the Treaty, namely the

emphasize that that interpretation is limited to the BITs whose preamble contains terms such as those that support the findings of those tribunals, which is not the case with Argentina's BITs with France and Spain, which govern this case.³³

30. It is possible for a State to explicitly assume the obligation of legal stability, particularly when domestic law so permits and the State conclude a "legal stability agreement" with the investor, as in the case of Peru for example.³⁴ In other situations, the State assumes as a contractual obligation, through the concession contract for example, not to apply for an investment certain legislative amendments, such as those relating to income tax.³⁵ But these are cases of specific and explicit obligations whose infringement is, by itself, a wrongful act which does not require invoking the fair and equitable treatment, let alone the "legitimate expectations", to explain the violation.
31. However, an international obligation that includes the State declining to exercise its regulatory power cannot be presumed, considering, as the Tribunal in *Myers* stated, "*the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.*"³⁶ The regulatory power is essential to the achievement of the goals of the State, so to renounce to exercise it is an extraordinary act that must emerge from an unequivocal commitment; more so when it is at stake its ability to deal

*promotion of the investment flow, rather than being related to its other objective, that of granting protection for investments on a reciprocal basis. Stability of the legal framework is undoubtedly conducive to attracting foreign investments, especially direct investments where business plans can extend over a number of years; and even more so in respect of those where initial investments are substantial and are recouped only over a long period of time. On the other hand, it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT's Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable. In any case, it is uncontested that the legal and regulatory regime for CNA's insurance business in general remained stable throughout the crisis.*³² (para. 258; Emphasis added).

³³ Surprisingly, one of those decisions, despite being explicitly based on the Preamble of the Argentina-USA BIT, has gone so far as to assert that "*the stability of the legal and business framework in the State is an essential element in the standard for what is fair and equitable treatment*" and that "*the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law.*" (*LG&E Energy Corp. v. Argentina*, cit., para. 125).

³⁴ Cf. *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*. ICSID Case No. ARB/03/28 of August 18, 2008.

³⁵ That was the case of *Revere Copper & Brass Inc. v. Overseas Private Investment Corporation*, Award August 24, 1978. (Claimants Legal Authorities No. 34). According to the Award, "*(t)he 1967 Agreement prescribed the amount of taxes and royalties which were to be payable to the Government by RJA and provided, inter alia that no further taxes or financial burdens would be imposed on RJA and that the Government would do nothing to derogate from RJA's rights concerning the project.*" It was, therefore, an express contractual obligation.

³⁶ *S.D. Myers vs. Canada. First Partial Award*. Ad hoc—UNCITRAL Arbitration Rules, IIC 249 (2000). November 13, 2000; para. 263.

with a serious crisis. As stated by the *Continental* Tribunal, “it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose.”³⁷ That commitment would touch on core competencies of the State, which it is inconceivable the State would impliedly renounce. A treaty obligation, whereby the State guarantees the stability of its legal order by renouncing the exercise of regulatory power must be explicit and cannot be assumed through an implicit declaration, diluted in general and ambiguous expressions about a treatment of investment standard (nor even by the way, through the preamble of a treaty).

32. BITs do not contain any clause in which Argentina agrees to be bound not to exercise its regulatory power, when necessary, particularly if it arose a pressing social necessity to do so, which in fact did occur. There is no basis in the BITs to conclude that Argentina could only exercise its regulatory power in accordance with international law, if the requirements for a state of necessity were met. In this connection, I believe that the subsidiary defense advocated by Argentina based, on necessity, is inappropriate and unnecessary given that the BITs do not contain any explicit commitment to legal stability and a commitment of that nature cannot be inferred or presumed to be implied in any international convention. As already pointed out, such a commitment must be express or, at least, unambiguous. That is not the case in the BITs under review in this case.
33. It is true that the Decision does not state that the requirement of stability of the legal environment of the concession was absolute. Citing paragraph 306 of *Saluka*, it states that the legitimate regulatory interests of the host State must be borne in mind. I consider that paragraph 307 of the *Saluka* award helps to clarify the concept expressed, for in that case it is said that one should expect that the host State will

*[implement] its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investment over the foreign-owned investment.*³⁸

34. The paragraph quoted from *Saluka* is, in my opinion, beyond reproach. It shows that fair and equitable treatment is a standard of behavior, the emphasis of which is on the duties to the

³⁷ *Continental Casualty Company v. Argentine Republic*, cit.; para. 258.

³⁸ Footnote omitted.

State rather than the rights of investors. Fair and equitable treatment, according to the above *dictum*, does not impose on the State an obligation not to alter the legal environment of the investment, but to require that the exercise of its regulatory power in matters connected with the foreign investment comply with the requirements in a way that is timely, consistent, reasonable, proportionate, even-handed, and non-discriminatory. In other words, what should be subject to scrutiny is whether these measures conform to the canons of good governance in a modern and well-organized State.

35. Argentina, like any other State, had a duty to take exceptional measures, without excluding the modification of the legal regime of the Concession, to address a situation that was also exceptional. These measures were unforeseeable and unpredictable when the BITs were adopted, as was the severity of the emergency which Argentina underwent in 2001-2003. The BITs, as well as general international law provided no basis for concluding that in such a crisis situation taking unpredictable action or measures affecting the predictability of a regulatory framework would constitute a violation of an international obligation subject to reparation under international law.
36. The experience of the recent international financial crisis shows how States are compelled to adopt emergency measures that never entered the minds of leaders who had instead fought their entire lifetime against State intervention in certain areas of the economy. But that unpredictability neither determines the illegitimacy of such measures, nor can it be a legal basis for those who may be adversely affected by them to invoke acquired rights or to claim compensation. What might take away their legitimacy is if they were unreasonable, disproportionate, discriminatory, or in any way arbitrary. Again, what should be verified is whether the government's measures conform to the canons of a modern and well-organized State.
37. In this context, what the Tribunal should determine was whether the various measures taken by Argentina were such that any reasonably good government of a well-organized modern State could have adopted if it had to deal with a crisis of the proportions faced by Argentina, or whether, on the contrary, and to what extent, they were unreasonable, disproportionate, discriminatory, or in any way arbitrary. However, it is not for the Tribunal to determine the alternative measures that could have been adopted, because it cannot *ex post facto* substitute itself for the Argentine Government when it had to address the serious crisis that hit the country.
38. The Tribunal did not enter into the analysis of each of the Argentine measures in particular, but concluded that they breached the fair and equitable treatment, because they altered the Regulatory Framework on issues that fell under the legitimate expectations of investors.
39. According to the Decision, the mere alteration of the Regulatory Framework violated the fair and equitable treatment, because Argentina could only exercise their legitimate right to regulate, within the rules of the detailed legal framework that Argentina had established for the Concession (para. 217). This assertion is not unreasonable, provided that is referred to

situations of relative normalcy, but it is not wise when a serious situation arise requiring adaptation of the legal system to the new situation. In that context, what is reasonable is precisely the exercise of regulatory power in the most suitable for the common good.

40. In that sense, I find some contradiction in the Decision, because, while asserting that Argentina retained its legitimate regulatory power, also affirms that such power could not be exercised it in any way to change the regulatory framework, not even to address the requirements of the common good in an emergency situation in a way that was or could be timely, consistent, reasonable, proportionate, even-handed, and non-discriminatory. This would mean that the state cannot, by itself, exercise its regulatory power. Then, one could conclude, accordingly, that the regulatory power exists, but that does not exist at the same time.
41. The Tribunal did not enter into the analysis of each of the Argentine measures in particular, but concluded that they violated the fair and equitable treatment, because they altered the Regulatory Framework on issues which fell within the legitimate expectations of the investors. Nevertheless, the Decision refers to various measures enacted by Argentina, directing the regulatory authorities not to respect important elements of the legal framework, identifying those measures by the number of the Exhibits (Para. 217). Such actions, according to the Decision, were beyond the scope of its legitimate right to regulate and in effect constituted an abuse of regulatory discretion. These measures are:
 - C-78 and R-76: Emergency Law (Federal): Law No. 25,561.
 - C-90 and R-82: Decree 221/02 of March 1, 2002, creating the Renegotiation Commission.
 - C-89: ENRESS Resolution 55/02 of March 1, 2002, rejecting a request for extraordinary tariffs review, for failure to submit the required supporting documents.
 - C-93: Decree 391/02 of March 18, 2002, rejecting a request for extraordinary review of tariffs, for default of information and because it involved a modification to the contract, subject to renegotiation.
 - C-95: ENRESS Resolution 116/02 of February 18, 2002, again rejecting the same claim, adding that the repeal of the convertibility was not foreseen and that the request involved an automatic adjustment on the dollar.
 - C-100 and R-88: Decree 1252/1202 of June 13, 2002, refusing to approve the provisional agreement of May 8, 2002, signed by APSF and the Ministry of Public Works of the Province and setting a deadline of 180 days for the presentation, by the Renegotiation Commission of a project of amendment of the regulatory and contractual regime.

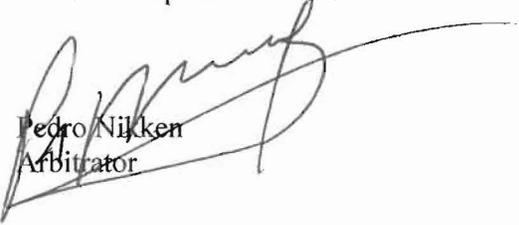
- C-105 and R-93: Letter from the Renegotiation Commission to APSF of August 23, 2002, which rejected again the same request, stating that the contract was amended by Decree 1252/1202 of 06.13.2002, invoking the emergency regime and the renegotiation as the current framework, and rejecting the objections raised by APSF and the concept of “insurance exchange” invoked by the company.
 - C-115: Decree 3789/02 of December 30, 2002 extending the renegotiation for 180 days.
 - C-123 and R-120: Decree 1855/03 July 11, 2003 extending the renegotiation for 180 days.
 - R-137: Decree 2362/04 of November 18, 2004, which opens a new period of renegotiation, responding to a request for APSF, according to communication GAL 1880 of April 27, 2004 (Annex C-136).
42. Some of these measures point to the temporary freezing of tariffs, while others refer to the renegotiation of the contract (to which I refer below), refer to the renegotiation of the contract. It cannot be argued that the measures referred to the temporary freezing of tariffs, by themselves and at the time when they were adopted, were disproportionate, unreasonable, discriminatory or arbitrary, or that they were not within the range of decisions that any reasonable government could have adopted under the same circumstances.
43. Nevertheless, precisely for being exceptional, those measures should be implemented for the period strictly necessary to address the emergency. Temporality is an essential part of the reasonableness of this type of measure. Argentina did not comply with this requirement since some of the measures that severely affected APSF, particularly the freezing of tariffs, were extended indefinitely, which did not comply with the conduct that good governance would follow at all times. It is not reasonable to keep tariffs frozen for a public service provided by a party through the grant of an unsubsidized concession when there is evidence that its operating costs have risen significantly, for reasons unrelated to the concessionaire. The freezing could be explained for a short time—while a reasonable degree of economic and social normalcy could be reestablished. Although efficiency was one of the components of the tariff system, there was evidence of enough causes external to the concession—many of them having to do with the emergency measures adopted by the Government—to offer solutions to the concessionaire that would be likely to restore the economic and financial balance of the concession, especially as it was under a legal duty to review the tariffs. By failing to take concrete actions that would make that result viable, Argentina departed from the canons of good governance in a modern State that is reasonably well-organized and, therefore, did not give the Claimants’ investment the fair and equitable treatment imposed by the BITs.
44. In this regard, a breach of fair or equitable treatment does not arise, in my opinion, as an immediate consequence of the enactment of the Emergency Law or the other related measures adopted by the Government immediately after said Law, but from the moment when the

minimum degree of normalcy required to also address the normalization of the Concession was reached.

45. I also disagree with the Decision in the conclusion that the renegotiation decided upon unilaterally by the State constitutes another violation of fair and equitable treatment.
46. The renegotiation provided for under the Emergency Law and other acts of the Province, was a general measure that affected all contracts for public works and services. As a matter of principle, it could not be regarded as unreasonable in the context of the abolition of the regime for convertibility of the peso against the dollar—which had been an essential component of the privatization policy undertaken by Argentina in the nineties— of which the APSF Concession was a part.
47. Renegotiation of long-term concession contracts is far from exceptional. To the contrary, the original terms of such contracts should be renegotiated often, when faced with new and unforeseen events. In the case of APSF’s Concession, before the crisis of 2001-2003, two processes for renegotiation were opened to address many problems that the Concessionaire had been facing in the early years of performing the contract. Also, regarding the renegotiation provided for under the Emergency Law, there are statements by representatives of the Claimants, in which there has not been alleged or demonstrated any coercion whatsoever, expressing their agreement with the renegotiation, always requiring, however, that the economic and financial equilibrium of the Concession be preserved.
48. I do not agree with the assumption expressed in the Decision (para. 223) that APSF was coerced into acceding to the renegotiation because, had it refused, it could have been accused of violating Article 4.1 of the Concession Agreement, which obligated both sides to “*use all means available to establish and maintain a fluid relationship which would facilitate the discharge of this Concession Agreement.*” Rather, I believe that this clause is evidence that the obligation to renegotiate did not have as its sole source the Emergency Law, but the Concession Contract itself and that APSF could not lawfully refuse to renegotiate (as in fact it did not refuse). Moreover, the international standard for such contracts in the event of “*hardship*” aims to impose an obligation on the parties to negotiate an adaptation of the contract to the changed circumstances or the termination of the contract,³⁹ which is moreover, in my opinion, a corollary of the good faith that should prevail in the execution of any contract.

³⁹ Cf. *Principles of European Contract Law* (developed by the Commission on European Contracts Law), **Article 6:111: Change of Circumstances**; *UNIDROIT Principles of International Commercial Contracts 2004: Article 6.2.2 (Definition of hardship); Article 6.2.3 (Effects of hardship)*.

49. What, to my way of thinking, has no satisfactory explanation is that while that prolonged negotiation process was being extended tariffs were kept frozen without arbitrating even a temporary remedy for the well-known financial difficulties that APSF was undergoing, as was requested by the latter repeatedly and insistently. That fact constitutes, without doubt, a violation of the obligation of fair and equitable treatment of the Claimants' investment. But that offense is not due to the renegotiation itself, but to Argentina's refusal to revise the tariffs, in contravention of its obligations under the BITs. From the foregoing, I conclude that the renegotiation process was not per se a violation of the State's obligations under the standard of fair and equitable treatment.



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