

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Orazul International España Holdings S.L.

v.

Argentine Republic

(ICSID Case No. ARB/19/25)

AWARD

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Mr. David R. Haigh KC, Arbitrator

Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal

Ms. Anna Toubiana, ICSID

Assistant to the Tribunal

Ms. Charlotte Matthews

Date of dispatch to the Parties: 14 December 2023

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LIST OF ABBREVIATIONS

ADEERA	Argentine Electricity Distributors Association
Adhesion Contract	FONINVEMEM Adhesion Contract dated 6 December 2004
AGEERA	Argentine Electric Energy Generators Association
AGUEERA	Argentine Large Electricity Users Association
Alto Valle Plant	Alto Valle Thermal Power Plant
Argentina or the Respondent	Argentine Republic
ARS	Argentine pesos
ATEERA	Argentine Association of Electricity Transmission Companies
AyEE	Agua y Energía Eléctrica Sociedad del Estado
Bertone	Witness Statement of Andrea Bertone dated 23 July 2021
BIT/ Argentina-Spain BIT/ Treaty	Agreement Between Argentina and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments dated 3 October 1991
BRG	Berkeley Research Group
BRG II	Expert Damages Assessment Report by Daniela M. Bambaci and Santiago Dellepiane A. of BRG dated 26 July 2021
CAMMESA	Compañía Administradora del Mercado Mayorista Eléctrico S.A.
Cameron I	Witness Statement of Daniel Omar Cameron dated 12 November 2020
Cameron II	Witness Statement of Daniel Omar Cameron dated 22 April 2021
Cameron III	Witness Statement of Daniel Omar Cameron dated 25 October 2021
Cerros Colorados	Hidroeléctrica Cerros Colorados S.A.

Cerros Colorados Plant	Cerros Colorados-Planicie Banderita Hydroelectric Power Plant
Claimant or Orazul	Orazul International España Holdings S.L.
Claimant’s Counter-Memorial on Preliminary Objections	Claimant’s Counter-Memorial on Preliminary Objections dated 26 July 2021
Claimant’s Memorial	Claimant’s Memorial on the Merits dated 15 September 2020
Claimant’s Observations on Respondent’s Request for Bifurcation	Claimant’s Observations on Respondent’s Request for Bifurcation dated 14 December 2020
Claimant’s Post-Hearing Brief	Claimant’s Post-Hearing Brief dated 4 November 2022
Claimant’s Rejoinder on Preliminary Objections	Claimant’s Rejoinder on Preliminary Objections dated 9 December 2021
Claimant’s Reply on the Merits	Claimant’s Reply on the Merits dated 26 July 2021
CNDC	Argentine Antitrust Agency
Concession Contract	Concession Contract for Hydraulic Energy Generation between Cerros Colorados and the Energy Secretariat entered into on 12 July 1993
Convertibility Law	Law 23,928, enacted by the Argentine Government on 27 March 1991, establishing a convertibility regime that pegged the Argentine peso to the US dollar at an ARS 1 = 1 USD exchange rate
Decree 634/91	Decree enacted by the Argentine Government on 11 April 1991, establishing a roadmap for the Government’s transformation of the electricity sector
DEI	Duke Energy International LLC
Dominion Energy	Dominion Resources Inc.
Duke Energy	Duke Energy Corporation

Electric Power Law	Law 15,336 enacted by the Argentine Congress on 15 September 1960, regulating electricity at the Republic's federal level
Electricity Law	Law 24,065 enacted by the Argentine Congress on 16 January 1992, codifying the principles and rights stated in Decree 634/91 and Resolution 38/91
Emergency Law	Law 25,561 enacted by the Argentine Government on 6 January 2002, declaring a public emergency and delegating the powers contemplated in the law to the executive branch until 10 December 2003
Energy Secretariat	Argentine Secretariat of Energy
ENRE	National Electricity Regulatory Entity
Expert Report of Jorge E. Viñuales	Expert Report on Certain Matters of Admissibility and Merits under International Law of Jorge E. Viñuales dated 15 October 2021
Expert Report of Rodríguez Pardina	Regulatory-Economic Report of Martín Rodríguez Pardina dated 25 October 2021
FET	Fair and Equitable Treatment
FONINVEMEM	Fund for Necessary Investments to Increase Electric Power Supply in the Wholesale Electric Market (<i>Fondo para Inversiones Necesarias que Permitan Incrementar la Oferta de Energía Eléctrica en el Mercado Eléctrico Mayorista</i>)
FONINVEMEM I Agreement or Final Agreement	Final Agreement for the Management and Operation of the Projects to Readjust the Wholesale Electricity Market signed on 17 October 2005
FONINVEMEM II Agreement or 2008-2011 Agreement	Agreement for the Management and Operation of Projects, Increase of Thermal Generation Availability of and Adaptation of the 2008-2011 Generation Remuneration dated 25 November 2010
Gallo Mendoza I	Witness statement of Javier Gallo Mendoza dated 23 April 2021
Gallo Mendoza II	Witness statement of Javier Gallo Mendoza dated 25 October 2021

Government	The Government of Argentina
Hidronor S.A.	Hidroeléctrica Norpatagónica S.A.
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Arbitration Rules in force as of 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 and became binding on Spain on 17 September 1994 and on Argentina on 18 November 1994
ILC	International Law Commission
ILC Articles	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts
Implementing Regulations	Regulatory Decree 1,398/1992 and Resolution 61/92
Legal Opinion of Christoph Schreuer	Questions of Jurisdiction and Merits, Legal Opinion of Christoph Schreuer dated 22 July 2021
McGee I	Witness Statement of Richard McGee dated 15 September 2020
McGee II	Witness Statement of Richard McGee dated 23 July 2021
MFN	Most Favored Nation
MWh	Megawatt per hour
Natural Gas Law	Law 24,076 enacted by the Argentine Government on 9 June 1992, which regulated the natural gas sector, promoted competition therein and privatized a state-owned company
Orazul Generating	Orazul Energy Generating S.A.
Parties	Claimant and Respondent
PPAs	Power Purchase Agreements
Privatization Law	Law 23,696 enacted by the Argentine legislature in August 1989, enabling the privatization of State-owned companies

Quadrant I	Expert Report of Daniel Flores of Quadrant dated 26 April 2021
Quadrant II	Expert Report of Daniel Flores of Quadrant dated 25 October 2021
Quadrant Memorandum	Quadrant Memorandum dated 8 July 2022
Resolution 38/91	Resolution issued by the Argentine Government on 19 July 1991, further organizing the wholesale electricity market
Resolution 61/92	Resolution issued by the Energy Secretariat on 29 April 1992, which provided the procedures for operation, dispatch, and price calculation in the WEM, as foreseen in Article 36 of the Electricity Law
Resolution 240/03	Resolution issued by the Energy Secretariat on 14 August 2003, which temporarily altered the methodology for the spot price calculation
Resolution 406/03	Resolution issued by the Energy Secretariat on 8 September 2003, temporarily authorizing CMMESA to use the Unified Fund to cover the deficit in the Seasonal Stabilization Fund and establish a transitory mechanism for the assignment of the scarce and insufficient resources
Resolution 943/03	Resolution issued by the Energy Secretariat on 27 November 2003, modifying Resolution 406/03, which established a transitory mechanism for a priority system requiring CMMESA to make partial payments to power generators for their electricity sales in the spot market
Resolution 956/04	Resolution issued by the Argentine Government on 28 September 2004, applying a surcharge to existing PPAs that exceeded contracted capacity in November 2004 <i>vis-à-vis</i> the term May-July 2004
Resolution 95/13	Resolution issued by the Argentine Government on 22 March 2013, establishing a new remuneration scheme based on fixed and variable costs depending on technologies used by generators and the scale of each plant

Resolution 529/14	Resolution issued by the Argentine Government on 23 March 2014, increasing the value of the Additional Remuneration in Resolution 95/13
Resolution 482/15	Resolution issued by the Argentine Government on 10 July 2015, whereby the Government would pay 50% of the Additional Remuneration once facilities under a new FONINVEMEM agreement were in operation
Resolution 31/20	Resolution issued by the Argentine Government on 26 February 2020, which adjusted the remuneration scheme for generators by <i>inter alia</i> converting power generators' prices to pesos
Resolution 440/21	Resolution issued by the Energy Secretariat on 21 May 2021, whereby the Energy Secretariat set a new remuneration value for generators
Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits dated 27 April 2021
Respondent's Memorial on Preliminary Objections and Request for Bifurcation	Respondent's Memorial on Preliminary Objections and Request for Bifurcation dated 16 November 2020
Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief dated 4 November 2022
Respondent's Rejoinder on the Merits	Respondent's Rejoinder on the Merits dated 25 October 2021
Respondent's Reply on Preliminary Objections	Respondent's Reply on Preliminary Objections dated 25 October 2021
Ruisoto I	Witness Statement of Jorge Héctor Ruisoto dated 26 April 2021
Ruisoto II	Witness Statement of Jorge Héctor Ruisoto dated 24 October 2021
Seasonal Stabilization Fund	Stabilization fund to compensate power generators when the seasonal price was lower than the spot price
SEGBA S.A.	Servicios Eléctricos del Gran Buenos Aires S.A.

Selling Memorandum	Selling Memorandum for the privatisation of the Cerros Colorados Plant, issued in December 1992
Sruoga I	Witness Statement of Alejandro Valerio Sruoga dated 22 April 2021
Sruoga II	Witness Statement of Alejandro Valerio Sruoga dated 22 October 2021
Tierno I	Witness Statement of José Tierno dated 15 September 2020
Tierno II	Witness Statement of José Tierno dated 26 July 2021
VCLT	Vienna Convention on the Law of Treaties
VCP	Variable costs of production
WEM or MEM	Wholesale Electricity Market

A. INTRODUCTION

1. This Award is rendered in a dispute submitted to the International Centre for Settlement of Investment Disputes (**ICSID** or the **Centre**) pursuant to the “*Agreement Between Argentina and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments*” dated 3 October 1991 (**Argentina-Spain BIT** or the **BIT** or the **Treaty**) and the “*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*”, which entered into force on 14 October 1966 and became binding on Spain on 17 September 1994 and on Argentina on 18 November 1994 (the **ICSID Convention**).

I. The Parties

2. The Claimant is Orazul International España Holdings S.L. (the **Claimant** or **Orazul**), a company incorporated in the Kingdom of Spain, with a registered office at Calle Serrano 41, 4th floor, 28001, Madrid, Spain.
3. The Respondent is the Argentine Republic (**Argentina** or the **Respondent** or the **Government**).
4. The Claimant and the Respondent are collectively referred to as the **Parties**.

II. The dispute

5. The dispute concerns measures adopted by Argentina since 2003 modifying the Argentine electricity regulatory framework. According to the Claimant, these measures were meant to be temporary and should have been reversed in 2006 or thereafter but never were. They allegedly radically reduced power generators’ revenues, created a discriminatory pricing regime, and prevented power generators from collecting their revenues. The Claimant argues that Argentina’s measures in the power generation sector harmed its shareholding interest in Argentina and violated multiple provisions of the Argentina-Spain BIT.
6. The Respondent disputes the Tribunal’s jurisdiction and the admissibility of the Claimant’s claims on various accounts. On the merits, the Respondent states that the Claimant benefited from the electricity market regulations and the agreements voluntarily entered into with the Government. In any event, the Respondent submits that it complied with its obligations under the BIT and that the Claimant’s claim is grossly overstated.

III. The Parties' requests for relief

7. The Claimant formulated its requests for relief on jurisdiction in its Rejoinder on Preliminary Objections as follows:

For the reasons stated herein, Orazul requests an award granting it the following relief:

- (a) Dismiss Respondent's Preliminary Objections;*
- (b) Find that Respondent's invocation of Article X(3) of the Treaty amounts to an abuse of rights;*
- (c) Order Argentina to pay all the costs of this arbitration, including without limitation, Claimant's legal costs, expert fees and in-house costs, the fees and expenses of the Tribunal, and ICSID's costs; and*
- (d) Award any further or other relief to which the Tribunal considers that Claimant has proved an entitlement.¹*

8. The Claimant formulated its requests for relief on the merits in its Reply on the Merits as follows:

For the reasons stated herein, Orazul requests an award granting it the following relief:

- (a) Declare that Argentina has breached its obligation:*
 - (i) under Article IV of the BIT to accord Orazul and its investments fair and equitable treatment;*
 - (ii) under Article III of the BIT, to refrain from impairing the management, maintenance, use, enjoyment, or disposal of investments through unjustified or discriminatory measures;*
 - (iii) under Article V of the BIT not to expropriate Orazul's investment except if made for the public interest, in accordance with the law, and in no case discriminatory;*
 - (iv) imported through the most-favored nation provision under Article IV(2) of the BIT, to provide full protection and security; and,*

¹ Claimant's Rejoinder on Preliminary Objections, ¶ 178.

(v) *imported through the most-favored nation provision under Article IV(2) of the BIT, to observe the obligations it entered into with regard to Orazul's investments.*

(b) *Order Respondent:*

(i) *to compensate Orazul for its losses arising from Argentina's breaches of investment protection in the BIT in accordance with Section VI above;*

(ii) *to pay post-award interest on any damages awarded in this arbitration at a rate to be established during the course of the arbitration; and,*

(iii) *to pay all the costs of this arbitration, including without limitation, Orazul's legal costs, expert fees, and in-house costs, the fees and expenses of the Tribunal, and ICSID's costs.*

(c) *Award any further or other relief to which the Tribunal considers that Orazul has proved an entitlement.²*

9. In its Post-Hearing Brief, the Claimant maintained its requests for relief.³

10. In its Submission on Costs, the Claimant formulated its request as follows:

For the reasons stated herein, Claimant requests that the Tribunal include in its award an order that:

(a) *Respondent reimburse Claimant's costs of the arbitration, including without limitation, Claimant's legal costs, expert fees and in-house costs, the fees and expenses of the Tribunal, and ICSID's costs, as itemized in the Statement of Costs attached to this Submission as Annex A;*

(b) *Respondent pay interest on such costs as the Tribunal awards at such rate as the Tribunal deems appropriate; and*

(c) *Award any further or other relief to which the Tribunal considers that Claimant has proved an entitlement.⁴*

11. The Respondent formulated its requests for relief on jurisdiction in its Reply on Preliminary Objections as follows:

² Claimant's Reply on the Merits, ¶ 930.

³ Claimant's Post-Hearing Brief, ¶ 140.

⁴ Claimant's Submission on Costs, ¶ 22.

By virtue of the foregoing, the Argentine Republic requests the Tribunal:

[...]

(b) to dismiss each and every one of Claimant's claims on the grounds that the Tribunal lacks jurisdiction; and

(c) to order Claimant to pay for any costs and expenses arising out of these arbitral proceedings.⁵

12. The Respondent formulated its requests for relief on the merits in its Rejoinder on the Merits as follows:

In view of the foregoing, the Argentine Republic requests that the Tribunal:

[...]

(c) rejects each and every one of Claimant's claims;

(d) orders Claimant to pay all costs and expenses resulting from this arbitration proceeding.⁶

13. The Respondent also formulated its requests for relief in its Post-Hearing Brief as follows:

In the light of the foregoing, the Argentine Republic requests that the Tribunal:

(a) accept the Argentine Republic's objections to the jurisdiction of the Tribunal and the admissibility of Claimant's claims;

(b) in any event, accept the Argentine Republic's responsive arguments, evidence and defences, and reject each and every claim put forward by Claimant; and

(c) order Claimant to pay for all the costs and expenses arising out of this arbitration proceeding, including without limitation, Respondent's legal costs, expert fees, in-house costs, the fees and expenses of the Tribunal and ICSID costs.⁷

14. In its Submission on Costs, the Respondent formulated its request as follows:

For all of the reasons set forth above, if the Tribunal finds that Claimant's claims should be dismissed, Respondent respectfully requests that the Tribunal order Claimant to bear all the costs of this proceeding, including

⁵ Respondent's Reply on Preliminary Objections, ¶ 225.

⁶ Respondent's Rejoinder on the Merits, ¶ 1199.

⁷ Respondent's Post-Hearing Brief, ¶ 177.

*those of Argentina, plus interest until the date of payment of such costs. Should the Tribunal accept any of Claimant's claims, Claimant should still bear the costs of the proceeding because Claimant's lack of transparency and procedural misconduct made this proceeding unnecessarily onerous for Argentina.*⁸

IV. The Tribunal

15. The Tribunal consists of Mr. David R. Haigh KC, Prof. Alain Pellet and Dr. Inka Hanefeld. It was constituted on 10 June 2020 in accordance with the ICSID Convention and the ICSID Arbitration Rules as in force as of 10 April 2006 (the **ICSID Arbitration Rules**).
16. Mr. Haigh accepted his appointment as Arbitrator appointed by the Claimant on 26 November 2019. Prof. Pellet accepted his appointment as Arbitrator appointed by the Respondent on 25 December 2019. Dr. Hanefeld accepted her appointment as President of the Tribunal by agreement of the Parties on 10 June 2020.
17. As recorded in paragraph 2.1 of Procedural Order No. 1, the Parties confirmed that the Tribunal was properly constituted and that no Party had any objection to the appointment of any Member of the Tribunal at such point in time.⁹
18. As set out in paragraph 7.1 of Procedural Order No. 1, the ICSID Secretariat appointed Ms. Anna Toubiana as the Secretary of the Tribunal.
19. By emails dated 1 February 2021, the Parties confirmed that they had no objection to the appointment of Ms. Charlotte Matthews of the President's law firm as Assistant to the Tribunal.
20. By emails dated 19 May 2022, the Parties confirmed that they had no objection to the appointment of Dr. Jean-Baptiste Merlin as Prof. Pellet's assistant. Following Dr. Merlin's acceptance of a new professional position, Dr. Victor Grandaubert was appointed as Prof. Pellet's new assistant on 11 October 2022, to which the Parties did not object. Dr. Grandaubert ceased his functions as assistant for Prof. Pellet on 9 June 2023.

⁸ Respondent's Submission on Costs, ¶ 23.

⁹ Procedural Order No. 1, ¶ 2.1.

V. The languages of the proceedings

21. As set out in paragraph 12.1 of Procedural Order No. 1, the procedural languages of the arbitration are English and Spanish.
22. As set out in paragraph 12.11 of Procedural Order No. 1, the present Award is rendered in English and Spanish simultaneously, both language versions being equally authentic.

VI. The place of the proceedings

23. Pursuant to Articles 62 and 63 of the ICSID Convention, the place of the proceedings is Washington, D.C.

VII. The scope of this Award

24. The present Award addresses both the Tribunal's decision on jurisdiction and admissibility and the Tribunal's decision on the merits, as foreseen in the Procedural Timetable in Annex A to Procedural Order No. 1.
25. To the extent that certain facts, allegations or arguments are not expressly or comprehensively referred to in the below summaries of the Parties' positions or in other parts of the Award, this does not imply that the Tribunal has not taken them into consideration. Rather, the Tribunal has taken note of and carefully considered all written submissions and evidence on the record.

B. PROCEDURAL HISTORY

26. This section of the Award sets out in summary fashion the most important procedural steps in these proceedings.
27. On 30 August 2019, Orazul submitted a Request for Arbitration against the Argentine Republic, which was registered by the ICSID Secretary-General on 11 September 2019.
28. On 10 June 2020, the Tribunal was constituted.
29. On 7 August 2020, the First Session was held by videoconference.
30. On 24 August 2020, following the First Session and further communications with the Parties, the Tribunal issued Procedural Order No. 1 and the Procedural Timetable as Annex A thereto.
31. On 15 September 2020, the Claimant filed its Memorial in English language, followed by a Spanish translation.

32. On 16 November 2020, the Respondent submitted its Memorial on Preliminary Objections and Request for Bifurcation in Spanish language, followed by an English translation.
33. On 14 December 2020, the Claimant submitted its Observations on the Respondent's Request for Bifurcation in English language, followed by a Spanish translation.
34. On 7 January 2021, the Tribunal issued its Decision on the Respondent's Request for Bifurcation, in which it denied the bifurcation of the proceedings and directed the Parties to follow the procedural calendar set out in Scenario 2.2 of the Procedural Timetable annexed to Procedural Order No. 1.
35. On 27 April 2021, the Respondent submitted its Counter-Memorial on the Merits in Spanish language, followed by an English translation. The Respondent noted therein that the "*Claimant has neither submitted the purchase agreement for its assets in Argentina nor indicated the price paid by DEI for its interest in Hidroeléctrica Cerros Colorados S.A.,*"¹⁰ that the "*Claimant has not stated the value of its alleged investment – that is, of its stock interest in Hidroeléctrica Cerros Colorados S.A. in 2003,*"¹¹ and that the "*Claimant has failed to indicate the purchase value of the stock interest in Duke Energy Cerros Colorados S.A.*"¹² The Respondent reserved the right to request such information if not produced by the Claimant together with its Reply.¹³ The Respondent requested the Tribunal *inter alia* to:

*(b) consider the reservations made by the Argentine Republic with regard to submitting further arguments and requesting for any documentation Claimant fails to submit.*¹⁴

36. On 27 July 2021, the Claimant submitted its Counter-Memorial on Preliminary Objections and its Reply on the Merits (dated 26 July 2021) in English language, followed by a Spanish translation.
37. On 25 October 2021, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction in Spanish language, followed by an English translation. The Respondent requested *inter alia* the Tribunal to:

(a) order[] Claimant to submit all supporting documentation to justify: (i) the amounts paid by I Squared Capital for the acquisition in December 2016 of the operations of Cerros Colorados in Argentina; (ii) the relationship

¹⁰ Respondent's Counter-Memorial, ¶ 33.

¹¹ *Id.*, ¶ 36; see also ¶ 636.

¹² *Id.*, ¶ 39.

¹³ *Id.*, fn. 46, 51, 941.

¹⁴ *Id.*, ¶ 764(b).

between Orazul Energy Southern Cone and Cerros Colorados; (iii) the interests of Claimant in renewable electric energy generators and the plants related to the agreements of the FONINVEMEM; and (iv) the value of its alleged investment, i.e., the block of shares of Hidroeléctrica Cerros Colorados S.A. in 2003;

(b) order[] Claimant to submit the instrument by virtue of which the assets in Argentina were purchased, as well as the value paid by DEI to purchase its share in Hidroeléctrica Cerros Colorados S.A.¹⁵

38. In its Reply on Preliminary Objections of the same date, the Respondent requested *inter alia* the Tribunal to:

(a) [...] order Claimant to produce in these arbitral proceedings the agreement signed between Duke Energy and I Squared Capital relating to the purchase of the investments in the Argentine Republic on 22 December 2016, which was requested by the Argentine Republic in its Counter-Memorial.¹⁶

39. The Respondent also reserved its right to request the Tribunal to order the Claimant to produce the F1 Form submitted before the Argentine Antitrust Agency CNDC.¹⁷

40. On 29 November 2021, the Tribunal took note of the Respondent's requests and invited the Claimant to provide its comments thereon by 1 December 2021, or at the latest in its Rejoinder on Preliminary Objections.

41. On 10 December 2021, the Claimant submitted its Rejoinder on Preliminary Objections (dated 9 December 2021) in English language, followed by a Spanish translation.

42. On the same day, after having consulted the Parties, the Tribunal rescheduled the Hearing originally foreseen to occur from 14 February 2022 to 1 March 2022 to 1 September 2022 until 15 September 2022 in light of the ongoing COVID-19 pandemic.

43. On 27 January 2022, the Respondent noted in a letter (dated 26 January 2022) that the Claimant had failed to produce a certain number of requested documents. Accordingly, the Respondent requested the Tribunal to order the Claimant to produce:

¹⁵ Respondent's Rejoinder on the Merits, ¶ 1199(a)-(b).

¹⁶ Respondent's Reply on Preliminary Objections, ¶ 225(a).

¹⁷ *Id.*, fn. 266.

- (i) *all supporting documentation to justify the amounts paid by I Squared Capital for the acquisition in December 2016 of the operations of Cerros Colorados in Argentina;*
- (ii) *all supporting documentation to justify the value of Claimant's alleged investment, i.e., the block of shares of Hidroeléctrica Cerros Colorados S.A. in 2003;*
- (iii) *the instrument by virtue of which the assets in Argentina were purchased, as well as the value paid by DEI to purchase its share in Hidroeléctrica Cerros Colorados S.A.;*
- (iv) *the agreement signed between Duke Energy and I Squared Capital relating to the purchase of the investments in the Argentine Republic on 22 December 2016; and*
- (v) *a complete copy of Form F1, i.e. including all annexes of Form F1 (C-587).¹⁸*

44. On 10 February 2022, the Tribunal issued Procedural Order No. 2 by which it ordered the Claimant to produce the documents requested in (iii) – (v) and dismissed the Respondent's requests (i) and (ii) of the Respondent's letter dated 26 January 2022.

45. On 16 May 2022, the Parties provided their witness and expert notifications to the Tribunal.

46. The Respondent called the following witnesses and experts offered by the Claimant:

- Mr. Brent Bailey,
- Mr. Richard McGee,
- Mr. José Tierno,
- Ms. Daniela Bambaci and Mr. Santiago Dellepiane (Berkeley Research Group (**BRG**)).

47. The Claimant called the following witnesses and experts offered by the Respondent:

- Mr. Daniel Omar Cameron,
- Mr. Javier Gallo Mendoza,
- Mr. Jorge Héctor Ruisoto,
- Mr. Alejandro Valerio Sruoga,

¹⁸ Respondent's letter to the Tribunal dated 26 January 2022, p. 5.

- Mr. Daniel Flores (**Quadrant Economics**),
 - Mr. Martín Rodríguez Pardina,
 - Prof. Jorge E. Viñuales.
48. On 21 May 2022, the Claimant filed the three documents ordered by the Tribunal pursuant to Procedural Order No. 2 as well as a Confidentiality Agreement signed by the Parties.
 49. On 23 May 2022, the Claimant requested that the Tribunal also hear its witness Ms. Andrea Bertone as well as its experts Prof. Christoph Schreuer and the Synex report authors (Messrs. Renato Agurto and Sebastian Bernstein), which had not been called for cross-examination by the Respondent.
 50. On 30 May 2022, the Tribunal granted the Claimant’s request that its witness Ms. Bertone as well as its experts Prof. Schreuer and the Synex report authors (Messrs. Agurto and Bernstein) be examined at the Hearing. The Tribunal noted that the Respondent would also be invited to cross-examine such individuals, should it wish to do so. The Tribunal also advised that it had no specific questions or issues for the Parties to address in advance of the Hearing.
 51. On 2 June 2022, the Tribunal issued Procedural Order No. 3 in response to the Respondent’s letter of 26 May 2022, in which the Respondent stated that the Claimant had provided incomplete and redacted versions of the documents to be produced by it pursuant to Procedural Order No. 2. The Tribunal invited the Claimant to submit by 7 June 2022 full and unredacted versions of the documents ordered to be produced by the Tribunal by Procedural Order No. 2, subject to any exemptions from disclosure sought by the Respondent.
 52. On 5 June 2022, the Respondent advised which information of the documents ordered to be produced by the Tribunal by Procedural Order No. 2 could be exempted from disclosure.
 53. On 7 June 2022, further to Procedural Order No. 3, the Claimant confirmed that it had uploaded the unredacted documents ordered to be produced by the Tribunal by Procedural Order No. 2 to the file sharing platform.
 54. On 14 June 2022, the Parties provided their positions on the sequence and timing of their comments to the Claimant’s newly produced documents. In addition, with respect to two allegedly missing Schedules to Exhibit C-596, the Respondent requested the Tribunal to order the Claimant to inform whether such Schedules had been produced after the 2016 I Squared Capital SPA was executed and, if so, to produce them.

55. On 17 June 2022, the Tribunal requested the Claimant to clarify whether the missing Schedules referred to by the Respondent in its communication of 14 June 2022 had been produced after the execution of the 2016 I Squared Capital SPA and issued directions for the Parties' comments on the Claimant's production of documents.
56. On 29 June 2022, a Pre-Hearing Meeting between the Parties and the Tribunal took place by videoconference. During the Pre-Hearing Meeting, the Claimant advised that the two missing Schedules to Exhibit C-596 did not exist. The Respondent advised that its international legal expert Prof. Viñuales called by the Claimant for cross-examination would not be available to attend the Hearing in-person but could attend only remotely and that two of its witnesses were still in the process of obtaining visas to travel to the United States.
57. On 1 July 2022, following the Pre-Hearing Meeting and the Parties' respective comments to the draft procedural order on the organization of the Hearing, the Tribunal issued Procedural Order No. 4 on the Organization of the Hearing.
58. On 11 July 2022, the Respondent filed its comments on the Claimant's production of documents.
59. On the same date, the Respondent requested the Tribunal to allow Prof. Viñuales to be examined by videoconference at the Hearing and to issue relevant directions.
60. On 15 July 2022, the Claimant advised that its international legal expert Prof. Schreuer would also be unavailable to travel and requested that he be examined by videoconference. The Claimant also requested the Tribunal to issue an order directing the Respondent to undertake certain actions with respect to the in-person participation of its witnesses and experts.
61. On 18 July 2022, the Tribunal decided that the international legal experts of both Parties, Prof. Viñuales and Prof. Schreuer, would be examined by videoconference and requested the Respondent to provide an update on the status of the in-person participation of its witnesses and experts by 21 July 2022.
62. On 21 July 2022, the Respondent requested that its witness Mr. Cameron be heard by videoconference in view of the difficulties faced in obtaining a visa for travel, to which the Claimant objected.
63. On 22 July 2022, the Tribunal advised the Parties that the ICSID Secretariat would address a letter to the US Embassy in Buenos Aires concerning Mr. Cameron's visa application and directed the Respondent to continue its efforts to ensure the in-person participation of Mr. Cameron by resorting to any appropriate channels to this effect.

64. On 25 July 2022, the ICSID Secretary-General addressed a letter to the US Embassy in Buenos Aires concerning Mr. Cameron's visa application, to which the US Embassy replied on 27 July 2022 stating that Mr. Cameron's expedited visa appointment application was found not to qualify for as an emergency under the consular criteria and thus did not qualify for an earlier appointment.
65. On 29 July 2022, the Parties provided their respective lists of participants for the Hearing as well as the language in which their witnesses and experts would testify and the order in which they would appear.
66. On 5 August 2022, the Claimant filed its comments dated 4 August 2022 on the Claimant's production of documents.
67. On 9 August 2022, the Respondent confirmed the in-person participation of its witness Mr. Gallo Mendoza for the Hearing.
68. On 12 August 2022, the Respondent requested the Tribunal to direct the Claimant to resubmit BRG's Third Report eliminating Section II.3 and Appendix B thereof, exclude from the record the eleven new exhibits included in Table 2 and Appendix B of BRG's Third Report, and to order the Claimant to resubmit its response striking any references to Section II.3 and Appendix B of BRG's Third Report and the eleven new exhibits.
69. On 19 August 2022, the Tribunal rejected the Respondent's request of 12 August 2022 after having received comments from the Claimant dated 17 August 2022 and additional comments from the Respondent dated 18 August 2022.
70. On 23 August 2022, the Respondent requested the Tribunal's leave to introduce three recent legal authorities into the record, in accordance with Section 16.4 of Procedural Order No. 1.
71. On 25 August 2022, the Claimant stated that it had no objection to the Respondent's submission of the three legal authorities provided that the Claimant was also allowed to submit certain new legal authorities that were not available at the time of the Claimant's last written submission.
72. On 29 August 2022, having given both Parties the opportunity to comment, the Tribunal decided to admit without prejudice to their ultimate relevance the additional legal exhibits requested to be admitted by the Parties.
73. On 31 August 2022, the Claimant informed the Tribunal that Prof. Schreuer would be unable to testify at the Hearing due to health concerns and requested the Tribunal to direct that neither international legal expert would testify at the Hearing and/or that both Parties would have an additional 30 minutes for their opening arguments to further elaborate upon international legal issues.

74. On the same day, the Tribunal indicated that it would provide the Respondent with an opportunity to comment on the Claimant's request of 31 August 2022 at the opening of the Hearing. The Tribunal advised that unless the Respondent expressly agreed that both Parties would have an additional 30 minutes for their opening statements, the Tribunal would limit the Parties' opening statements to no more than 3 hours, as foreseen in paragraph 15 of Procedural Order No. 4.
75. The Hearing was held from 1 to 15 September 2022 at the ICSID facilities in Washington DC.
76. The following persons participated:¹⁹

Tribunal:

Dr. Inka Hanefeld, President of the Tribunal

Mr. David R. Haigh KC, Arbitrator

Prof. Alain Pellet, Arbitrator

Tribunal's Assistant:

Ms. Charlotte Matthews, Assistant to the Tribunal

ICSID Secretariat

Ms. Anna Toubiana, Secretary of the Tribunal

Ms. Ivania Fernandez, Paralegal

For the Claimant:

Counsel:

Ms. Silvia Marchili, White & Case LLP

Ms. Andrea Menaker, White & Case LLP

Mr. Hansel T. Pham, White & Case LLP

Ms. Estefania San Juan, White & Case LLP

Ms. Isabella Bellera Landa, White & Case LLP

Ms. Jessica Marroquin, White & Case LLP

Ms. Viviana Mendez, White & Case LLP*

Ms. Patty Garcia Linares, White & Case LLP

¹⁹ Based on the list of participants dated 30 August 2022, * denotes remote participation in the Hearing.

Ms. Julieta Monteroni, White & Case LLP
Mr. Manuel Valderrama, White & Case LLP*
Ms. Arianna Talaie, White & Case LLP*
Mr. Nils Ivars, White & Case LLP*
Mr. Jacob Bachmaier, White & Case LLP
Mr. Daniel Shults, White & Case LLP
Mr. Brandon Murray, White & Case LLP
Mr. Antonio Nittoli, White & Case LLP
Mr. Nicolas Eliashev, Tavarone, Rovelli Salim & Miani Abogados
Mr. Tomás Villaflor, Tavarone, Rovelli Salim & Miani Abogados*

Party representatives:

Mr. Jose Arango
Mr. Gino Sangalli
Mr. Javier Garcia
Mr. David Kay

Witnesses:

Ms. Andrea Bertone
Mr. Brent Bailey
Mr. Richard McGee
Mr. José Tierno

Experts:

Mr. Renato Agurto, Synex
Mr. Sebastian Bernstein, Synex
Mr. Santiago Dellepiane, BRG
Ms. Daniela Bambaci, BRG
Mr. Ian Friser-Frederiksen, BRG
Ms. Lauren Winne, BRG
Ms. Maria Agustina Gallo, BRG*
Mr. Matias Galarza, BRG*

For the Respondent:

Counsel:

Mr. Carlos Alberto Zannini, Procuración del Tesoro de la Nación
Mr. Sebastián Soler, Procuración del Tesoro de la Nación
Ms. Mariana Lozza, Procuración del Tesoro de la Nación
Ms. María Alejandra Etchegorry, Procuración del Tesoro de la Nación
Ms. Soledad Romero Caporale, Procuración del Tesoro de la Nación
Ms. Carolina Carla Catanzano, Procuración del Tesoro de la Nación
Mr. Cristian De Fazio, Procuración del Tesoro de la Nación
Ms. María Rosario Tejada, Procuración del Tesoro de la Nación
Mr. Julián Rivainera, Procuración del Tesoro de la Nación
Mr. Pedro Grijalba Marsans, Procuración del Tesoro de la Nación
Mr. Juan Andrés Navarro Gamboa, Procuración del Tesoro de la Nación
Ms. Annabella Sandri Fuentes, Procuración del Tesoro de la Nación
Ms. Valeria Etchechoury, Procuración del Tesoro de la Nación*
Ms. Cintia Yaryura, Procuración del Tesoro de la Nación*
Mr. Emiliano Leanza, Procuración del Tesoro de la Nación
Ms. Ana Miño Foncuberta, Procuración del Tesoro de la Nación
Ms. Daiana Baranchuk, Procuración del Tesoro de la Nación*
Mr. Braian Joachim, Procuración del Tesoro de la Nación

Witnesses:

Mr. Jorge H. Ruisoto
Mr. Daniel O. Cameron*
Mr. Javier Gallo Mendoza
Mr. Alejandro V. Sruoga

Experts:

Prof. Jorge Viñuales*
Dr. Martín Rodríguez Pardina
Dr. Daniel Flores, Quadrant Economics
Ms. Lauren Silber, Quadrant Economics
Mr. Iván López, Quadrant Economics*
Mr. Dario Gatti, Quadrant Economics*

Mr. José Diaz Barriga Ocampo, Quadrant Economics*

Court Reporters:

Mr. Dante Rinaldi

Mr. Paul Pelissier

Ms. Dawn Larson

Interpreters:

Mr. Daniel Giglio*

Ms. Silvia Colla*

Ms. Monique Fernandez*

77. On 1 September 2022, after having heard the Parties' comments on the Claimant's request to not have any international legal expert testify in the Hearing, the Tribunal decided to hear the Respondent's international legal expert Prof. Viñuales by videoconference as originally foreseen.
78. On 9 September 2022, the Claimant submitted a proposal for the disqualification of the President, which suspended the proceedings.
79. On 11 September 2022, the Claimant's proposal for the disqualification of the President was rejected by a decision taken by the two other arbitrators. The proceedings were resumed the same day in accordance with ICSID Arbitration Rule 9(6).²⁰
80. On 6 October 2022, the Respondent requested the Tribunal to order the Claimant to clarify certain points in relation to the Claimant's representatives, in particular with regard to Mr. David Kay, and Prof. Schreuer's inability to testify at the Hearing.
81. On 21 October 2022, the Claimant submitted its comments on the Respondent's requests of 6 October 2022.
82. On 24 October 2022, the Tribunal invited the Parties to file additional comments in relation to the issues addressed in the Respondent's letter of 6 October 2022, which were submitted by the Respondent on 4 November 2022 and by the Claimant on 18 November 2022.

²⁰ For details regarding the Claimant's proposal for the disqualification of the President and the rejection of the Claimant's proposal for the disqualification of the President, see Decision on the Claimant's Proposal to Disqualify the President dated 11 September 2022.

83. On 27 October 2022, the Parties sent a consolidated version of their corrections to the Hearing transcripts setting out their agreed proposed edits as well as their disagreements (the **Hearing Transcript** or **Transcript**).
84. On 4 November 2022, the Claimant submitted a letter to the Tribunal in “Answer to Prof. Pellet’s Question on Respondent’s Suggestions regarding Document Authenticity.”
85. On 5 November 2022, the Parties simultaneously submitted their Post-Hearing Briefs dated 4 November 2022.
86. On 9 December 2022, the Tribunal issued Procedural Order No. 5 concerning the Respondent’s requests for disclosure in relation to the Claimant’s representatives and Prof. Schreuer of 6 October 2022.
87. On 29 December 2022, the Respondent requested the Tribunal to:
- a) declare Claimant’s new evidence submitted with its letter of 4 November 2022 inadmissible;*
 - b) in any case, take into account Respondent’s observations on Claimant’s new evidence submitted with its letter of 4 November 2022; and*
 - c) authorize Respondent to submit CAMMESA’s document that includes updated information on the payment of Cerros Colorados’ sales liquidations.²¹*
88. On 19 January 2023, the Tribunal issued Procedural Order No. 6 by which it rejected the Respondent’s requests (a) and (c) and took note that the Respondent’s request (b) of the Respondent’s letter dated 29 December 2022 had been satisfied.
89. On 13 April 2023, the Parties were informed that Ms. Anna Toubiana would take maternity leave and that Ms. Gabriela González Giráldez would act as Secretary of the Tribunal during Ms. Toubiana’s leave.
90. On 26 April 2023, the Tribunal advised the Parties that it considered the record to be closed.
91. On 16 May 2023, the Respondent requested that additional and revised translations be submitted to the record. On 17 May 2023, the Claimant objected to the Respondent’s request.
92. On 17 May 2023, the Parties submitted their submissions on costs.
93. On 22 May 2023, the Tribunal rejected the Respondent’s request dated 16 May 2023.

²¹ Respondent’s letter to the Tribunal dated 29 December 2022, p. 8.

94. On 24 May 2023, the Parties submitted their replies to the other Party's submission on costs.
95. The proceedings were closed on 5 September 2023.
96. On 11 October 2023, Ms. Toubiana resumed her functions as Secretary of the Tribunal.

C. SUMMARY OF FACTS

97. The following summary of facts sets out in summary fashion the events forming the factual background of the dispute with respect to the liberalization of the Argentine electricity framework (see I.), the Claimant's interest in Cerros Colorados (see II.), the 2001 Argentine crisis (see III.), subsequent events after December 2003 affecting the Argentine power generation sector, including FONINVEMEM I, *Energía Plus*, *Energía Delivery Plan*, and FONINVEMEM II (see IV.), and subsequent events from 2013 further affecting the Argentine power generation sector (see V.).

I. The liberalization of the Argentine electricity framework

98. On 15 September 1960, the Argentine Congress enacted Law 15,336 (the **Electric Power Law**), regulating electricity at the Republic's federal level.²² With the Law's enactment, electric power became subject to trade, and operations to buy or sell electricity were deemed private commercial acts, although the electric sector was dominated by publicly owned companies.
99. In the late 1980s, the Argentine electricity sector faced a crisis resulting from adverse natural conditions, a succession of technical issues, and an economic recession.²³
100. In July 1989, following a declining economic situation and resulting political tensions, Raúl Alfonsín resigned from his position as President of Argentina, transferring power to Carlos Menem. Shortly thereafter, Argentina launched a program of economic expansion centered on the privatisation of State-owned enterprises in key economic sectors, the liberalization of key economic activities and the attraction of foreign investment, including in the electricity generation sector.

²² Law 15,336 dated 15 September 1960 (C-135).

²³ Ministry of Energy and Mining, 1986-1990 Five-Year Report for the Electricity Sector (A RA-141).

101. As part of its structural reforms, in August 1989, the Argentine legislature enacted Law 23,696 enabling the privatization of state-owned companies (the **Privatization Law**).²⁴
102. Before the privatization process, the main actors in the electricity generation sector were three government-controlled companies, known as Servicios Eléctricos del Gran Buenos Aires S.A. (**SEGBA S.A.**), Hidroeléctrica Norpatagónica S.A. (**Hidronor S.A.**), and Agua y Energía Eléctrica Sociedad del Estado (**AyEE**).²⁵
103. During the privatization process, Hidronor S.A. was split into five business units, one of which was entrusted with the operation of the Cerros Colorados-Planicie Banderita Hydroelectric Power Plant (the **Cerros Colorados Plant**), while AyEE was split into 23 business units, one of which was entrusted with the Alto Valle Thermal Power Plant (the **Alto Valle Plant**).
104. In March 1991, the Respondent enacted Law 23,928 (the **Convertibility Law**), establishing a convertibility regime that pegged the Argentine peso to the US dollar at an ARS 1 = 1 USD exchange rate.²⁶
105. On 12 April 1991, the Government enacted Decree 634/1991 (**Decree 634/91**),²⁷ which established a roadmap for the Government's transformation of the electricity sector.
106. On 19 July 1991, the Government issued Resolution 38/1991 (**Resolution 38/91**),²⁸ which further organized the wholesale electricity market (**WEM** or **MEM**).
107. Between November and December 1991, debates were held in both the Argentine Chamber of Representatives and the Senate on the future electricity law that was to be adopted.²⁹
108. On 16 January 1992, Respondent enacted Law 24,065 (the **Electricity Law**),³⁰ which codified the principles and rights stated in Decree 634/91 and Resolution 38/91.
109. The Electricity Law organized the electricity sector based on four broad categories, *i.e.*, generation, transmission, distribution, and demand. The Law privatized a number of state-owned assets, liberalized power generation activities through the WEM, and

²⁴ Law 23,696 dated 17 August 1989 (**A RA-142**).

²⁵ Claimant's Memorial, fn. 64; Respondent's Counter-Memorial, ¶ 27; see Decree 3,967/1947 dated 14 February 1947 (**C-91**) (which created AyEE); Law 14,772 dated 24 October 1958 (**C-134**) (which stated the basis for SEGBA); Decree 7,925/1967 dated 23 October 1967 (**C-93**) (which created Hidronor).

²⁶ Law 23,928 dated 27 March 1991 (**A RA-147**); Decree 2,128/1991 dated 10 October 1991 (**A RA-148**).

²⁷ Decree 634/1991 dated 12 April 1991 (**C-1**).

²⁸ Resolution 38/1991 dated 19 July 1991 (**C-351**).

²⁹ Argentine Chamber of Representatives, Session Journal, Meeting No. 58, Extension Session No. 8, 18 and 19 December 1991 (**A RA-341**), p. 5624.

³⁰ Law 24,065 dated 16 January 1992 (the **Electricity Law**) (**C-2**).

created the National Electricity Regulatory Entity (**ENRE**). The Law further foresaw that an agency would be created for the technical dispatch of capacity in the WEM and that the Energy Secretariat, an organ of the Ministry of Economy, would lay down rules for the power generators' compensation. Furthermore, the Electricity Law foresaw that distribution companies would purchase electricity in the WEM at a seasonal rate that was adjusted on a quarterly-annual basis. Since spot prices could deviate from the seasonal price, the Electricity Law foresaw the creation of a stabilization fund (**Seasonal Stabilization Fund**), to compensate power generators when the seasonal price was lower than the spot price.

110. On 30 March 1992, the Energy Secretariat called for public tender for the sale of 90% of the shares of the company operating the Alto Valle Plant through Resolution 440/1992.³¹ The Government noted in the Bidding Terms and Conditions that the Alto Valle Plant could “*commercialize energy as provided by [the Electricity Law].*”³²
111. On 29 April 1992, the Energy Secretariat issued Resolution 61/1992 (**Resolution 61/92**), which provided the procedures for operation, dispatch and price calculation in the WEM, as foreseen in Article 36 of the Electricity Law.³³
112. Resolution 61/92 excluded from the market price calculation “*any Diesel engines and Gas Turbines that can only burn Gas Oil [...]*.”³⁴ Such excluded generators were to be remunerated for generation at their operating cost.
113. Under Resolution 61/92, the WEM had the following components: a *term market*, with agreements involving amounts, prices, and terms freely agreed between sellers and buyers (**PPAs**), a *spot market*, with prices determined hourly based on the short-term marginal costs of the system, and a quarterly *stabilization system* of prices for the spot market, intended for distribution companies' purchases.³⁵ According to the *marginal cost of the system* method, the price was determined based on the variable cost of the last generator that dispatched at a given hour. The *capacity price* was set at USD 5/MW as of 1 November 1992 until 30 April 1993. After 1 May 1994, such price was set at USD 10/MW.³⁶

³¹ Resolution 440/1992 dated 30 March 1992 (**C-196**).

³² Bidding Terms and Conditions dated March 1992 (**C-50**).

³³ Resolution 61/1992, as amended dated 29 April 1992 (**C-4**).

³⁴ Resolution 61/1992 dated 29 April 1992 (**C-4**) Annex I, Item 2.3.4.1.

³⁵ Emphasis added.

³⁶ Resolution 61/1992 dated 29 April 1992 (**C-4**), Article 33, Section 2.4.2.1. of Annex I.

114. In parallel to the reforms in the electricity sector, on 9 June 1992, the Respondent enacted Law 24,076 (the **Natural Gas Law**),³⁷ which *inter alia* regulated the natural gas sector, promoted competition therein and privatized a state-owned company.
115. On 21 July 1992, through Decree 1192/1992, the management of the WEM was entrusted to CAMMESA, a mixed ownership entity responsible for the “National Dispatch of Energy” as foreseen in the Electricity Law.³⁸ Its shareholders were the Argentine Electric Energy Generators Association (**AGEERA**), the Argentine Large Electricity Users Association (**AGUEERA**), the Argentine Electricity Distributors Association (**ADEERA**), the Argentine Association of Electricity Transmission Companies (**ATEERA**), and the Energy Secretariat.
116. On 6 August 1992, the Government enacted Regulatory Decree 1398/1992,³⁹ which formed together with Resolution 61/92, the “**Implementing Regulations**” of the Electricity Law.
117. On 27 August 1992, the Government sold 90% of the shares in the company operating the Alto Valle Plant to a consortium led by the US energy company Dominion Resources Inc. (**Dominion Energy**) for approximately ARS 22 million.⁴⁰
118. On 28 September 1992, the Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (the **BIT**)⁴¹ came into force.
119. In December 1992, the selling memorandum for the privatisation of the Cerros Colorados Plant was issued (the **Selling Memorandum**).⁴² The Selling Memorandum exposed selling points to potential investors and explained the regulatory framework of the Respondent’s electricity sector as well as the pricing system thereunder.
120. On 22 February 1993, as part of the privatization of the power generation activity of Hidronor S.A. and within the framework of the Electricity Law, Decree 287/1993 mandated the creation of Hidroeléctrica Cerros Colorados S.A. (**Cerros Colorados**) and endowed it with “*the concession for the generation of electric energy by taking advantage of the falls formed by the Planicie Banderita works on the Neuquén River.*”⁴³

³⁷ Law 24,076 dated 20 May 1992 (**C-140**).

³⁸ Decree 1,192/1992 dated 21 July 1992 (**C-84**).

³⁹ Regulatory Decree 1,398/1992 dated 6 August 1992 (**C-5**).

⁴⁰ Decree 1,559/1992 dated 27 August 1992 (**C-85**); Stock Purchasing Agreement for Central Térmica Alto Valle S.A. dated 10 August 1992 (**C-217**).

⁴¹ Treaty between the Kingdom of Spain and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (**Treaty**) (**CL-1** and **CL-246**).

⁴² Banco General de Negocios, CS First Boston, and Kleinwort Benson, Selling Memorandum for the Privatization of Hidroeléctrica Norpatagónica S.A. dated December 1992 (**Selling Memorandum**) (**C-6**).

⁴³ Decree 287/1993 dated 22 February 1993 (**C-90**).

The Bidding Terms and Conditions for the sale of Cerros Colorados' shares noted that the public tender was *inter alia* to be governed by the Electricity Law.⁴⁴ Further, the bylaws of Cerros Colorados indicated that its purpose was to produce and commercialize electrical energy “*subject to the terms and limitations established by Laws No. 15,336 and [the Electricity Law].*”⁴⁵

121. On 3 June 1993, the Government issued Resolution 167/1993, which extended the exclusion of certain generators foreseen in Resolution 61/92 until 30 April 1994.⁴⁶
122. On 12 July 1993, Cerros Colorados and the Energy Secretariat entered into a **Concession Contract** to operate the Planicie Banderita Hydroelectric Power Plant for a period of 30 years from the time of taking possession on 11 August 1993.⁴⁷ The Concession Contract provided that *inter alia* the Electricity Law and “*its complementary regulations*” were part of the applicable law governing the contract and entrusted Cerros Colorados with the right to generate and sell electricity in accordance with the rules applicable to the WEM.⁴⁸
123. On 9 August 1993, Decree 1661/1993 awarded 59% of the shares in Cerros Colorados to Patagonia Holding S.A., a company controlled by Dominion Energy, through its subsidiary Dominion Generating S.A., and Louis Dreyfus Argener.⁴⁹ This stock interest was awarded at a price of USD 181,000,000.⁵⁰ In 1998, Dominion Energy acquired an additional 39% interest in Cerros Colorados, bringing its entire stock interest in Cerros Colorados to 98%.⁵¹
124. On 1 May 1994, capacity payments, which were limited to USD 5/MW-hrp until 30 April 1994, rose to USD 10/MW-hrp as foreseen by Resolution 61/92.⁵²
125. On 19 June 2001, the Argentine Republic adopted Decree 804/2001, which modified parts of the Electricity Law.⁵³

⁴⁴ Bidding Terms and Conditions dated 6 April 1993 (C-251).

⁴⁵ Bylaws of Hidroeléctrica Cerros Colorados S.A. (Part 1) dated 31 May 1993 (C-52). See also, Bylaws of Hidroeléctrica Cerros Colorados S.A. (Part 2) dated 12 March 1999 (C-53) (after Cerros Colorados merged with Alto Valle).

⁴⁶ Resolution 167/1993 dated 3 June 1993 (C-184).

⁴⁷ Concession Contract between the Argentine Government and Cerros Colorados S.A. dated 22 February 1993 (**Concession Contract**) (C-79).

⁴⁸ *Id.*, Article 70.

⁴⁹ Decree 1661/1993 dated 9 August 1993 (C-86).

⁵⁰ Claimant's Memorial, ¶ 145.

⁵¹ Duke Energy Corporation, *Note 3 to Consolidated Financial Statements, Form 10-K* dated December 1997 (C-152); Hidroeléctrica Cerros Colorados, *Financial Statement, 1999* (C-597), p. 1; Patagonia Holdings S.A., *Board Minute No. 38* dated 19 June 1998 (C-257).

⁵² Resolution 61/1992, as amended dated 29 April 1992 (C-4).

⁵³ Decree 804/2001 dated 19 June 2001 (C-264).

126. On 12 September 2001, Decree 804/2001 was abrogated by the Argentine Congress through Law 25,468.⁵⁴

II. The Claimant's interest in Cerros Colorados

127. On 14 April 1999, ENRE approved the merger between Alto Valle and Cerros Colorados, which was registered in March 2000 and entailed retroactive effect as of 1 October 1998.⁵⁵
128. In August 1999, Duke Energy Corporation (**Duke Energy**), a major US utility company, through its subsidiary, Duke Energy International LLC (**DEI**), purchased Dominion Energy's power generation assets in Argentina, Belize, Bolivia, Ecuador, and Peru for approximately USD 405 million, thus, acquiring an interest in Cerros Colorados.⁵⁶ The acquisition was completed in January 2001 when Duke Energy Generating S.A., a subsidiary of Duke Energy, acquired 90.87% of the shares in Cerros Colorados.⁵⁷
129. On 22 October 2003, Duke Energy International España Holdings S.L.U. was incorporated in Spain.⁵⁸
130. On 12 December 2003, Duke Energy International España Holdings S.L.U. acquired a 99.92% interest in Duke Energy Generating S.A. Duke Energy International España Holdings S.L.U. thus acquired an indirect 90.80% interest in Cerros Colorados.⁵⁹
131. On 13 December 2007, Cerros Colorados changed its corporate name from Hidroeléctrica Cerros Colorados S.A. to "*Duke Energy Cerros Colorados S.A.*"⁶⁰
132. On 20 December 2016, I Squared Capital, a US infrastructure fund, acquired Duke Energy's power generation participations in Argentina.⁶¹
133. On 10 January 2017, Duke Energy Generating S.A. changed its corporate name to "*Orazul Energy Generating S.A.*" (**Orazul Generating**).⁶²

⁵⁴ Law 25,468 dated 12 September 2001 (C-265).

⁵⁵ Resolution 537/1999 dated 22 April 1999 (C-197); Cerros Colorados bylaws (part 2) dated 12 March 1999 (C-53).

⁵⁶ Duke Energy Corporation, 10-K for the Fiscal Year ended 31 December 1999 dated 20 March 2000 (C-94).

⁵⁷ Cerros Colorados, *Notes to the Financial Statements 2001 & 2000* dated 31 December 2000, 2001 (C-61); Copies of the Stock Ledgers (C-3); Patagonia Holdings S.A. Board Meeting Minutes No. 55 dated 1 July 2001 (C-168); Official Bulletin 29.558 dated 3 January 2001 (C-166).

⁵⁸ Bylaws of Duke Energy International España Holdings, S.L. dated 22 October 2003 (C-48).

⁵⁹ Copies of the Orazul Companies Stock Ledgers for Law 23,299 dated 1992-2020 (C-3).

⁶⁰ Minutes of Shareholders' Meeting of Duke Energy Cerros Colorados S.A. dated 4 February 2008 (C-234).

⁶¹ Duke Energy Press Release, *Duke Energy completes sale of international businesses in Peru, Chile, Ecuador, Guatemala, El Salvador, Argentina* dated 20 December 2016 (C-309); Duke Energy, Annual Report and Form 10-K dated 2016 (A RA-42).

⁶² Minutes of Shareholders' Meeting of Duke Energy Generating S.A. dated 10 January 2017 (C-232).

134. On 17 January 2017, Duke Energy International España Holdings S.L.U. changed its corporate name to the Claimant’s current name, “*Orazul International España Holdings S.L.U.*” (**Orazul**).⁶³
135. On 27 January 2017, Duke Energy Cerros Colorados S.A. changed its corporate name to “*Orazul Energy Cerros Colorados S.A.*”⁶⁴
136. In July 2017, the Claimant reduced its ownership in Orazul Generating from 99.92% to 95%, thus reducing the Claimant’s indirect interest in Cerros Colorados to 86.33%.⁶⁵

III. The 2001 Argentine crisis

137. At the end of 2001, the Argentine Republic underwent a severe economic, social and institutional crisis. On 3 December 2001, the Argentine Executive passed Decree 1570/2001, which restricted bank movements until the completion of an external debt restructuring.⁶⁶ Against this background, in the early months of 2002, the Respondent enacted a series of legislative measures to address its socio-economic situation (the **Argentine crisis**).⁶⁷
138. Among others, on 6 January 2002, the Respondent enacted Law 25,561 (the **Emergency Law**).⁶⁸ The Emergency Law declared a “*public emergency in social, economic, administrative, financial, and exchange matters*”⁶⁹ and delegated the powers contemplated in the law to the Executive branch until 10 December 2003. The Emergency Law provided for an abandonment of the convertibility regime and provided that US dollar obligations and tariffs would be converted to Argentine pesos at a 1:1 rate, a measure known as “*pesification*”, which extended to the power generation sector. Furthermore, the Emergency Law eliminated adjustment clauses that were pegged to US dollars or any other foreign currency, together with indexation clauses and mechanisms for public service contracts, including tariffs for the distribution of electricity and natural gas. The Emergency Law also clarified that “*under no circumstance*” did it “*entail an authorization for contracting companies and those providing public services to suspend or alter compliance with their obligations.*”⁷⁰

⁶³ Resolutions of the Sole Shareholder of “Duke Energy International España Holdings, S.L.U.” dated 17 January 2017 (**C-212**).

⁶⁴ Minutes of Shareholders’ Meeting of Duke Energy Cerros Colorados S.A. dated 27 January 2017 (**C-235**).

⁶⁵ Copies of the Orazul Companies Stock Ledgers for Law 23,299 dated 1992-2020 (**C-3**).

⁶⁶ Decree 1570/2001 dated 1 December 2001 (**A RA-350**).

⁶⁷ See for instance, Decree 108/02 dated 15 January 2002 (**A RA-171**); Law 25,590 dated 15 May 2002 (**A RA-173**).

⁶⁸ Law 25,561 dated 6 January 2002 (**C-7** and **A RA-170**).

⁶⁹ Emergency Law (**C-7** and **A RA-170**), Article 1.

⁷⁰ *Id.*, Article 10.

139. On 3 February 2002, the Respondent adopted Decree 214/2002 implementing the Emergency Law.⁷¹
140. On 14 March 2002, the Respondent issued Resolution 2/2002, by which CAMMESA was instructed to require power generators to declare their variable costs of production (VCPs), capacity payments, and other values previously calculated in US dollars, in Argentine Pesos at a 1:1 rate.⁷² Capacity payments were thus set at ARS 10/MW-hrp, meaning that their value diminished to approximately USD 3/MW-hrp.
141. On 5 April 2002, the Energy Secretariat adopted Resolution 8/2002, which sought to assure the recovery of generators' costs and minimize the effects of devaluation.⁷³ Specifically, Resolution 8/2002 capped the spot price at ARS 120/MWh for the determination of the market price.
142. On 24 May 2002, the President of the Argentine Republic declared an emergency in the supply of hydrocarbons until 30 September 2002.⁷⁴
143. On 31 May 2002, Resolution 2612/2002 was adopted, establishing a maximum reference gas price that distributors could charge.⁷⁵
144. On 23 October 2002, CAMMESA was instructed by virtue of the Energy Secretariat's Resolution 146/2002 to implement and put into practice an operation for the advance financing of major or extraordinary maintenance for generation equipment and/or electric power transmission systems essential for the supply of electric power to final users.⁷⁶
145. As of 2002, seasonal prices, being the quarterly adjusted prices paid by distributors to energy producers, were frozen at a lower value than the spot price.⁷⁷ CAMMESA continued to use the Seasonal Stabilization Fund to compensate generators for the difference between the spot price and the seasonal price.

⁷¹ Decree 214/2002 dated 3 February 2002 (A RA-180).

⁷² Resolution 2/2002 dated 14 March 2002 (C-186) as modified by Resolutions 246/2002 dated 4 July 2002 (C-191) and 317/2002 dated 18 July 2002 (C-194), and extended until 2003 winter period by Resolution 1/2003 dated 2 January 2003 (C-172).

⁷³ Resolution 8/2002 dated 5 April 2002 (A RA-182).

⁷⁴ Decree 867/2002 dated 23 May 2002 (A RA-189).

⁷⁵ ENARGAS Resolution 2,612/2002 (C-192), Annex II.

⁷⁶ Resolution 146/2002 dated 23 October 2002 (A RA-183).

⁷⁷ Resolution 75/2002 dated 30 April 2002 (C-205); Resolution 329/2002 dated 25 July 2002 (C-195); Resolution 148/2002 dated 25 October 2002 (C-182).

146. The Seasonal Stabilization Fund was depleted by June 2003.⁷⁸ Accordingly, as from that month, it was not possible to cover all of the receivables due to generators of the WEM with the funds obtained from electricity demand.
147. On 14 August 2003, the Energy Secretariat issued Resolution 240/2003 (**Resolution 240/03**), whereby it temporarily altered the methodology for the spot price calculation.⁷⁹ Specifically, Resolution 240/03 determined that VCPs corresponding to costs of operating with liquid fuel would no longer be accounted for when calculating the spot price. Additionally, the resolution mandated that power generators burning more expensive fuels would receive additional transitory dispatch costs, so generators no longer received a uniform price for the electricity they produced. Furthermore, Resolution 240/03 imposed a cap of ARS 120/MWh on the spot price and stated that CAMMESA had found an “*abnormal supply of natural gas to power plants, which disrupt[ed] the operation of the market and its resulting prices.*”⁸⁰
148. On 8 September 2003, the Energy Secretariat issued Resolution 406/2003 (**Resolution 406/03**), which temporarily authorized CAMMESA to use the “**Unified Fund**”, created by the Electricity Law, to cover the deficit in the Seasonal Stabilization Fund and establish a “*transitory mechanism for the assignment of the scarce and insufficient resources.*”⁸¹ According to such transitory payment mechanism, CAMMESA would first pay thermal and hydroelectric generators their respective short-term variable costs, which, in the case of hydroelectric generators, comprised their variable costs, followed by capacity payments and, if funds were sufficient, their marginal income. Pursuant to Resolution 406/03, receivables that the Unified Fund could not cover became a debt that CAMMESA owed to power generators with an uncertain due date that would be determined in the future. Resolution 406/03 required generators to still pay providers for the fuel, inputs, and human resources necessary for their operation and maintenance.
149. On 16 September 2003, in an address to Congress, representatives of the Argentine Executive Branch underlined that the economy had experienced a “*significant recovery.*”⁸²
150. On 30 September 2003, AGEERA filed an administrative appeal before the Energy Secretariat against Resolution 240/03, arguing that the resolution was contrary to the

⁷⁸ Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:0176178/2004 (Part 1) dated 28 July 2004 (C-105).

⁷⁹ Resolution 240/2003 dated 14 August 2003 (C-8).

⁸⁰ *Id.*, second whereas clause.

⁸¹ Resolution 406/2003 dated 8 September 2003 (C-9), third whereas clause.

⁸² Message sent to Congress by Argentine National Executive Branch Regarding the 2004 Budget dated 16 September 2003 (C-244).

Electricity Law on the basis that spot prices were no longer based on the marginal cost of the system nor uniform.⁸³

151. By October 2003, the Respondent, which had anticipated gas shortages for the upcoming winter, noted in a communication to CAMMESA that it no longer expected any gas shortages in the near future.⁸⁴ The Respondent noted that

*until instructed otherwise, CAMMESA will have to calculate Market Prices based on “the Scheduling, Load Dispatch and Price Calculation Procedures” (THE PROCEDURES).*⁸⁵

152. On 9 October 2003, the Energy Secretariat issued Note 526/2003 to CAMMESA in which it advised that the application of Resolution 240/03 to calculate the spot price would only be applied until the second week of October 2003 because the Energy Secretariat did not foresee natural gas shortages in the near future.⁸⁶
153. On 27 November 2003, the Energy Secretariat issued Resolution 943/2003 (**Resolution 943/03**), modifying Resolution 406/03, which established a transitory mechanism for a priority system requiring CAMMESA to make partial payments to power generators for their electricity sales in the spot market.⁸⁷ The Resolution quantified the amounts owed to generators into two categories: i) those that would be paid on certain due dates, based on available resources; and ii) those that would be paid on uncertain due dates, determined by the Energy Secretariat.
154. In December 2003, *i.e.*, at the time when Duke Energy International España Holdings S.L.U. (later renamed Orazul) was incorporated in Spain⁸⁸ and had acquired an indirect 90.80% interest in Cerros Colorados,⁸⁹ CAMMESA submitted a report to the Energy Secretariat warning that while the operation of the Argentine electricity system had thus far made it possible to cover increases in demand, the economic and financial conditions of the sector did not allow to cover future demand at a sustainable cost.⁹⁰

⁸³ Administrative Appeal filed by AGEERA against Resolution 240/2003 dated 30 September 2009 (**A RA-331**).

⁸⁴ Note 526/2003 from the Energy Subsecretariat to CAMMESA dated 9 October 2003 (**C-159**).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*; CAMMESA, 2003 Annual Report (**C-71**).

⁸⁷ Resolution 943/2003 dated 27 November 2003 (**C-209**), p. 1.

⁸⁸ Bylaws of Duke Energy International España Holdings, S.L. dated 22 October 2003 (**C-48**).

⁸⁹ Copies of the Orazul Companies Stock Ledgers for Law 23,299 dated 1992-2020 (**C-3**).

⁹⁰ CAMMESA, Risk Assessment, Long and Medium Term – Period 2004-2007 dated December 2003, Annex: Supply 2004-2006 (**A RA-55**).

155. On 4 December 2003, the Argentine Congress adopted Law 25,820 extending the Emergency Law, which was set to expire on 10 December 2003, by a year to 31 December 2004.⁹¹

IV. Subsequent events after December 2003 affecting the Argentine power generation sector, including FONINVEMEM I, *Energía Plus*, *Energía Delivery Plan*, and FONINVEMEM II

156. On 26 January 2004, capacity payments were increased from their 2002 Peso rates (ARS 10/MW-hrp) to ARS 12/MW-hrp, (*i.e.*, approximately USD 4/MW-hrp).⁹²
157. On 28 January 2004, AGEERA stated in a letter to CAMMESA that it considered it necessary to advance as soon as possible towards the implementation of measures aimed at ensuring the supply of energy and that such measures “*should be previously discussed with market agents so that a consensus [may] be reached among stakeholders.*”⁹³
158. On 30 January 2004, the Energy Secretariat instructed CAMMESA to reinstate the application of Resolution 240/03.⁹⁴
159. In February 2004, the Government issued Decree 181/2004 authorizing the Energy Secretariat to adjust natural gas prices.⁹⁵
160. In March 2004, Cerros Colorados joined the administrative appeal filed by AGEERA against Resolution 240/03.⁹⁶
161. In April 2004, the Energy Secretariat issued Note 334/2004 to CAMMESA stating that
*[u]nderstanding the notorious supply crisis situation [...] the Ministry of Energy is committed to establishing transitory regulations that tend to moderate the impacts on supply and demand, mostly to preserve equal energy supply conditions.*⁹⁷
162. On 21 April 2004, the Energy Secretariat entered into an agreement with gas producers through Resolution 208/2004 to execute a “*normalization scheme of natural gas prices [...] in accordance with the guidelines established in Decree 181/2004.*”⁹⁸ The

⁹¹ Law 25,820 dated 4 December 2003 (QE-14).

⁹² Resolution 93/2004 dated 26 January 2004 (C-208).

⁹³ Letter from AGEERA to CAMMESA dated 28 January 2004 (A RA-56), p. 1.

⁹⁴ Note 65/2004 from the Electric Subsecretary to CAMMESA dated 30 January 2004 (C-160).

⁹⁵ Decree 181/04 dated 13 February 2004 (C-87).

⁹⁶ Cerros Colorados, Submission Joining AGEERA’s Administrative Appeal Against Resolution 240/03 dated 25 March 2004 (C-288).

⁹⁷ Note 334/2004 from the Energy Secretariat to CAMMESA dated 15 April 2004 (C-158).

⁹⁸ Resolution 208/2004 dated 21 April 2004 (C-242 and RA-186).

agreement provided for the Energy Secretary to implement the natural gas price increases, so as to allow the natural gas producers to collect those prices, “including [...] recognizing those natural gas prices as Natural Gas Reference Price in the declaration of variable production costs by thermal plants for purposes of determining the Spot Price or Market Price.”⁹⁹ Pursuant to Article 11 of the agreement, the term of the agreement was to last until 31 December 2006.

163. At the same period, Argentine newspapers reported that electricity generators and the Government were also negotiating a path toward price increases in the WEM.¹⁰⁰ According to an article published in *La Nación*, the Executive Branch had already increased wholesale electricity prices in February 2004, which led to a rise of up to 35% for large users tariffs only. However, thermal and hydroelectric generators expected future increases, since they considered them necessary to encourage new investments to avoid shortage in the supply. The Argentine Fuel Undersecretary is reported to have stated that the Government was working toward an agreement with power generators to
- reach a free wholesale market in a gradual process that should be completed by June 30, 2006, when the wellhead gas price would also be free for households and businesses.*¹⁰¹
164. In May 2004, the Government issued its 2004-2008 National Energy Plan, which included a plan for the “re-adaption” of the WEM, in particular, to achieve the sustainability of the WEM in the medium term.¹⁰²
165. On 15 July 2004, the Energy Secretariat adopted Resolution 712/2004 launching the “Fund for Necessary Investments to Increase Electric Power Supply in the Wholesale Electric Market Program” to allocate economic resources for investments intended to increase electric power supply by 2007 (FONINVEMEM).¹⁰³ The FONINVEMEM’s objective was to build plants, which would increase electric supply.
166. CAMMESA was entrusted with the management of the FONINVEMEM. Resolution 712/2004 stated that Argentina’s increasing demand for electricity and the financing difficulties of the sector required it to add new power generation capacity. The Resolution also set out that its provisions

⁹⁹ *Ibid.*

¹⁰⁰ *Negotiate a Gradual Increase in Electricity*, LA NACIÓN dated 23 April 2004 (available at <https://www.laNación.com.ar/economia/negocian-un-aumento-gradual-de-electricidad-nid595041/>) (C-130).

¹⁰¹ *Ibid.*

¹⁰² Minister of Federal Planning, Public Investment, and Services and the Energy Secretariat, *National Energy Plan 2004-2008* dated May 2004 (C-154).

¹⁰³ Resolution 712/2004 dated 12 July 2004 (C-11).

*constitute partial and transitory rules, the enactment of which is necessary and urgent in the context of the emergency in the country's economy as it affects the WHOLESale ELECTRIC MARKET (WEM).*¹⁰⁴

167. On 28 July 2004, the Energy Secretariat prepared a technical report that recognized the need for investments in the electricity sector in order to stabilize the WEM.¹⁰⁵
168. On 6 August 2004, the Energy Secretariat issued Resolution 826/2004, which formally invited power generators to state whether they would participate in the FONINVEMEM.¹⁰⁶
169. On 10 August 2004, AGEERA sent a letter to the Energy Secretary, Mr. Daniel Cameron, to request an extension of the deadline to participate in FONINVEMEM and obtain clarifications on the FONINVEMEM regime.¹⁰⁷
170. On 17 August 2004, the Energy Secretariat extended the deadline to participate in the FONINVEMEM to 30 August 2004.¹⁰⁸
171. On 27 August 2004, AGEERA sent another letter to the Energy Secretary requesting a new extension of the deadline to participate in FONINVEMEM as well as more precise information on the conditions under which adhering companies will participate in the management of FONINVEMEM-related projects and on the situation of companies that do not accept to participate in FONINVEMEM.¹⁰⁹
172. On 30 August 2004, the Energy Secretariat extended the deadline to participate in FONINVEMEM to 17 September 2004.¹¹⁰
173. On 15 September 2004, the Executive Branch expressed in a message sent to the National Congress that the exceptional performance of the economy had

*surprised most private analysts [...] and, to some extent, exceeded the government's own expectations regarding the speed with which the recovery took place and the context of macroeconomic stability was consolidated.*¹¹¹

¹⁰⁴ *Id.*, twenty-second whereas clause.

¹⁰⁵ Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:0176178/2004 (Part 1) dated 28 July 2004 (C-105).

¹⁰⁶ Resolution 826/2004 dated 6 August 2004 (C-13).

¹⁰⁷ Letter from AGEERA dated 10 August 2004 (A RA-57).

¹⁰⁸ Resolution 833/2004 dated 17 August 2004 (A RA-59).

¹⁰⁹ Letter from AGEERA dated 27 August 2004 (A RA-58).

¹¹⁰ Resolution 936/2004 dated 30 August 2004 (A RA-60).

¹¹¹ Message from the Executive to the National Congress Regarding 2004 Budget dated 15 September 2004 (C-250), p. 22.

174. On 17 September 2004, the Energy Secretariat extended the deadline to participate in the FONINVEMEM to 13 October 2004.¹¹²
175. On 28 September 2004, the Government issued Resolution 956/2004 (**Resolution 956/04**), which applied a surcharge to existing PPAs that exceeded contracted capacity in November 2004 *vis-à-vis* the term May-July 2004.¹¹³ Any surpassing amount of revenue arising out of PPAs was automatically offset by deducting those amounts from payments due to power generators.
176. On 12 October 2004, the Energy Secretariat extended the deadline to participate in the FONINVEMEM to 27 October 2004.¹¹⁴
177. On 14 October 2004, the Energy Secretariat denied the AGEERA appeal in relation to Resolution 406/03 and stated that
- it is possible without violating or suppressing the guarantees that protect economic rights, postponing within reasonable limits the fulfillment of obligations arising from acquired rights.*¹¹⁵
178. On 26 October 2004, the Energy Secretariat extended the deadline to participate in the FONINVEMEM to 19 November 2004.¹¹⁶
179. In November 2004, Energy Secretary Mr. Daniel Cameron gave a speech at the 2004 Industrial Organization of Argentina.¹¹⁷ Mr. Cameron noted that a
- country's normal planning horizon, as far as energy matters are concerned, should be at least fifteen or twenty years. However, this Government had to devise an energy management plan for the 2004-2008 period to finally have the possibility of doing so in a more systematized way and subject to more reasonable terms.*¹¹⁸
180. He also stated that
- [o]nce readapted, we foresee a free market for medium and large consumptions that will have to manage a significant percentage, or the total demand, as well as the possibility that the distributors, through bidding mechanisms, regulated by the Ministry of Energy, manage the expansion of*

¹¹² Resolution 948/2004 dated 17 September 2004 (A RA-61).

¹¹³ Resolution 956/2004 dated 28 September 2004 (C-210).

¹¹⁴ Resolution 971/2004 dated 12 October 2004 (A RA-62).

¹¹⁵ Resolution 1,069/2004 dated 14 October 2004 (C-174), p. 5.

¹¹⁶ Resolution 1,097/2004 dated 26 October 2004 (A RA-63).

¹¹⁷ *UIA Conference Transcript* dated 23-25 November 2004 (C-109).

¹¹⁸ *Id.*, pp. 149-151.

*your demand through contracts at terms that imply the installation of new power generation.*¹¹⁹

181. At the same occasion, the Chief of the Cabinet of Ministers noted with respect to the Argentine crisis that

*in the worst of hells, and after two years we have managed to escape its worst flames, but we have not come out yet [...] the heat is still overwhelming and the flames still burn, and they burn badly.*¹²⁰

182. On 18 November 2004, the Energy Secretariat extended the deadline to participate in FONINVEMEM to 3 December 2004.¹²¹

183. On 1 December 2004, the Energy Secretariat issued Resolution 1416/2004 by which it was decided that the extension of the deadline to participate in the FONINVEMEM was continued until general guidelines and the essential organizational aspects for managing the FONINVEMEM were established.¹²²

184. On 6 December 2004, the Energy Secretariat issued Resolution 1427/2004 to which the FONINVEMEM Adhesion Contract was attached as an Annex (the **Adhesion Contract**).¹²³ The Adhesion Contract provided that its purpose was to

*establish the basis on which the [WEM] would be restored, meaning that it would be readjusted to normalize the regular operation of the [WEM] as a competitive market, with sufficient supply, in which Generators, Distributors, Traders, Participants and Large Energy Users can buy and sell electricity at prices determined by the offer and the demand, without regulatory distortions and within the framework established by Law 24,065.*¹²⁴

185. The Adhesion Contract required generators to invest at least 65% of their outstanding receivables owed by CAMMESA for the period between January 2004 and December 2006.

186. In return, the Energy Secretariat committed *inter alia* in Article 4.1 (iv) to the following:

When the Market is restored once the new equipment built with FONINVEMEM resources commences commercial operations, abrogate

¹¹⁹ *Ibid.*

¹²⁰ *Id.*, pp. 25-28.

¹²¹ Resolution 1,225/2004 dated 18 November 2004 (A RA-64).

¹²² Resolution 1,416/2004 dated 1 December 2004 (A RA-65).

¹²³ FONINVEMEM Adhesion Contract dated 6 December 2004 (FONINVEMEM Adhesion Contract) (C-211); see also Resolution 1,427/2004 dated 6 December 2004 (C-65).

¹²⁴ *Ibid.*

Resolution 240 of the ENERGY SECRETARIAT dated 14 August 2003, and remunerate generators with the System's Marginal Price as set under "THE PROCEDURES", in a free spot market, considering the cost of unsupplied energy, with a water value that represents the thermal replacement value.

187. On 14 December 2004, in response to enquiries by generators, the Energy Secretariat stated in a Note that their decision to participate in the FONINVEMEM program implied signing the Memorandum of Adhesion and accepting all the terms specified therein.¹²⁵ Furthermore, in the event that any of the participants decided not to sign the Final Agreement, the Energy Secretariat specified that they would be released from the obligation to manage the project(s) to be undertaken and obtain the necessary financing.¹²⁶
188. On 15 December 2004, Argentina enacted Law 25,972, which extended the Emergency Law until 31 December 2005.¹²⁷
189. On 17 December 2004, Cerros Colorados sent a letter to the Energy Secretariat advising that its participation in FONINVEMEM was conditioned to the finding of an agreement on a number of issues. Cerros Colorados referred to its "*intention to collaborate with the restoration of the regular functioning of the WEM as a competitive market [...] without regulatory distortions and within the framework established by [the Electricity Law].*"¹²⁸
190. On 20 December 2004, CAMMESA sent a letter to the Energy Secretary, Mr. Cameron, to inform him of the outcome of the call to WEM agents to participate in the creation of the FONINVEMEM.¹²⁹
191. In its annual report for 2004, CAMMESA noted that the Government's objective in the gas and electricity price increases was to normalize both the electricity and gas market.¹³⁰
192. On 5 January 2005, the decision of the WEM agents to participate in creating the FONINVEMEM was accepted by Resolution 3/2005.¹³¹

¹²⁵ Letter 1593 from the Energy Secretary to CAMMESA dated 14 December 2004 (A RA-66).

¹²⁶ *Ibid.*

¹²⁷ Law 25,972 dated 15 December 2004 (C-12).

¹²⁸ Letter from Cerros Colorados to the Energy Secretary dated 17 December 2004 (C-145).

¹²⁹ Letter B-027613-1 from CAMMESA dated 20 December 2004 (A RA-67).

¹³⁰ CAMMESA, 2004 Annual Report (C-72).

¹³¹ Resolution 3/2005 dated 5 January 2005 (A RA-68).

193. On 2 February 2005, the Energy Secretariat issued Resolution 49/2005, whereby the Energy Secretary instructed CAMMESA to pay up to 35% of the unpaid receivables to generators.¹³²
194. On 10 February 2005, the Energy Secretariat instructed in a letter to CAMMESA to “*delay, until further notice the payment under Article 3 (a) of Resolution SE No. 49/2005 to the Agents not included in Article 1 of Resolution SE No. 3/2005.*”¹³³
195. On 15 March 2005, the Energy Secretariat proposed to issue a new invitation to other electricity generators who had not signed the Adhesion Contract attached to Resolution 1427/2004.¹³⁴
196. In March 2005, Duke Energy noted in a memorandum regarding Argentina and *inter alia* addressing the FONINVEMEM that it had “*opted out of this investment mechanism*” as “*Duke Energy refuses to participate in forced investments.*”¹³⁵ That same month, Duke Energy also noted in an internal presentation that it
- rejected the Government’s proposal to invest in two thermal plants through FONINVEMEM because [...] [t]he money corresponding to Duke Energy accounts receivable should not be subject to any additional investment [and] [a]t the time of the invitation [Duke Energy] did not have enough information to make a decision.*¹³⁶
197. On 6 April 2005, through Resolution 622/2005, the Energy Secretariat ordered CAMMESA to issue a new invitation to electricity generators who had not yet signed the Adhesion Contract.¹³⁷
198. On 14 April 2005, the Energy Secretariat requested CAMMESA to extend the call until 25 April 2005 in light of the number of clarifications requested by electricity generators.¹³⁸
199. On 18 April 2005, Cerros Colorados sent a letter to the Undersecretary of Electric Energy requesting clarifications on Resolution 622/2005,¹³⁹ including on the “*manner in which the 35% of receivables will be paid for the year 2004 for those generators*

¹³² Resolution 49/2005 dated 7 February 2005 (C-246).

¹³³ Energy Secretariat Note 194 to CAMMESA dated 10 February 2005 (C-445).

¹³⁴ Memorandum of Agreement for a New Invitation to Participate in the FONINVEMEM dated 15 March 2004 (A RA-69).

¹³⁵ Duke Energy, Memorandum regarding Argentina dated March 2005 (C-368).

¹³⁶ Duke Energy Argentina, *Government Affairs* dated March 2005 (C-341), p. 8.

¹³⁷ Resolution 622/2005 dated 6 April 2005 (C-200).

¹³⁸ Letter SSEE 0339 dated 14 April 2005 (A RA-198).

¹³⁹ Letter from Duke Energy Argentina - Hidroeléctrica Cerros Colorados S.A. to the Undersecretary of Electricity dated 18 April 2005 (A RA-199).

deciding not to participate in the second call,” to which the Undersecretary replied on 21 April 2005.¹⁴⁰

200. On 25 April 2005, Cerros Colorados sent a letter to the Deputy Secretary of Energy indicating that it was willing to accept the latest call made under Resolution 622/2005 but that it required additional time to express its intention “*for regulatory reasons and due to internal procedures.*”¹⁴¹
201. On 26 April 2005, several generators decided to participate in the FONINVEMEM program, which resulted in an additional participation of 15.2%, *i.e.*, by April 2005, the level of participation was 87.4%.¹⁴²
202. On 12 May 2005, the Energy Secretariat granted an extension of time until 17 May 2005 to allow electricity generators who had not done so, such as Cerros Colorados, to join the FONINVEMEM program.¹⁴³
203. On 13 May 2005, Cerros Colorados stated its intention to enter in the FONINVEMEM program, resulting in a level of participation in the program of 91.4%.¹⁴⁴
204. On 23 May 2005, at a meeting between representatives of Duke Energy and the Energy Secretariat, according to the minutes of such meeting, Duke Energy “*thanked*” the Energy Secretariat for “*the actions taken that concluded in the participating of [Duke] in the Foninvemem.*”¹⁴⁵ The meeting minutes also indicate that the Undersecretary of Energy stated that “[*o*]nce the participation is accepted, [Duke] would be in equal conditions to receive the payment of the four installments corresponding to year 2004’s 35%. [The Undersecretary] has to speak about this with CAMMESA to analyze the availability of funds.”¹⁴⁶
205. On 27 May 2005, the Energy Secretariat issued Resolution 771/2005 whereby it accepted the decision to participate of the companies that had stated their intent to do so.¹⁴⁷ By virtue of Resolution 771/2005, the signatory generating companies and the Energy Secretariat entered into the Adhesion Contract.¹⁴⁸

¹⁴⁰ Letter SSEE 0359 dated 21 April 2005 (A RA-201).

¹⁴¹ Letter from Cerros Colorados to the Subsecretary of Energy and CAMMESA dated 25 April 2005 (C-66).

¹⁴² Letter B 29137-1 from CAMMESA dated 26 April 2005 (A RA-70).

¹⁴³ Resolution 751/2005 dated 12 May 2005 (C-206), Article 1.

¹⁴⁴ Cerros Colorados, *Digital Acceptance to Participate in the Adhesion Contract* dated 13 May 2005 (C-292); Letter B 29137-2 from CAMMESA dated 17 May 2005 (A RA-71).

¹⁴⁵ Minutes of the meeting between Undersecretary of Energy Marcheschi and Cerros Colorados dated 23 May 2005 (C-517).

¹⁴⁶ *Ibid.*

¹⁴⁷ Resolution 771/2005, 27 May 2005 (C-207), Article 1.

¹⁴⁸ *Id.*, Article 2.

206. On 17 October 2005, the FONINVEMEM agreement with power generators (the **FONINVEMEM I Agreement** or **Final Agreement**) was entered into.¹⁴⁹ The FONINVEMEM I Agreement’s purpose is set out in Article 1, which provides that it is “*intended to establish the framework to initiate the readjustment process of the WHOLESALE ELECTRIC MARKET (WEM), subject to the terms and conditions of this Agreement.*”¹⁵⁰
207. Under the Final Agreement, the generators committed *inter alia* to build two combined-cycle plants of at least 800 MW capacity each intended to supply power for 10 years after commissioning of the plants to the WEM under an electric power supply agreement to be entered into with CAMMESA. The generating companies were “*responsible for managing the purchase of equipment, constructing, operating and maintaining each of the Plants to be installed, the assets of which shall be transferred to them free of charge upon termination of the Supply Agreement.*”¹⁵¹ In exchange, the Government *inter alia* committed to repaying generators their receivables (**receivables** or **LVFVDs**) in 120 equal and consecutive instalments after the commercial approval of the plants plus a + 1% LIBOR rate.
208. On 27 October 2005, the Energy Secretariat adopted Resolution 1371/2005, which acknowledged the participants in the FONINVEMEM I Agreement and included Cerros Colorados therein.¹⁵²
209. On 28 October 2005, the Energy Secretariat stated to the press that “[t]he normalization process of the market is based on a greater contracting of demand [...] and the liberalization of all large consumers of distributors.”¹⁵³ According to an article by *La Nación*, the Government committed to allow “*direct and free contracts between large industries and power generators.*”¹⁵⁴
210. On 1 December 2005, the Energy Secretariat adopted Resolution 1868/2005, which provided that participants of the FONINVEMEM I Agreement had to submit the bylaws of the generating companies to be created by virtue of Article 3 of the FONINVEMEM I Agreement for the Energy Secretariat’s consideration.¹⁵⁵

¹⁴⁹ Acuerdo Definitivo para la Gestión y Operación de los Proyectos para la Readaptación del MEM en el Marco de la Resolución 1,427/2004 dated 17 October 2005 (**FONINVEMEM I Agreement** or **Final Agreement**) (C-36).

¹⁵⁰ FONINVEMEM I Agreement, (C-36), Article 1.

¹⁵¹ *Id.*, Article 3.

¹⁵² Resolution 1,371/2005 dated 27 October 2005 (C-177); see also Letter B-31305-1 from CAMMESA dated 20 October 2005 (A RA-72) (detailing the participants in FONINVEMEM).

¹⁵³ Francisco Olivera, “For Large Companies, They Will Allow Free Electric Power Contracts”, LA NACIÓN dated 28 October 2005 (C-118).

¹⁵⁴ *Ibid.*

¹⁵⁵ Resolution 1,868/2005 dated 1 December 2005 (A RA-203).

211. On 13 December 2005, generating companies known as “*Termoeléctrica Manuel Belgrano S.A.*” and “*Termoeléctrica José de San Martín S.A.*” were created, in accordance with Article 3 of the FONINVEMEM I Agreement.¹⁵⁶ The generating companies, in which Cerros Colorados held shares, undertook to manage the construction, operation and maintenance of the new generating plants.
212. On 9 January 2006, Argentina enacted Law 26,077, which extended the Emergency Law until 31 December 2006.¹⁵⁷
213. On 16 February 2006, the Energy Secretariat provided by way of Resolution 171/2006 that the text of the corporate bylaws of Termoeléctrica José de San Martín S.A. and Termoeléctrica Manuel Belgrano S.A. was consistent with the regulations applicable to the FONINVEMEM, including the Final Agreement.¹⁵⁸
214. In February 2006, the Government’s Investment Development Agency emphasized “*the continuous recovery of the Argentine economy observed since the end of 2002.*”¹⁵⁹
215. On 4 September 2006, the Energy Secretariat issued Resolution 1281/2006, which recognized the need to ensure the supply of additional generation capacity in order to meet the country’s growing demand.¹⁶⁰ The Resolution mandated large users and large customers in the WEM that wanted to contract more demand than in 2005 to contract such demand via PPAs entered with new plants and established *Energía Plus*, a price scheme that benefited generators operating new power plants, allowing them to freely negotiate PPAs with large users, customers, and distributors, if their demand exceeded the base demand.
216. On 13 October 2006, the Energy Secretariat and generators participating in the FONINVEMEM, including Cerros Colorados, signed the Memorandum of Dollarization of Receivables, pursuant to which the parties agreed upon a scheme for the conversion of the generators’ receivables into US dollars, as well as other matters concerning the exchange rate and applicable interest.¹⁶¹
217. On 19 December 2006, Argentina enacted Law 26,204, which extended the Emergency Law until 31 December 2007.¹⁶²

¹⁵⁶ By-laws of Termoeléctrica Manuel Belgrano S.A., 13 December 2005 (A RA-73); By-laws of Termoeléctrica José de San Martín S.A., 13 December 2005 (A RA-74); Shareholder Register of Termoeléctrica José de San Martín S.A. (A RA-75); Shareholder Register of Termoeléctrica General Belgrano S.A. (A RA-76).

¹⁵⁷ Law 26,077 dated 9 January 2006 (C-14).

¹⁵⁸ Resolution 171/2006 dated 16 February 2006 (A RA-204).

¹⁵⁹ Agencia de Desarrollo de Inversiones República Argentina, *10 Razones Para Invertir en Argentina*, ADI dated February 2006 (C-33).

¹⁶⁰ Resolution 1,281/2006 dated 4 September 2006 (C-176).

¹⁶¹ Memorandum of Dollarization of Receivables dated 13 October 2006, Section 5 (A RA-89).

¹⁶² Law 26,204 dated 19 December 2006 (C-16).

218. On 18 January 2007, the Government created an additional program, the *Energía Delivery Plan*, to incentivize investment of generators not part of the WEM.¹⁶³ Under this regime, the Energy Secretariat approved the execution of PPAs between new generators and CAMMESA, providing incentives to new power plants (*i.e.*, US dollar prices for fixed-terms).¹⁶⁴
219. On 29 May 2007, EnerNews and Río Negro news reported that Duke Energy was considering to “*install a power plant in El Chañar but also some type of repowering facilities in Alto Valle*” in view of the *Energía Plus* program, “*which grants higher tariffs to the new generation offers and is an incentive for new investments.*”¹⁶⁵
220. On 31 May 2007, the Energy Secretariat issued Resolution 564/2007, which sought additional financing from power generators for the FONINVEMEM to complete the new power plants foreseen in the FONINVEMEM I Agreement.¹⁶⁶ The Energy Secretariat requested power generators to contribute 50% of their outstanding receivables for that year to the FONINVEMEM.
221. On 25 July 2007, the Energy Secretary, Mr. Daniel Cameron, wrote to the General Manager of CAMMESA with details as to the participation of generators, including Cerros Colorados, in the FONINVEMEM I Agreement under the terms of Resolution 564/2007.¹⁶⁷
222. On 3 January 2008, Argentina enacted Law 26,339, which extended the Emergency Law until 31 December 2008.¹⁶⁸
223. On 21 July 2008, the Energy Secretariat issued Resolution 724/2008, which authorized the execution of supply agreements between power generators and CAMMESA to enable generators to repair critical equipment if the cost of repairs surpassed 50% of a generator’s expected income in the spot market.¹⁶⁹
224. On 9 December 2008, Cerros Colorados and the Energy Secretariat entered into a framework agreement under Resolution 724/2008 for the undertaking of repair works

¹⁶³ Energy Secretariat Resolution 220/2007 dated 18 January 2007 (C-190).

¹⁶⁴ Resolution 1,836/2007 dated 27 November 2007 (C-178).

¹⁶⁵ EnerNews, “Neuquén I: Duke Energy quiere instalar una central hidráulica” [Neuquén I: Duke Energy wants to install a hydroelectric plant], 29 May 2007, available at: <http://enernews.com/nota/195316/neuquen-i-duke-energy-quiere-instalar-una-central-hidraulica> (JR-99); Río Negro, “Quieren instalar una central hidráulica en El Chañar” [A hydroelectric plant to be installed in El Chañar], 29 de mayo de 2007, available at: <https://www.rionegro.com.ar/quieren-instalar-una-central-hidraulica-en-el-chanar-LTHRN200755292001/> (JR-100).

¹⁶⁶ Resolution 564/2007 dated 31 May 2007 (C-198).

¹⁶⁷ Letter SE 744 dated 25 July 2007 (A RA-95).

¹⁶⁸ Law 26,339 dated 3 January 2008 (C-17).

¹⁶⁹ Resolution 724/2008 dated 21 July 2008 (C-203).

at the Portezuelo Grande dam (*i.e.*, one of the four dams at the Planicie Banderita Plant).¹⁷⁰

225. On 10 December 2008, Argentina enacted Law 26,456, which extended the Emergency Law until 31 December 2009.¹⁷¹
226. On 29 December 2008, AGEERA addressed a letter to the Energy Secretariat stating that the economic situation of generators was deteriorating due to Resolution 406/03 and other governmental measures.¹⁷²
227. On 12 May 2009, Cerros Colorados entered into a supply agreement with CAMMESA by which it committed to deliver a quantity of energy to the Planicie Banderita Plant.¹⁷³
228. On 28 August 2009, Cerros Colorados sent a letter to the Sub-Secretary of Energy complaining that, as a consequence of the Government's intervention on the spot price and VCPs, it suffered operational losses as the actual VCPs for the Alto Valle Plant were higher than the VCPs recognized by the Government.¹⁷⁴
229. On 1 October 2009, the Director of CAMMESA wrote to the Energy Secretary, Mr. Cameron, indicating that
- different Generators have observed the Transitory Seasonal Programming made by this Company for the period mentioned above, since they understand that, given the fact that the plants will be soon authorized to start operating, CAMMESA should have applied subsections (iii) and (iv) of section 4.1 of the Adhesion Agreement attached to E.S. Resolution No. 1427/2004, as supplemented by the Final Agreement as defined by E.S. Resolution No. 1193/2005.*¹⁷⁵
230. On 7 October 2009, the Energy Secretariat issued Note 6,866/09, which authorized CAMMESA to use generators' natural gas supply and transportation capacity and provided additional remuneration for generators who adhered to it.¹⁷⁶
231. On 17 December 2009, Argentina enacted Law 26,563, which extended the Emergency Law until 31 December 2011.¹⁷⁷

¹⁷⁰ Framework Agreement with the Energy Secretariat dated 9 December 2008 (C-300).

¹⁷¹ Law 26,456 dated 10 December 2008 (C-18).

¹⁷² Letter from AGEERA to the Energy Secretariat dated December 2008 (C-272).

¹⁷³ Supply Agreement with CAMMESA dated in April 2009 (C-299).

¹⁷⁴ Letter from Cerros Colorados to the Energy Secretariat dated August 2009 (C-276).

¹⁷⁵ Letter B-52514-1 from CAMMESA to the Secretariat of Energy dated 10 October 2009 (A RA-216).

¹⁷⁶ Note 6,866/09 dated 7 October 2009 (C-277).

¹⁷⁷ Law 26,563 dated 17 December 2009 (C-19).

232. On 19 January 2010, the Energy Secretary, Mr. Daniel Cameron, wrote to the Vice-President of CAMMESA to inform him that

*the Electric System still needs to operate with significant volumes of liquid fuels, the prices of which are an externality to the system that strongly affects its costs, which implies the impossibility of using, at present, the marginal costs of production as a means of remuneration for the electric energy produced.*¹⁷⁸

233. He also indicated that “*the Market has not yet been readjusted, notwithstanding the fact that the new facilities built with FONINVEMEM resources have started to operate.*”¹⁷⁹ The Energy Secretary added that the “*Energy Secretariat is now analyzing the measures to be adopted to enable the enforcement of the Agreement referred to above, considering the global remuneration that must be recognized to the generating agents.*”¹⁸⁰

234. On 28 January 2010, Cerros Colorados sent a letter to CAMMESA and the Energy Secretariat noting and requesting

*the adoption of such measures as may be necessary to fulfill the commitments undertaken in the agreements and regulations in force, in order to avoid worsening the standing of this company, whose continued existence is seriously compromised in the short term. In particular, we believe that articles 4.1.(iii) of the Adhesion Act (Resolution SE No. 1427/2004), 4.(a) of the Final Agreement (S.E. Resolution No. 1,193/2005) and 4 of Resolution SE No. 564/07 become immediately enforceable as of the commercial approval of the plants, and any delay in such enforcement will affect the company’s performance.*¹⁸¹

235. Between January and February 2010, the new 825 MW Timbúes Plant and 823 MW Belgrano Plant commenced operations.¹⁸²

236. Between July and September 2010, Cerros Colorados sent letters to CAMMESA requesting the immediate application of Resolution 1427/2004, in particular the

¹⁷⁸ Letter 496/2010 from the Energy Secretariat to CAMMESA dated 19 January 2010 (A RA-217).

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Letter from Cerros Colorados to CAMMESA and the Energy Secretariat dated 28 January 2010 (C-393).

¹⁸² Termoeléctrica Manuel Belgrano Webpage (available at <http://www.tmbsa.com.ar/empresa/>) (C-220); Termoeléctrica Jose de San Martin Webpage (available at <http://www.tsm.com.ar/>) (C-221); Letter B-54090-1 from CAMMESA dated 7 January 2010 (A RA-96); Letter B-54510-3 from CAMMESA dated 1 February 2010 (A RA-97).

application of Article 4.1 (iv) regarding the abrogation of Resolution 240/03.¹⁸³ Cerros Colorados complained that despite the commencement of commercial operations of the plants built with FONINVEMEM resources, the FONINVEMEM Adhesion Contract and Agreement were not complied with.¹⁸⁴

237. On 25 November 2010, the Government and power generators, including Cerros Colorados, entered into a new agreement, *i.e.*, the **FONINVEMEM II Agreement** or **2008-2011 Agreement**.¹⁸⁵ The 2008-2011 Agreement stipulated that “*the [Energy] Secretariat assumed commitments in the ADHESION CONTRACT in order to readjust the WEM and the income of the GENERATORS according to those available prior to the issuance of the Emergency Law.*”¹⁸⁶ It stated that “[*s*]ince January 1, 2008 to date, the sums of money for the LVFVD under Article 4(c) of Resolution 406/2003 of the ENERGY SECRETARIAT have increased on a monthly basis.”¹⁸⁷ It also set out that “*it is essential to create additional mechanisms suitable for the promotion of new investments required to increase the electric power supply.*”¹⁸⁸
238. Under Article 1 of the FONINVEMEM II Agreement establishing the purpose of the Agreement, the Government declared that its aim was to

*establish the framework, conditions and commitments to be assumed by the parties to: (i) continue with the process to readjust the [...] WEM; (ii) facilitate the addition of new generation to meet the increased demand for power and capacity in such Market; (iii) determine a mechanism for the settlement of LVFVD of the GENERATORS with respect to receivables between January 1, 2008 and December 31, 2011; and (iv) acknowledge an overall remuneration payable to any Generator Agent of the MEM that becomes a party to this AGREEMENT.*¹⁸⁹

239. The FONINVEMEM II Agreement also set out the Government’s commitment to increase capacity payments and VCPs for thermal generators. Generators committed to build a new power plant in order to receive payment for credits accrued during 2008-2011. Additionally, this Agreement required receivables to be paid to generators in 120

¹⁸³ Note from Cerros Colorados to CAMMESA dated 8 July 2010 (C-78); Note from Cerros Colorados to CAMMESA dated 12 August 2010 (C-73); Letter from Cerros Colorados to CAMMESA dated 24 September 2010 (C-275).

¹⁸⁴ *Ibid.*

¹⁸⁵ Acuerdo para la Gestión y Operación de Proyectos, Aumento de la Disponibilidad de Generación Térmica y Adaptación de la Remuneración de la Generación 2008-2011 dated 25 November 2010 (“**FONINVEMEM II Agreement**” or “**2008-2011 Agreement**”) (C-37).

¹⁸⁶ FONINVEMEM II Agreement (C-37), whereas clause (e).

¹⁸⁷ *Id.*, whereas clause (j).

¹⁸⁸ *Id.*, whereas clause (k).

¹⁸⁹ *Id.*, Article 1.

equal instalments over 10 years starting from the commissioning of a new plant, *i.e.*, the Vuelta de Obligado plant. Finally, under this Agreement, power generators waived all existing and future claims against the Government, the Energy Secretariat, and CAMMESA, in connection with Resolution 240/03, Resolution 406/03, or any subsequent measure issued by the Energy Secretariat between 2003 and 31 December 2011.

240. On 12 April 2011, the first addendum to the FONINVEMEM II Agreement was signed.¹⁹⁰ The first addendum determined rules for the allocation of shares of the new plant.
241. On 28 April 2011, shareholders of the Timbúes and Belgrano Plants, among which was Cerros Colorados, made a proposal to the Energy Secretariat to provide additional capacity to both plants.¹⁹¹
242. On 31 May 2011, Central Vuelta de Obligado S.A. was entrusted with the operation of the Vuelta de Obligado power plant.¹⁹²
243. On 27 December 2011, Argentina enacted Law 26,729, which extended the Emergency Law until 31 December 2013.¹⁹³
244. On 16 March 2012 and 11 July 2012, Cerros Colorados sent letters to CAMMESA according to which the Government was still not complying with Resolution 1427/2004.¹⁹⁴
245. On 25 June 2012, the second addendum to the FONINVEMEM II Agreement was issued.¹⁹⁵ The addendum set the Government's participation in the companies operating FONINVEMEM power plants and established that it could not be lower than 70%. It also provided that if the total cost of the projects was higher than USD 777,000,000, the Government would be allowed to increase its shareholding interest.
246. On 26 July 2012, the Energy Secretariat through Resolution 1261/2012 approved the capacity increase of the Timbúes and Belgrano Plants proposed by the shareholders in their letter of 28 April 2011.¹⁹⁶ The resolution amended the FONINVEMEM I Agreement by establishing *inter alia* the manner in which the requested capacity increase would be implemented.

¹⁹⁰ First Addendum to FONINVEMEM II Agreement dated 12 April 2011 (C-117).

¹⁹¹ Letter from the generators to the Secretariat of Energy dated 28 April 2011 (A RA-98).

¹⁹² Trust Agreement "Central Vuelta de Obligado" dated 31 May 2011 (A RA-115).

¹⁹³ Law 26,729 dated 27 December 2011 (C-20).

¹⁹⁴ Notes from Cerros Colorados to CAMMESA Regarding the Government's Lack of Compliance of FONINVEMEM Commitments dated March 2012 and July 2012 (C-77, C-81).

¹⁹⁵ Second Addendum to FONINVEMEM II Agreement dated 25 June 2012 (C-215).

¹⁹⁶ Resolution 1,261/12 dated 26 July 2012 (A RA-99).

247. In August 2012, the *Ambito Financiero* newspaper reported that the Government announced that it would prepare a series of measures in order to face the deficit in the energy sector.¹⁹⁷

V. Subsequent events from 2013 further affecting the Argentine power generation sector

248. On 15 March 2013, the Deputy Secretary of Electric Power issued a report, the objective of which was

*to analyze the appropriateness of applying a new remuneration scheme for the generation of electric power under economically reasonable conditions, so that the electric sector continues to accompany the economic growth and social development that has characterized Argentina during the last decade.*¹⁹⁸

249. On 22 March 2013, the Government issued Resolution 95/2013 (**Resolution 95/13**), which established a new remuneration scheme based on fixed and variable costs depending on technologies used by generators and the scale of each plant.¹⁹⁹

250. The remuneration scheme of Resolution 95/13 set forth three major items of remuneration, namely remuneration for fixed costs, remuneration for variable non-fuel costs, and additional remuneration divided into two portions: a portion to be directly settled and another portion allocated to a trust for its investment in new infrastructure projects.²⁰⁰ Resolution 95/13 also modified the order of priority for payments, giving first priority to the payment of fixed costs, own fuel costs and variable non-fuel costs, and second priority to the additional remuneration, thereby abrogating the former order of priority established in Resolution 406/03.²⁰¹ The Resolution also set out that the cost of fuel would be recognized but that “*fuel commercial management and dispatch*” would be centralized by CAMMESA. In addition, once agreements between generators and fuel and byproduct suppliers would expire, such costs would no longer be recognized, thereby creating an incentive for CAMMESA to become the only supplier of fuel.²⁰² The Resolution also temporarily suspended the execution of new PPAs in the

¹⁹⁷ The Government Studies Changes to the Electric System, *ÁMBITO FINANCIERO* (available at <https://www.ambito.com/economia/el-gobierno-estudia-cambios-el-sistema-electrico-n3751408>) dated 24 August 2012 (C-44).

¹⁹⁸ Financial Planning Subsecretariat, Remuneration Scheme for Electric Power Generation, Administrative Docket S01: 0060219/2013 (Part 1) dated 15 March 2013 (C-116).

¹⁹⁹ Resolution 95/2013 dated 22 March 2013 (C-21).

²⁰⁰ *Id.*, Article 5.

²⁰¹ *Id.*, Article 7.

²⁰² *Id.*, Article 8.

term market.²⁰³ Finally, the Resolution provided that generators wishing to benefit from it shall agree to waive any prior or future administrative and judicial claims against the Government, the Energy Secretariat or CAMMESA regarding Resolution 406/03 and the FONINVEMEM II Agreement.²⁰⁴

251. On 4 April 2013, Cerros Colorados sent a letter to the Electric Energy Subsecretariat addressing the economic impact of Resolution 95/13.²⁰⁵ Cerros Colorados requested the Energy Secretariat to establish a remuneration scheme that would cover the costs of its thermal and hydroelectric power plants and to grant funds for “*major*” and “*lifetime extension*” maintenance in accordance with the provisions of Resolution 146/2002.²⁰⁶ Cerros Colorados also noted that the application of Resolution 95/13 would produce “*negative results.*”²⁰⁷
252. On 13 June 2013, Cerros Colorados sent a letter addressed to CAMMESA’s Contract Manager, Mr. Jorge Ruisoto, advising that the application of the remuneration scheme of Resolution 95/13 produced a negative cash flow.²⁰⁸ Cerros Colorados *inter alia* requested the total payment of its receivables and the reevaluation of its remuneration. Cerros Colorados specifically requested the Secretariat of Energy to establish a remuneration scheme that would take special account of the “*real*” costs of the Alto Valle Plant to cover maintenance and expenses in accordance with the scheme of Resolution 95/13.
253. On 26 August 2013, Cerros Colorados formally declared to accept Resolution 95/13 “*in its entirety.*”²⁰⁹
254. On 9 September 2013, the Energy Secretariat advised CAMMESA that it did not object to Cerros Colorados’ request whereby the company asked to have its receivables appropriated to the funding of projects under Resolution 724/2008 shifted to the Vuelta de Obligado Plant.²¹⁰
255. On 17 September 2013, by means of Letter 5568, the Energy Secretariat invited the generators who had subscribed to FONINVEMEM I to communicate their decision to

²⁰³ *Id.*, Article 9.

²⁰⁴ *Id.*, Article 12; Note 1808 dated 11 April 2013 (C-252).

²⁰⁵ Letter from Duke Energy to the Energy Secretariat dated 4 April 2013 (C-148).

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ Letter from Duke Energy to Contract and Regulatory Manager dated 13 June 2013 (C-144).

²⁰⁹ Letter from Cerros Colorados to the Energy Secretary dated 26 August 2013 (C-253).

²¹⁰ Energy Secretariat, Note 5423 dated 9 September 2013 (C-102).

- undertake the commitments set forth in Resolution 1261/2012, in accordance with the addendum to the Agreement attached to the letter.²¹¹
256. On 25 September 2013, the shareholders of the Timbúes and Belgrano Plants that participated in the expansion project for the capacity of the plants, including Cerros Colorados, communicated their decision to adhere to the commitments established in Resolution 1261/2012, signing the Addendum to FONINVEMEM I.²¹²
 257. On 21 October 2013, Argentina enacted Law 26,896, which extended the Emergency Law until 31 December 2015.²¹³
 258. On 23 May 2014, Argentina issued Resolution 529/2014 (**Resolution 529/14**), which increased the value of the Additional Remuneration in Resolution 95/13.²¹⁴
 259. On 19 June 2014, Cerros Colorados sent a letter to the Energy Sub-Secretariat requesting that the Cerros Colorados complex be reclassified as a small hydroelectric powerplant and the reevaluation of the Alto Valle Plant's remuneration for purposes of Resolution 95/13.²¹⁵
 260. On 3 September 2014, Cerros Colorados sent a letter to the Deputy Secretary of Energy requesting an urgent reply to its letter of 19 June 2014.²¹⁶
 261. On 10 July 2015, Argentina issued Resolution 482/2015 (**Resolution 482/15**), under which the Government would pay 50% of the Additional Remuneration once facilities under a new FONINVEMEM agreement were in operation.²¹⁷
 262. On 3 November 2015, Argentina enacted Law 27,200, which extended the Emergency Law until 31 December 2017.²¹⁸
 263. On 16 December 2015, the Argentine Republic issued Decree 134/2015, which declared a state of emergency in the electricity sector until 31 December 2017.²¹⁹ The Decree provided that the Ministry of Energy and Mines was to adopt measures for the sector's rehabilitation. The Decree stated among others that the "*remuneration systems*

²¹¹ Letter 5568 dated 17 September 2013 (**A RA-101**).

²¹² FONINVEMEM Declaration – Resolution 1,261/2012 - Letter SE 5568/2013 from Duke Energy Cerros Colorados S.A. dated 25 September 2013 (**A RA-102**); Letter B-84261-1 from CAMMESA dated 7 October 2013 (**A RA-103**).

²¹³ Law 26,896 dated 21 October 2013 (**C-22**).

²¹⁴ Resolution 529/2014 dated 23 May 2014 (**C-247**).

²¹⁵ Letter from Duke Energy to the Energy Secretariat dated 19 June 2014 (**C-146**).

²¹⁶ Letter from Duke Energy to the Energy Secretariat dated 3 September 2014 (**C-149**).

²¹⁷ Resolution 482/15 dated 10 July 2015 (**C-266**).

²¹⁸ Law 27,200 dated 3 November 2015 (**C-23**).

²¹⁹ Decree 134/2015 dated 16 December 2015 (**C-24**).

established in the [WEM] as of 2003 have not given sufficient economic signals to make private actors make the investments [...].”

264. In December 2015, the Argentine Presidency issued a report on a public administration diagnosis, the purpose of which was

*not to condemn any particular government but to make a diagnosis of the National State as of December 2015 and identify pending challenges, which sometimes coincide with errors or excesses of the immediately preceding administration, but often show long-standing Argentine frustrations, sometimes even of decades.*²²⁰

265. The report took note of the low residential electricity fees between 2001-2012, the resulting increased consumption between 2003 and 2015, and the fall in energy production due to the “*artificially low prices.*”²²¹

266. On 25 January 2016, following the issuance of Decree 134/2015, the Government issued Resolution 6/2016, which approved seasonal prices for February to April 2016 calculated as per Resolution 61/1992.²²² It noted among others that

*[t]he abandonment of economic criteria in the definition of prices of the [...] WEM distorted the economic signals, increasing the supply cost, discouraging private risk investment aimed at efficiently increase[ing] the offer and removing incentives to save and for the adequate use of energy resources by consumers and users.*²²³

267. On 26 January 2016, Cerros Colorados sent a letter to the Energy Secretariat requesting an urgent meeting to obtain the Energy Secretariat’s “*insight on the measures to be taken*” to address the insufficient remuneration provided by Resolution 95/13.²²⁴

268. On 22 March 2016, the Energy Secretariat issued Resolution 21/2016, which comprised the launch of a Government tender for long-term PPAs for new thermal projects.²²⁵ It called for offers to supply the demand for certain seasonal periods between 2016 and 2018. Pursuant to the terms of Resolution 21/16, the selected generators would be able to execute long-term PPAs with prices in US dollars with CAMMESA.

²²⁰ President of the Nation, *El Estado del Estado* dated December 2015 (C-171).

²²¹ *Id.*, p. 32.

²²² Resolution 6/2016 dated 25 January 2016 (C-199).

²²³ *Id.*, fifth whereas clause.

²²⁴ Letter from Duke Energy to the Energy Secretariat dated 26 January 2016 (C-147).

²²⁵ Resolution 21/2016 dated 22 March 2016 (C-188).

269. On 30 March 2016, the Government issued Resolution 22/2016, which adjusted the remuneration of generators.²²⁶
270. On 17 May 2016, the Government launched the “RenovAr” program, aimed at expanding renewable energy investments in Argentina.²²⁷
271. On 5 September 2016, the Energy Secretary, Mr. Alejandro Sruoga, met with the CEO of Duke Energy International Southern Cone, Ms. Mariana Schoua, to discuss “*interests related to the unsustainable financial situation of the assets.*”²²⁸
272. On 3 November 2016, Cerros Colorados and other hydroelectric generators filed an administrative petition before the Energy Secretariat and the Ministry of Energy and Mining requesting them to
- take the necessary measures to adjust the regulation applicable to the generator agents, hydroelectricity operation concessionaires [...] to be consistent with the provisions of Law 24,065 and the concession contracts that those generator agents have executed with the Argentine State.*²²⁹
273. Therein, the generators noted with respect to Resolution 95/13 that such resolution “*displayed an utter, blatant and substantial disregard for Law 24,065 by seriously departing from Article 31 of the Argentine Constitution.*”²³⁰
274. On 14 December 2016, Argentina enacted Law 27,345, which extended the Emergency Law until 31 December 2019.²³¹
275. On 27 January 2017, the Government adopted Resolution 19/2017 (**Resolution 19/17**), which adjusted the compensation values set by Resolution 95/13.²³² The Resolution provided for compensation values in US dollars and the removal of remuneration in the form of credits as allowed under Resolution 95/13.²³³
276. On the same day, the Government also adopted Resolution 20/2017, which increased the seasonal price for the period between February to April 2017.²³⁴ Resolution 20/2017 stipulated that

²²⁶ Resolution 22/2016 dated 30 March 2016 (C-189).

²²⁷ Decree 882/2016 dated 21 July 2016 (C-281), whereas clause referring to Resolution 71 of 17 May 2016.

²²⁸ Hearing Record showing Meeting between Cerros Colorados and the Government on 5 September 2016 (C-386).

²²⁹ Administrative Petition filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40).

²³⁰ *Id.*, p. 20.

²³¹ Law 27,345 dated 14 December 2016 (C-25).

²³² Resolution 19/2017 dated 27 January 2017 (C-59).

²³³ See also, Energy Secretariat, *Balance de Gestión en Energía 2016-2019* dated December 2019 (C-101), p. 112.

²³⁴ Resolution 20/2017 dated 27 January 2017 (C-187).

*[t]he remuneration schemes established in the [...] WEM since 2003 implied the progressive adoption of regulatory decisions that did not meet the objectives set forth in Law No. 24,065, in terms of ensuring the supply and its quality at the lowest possible cost for the Argentine Electric System.*²³⁵

277. On 31 January 2017, the Energy Secretary, Mr. Alejandro Sruoga, announced that Argentina was “*undergoing a normalization process regarding the wholesale price of electricity*” as well as an increase of electricity prices.²³⁶
278. On 6 March 2017, the Minister of Energy, Mr. Juan Aranguren, met with representatives of generation companies to discuss their “*collective interest.*”²³⁷
279. On 14 August 2017, Cerros Colorados and other hydroelectric generators filed an administrative appeal before the Ministry of Energy and Mining²³⁸ and another before the Energy Secretariat²³⁹ on the basis of their concession contracts requesting an adjustment of their remuneration consistent with the Electricity Law and compensation for the “*damage suffered as a result of the Government’s disregard of the legal framework applicable to the concession contracts entered in pursuant to Law 23696 and related regulations.*”²⁴⁰ The petition before the Energy Secretariat was eventually supplemented on 17 November 2017 with a damages assessment completed by the Universidad de Buenos Aires.²⁴¹
280. On 30 October 2017, the Minister of Energy, Mr. Juan Aranguren, met with representatives of companies, including the CEO of Orazul Energy Argentina, Ms. Mariana Schoua, to discuss “*hydraulic concessions.*”²⁴²

²³⁵ *Id.*, third whereas clause.

²³⁶ Nuevo Tarifazo en la Luz los Aumentos van del 60 al 148%, DIAGONALES dated 31 January 2017 (C-490); La Luz Aumentará entre 60% y 148% para los usuarios de Edenor y Edesur, INFOBAE dated 31 January 2017 (C-489).

²³⁷ Hearing Record showing Meeting between Cerros Colorados and the Government on 6 March 2017 (C-478).

²³⁸ Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39).

²³⁹ Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat dated 14 August 2017 (C-38).

²⁴⁰ Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat dated 14 August 2017 (C-38), pp. 1-2; Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39), p. 1.

²⁴¹ Universidad de Buenos Aires, damages assessment filed before the Ministry of Energy and Mining and the Energy Secretariat dated 17 November 2017 (C-64).

²⁴² Hearing Record showing Meeting between Cerros Colorados and the Government on 30 October 2017 (C-479).

281. On 21 December 2017, the Energy Secretary, Mr. Alejandro Sruoga, met with representatives of companies, including Ms. Mariana Schoua, to discuss “*hydropower concessions*.”²⁴³
282. On 9 February 2018, Cerros Colorados filed a new administrative petition before the Ministry of Energy and Mining, in which it requested the Energy Secretary
*to adjust the regulation applicable to generation agents being hydroelectric generation concessionaires in order for such regulation to conform to the principles established by Law 24,065, in particular as concerns the economic cost and non-discrimination and, consequently, to readjust the remuneration applicable to the power and energy supplied thereby within the framework of the [...] WEM.*²⁴⁴
283. On the same day, the Claimant notified the President of the Argentine Republic and Minister of Energy and Mining of the existence of the dispute underlying these ICSID proceedings.²⁴⁵
284. On 20 March 2018, the 816 MW Vuelta de Obligado Plant commenced operations.²⁴⁶
285. On 6 November 2018, the Government issued Resolution 70/2018, which abrogated a portion of Resolution 95/13 and permitted generators to procure their own fuel to generate energy.²⁴⁷
286. On 1 March 2019, the Government adopted Resolution 1/2019, which abrogated Resolution 19/17 and implemented a new price scheme that reduced prices and capacity payments for thermal generators.²⁴⁸
287. On 9 August 2019, the Energy Secretariat and Cerros Colorados entered into the Agreement for the Regularization and Payment of Receivables, whereby the Energy Secretariat agreed to repay Cerros Colorados’ receivables for the period between 2013 and 2017 in pesos.²⁴⁹ Under the agreement, Cerros Colorados also waived bringing any

²⁴³ Hearing Record showing Meeting between Cerros Colorados and the Government on 21 December 2017 (C-312).

²⁴⁴ Administrative Petition filed by Cerros Colorados before the Ministry of Energy and Mining dated 9 February 2018 (C-41).

²⁴⁵ Letter from Orazul to President of Argentina and Minister of Energy and Mining dated 9 February 2018 (C-27).

²⁴⁶ Letter B-125446-1 from CAMMESA dated 19 March 2018 (A RA-127); Letter B-125446-4 from CAMMESA dated 19 March 2018 (A RA-128).

²⁴⁷ Resolution 70/2018 dated 6 November 2018 (C-202).

²⁴⁸ Resolution 1/2019 dated 1 March 2019 (C-31).

²⁴⁹ Agreement for the Regularization and Payment of Receivables with the WEM between Cerros Colorados and CAMMESA dated 9 August 2019 (C-290).

claims “*whether administrative and/or in court*” against the State, the Energy Secretariat and CAMMESA regarding such receivables.²⁵⁰

288. On 30 August 2019, Claimant filed its Request for Arbitration in these ICSID proceedings, which was registered with the ICSID Secretariat on 11 September 2019.

289. In December 2019, the Energy Secretariat published a report on the management of energy in Argentina and noted the following:

In spite of the evident transitory character of these measures, such regulatory intervention was perpetuated for over ten years and, in general terms, significantly dissociated the prices and final tariffs from the real economic costs of supply, which had severe and negative consequences on the entire sector.

The distortion between prices and costs was so significant that, at the beginning of 2016, a residential user paid an equivalent to 3% of the real generation cost, whereas in the case of natural gas, the coverage of supply cost was nearly exceeding 10%.²⁵¹

290. On 21 December 2019, the Argentine Republic enacted Law 24,541, which declared a new public emergency until 31 December 2020 and authorized the Executive to freeze natural gas and electricity rates.²⁵²

291. On 27 December 2019, the Government issued Resolution 12/2019, which abrogated Resolution 70/2018 and restored Article 8 of Resolution 95/13, which gave CAMMESA the authority to centralize fuel provision.²⁵³

292. On 26 February 2020, the Argentine Republic issued Resolution 31/2020 (**Resolution 31/20**), which adjusted the remuneration scheme for generators by *inter alia* converting power generators’ prices to pesos.²⁵⁴ The Resolution also set forth an adjustment formula to mitigate the conversion on a monthly basis.

293. On 16 March 2020, Argentina enacted Decrees 277/2020 and 278/2020, providing for Government intervention respectively in ENRE and ENERGAS.²⁵⁵

²⁵⁰ *Id.*, Article 3.

²⁵¹ Energy Secretariat, *Balance de Gestión en Energía 2016-2019* dated December 2019 (C-101).

²⁵² Law 27,541 dated 21 December 2019 (C-141).

²⁵³ Resolution 12/2019 dated 27 December 2019 (C-180).

²⁵⁴ Resolution 31/2020 dated 26 February 2020 (C-193).

²⁵⁵ Decree 277/2020 dated 16 March 2020 (C-249); Decree 278/2020 dated 16 March 2020 (C-323).

294. On 8 April 2020, the Energy Secretary ordered CAMMESA to suspend until further notice the adjustments provided for in Resolution 31/20.²⁵⁶
295. On 14 April, 12 May, 5 June, 3 and 13 July 2020 respectively, Cerros Colorados wrote letters to CAMMESA noting that the calculation of its remuneration was not in line with Resolution 31/2020 and thus requested that its remuneration actually be adjusted to what was provided for in Resolution 31/20.²⁵⁷
296. On 4 and 8 May 2020 respectively, the Respondent increased its percentage of shares in the FONINVEMEM Plants, *i.e.*, to 65% in Termoeléctrica Manuel Belgrano S.A.²⁵⁸ and 68.826% in Termoeléctrica San Martín S.A.²⁵⁹
297. On 13 August 2020, AGEERA wrote a letter to the Energy Secretary, Mr. Sergio Lanziani, requesting that the mechanism provided for in Resolution 31/20 be applied as soon as possible and that accrued amounts be recognized.²⁶⁰
298. On 21 May 2021, the Energy Secretariat adopted Resolution 440/2021 (**Resolution 440/21**), whereby the Energy Secretariat set a new remuneration value for generators.²⁶¹ In order to benefit from such new remuneration, generators were to enter into a waiver, which provided in part that the generators

[...] fully and unconditionally commit to the withdrawal of any ongoing administrative claim or judicial process, filed against the NATIONAL STATE, the SECRETARY OF ENERGY and/or CAMMESA, related to Article 2 of Resolution No. 31/2020 of the SECRETARY OF ENERGY, as well as the waiver to file in the future any administrative and/or judicial claim against the NATIONAL STATE, the SECRETARY OF ENERGY and/or CAMMESA, in relation to that same article.

Additionally, the [generators commit] to avoid and dismantle any type of presentation, claim or demand that could eventually be formulated by any

²⁵⁶ Secretary of Energy, Note NO-2020-24910606-APN-SE#MDP dated 8 April 2020 (C-308).

²⁵⁷ Objection to Sales Statement No. 2003 dated 14 April 2020 (C-162); Objection to Sales Statement No. 2003 dated 12 May 2020 (C-161); Objection to Sales Statement No. 2004 dated 5 June 2020 (C-163); Objection to Sales Statement No. 2005 dated 3 July 2020 (C-164); Objection to Sales Statement No. 2006 dated 13 July 2020 (C-165).

²⁵⁸ Minutes of Shareholders' Special Meeting of Termoeléctrica Manuel Belgrano S.A. dated 4 May 2020 (C-231 and A RA-105).

²⁵⁹ Termoeléctrica San Martín S.A., Extraordinary Shareholders Meeting Minute No. 25 dated 8 May 2020 (C-258 and A RA-106).

²⁶⁰ Letter sent by AGEERA to the Energy Secretariat dated 13 August 2020 (C-255).

²⁶¹ Resolution 440/2021 dated 21 May 2021 (C-331).

*of its shareholders, within the Argentine Republic or abroad, or before international bodies and/or courts.*²⁶²

D. OVERVIEW OF THE PARTIES' SUBMISSIONS

299. In the following section, the Tribunal gives a short overview of the Parties' submissions before addressing them in further detail in sections E. *et seq.*

I. The Claimant's case

300. According to the Claimant, this Tribunal has jurisdiction and the Claimant's claims are admissible. On the merits, the Claimant submits that Argentina breached its obligations under international law.

301. First, the Claimant alleges that Argentina breached its obligations under Article IV(1) of the BIT by failing to accord the Claimant fair and equitable treatment (**FET**). According to the Claimant, Argentina

- failed to protect the Claimant's legitimate expectations and to provide a stable and predictable legal environment,
- failed to provide transparency and due process,
- acted arbitrarily and unreasonably, and
- abused its authority in violation of the FET standard.

302. Second, the Claimant alleges that Argentina impaired Orazul's investment through unjustified and discriminatory measures in violation of Article III(1) of the BIT. Specifically, the Claimant submits that the Government impaired Orazul's ability to operate its business and imposed unreasonable, arbitrary and discriminatory measures.

303. Third, the Claimant submits that Argentina failed to protect Orazul and its investments by not providing regulatory and legal security for Orazul or its investments, in violation of Article III(1) of the BIT and Article 4(2) of the Australia-Argentina BIT imported by virtue of Article IV(2) of the BIT.

304. Fourth, the Claimant submits that Argentina unlawfully expropriated Orazul's investments in violation of Article V of the BIT.

305. Fifth, the Claimant submits that Argentina failed to observe obligations it entered into with regard to Orazul's investments in the Electricity Law and the FONINVEMEM

²⁶² CAMMESA's Note B-156035-1 and Template Waiver (C-334).

Agreements, among others, in violation of the umbrella clause contained in Article II(2)(c) of the US-Argentina BIT imported by virtue of Article IV(2) of the BIT.

306. The Claimant denies that Argentina's breaches can be excused by the necessity defense.
307. The Claimant thus contends that it is entitled to compensation in the amount needed to wipe out the consequences of Argentina's Treaty breaches, which the Claimant quantifies in the amount of USD 667.3 million plus interest and costs.

II. The Respondent's case

308. The Respondent contends that the Tribunal lacks jurisdiction and that the Claimant's claims are inadmissible. Specifically, the Respondent makes the following allegations:
309. The Claimant's claim must be dismissed because it is untimely and contrary to general principles of law.
310. The Claimant has failed to comply with the pre-arbitration requirements contained in Article X of the BIT.
311. The Tribunal lacks jurisdiction because the Claimant is a holding company whose current shareholder acquired it in 2016 and, in any event, the Claimant acquired Cerros Colorados in December 2003 when the measures had already been adopted or the dispute was foreseeable, which constitutes a clear abuse of right.
312. In addition, the Tribunal lacks jurisdiction *ratione materiae* because the measures at issue in this arbitration were consented to and the right to claim for them has been waived.
313. On the merits, the Respondent's position is that the Claimant has failed to show a breach of international law.
314. In any event, the Respondent submits that the Claimant is not entitled to the damages claimed. Finally, the Respondent submits that the interest sought by the Claimant should not be awarded and that the Claimant must bear the costs of these proceedings.

E. JURISDICTION AND ADMISSIBILITY

315. In this section of the Award, the Tribunal will deal with the Respondent's objections regarding jurisdiction and admissibility.
316. In this respect, the Tribunal will have to decide on five issues:
 - Which Party bears the burden of proof in relation to matters of jurisdiction and admissibility?

- Are the Claimant’s claims belated and contrary to general principles of law?
- Must the Claimant’s claims be rejected because they fail to comply with the requirements of Article X of the BIT?
- Is the Claimant a protected investor with a protected investment and has it engaged in an abuse of process?
- Has the Claimant consented to the contested measures and waived its right to bring any claims concerning the contested measures?

317. In what follows, the Tribunal will set forth its analysis with respect to these five issues.

I. The burden of proof in relation to matters of jurisdiction and admissibility

318. Turning to the first issue, the Tribunal must decide which Party bears the burden of proof in relation to objections to matters of jurisdiction and admissibility.

1. The Respondent’s position

319. The Respondent is of the view that the Claimant has to prove that the Tribunal has jurisdiction over the dispute.²⁶³

2. The Claimant’s position

320. The Claimant submits that the Respondent has to prove its objections by establishing the facts upon which its objections are based.²⁶⁴

3. The Tribunal’s analysis

321. The Tribunal finds that the Claimant bears the initial burden to prove that the prerequisites for jurisdiction are fulfilled. To the extent that the Respondent raises objections to jurisdiction and admissibility, it is incumbent upon the Respondent to prove the underlying facts of those objections.

322. The Tribunal’s finding is consistent with existing case law as referenced by the Parties. For example, the tribunal in *Pac Rim Cayman v. El Salvador* held:

Burden of proof: As far as the burden of proof is concerned, in the Tribunal’s view, it cannot here be disputed that the party which alleges something positive has ordinarily to prove it to the satisfaction of the

²⁶³ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 127, 138.

²⁶⁴ Claimant’s Counter-Memorial on Preliminary Objections, ¶ 27.

*Tribunal. At this jurisdictional level, in other words, the Claimant has to prove that the Tribunal has jurisdiction. Of course, if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent.*²⁶⁵

323. The Tribunal agrees with this finding, which is in accordance with the maxim “*onus probandi actori incubitur*.”²⁶⁶ It requires a party advancing an allegation in support of its case to prove it.
324. The Tribunal’s finding is also in line with the submissions of the Claimant’s international law expert, Prof. Schreuer, on the allocation of the burden of proof.²⁶⁷ The Respondent’s international law expert, Prof. Viñuales, has not refuted Prof. Schreuer’s point in this regard.²⁶⁸
325. With these considerations in mind, the Tribunal will proceed to examine the specific claims and allegations made by the Parties.

II. The Respondent’s claim that the Claimant’s claims are belated and contrary to general principles of law

326. Turning to the second issue, the Tribunal must decide whether the Claimant’s claims are belated and contrary to general principles of law.

1. The Respondent’s position

327. The Respondent asserts that the Claimant’s claims are belated and contrary to general principles of law and therefore objects to the admissibility of the Claimant’s claims.
328. As far as the delay is concerned, the Respondent states that the Claimant grounds its claims in regulatory measures adopted between 2003 and 2013, but only initiated these proceedings in August 2019.²⁶⁹ Accordingly, between 6 and 16 years have passed since the adoption of the measures, and the initiation of these proceedings.²⁷⁰

²⁶⁵ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012 [hereinafter: *Pac Rim v. El Salvador*] (CL-251), ¶ 2.11. See also *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 [hereinafter: *Generation v. Ukraine*] (AL RA-135), ¶¶ 64, 65; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, Interim Award, 1 December 2008 (CL-265), ¶ 138.

²⁶⁶ *Generation v. Ukraine* (AL RA-135), ¶¶ 64, 65.

²⁶⁷ Legal Opinion of Christoph Schreuer, ¶¶ 216 *et seq.*

²⁶⁸ Expert Report of Jorge E. Viñuales.

²⁶⁹ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, II.A; Respondent’s Reply on Preliminary Objections, II.A.

²⁷⁰ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 58.

329. The Respondent submits that it did not renew any promise to eliminate the rules adopted after 2001 and thus the Claimant failed to prove that it cannot be blamed for any delays. According to the Respondent, (i) the measures challenged in these proceedings were already part of the regulatory framework when the Claimant invested, and (ii) the Claimant has been unable to identify any commitment on the part of Argentina to re-apply the regulations in place prior to the outbreak of the crisis in 2001.²⁷¹ In addition, the Respondent contends that it never acknowledged any alleged illegality of existing regulations.²⁷²
330. According to the Respondent, the Claimant's notes²⁷³ submitted to the Secretariat of Energy between 2008 and 2016 did not formulate any claim for the alleged violation of the BIT.²⁷⁴ The Respondent adds that the administrative petitions²⁷⁵ submitted to the Energy Secretariat on 8 November 2016, 14 August 2017 and 9 February 2018 were neither timely (they were made between 3.5 and 14.5 years after the issuance of the measures), nor did they constitute a claim for the alleged violation of the BIT. The Respondent contends that the Claimant has consented to and accepted the measures it now challenges in these proceedings.²⁷⁶
331. Contrary to the Claimant's argument, the Respondent considers that the measures challenged by the Claimant do not entail a continuous breach of the BIT.²⁷⁷ The Respondent considers that the Claimant's argument is based on the false premise that Argentina breached an alleged obligation to restore the 1990s regulatory framework for 20 years, whereas such framework was already in place when the Claimant acquired Cerros Colorados in December 2003. In any event, were a breach to such a non-existent obligation to exist, the Respondent states that it would not entail in itself a breach of the BIT.²⁷⁸

²⁷¹ Respondent's Reply on Preliminary Objections, ¶¶ 60 *et seq.*

²⁷² *Id.*, ¶¶ 70 *et seq.*; Respondent's Rejoinder on the Merits, II.E.4.a.

²⁷³ E.g., Letter from Duke Energy to Contract and Regulatory Manager dated 13 June 2013 (C-144); Letter from Cerros Colorados to the Energy Secretary dated 17 December 2004 (C-145).

²⁷⁴ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 61-63; Respondent's Reply on Preliminary Objections, ¶¶ 73-74.

²⁷⁵ Administrative Petition Filed by Cerros Colorados and Other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40); Administrative Appeal Filed by Cerros Colorados and Other Hydroelectric Generators Before the Energy Secretariat dated 14 August 2017 (C-38); Administrative Appeal Filed by Cerros Colorados and Other Hydroelectric Generators Before the Ministry of Energy and Mining dated 14 August 2017 (C-39); Administrative Petition Filed by Cerros Colorados Before the Ministry of Energy and Mining dated 9 February 2018 (C-41).

²⁷⁶ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 63 *et seq.*

²⁷⁷ Respondent's Reply on Preliminary Objections, ¶¶ 75-82; see also Expert Report of Jorge E. Viñuales, ¶¶ 54 *et seq.*

²⁷⁸ *Id.*, ¶ 81.

332. The Respondent refers to the international law principles of extinctive prescription, repose, estoppel, acquiescence, and good faith, which in the Respondent’s view all mandate for a dismissal of the claim on the grounds of delay.
333. While the Respondent does not dispute that there is no specific time limit prescribed in the BIT,²⁷⁹ the Respondent affirms that the principle of extinctive prescription is part of the general principles of law,²⁸⁰ applicable pursuant to Article X(5) of the BIT. The Respondent cites the International Court of Justice (ICJ) *Nauru v. Australia* case, which stated that “*even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible.*”²⁸¹
334. According to the Respondent, the measure of the principle of extinctive prescription is “*delay*” rather than a definitive date after which claims are belated. The Respondent relies on the tribunal’s finding in the *Nordzucker v. Poland* case, according to which:
- International law has no rule that specifies the time period which must elapse in order to render extinctive prescription operative. Instead of rules providing for precise time limitations, international law refers to a general principle that a claimant shall not unreasonably delay the pursuit of its claim.*²⁸²
335. The Respondent considers that the reasonableness of delay must be assessed in light of the circumstances of the case.²⁸³ The Respondent adds that municipal statutes of limitation may be taken into account as a valid reference when assessing delay.²⁸⁴ The parameters to be taken into account by the Tribunal, according to the Respondent’s international law expert, include the disadvantage that the delay entails for the respondent, the deadlines that appear reasonable for this type of claim in domestic and international law, the conduct of the claimant, particularly if it evidences a waiver of the claim, stability and legal certainty.²⁸⁵ According to the Respondent, prescription does not, however, require prejudice to the respondent’s rights of defence.²⁸⁶ The Respondent rejects the Claimant’s argument according to which the Respondent is “*in*

²⁷⁹ Respondent’s Reply on Preliminary Objections, ¶ 3; Expert Report of Jorge E. Viñuales, ¶ 13.

²⁸⁰ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 36; International Law Institute Yearbook, No. 32, 1925 (Respondent’s free translation from French) (AL RA-11), pp. 22-23; Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, 1987 (AL RA-15), p. 378.

²⁸¹ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 (CL-367), ¶ 32.

²⁸² Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 37; *Nordzucker AG v. Republic of Poland*, UNCITRAL, Partial Award, 10 December 2008 (AL RA-16), ¶ 221.

²⁸³ Respondent’s Reply on Preliminary Objections, ¶ 49; Expert Report of Jorge E. Viñuales, ¶ 85.

²⁸⁴ *Id.*, ¶¶ 32, 48.

²⁸⁵ Expert Report of Jorge E. Viñuales, ¶¶ 79 *et seq.*, ¶ 85; Respondent’s Reply on Preliminary Objections, ¶ 35.

²⁸⁶ Respondent’s Reply on Preliminary Objections, ¶ 50.

possession of a very substantial documentary record related to this dispute”²⁸⁷ and is thus not prejudiced by the passage of time. According to the Respondent, the Claimant’s contention is irrelevant and only confirms that had a dispute existed, the Claimant should have initiated arbitration in a timely manner.²⁸⁸

336. The Respondent also relies on the principle of acquiescence to claim that undue delay in bringing an action bars the claim.²⁸⁹ The Respondent argues that inaction may result in the loss of a right or an entitlement if, under the specific circumstances, some sort of reaction was expected. The Respondent recalls three relevant elements to determine whether a right is extinguished, namely that the claimant must have failed to file a claim, such omission must have lasted for a certain period although there is no time limit, and the claimant must have failed to assert claims in circumstances that would have required action.²⁹⁰ The Respondent states that the Claimant does not dispute this standard.²⁹¹ According to the Respondent, between 6 and 16 years have passed since the adoption of the disputed measures and the Claimant has failed to file any claim against such measures alleging a violation of the BIT. The Respondent contends that the circumstances “*required some reaction*” from the Claimant.²⁹²
337. The Respondent additionally refers to the equitable principle of repose cited in the *Wena v. Egypt* case, according to which “*a respondent who reasonably believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its subsequent resurrection.*”²⁹³ Again, the Respondent states that the Claimant does not dispute the existence or applicability of the principle.²⁹⁴
338. The Respondent also refers to the principle of estoppel to affirm that undue delay can bar a claim.²⁹⁵ The Respondent states that estoppel requires “*a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.*”²⁹⁶ The Respondent adds that

²⁸⁷ Claimant’s Counter-Memorial on Preliminary Objections, ¶ 112.

²⁸⁸ Respondent’s Reply on Preliminary Objections, ¶ 44.

²⁸⁹ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 41-44; Respondent’s Reply on Preliminary Objections, ¶¶ 51-52; Expert Report of Jorge E. Viñuales, ¶¶ 98 *et seq.*

²⁹⁰ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 43; Christian J. Tams, Waiver, “Acquiescence, and Extinctive Prescription”, in *The Law of International Responsibility*, James Crawford J, Pellet A, and Olleson, S (eds.), 2010 (AL RA-21), pp. 1043-1044.

²⁹¹ Respondent’s Reply on Preliminary Objections, ¶ 52.

²⁹² Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 44.

²⁹³ *Id.*, ¶ 38; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 [hereinafter: *Wena v. Egypt*] (CL-175), ¶ 105.

²⁹⁴ Respondent’s Reply on Preliminary Objections, ¶ 53.

²⁹⁵ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 39.

²⁹⁶ Case concerning the land, island and maritime frontier dispute (El Salvador v. Honduras), ICJ, Judgment of 13 September 1990, ¶ 63 (AL RA-18); Temple of Preah Vihear (Cambodia v. Thailand), ICJ, Judgment of 15 June 1962, I.C.J. Reports 1962, p. 32 (AL RA-19).

the general principle of good faith requires a claimant to be diligent when filing a claim under a treaty.²⁹⁷ According to the Respondent, a delay in filing a claim may only be justified if the claimant has shown good cause for the delay, *i.e.*, “*incompetence, disability, incapacity to practice, war impediment, well-founded fear, and similar circumstances*”, which the Claimant has failed to prove.²⁹⁸ Otherwise, a long delay in filing a claim creates a presumption of negligence.²⁹⁹

339. The Respondent concludes from these principles that international law bars actions not acted on within a reasonable period of time and that the Claimant’s claims have not been made within such period. The Respondent refers to different benchmarks to determine the reasonable time within which a claim should be brought. In particular, the Respondent notes that previous tribunals have considered provisions of national law to determine what the limitation period is.³⁰⁰ In this regard, the Respondent refers to the three-year statute of limitation for torts,³⁰¹ as well as the three-year time limit under the Law on State Responsibility in Argentina.³⁰² The Respondent also refers to the time limits provided for by BITs and other treaties containing investment protection provisions, the majority of which consider that a three-year limitation period is a reasonable time limitation for filing claims.³⁰³ The Respondent affirms that the limitations provided for in BITs and other treaties containing investment protection provisions are “*appropriate benchmarks to determine what States understand to be a reasonable time limit for investors to bring any claim on their investments.*”³⁰⁴

2. The Claimant’s position

340. The Claimant rejects the Respondent’s argument, according to which its claims would be time-barred. On the contrary, the Claimant argues that its claims are timely and were

²⁹⁷ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 45.

²⁹⁸ Respondent’s Reply on Preliminary Objections, ¶ 68; Bin Cheng, *General Principles of Law as Applied by Intentional Courts and Tribunals*, 1987 (AL RA-15), p. 484; *see also John H. Williams v. Venezuela*, Decision of December 5, 1885 by Little, Member of the Commission, Claims Commission established under the US-Venezuela Convention, U.N. Reports on International Arbitration Awards, Vol. XXIX (AL RA-257), p. 290.

²⁹⁹ Respondent’s Reply on Preliminary Objections, ¶ 67; Kaj Hober, *Extinctive Prescription and Applicable Law in Interstate Arbitration*, 2001 (AL RA-248), p. 290.

³⁰⁰ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 48-49; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 (AL RA-23), ¶ 421; *Yury Bogdanov, citizen of the Russian Federation v. Republic of Moldova*, Arbitration proceeding before the Stockholm Chamber of Commerce No. V (114/2009), Final Arbitral Award dated 30 March 2010 (AL RA-24), ¶ 94; *Wena v. Egypt* (CL-175), ¶ 106.

³⁰¹ Argentine Civil and Commercial Code (A RA-6), Article 2561.

³⁰² Law No. 26,944, on State Responsibility, 2 July 2014 (A RA-7), Article 1; Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 51.

³⁰³ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 54; 56.

³⁰⁴ *Id.*, ¶ 57.

brought in good faith after relying on the representations and commitments made by Argentina.³⁰⁵

341. The Claimant submits that the time-bar objection is based on the false assertion that the Government breached the BIT 16 and 6 years ago, and no longer does.³⁰⁶ In this respect, the Claimant affirms that the Respondent has not only been in continuous breach of its Treaty obligations, but has also adopted new harmful measures as recently as in May 2021.³⁰⁷ According to the Claimant, the Respondent's failure to restore the original market-based rules in a manner consistent with the Electricity Law constitutes a continuous breach of the BIT.
342. According to the Claimant, the Respondent's assertions that it would not have brought its claims timely and in good faith is both wrong and inconsistent with the Respondent's own representations and commitments.³⁰⁸ The Claimant states that it relied on the Respondent's repeated assurances of the temporariness of the disputed measures but that the Respondent constantly "*mov[ed] the goal post.*"³⁰⁹ At the time the Claimant acquired its participation in Cerros Colorados, the Electricity Law establishing a competitive electricity framework was in place and the Claimant was thus entitled to rely on it. Although the disputed measures adopted in 2003 were also already in place at the same time, the Claimant expected such measures to be reverted by mid-2006, in line with the Respondent's representations.³¹⁰ However, according to the Claimant, the Respondent extended and continued to enforce such measures,³¹¹ even though it continued to affirm their temporary nature and promised to restore and normalize the electricity market. When President Mauricio Macri took office in December 2015, the Claimant again expected that the electricity framework would be restored as the administration acknowledged that Cerros Colorados had suffered damages and met several times with it to discuss its grievances.³¹² Cerros Colorados ultimately filed three administrative petitions before the Energy Secretariat and the Minister of Energy and Mining, seeking *inter alia* the adjustment of its remuneration in compliance with the Electricity Law.³¹³ According to the Claimant, the Government failed to resolve such petitions and failed on its promise to normalize the electricity market. Additionally, the

³⁰⁵ Claimant's Rejoinder on Preliminary Objections, ¶¶ 77 *et seq.*

³⁰⁶ Claimant's Counter-Memorial on Preliminary Objections, ¶ 32.

³⁰⁷ *Id.*, ¶¶ 9, 31.

³⁰⁸ *Id.*, ¶¶ 40 *et seq.*

³⁰⁹ McGee I, ¶ 30; Claimant's Memorial, ¶ 330.

³¹⁰ Claimant's Counter-Memorial on Preliminary Objections, ¶ 45; see also, Claimant's Rejoinder on Preliminary Objections, ¶ 74.

³¹¹ *Id.*, ¶ 46.

³¹² *Id.*, ¶¶ 58-60.

³¹³ *Id.*, ¶ 61.

Claimant alleges that negotiations were held between Cerros Colorados and the Government regarding a potential compensation but that negotiations extended for a year without reaching a settlement.³¹⁴ The Claimant states that it was left with no other choice than to launch arbitration proceedings against the Respondent.

343. The Claimant considers that the Respondent's time-bar objection is also unsupported by both the BIT and other sources of international law, neither of which contain limitation periods or a general principle whereby claims can be barred due to the passage of time.³¹⁵
344. As to the principles cited by the Respondent, the Claimant states that none support its objection and the Respondent has failed to explain how any of them are applicable to the specific circumstances of the case.³¹⁶
345. In particular, the doctrine of extinctive prescription cannot and does not apply to the case at hand because the legal requirements of prescription are not met.³¹⁷ First, the Claimant has not delayed bringing its claims, even less so unreasonably. Without an express treaty provision to the contrary, the Claimant argues that a claim is not barred under international law until an exceedingly long period of time has elapsed.³¹⁸ Second, any alleged delay would, in any event, be attributable to the Respondent as the Claimant cannot be found to have delayed its claims for relying on the Respondent's promises or for attempting to settle its claims with the Respondent.³¹⁹ Third, Argentina has suffered no prejudice from any purported delay, in particular because the factual record of the case is intact.³²⁰ The Claimant disagrees with the Respondent that tribunals are not required to assess prejudice and may also consider other principles such as stability, certainty or peace when an objection is based on extinctive prescription.³²¹
346. In response to the Respondent's reliance on the *Nauru* case, the Claimant states that investment tribunals have not relied on that case to apply the principle of extinctive prescription when the applicable investment treaty does not contain a prescription

³¹⁴ Claimant's Rejoinder on Preliminary Objections, ¶ 84.

³¹⁵ Claimant's Counter-Memorial on Preliminary Objections, ¶ 29 and ¶¶ III.B; Claimant's Rejoinder on Preliminary Objections, ¶¶ 75, 94.

³¹⁶ Claimant's Rejoinder on Preliminary Objections, ¶ 75.

³¹⁷ Claimant's Counter-Memorial on Preliminary Objections, ¶¶ 86-114.

³¹⁸ Claimant's Counter-Memorial on Preliminary Objections, ¶¶ 86-114; Claimant's Rejoinder on Preliminary Objections, ¶ 106.

³¹⁹ Claimant's Counter-Memorial on Preliminary Objections, ¶¶ 86-114; Claimant's Rejoinder on Preliminary Objections, ¶ 111.

³²⁰ Claimant's Counter-Memorial on Preliminary Objections, ¶¶ 86-114; Claimant's Rejoinder on Preliminary Objections, ¶¶ 113-118.

³²¹ Claimant's Rejoinder on Preliminary Objections, ¶¶ 119-122.

period.³²² For example, the tribunal in *(DS)2 v. Madagascar*, which briefly referenced *Nauru*, found that “*in the absence of a statute of limitations in the Treaty, the Claimants’ claim is not time-barred.*”³²³ Furthermore, according to the Claimant, Argentina and Spain, despite having the option to do so, did not include a specific time limitation for the presentation of claims under the BIT and a time bar should thus not be imposed. However, the parties to the Treaty included a six-month cooling off-period, which shows that the parties did not place particular value on the prompt institution of proceedings.³²⁴ The Claimant also considers that the Respondent cannot invoke domestic standards of limitations under Argentine law as these are not applicable under investment treaties.³²⁵

347. The Claimant has also not acquiesced to the enactment or enforcement of the Respondent’s measures.³²⁶ According to the Claimant, the mere passage of time does not amount to acquiescence absent other circumstances. Under the standard cited by the Respondent, the complaining party must have failed to make its claim in circumstances that required a reaction in case it had any objections, and such failure must have been extended for a certain time. However, the Claimant did react to the disputed measures, for example by filing letters to the Government,³²⁷ filing administrative petitions before the Energy Secretariat and the Minister of Energy and Mining,³²⁸ engaging in meetings with Government officials to resolve the dispute, providing notice of the dispute to the Respondent in February 2018, and participating in negotiations under the BIT for a year.³²⁹ The fact that it initially refrained from taking legal action does not mean that the Claimant abandoned its claims.
348. The Claimant submits that the Respondent may not rely on the notion of repose either.³³⁰ According to the Claimant, the contours of the concept are unclear and the Respondent has failed to show its relevance in the case at hand. In particular, in the *Wena v. Egypt*

³²² *Id.*, ¶ 98.

³²³ *(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Award, 17 April 2020 [hereinafter: *Sutter v. Madagascar*] (CL-351), ¶ 356.

³²⁴ Claimant’s Rejoinder on Preliminary Objections, ¶ 101.

³²⁵ Claimant’s Counter-Memorial on Preliminary Objections, ¶ 81; Claimant’s Rejoinder on Preliminary Objections, ¶¶ 75, 86-93; Legal Opinion of Christoph Schreuer, ¶ 20.

³²⁶ Claimant’s Counter-Memorial on Preliminary Objections, ¶¶ 115-122; Claimant’s Rejoinder on Preliminary Objections, ¶¶ 125-127.

³²⁷ For example: Letter from AGEERA to the Energy Secretariat dated December 2008 (C-272); Letter from Cerros Colorados to the Energy Secretariat dated August 2009 (C-276); Letter from AGEERA to the Energy Secretariat dated December 2009 (C-274).

³²⁸ For example: Administrative Petition filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40); Administrative Petition filed by Cerros Colorados before the Ministry of Energy and Mining dated 9 February 2018 (C-41).

³²⁹ Claimant’s Rejoinder on Preliminary Objections, ¶ 127.

³³⁰ Claimant’s Counter-Memorial on Preliminary Objections, ¶¶ 123-127; Claimant’s Rejoinder on Preliminary Objections, ¶ 128.

case cited by the Respondent, the tribunal rejected the argument based on repose as the respondent had had “*ample notice of the ongoing dispute,*” just like in the case at hand. The Claimant argues that the Respondent could not have reasonably believed that the claims had been abandoned and that it was aware of its breach of the rights of power generators and their investors.

349. The Claimant is of the view that it is also not estopped from bringing its claims. According to the Claimant, a State may only rely on estoppel where

*a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct. Mere inactivity, as opposed to an act, is not enough and is addressed by norms on statutes of limitation.*³³¹

350. The Claimant submits that the other party must have been prejudiced by its reliance on the representation made.³³² The Claimant considers that both requirements for the application of the doctrine are missing and therefore that the Respondent cannot rely on the doctrine to sustain its objection. In particular, no conduct by Orazul demonstrated that it would not exercise its rights under the BIT.³³³ On the contrary, the Claimant submits that Orazul and Cerros Colorados met and held negotiations with the Government,³³⁴ notified the existence of the BIT dispute in February 2018,³³⁵ made administrative filings,³³⁶ sent letters to ministers, secretaries, and other public officials complaining about the disputed measures,³³⁷ and executed the FONINVEMEM agreements, whereby the Government committed to restore the original Electricity Law abiding rules.³³⁸ According to the Claimant, the Respondent has also not identified a

³³¹ *Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 [hereinafter: *Mamidoil v. Albania*] (CL-264), ¶ 469.

³³² Claimant’s Counter-Memorial on Preliminary Objections, ¶ 128; Legal Opinion of Christoph Schreuer, ¶ 72.

³³³ Claimant’s Counter-Memorial on Preliminary Objections, ¶ 132.

³³⁴ Tierno I, ¶ 75.

³³⁵ Letter from Orazul to President of Argentina and Minister of Energy and Mining dated 9 February 2018 (C-27).

³³⁶ Administrative Petition filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat dated 14 August 2017 (C-38); Universidad de Buenos Aires, damages assessment filed before the Ministry of Energy and Mining and the Energy Secretariat dated 17 November 2017 (C-64); Administrative Petition filed by Cerros Colorados before the Ministry of Energy and Mining dated 9 February 2018 (C-41).

³³⁷ The Claimant cites *inter alia*: Letter from AGEERA to the Energy Secretariat dated December 2008 (C-272); Letter from Cerros Colorados to the Energy Secretariat dated August 2009 (C-276); Letter from AGEERA to the Energy Secretariat dated December 2009 (C-274).

³³⁸ FONINVEMEM Adhesion Contract (C-211); FONINVEMEM I Agreement (C-36); FONINVEMEM II Agreement (C-37).

single instance in which a court or tribunal considered delay in filing a claim a violation of the principle of good faith.³³⁹

351. Finally, the Claimant states that even if such principles were applicable, it would still be entitled to bring its claims as only months have passed since the enactment of the last unlawful measure and any delay in bringing the claims is actually attributable to the Respondent.³⁴⁰

3. The Tribunal's analysis

352. In addressing the timeliness of the Claimant's claims, the Tribunal notes that neither the BIT, nor the ICSID Convention, nor general international law set out a fixed prescription period or time limit for asserting claims such as the ones brought by the Claimant in this arbitration.
353. Investment tribunals have confirmed that absent such a fixed time limit or prescription period, a claimant's investment claims do not become time-barred. For example, the *SGS v. Paraguay* tribunal found that a claimant bringing a claim a number of years after the facts giving rise to the claim should not be punished for failing to exercise its rights sooner in the absence of any limitation period in the treaty.³⁴¹ Similarly, the *(DS)2 v. Madagascar* tribunal found that absent any rule on prescription in the treaty, the claimants' claim was not time-barred in the circumstances.³⁴²
354. While the Tribunal agrees with the ultimate conclusions reached by these tribunals in this respect, the Tribunal wishes to address the Respondent's arguments in further detail. The Respondent has argued that the Claimant's claim is not admissible due to the passage of time on the basis of a number of legal theories, including acquiescence, extinctive prescription, estoppel, repose and good faith. According to the Respondent, all of these theories should lead to the inadmissibility of the Claimant's claims. The Tribunal disagrees.
355. Turning to the theory of acquiescence, the Tribunal notes that the Respondent relies on Professor Tams' explanation that "[i]n order to establish acquiescence, it has to be shown that the claimant State has failed to assert its claim and that it thereby has

³³⁹ Claimant's Counter-Memorial on Preliminary Objections, ¶ 41.

³⁴⁰ *Id.*, ¶ 114.

³⁴¹ *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012 (CL-122), ¶ 166.

³⁴² *Sutter v. Madagascar* (CL-351), ¶ 356.

implicitly accepted its extinction.”³⁴³ The Respondent considers that three conditions have to be met for the acquiescence doctrine to apply:

(i) First, the complaining party must have failed to make the claim;

(ii) Second, the failure to file the claim must have extended for a certain time, although there is no specific time limit, and even a short period of passivity may be sufficient to establish acquiescence; and

*(iii) Third, the complaining party must have failed to make its claim in circumstances that required any reaction if it had any objections.*³⁴⁴

356. The Tribunal finds that the Respondent has not shown under this standard that it has itself advanced that the Claimant acquiesced and thereby lost its claim.
357. Although the Claimant only brought its BIT claim in these proceedings in 2019, the Claimant complained of the measures adopted by the Respondent already on a number of occasions throughout the years preceding its ICSID claim.³⁴⁵ The Respondent could thus not expect that the claim would be time-barred.
358. Accordingly, the Tribunal finds that under the Respondent’s advanced standard, there could be no acquiescence by the Claimant.
359. The Tribunal reaches a similar finding with respect to the theory of extinctive prescription. In this respect, the Tribunal has taken note of the ICJ’s decision in the *Nauru* case, in which the Court held:

³⁴³ Christian J. Tams, *Waiver, Acquiescence, and Extinctive Prescription*, THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford et al. eds., 2010) (CL-263), p. 1043.

³⁴⁴ Respondent’s Reply on Preliminary Objections, ¶ 51, referring to Christian J. Tams, *Waiver, Acquiescence, and Extinctive Prescription*, THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford et al. eds., 2010) (CL-263), p. 1043.

³⁴⁵ See for example: Cerros Colorados, Submission Joining AGEERA’s Administrative Appeal Against Resolution 240/03 dated 25 March 2004 (C-288); Letter from Cerros Colorados to the Energy Secretariat dated August 2009 (C-276); Letter from Cerros Colorados to CAMMESA and the Energy Secretariat dated 28 January 2010 (C-393); Note from Cerros Colorados to CAMMESA dated 8 July 2010 (C-78); Note from Cerros Colorados to CAMMESA dated 12 August 2010 (C-73); Letter from Cerros Colorados to CAMMESA dated 24 September 2010 (C-275); Note No. 35/2012 from Cerros Colorados to CAMMESA dated 16 March 2012 (C-77); Note No. 62/2012 from Cerros Colorados to CAMMESA dated 11 July 2023 (C-81); Letter from Duke Energy to the Energy Secretariat dated 4 April 2013 (C-148); Letter from Duke Energy to Contract and Regulatory Manager dated 13 June 2013 (C-144); Letter from Duke Energy to the Energy Secretariat dated 19 June 2014 (C-146); Letters from Duke Energy to the Energy Secretariat dated 3 September 2014 (C-149); Administrative Petition filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat dated 14 August 2017 (C-38); Administrative Petition filed by Cerros Colorados before the Ministry of Energy and Mining dated 9 February 2018 (C-41); Letter from Orazul to President of Argentina and Minister of Energy and Mining dated 9 February 2018 (C-27).

*even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.*³⁴⁶

360. The Tribunal finds that prejudice is a decisive factor in deciding whether to bar a claim on the basis of extinctive prescription.³⁴⁷ This is in line with the *Nauru* case, in which the ICJ held that

*it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.*³⁴⁸

361. Similarly, investment tribunals have rejected defenses based on the passage of time in situations in which a party was not substantially disadvantaged by such a passage of time. For example, the tribunal in *Wena v. Egypt* held:

104. [...] the Tribunal sees no legal or equitable reason to bar Wena's claim. First, contrary to Respondent's claim that "Claimant severely compromised the ability of the Respondent to defend itself in these proceedings," the Tribunal agrees with Wena that, given the voluminous evidence produced by the parties as well as the extensive testimony provided by several witnesses [...], neither party seems to have been disadvantaged - which, of course, is one of the equitable reasons for disallowing an untimely claim. [...]

³⁴⁶ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 (CL-367), ¶ 32.

³⁴⁷ *Id.*, ¶ 36 (noting that "it will be for the Court, in due time, to ensure that Nauru's delay in seising (sic.) it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law."); Kaj Hobér, *EXTINCTIVE PRESCRIPTION AND APPLICABLE LAW IN INTERSTATE ARBITRATION* (Iustus Forlag 2001) (CL-261), 285 (noting that the extinctive prescription principle requires, at least prima facie, the simultaneous existence of the following four criteria: an unreasonable delay in the presentation of a claim; imputability of the delay to negligence of the claimant; absence of a record of facts; and the respondent must be placed at a disadvantage in establishing his or her defense), 302 (submitting that these four criteria "in fact boil down to two, viz., (i) delay in presenting a claim and (ii) the delay must put the respondent at a disadvantage," and the remaining two requirements are "different aspects – sub-categories – of these two requirements."); James Crawford, *STATE RESPONSIBILITY: THE GENERAL PART* (Cambridge University Press 2013) (CL-262), 563 ("The decisive factor is not the length of elapsed time in itself, but whether the respondent has suffered prejudice.").

³⁴⁸ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, (CL-367), ¶ 36.

106. [...] the Tribunal sees no reason to exercise such discretion in this case, where Egypt has had ample notice of Wena's continued claims and where neither party appears to have been substantially harmed in its ability to bring its case.³⁴⁹

362. The Tribunal also considered the analysis of Prof. Kaj Hobér stating that the criteria of extinctive prescription “boil down to two, viz., (i) delay in presenting a claim and (ii) the delay must put the respondent at a disadvantage.”³⁵⁰ Likewise, Prof. Crawford observed with regard to defenses based on the passage of time that the “decisive factor is not the length of elapsed time in itself, but whether the respondent has suffered prejudice.”³⁵¹
363. The Tribunal finds that in the case at hand, the Respondent has not shown any disadvantage, prejudice or injustice caused to it by virtue of the passage of time. In this regard, the Tribunal agrees with the Claimant's position that there is no indication that Argentina has been unable to present testimonial or documentary evidence that it might have been able to present if this arbitration had been initiated sooner.³⁵² The Respondent has neither shown prejudice to exist in the present case nor otherwise demonstrated that the requirement of prejudice could be dispensed with. The Tribunal therefore rejects the Respondent's defense based on extinctive prescription.
364. With respect to the doctrine of estoppel relied on by the Respondent, the Tribunal has considered the tribunal's decision in *Mamidoil v. Albania*. Pursuant to that decision, the defense of estoppel requires that “a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct.”³⁵³ The Tribunal finds that the Respondent has not shown that the Claimant, by its conduct, would not exercise its right to initiate ICSID arbitration, much less that the Respondent relied on such conduct. Accordingly, the Tribunal also rejects the Respondent's argument that the claim is inadmissible on the basis of estoppel.
365. The Tribunal comes to the same conclusion with respect to the Respondent's argument based on repose. In support of this argument, the Respondent invokes the decision in the *Wena v. Egypt* case according to which “a respondent who reasonably believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its

³⁴⁹ *Wena v. Egypt* (CL-175), ¶¶ 104, 106.

³⁵⁰ Kaj Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (Iustus Forlag 2001) (CL-261), 285.

³⁵¹ James Crawford, *STATE RESPONSIBILITY: THE GENERAL PART* (Cambridge University Press 2013) (CL-262), 563.

³⁵² Claimant's Counter-Memorial on Preliminary Objections, ¶ 110.

³⁵³ *Mamidoil v. Albania* (CL-264), ¶ 469.

subsequent resurrection.”³⁵⁴ The Respondent has not shown that such circumstances are given in the case at hand. In particular, the Tribunal is of the view that while the Claimant did not bring its ICSID arbitration claim until 2019, it nevertheless expressed its disagreement with some of the Respondent’s measures it complains of throughout the years preceding its ICSID claim.³⁵⁵

366. Finally, the Tribunal also rejects the Respondent’s argument based on good faith. The Respondent argues that the lack of diligence when filing a claim is contrary to good faith and may bar a claim. The Respondent bases this argument on the *SM Jaleel*³⁵⁶ case of the Caribbean Court of Justice and the *Brasserie du Pêcheur*³⁵⁷ case of the Court of Justice of the European Communities. However, both cases referred to by the Respondent dealt with the specific obligations under the founding treaties of the regional organizations, the Caribbean Community and European Community respectively, which are irrelevant to the case at hand.
367. In addition, the Tribunal notes that the findings of the Court of Justice of the European Communities in the *Brasserie du Pêcheur* case did not deal with the time limit for claims but with the issue of the extent of reparation. It found that

*it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself.*³⁵⁸

³⁵⁴ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 38; *Wena v. Egypt (CL-175)*, ¶ 105.

³⁵⁵ See for example: Cerros Colorados, Submission Joining AGEERA’s Administrative Appeal Against Resolution 240/03 dated 25 March 2004 (C-288); Letter from Cerros Colorados to the Energy Secretariat dated August 2009 (C-276); Letter from Cerros Colorados to CAMMESA and the Energy Secretariat dated 28 January 2010 (C-393); Note from Cerros Colorados to CAMMESA dated 8 July 2010 (C-78); Note from Cerros Colorados to CAMMESA dated 12 August 2010 (C-73); Letter from Cerros Colorados to CAMMESA dated 24 September 2010 (C-275); Note No. 35/2012 from Cerros Colorados to CAMMESA dated 16 March 2012 (C-77); Note No. 62/2012 from Cerros Colorados to CAMMESA dated 11 July 2012 (C-81); Letter from Duke Energy to the Energy Secretariat dated 4 April 2013 (C-148); Letter from Duke Energy to Contract and Regulatory Manager dated 13 June 2013 (C-144); Letter from Duke Energy to the Energy Secretariat dated 19 June 2014 (C-146); Letters from Duke Energy to the Energy Secretariat dated 3 September 2014 (C-149); Administrative Petition filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat dated 14 August 2017 (C-38); Administrative Petition filed by Cerros Colorados before the Ministry of Energy and Mining dated 9 February 2018 (C-41); Letter from Orazul to President of Argentina and Minister of Energy and Mining dated 9 February 2018 (C-27).

³⁵⁶ *S.M. Jaleel & Co Ltd & Guyana Beverages Inc v. Guyana Cooperative Republic*, Caribbean Court of Justice, [2017] CCJ 2 (OJ), Decision issued on 9 May 2017 (AL RA-10), ¶¶ 43, 45.

³⁵⁷ *Brasserie du Pêcheur S.A. v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others*, Court of Justice of the European Communities, Joined cases C-46/93 and C-48/93, 5 March 1996 (AL RA-22), ¶¶ 84, 85.

³⁵⁸ *Id.*, ¶ 85.

368. This authority does not support the proposition that the Claimant's claims must be rejected as being untimely.
369. In any event, the Respondent has not shown that the Claimant acted without diligence when filing its claims. The Respondent has notably failed to show that there was a delay on the part of the Claimant that would amount to a lack of diligence, in particular in view of its repeated protest against some of the measures taken by the Respondent.
370. Having regard to all legal theories advanced by the Respondent and all the circumstances of the case, the Tribunal therefore rejects the Respondent's claim that the Claimant's claims are belated and contrary to general principles of law.

III. The Respondent's claim that the Claimant does not fulfill the requirements of Article X of the BIT

371. The Tribunal turns to the third issue, which requires the Tribunal to assess whether the Claimant's claims must be rejected because they fail to fulfill the local-litigation requirement in Article X of the BIT.

1. The Respondent's position

372. The Respondent asserts that the Tribunal lacks jurisdiction in these proceedings as the Claimant failed to fulfill the requirement in Article X of the BIT to first submit the dispute to Argentine courts.
373. The Respondent affirms that the offer to arbitrate under the BIT may not be unilaterally modified by an investor and that the requirements established by Article X of the BIT are part of the consent limitations that the Argentine Republic and the Kingdom of Spain agreed upon at the time they signed the BIT.³⁵⁹ According to the Respondent, a unilateral offer to arbitrate must be accepted by the investor under the same terms agreed upon by the States for the arbitration agreement to exist.³⁶⁰
374. The Respondent rejects the Claimant's argument that it was exempt from fulfilling the conditions of Article X on the ground that it would have been futile for Orazul to redress its claims in the Argentine courts.³⁶¹

³⁵⁹ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 88.

³⁶⁰ *Id.*, ¶ 77.

³⁶¹ Claimant's Memorial, ¶ 361.

375. The Respondent further rejects the Claimant’s contention that most favored nation (MFN) treatment applies to matters of dispute resolution and considers the Claimant’s position as “*disregarding the terms of the Treaty.*”³⁶²
376. The Respondent argues that the 18-month clause was specially negotiated between the Parties to the BIT, such provision not being present in all of the BITs entered into by Argentina.³⁶³ The Respondent recalls that it entered into BITs containing the 18-month clause after concluding treaties that do not contain such a provision. This, the Respondent submits, shows that the State parties did not intend the 18-month clause to be set aside through the MFN clause.
377. According to the Respondent, the existence of the clause in the Argentina-Spain BIT evidences the existence of an essential policy in this respect.³⁶⁴ To further support its position, the Respondent relies on the tribunal’s finding in *ICS v. Argentina*:

If Argentina had generally intended for its BITs’ MFN clauses to apply to their international dispute resolution provisions, then it concluded no less than five subsequent BITs which included the 18-month litigation prerequisite for no good reason, given that it had already concluded three BITs without this requirement. (...)

*The doctrine of effet utile would be violated with respect to the noted treaties, because the 18-month litigation prerequisite would have been void ab initio – immediately superseded by means of the treaties’ MFN clauses.*³⁶⁵

378. According to the Respondent, for an MFN clause to apply to matters of dispute resolution, the consent of the State parties that made the offer to arbitrate is required. According to the Respondent, such consent must be derived from the clear and unequivocal intention of the State parties as expressed in the treaty.³⁶⁶ In the case at hand, the Respondent submits, it is clear that the MFN provision is included in the middle of the substantive provisions of the treaty and thus does not apply to jurisdiction, which is found in the general and final provisions of the BIT.³⁶⁷

³⁶² Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 95.

³⁶³ *Id.*, ¶ 100.

³⁶⁴ Respondent’s Reply on Preliminary Objections, ¶ 121.

³⁶⁵ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 102-103; *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (AL RA-30), ¶¶ 316-317.

³⁶⁶ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 98.

³⁶⁷ Respondent’s Reply on Preliminary Objections, ¶¶ 127-129.

379. The Respondent also evokes Spain’s own interpretation of the perimeter of the MFN clause of the Argentina-Spain BIT in *Maffezini v. Spain*, which is consistent with Argentina’s position in the case at hand:

*[T]he reference in the most favored nation clause of the Argentine-Spain BIT to ‘matters’ can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions.*³⁶⁸

380. According to the Respondent, the State Parties’ interpretation of the BIT cannot be set aside as it is the “*authentic interpretation*” of the BIT.³⁶⁹

381. Finally, the Respondent submits that the dispute resolution clauses of the two treaties relied on by the Claimant through the MFN clause, namely the Australia-Argentina BIT and the US-Argentina BIT, provide for a fork-in-the-road system and such system cannot be presumed to be more favorable than the mechanism established under the Argentina-Spain BIT.³⁷⁰

2. The Claimant’s position

382. The Claimant considers that the Respondent’s objection lacks merit.

383. The Claimant invokes Article 13(3) of the Australia-Argentina BIT³⁷¹ and Article VII of the US-Argentina BIT,³⁷² according to which an investor may pursue ICSID arbitration even if it has not submitted the dispute for resolution to national courts. According to the Claimant, these provisions apply by virtue of the MFN clause in the Argentina-Spain BIT.³⁷³

384. The Claimant notes that the MFN clause in the Argentina-Spain BIT applies to “*all matters.*”³⁷⁴ According to the Claimant, this includes the dispute resolution clause of the BIT. The Claimant recalls that many tribunals have endorsed such an inclusive interpretation of the Argentina-Spain BIT.³⁷⁵ According to the Claimant, the ordinary

³⁶⁸ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 105; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000 [hereinafter: *Maffezini v. Spain*] (CL-6), ¶ 41.

³⁶⁹ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 105; Respondent’s Reply on Preliminary Objections, ¶ 122.

³⁷⁰ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 110-113.

³⁷¹ Treaty between the Government of Australia and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment dated 23 August 1995 (CL-135), Article 13.

³⁷² Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments dated 14 November 1991 (CL-5), Article VII.

³⁷³ Claimant’s Observations on Respondent’s Request for Bifurcation, II.B.

³⁷⁴ Treaty (CL-246), Article IV(2).

³⁷⁵ Claimant’s Observations on Respondent’s Request for Bifurcation, ¶¶ 64-65.

meaning of the terms of the BIT are clear and unambiguous as there is no doubt that the 18-month period is a “*matter[] governed by*”³⁷⁶ the BIT. Accordingly, there is no need for supplementary means of interpretation of the Vienna Convention on the Law of Treaties (VCLT).³⁷⁷ Furthermore, the MFN clause necessarily extends to the local litigation requirement because the BIT specifically carves out situations in which the MFN clause does not apply.³⁷⁸

385. According to the Claimant, there is no public policy reason not to give effect to the MFN provision as the 18-month local litigation requirement clause is not a reflection of an essential policy of either Argentine or Spanish treaties.³⁷⁹ Additionally, the Respondent has not disputed the Claimant’s right to rely on the MFN clause to dispense of the local litigation requirement provision in at least one case brought under the BIT.³⁸⁰
386. The Claimant also states that requiring the Claimant to submit its case before Argentine courts would result in “*substantial damages to Claimant without a chance of achieving an effective result*”, due to the average length of proceedings in Argentina, which “*far exceed [...] 18 months*”³⁸¹ and the requirement under Argentine law to make an advance payment of a filing fee of approximately three percent of the amount claimed as compensation. In the Claimant’s case, this would allegedly be equal to approximately USD 16.5 million.³⁸² The Claimant notes that in any event and as Argentina has itself recognized, the purpose of the local litigation requirement is to give the State an opportunity to address its breaches and resolve the issues before turning to investment arbitration. The Claimant asserts that Argentina has had plenty of opportunities to address the harmfulness of the disputed measures. In particular, the Claimant refers to both meetings held with representatives of the Argentine authorities, who acknowledged that they had harmed Cerros Colorados, as well as administrative petitions to which

³⁷⁶ Treaty (CL-246), Article IV(2).

³⁷⁷ Claimant’s Rejoinder on Preliminary Objections, ¶ 47.

³⁷⁸ *Id.*, ¶ 49; See Articles IV(3) and IV(4), and paragraph 1 of the Protocol to the BIT.

³⁷⁹ Claimant’s Counter-Memorial on Preliminary Objections, ¶ 134.

³⁸⁰ *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7, Decision of the Tribunal Regarding the Objections to Jurisdiction, 10 June 2005 (CL-187), ¶¶ 17, 28.

³⁸¹ Claimant’s Counter-Memorial on Preliminary Objections, ¶¶ 169, 176. See also *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012 [hereinafter: *Urbaser v. Argentina*] (CL-20), ¶¶ 196, 202; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 (CL-19) ¶¶ 607, 620; *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (CL-21), ¶¶ 582, 585-591; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 [hereinafter: *Teinver v. Argentina*] (CL-15), ¶¶ 126, 127, 129; *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014 (CL-232), ¶ 317; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2017 [hereinafter: *BG Group v. Argentina*] (CL-54), ¶¶ 147, 156.

³⁸² Claimant’s Observations on Respondent’s Request for Bifurcation, ¶ 72.

Argentina failed to respond to.³⁸³ The Claimant also states that the lack of independence of the Argentine judiciary renders the 18-month local litigation requirement of the BIT all the more futile.³⁸⁴

387. Finally, the Claimant submits that Argentina's position constitutes an abuse of rights under international law and Argentine law. Specifically, Argentina should be precluded from relying on the 18-month waiting period to object to the Tribunal's jurisdiction, because the exercise of those BIT rights, in the context of the current dispute, is completely contrary to the purpose for which those rights were agreed to in the BIT.³⁸⁵

3. The Tribunal's analysis

388. In what follows, the Tribunal will set out its analysis in three steps. The Tribunal will start by assessing whether the MFN clause of the Argentina-Spain BIT applies to matters of dispute resolution. Second, the Tribunal will assess whether the treatment of the Australia-Argentina BIT and the US-Argentina BIT is indeed more favorable than the one foreseen in Article X(2) of the Argentina-Spain BIT. Third, the Tribunal will examine whether the fork-in-the-road provisions of the relied upon BITs have been complied with.

389. Turning to the first prong of its analysis, the Tribunal notes that Article IV of the BIT, titled "*Treatment*", provides:

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

2. In all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country.

3. Such treatment shall not, however, extend to the privileges which either Party may grant to investors of a third State by virtue of its participation in:

- A free trade area;

- A customs union;

- A common market;

- A regional integration agreement; or

³⁸³ Claimant's Observations on Respondent's Request for Bifurcation, ¶ 75; Tierno I, ¶¶ 73-75

³⁸⁴ Claimant's Counter-Memorial on Preliminary Objections, ¶¶ 169-171; Claimant's Rejoinder on Preliminary Objections, ¶¶ 70-71.

³⁸⁵ Claimant's Counter-Memorial on Preliminary Objections, ¶¶ 182 *et seq.*

- An organization of mutual economic assistance by virtue of an agreement concluded prior to the entry into force of this Agreement, containing terms similar to those accorded by that Party to participants of the said organization.

*4. The treatment granted under this article shall not extend to tax deductions or exemptions or other similar privileges granted by either Party to investors of third countries by virtue of a double taxation agreement or any other tax agreement.*³⁸⁶

390. In addition, the Parties to the BIT concluded a Protocol to the BIT, which provides as follows in its first paragraph:

With reference to articles IV and VII:

The interpretation of articles IV and VII of the Agreement shall be that the Parties consider that the application of most-favoured-nation treatment shall not extend to the specific treatment reserved by either Party for foreign investors in respect of investments made in the context of concessionary funding provided for in a bilateral agreement concluded by that Party with the country to which the aforementioned investors belong, such as the Treaty for the establishment of a special associative relationship between Argentina and Italy of 10 December 1987 and the General Treaty of cooperation and friendship between Spain and Argentina of 3 June 1988.

391. The Tribunal finds that the language of Article IV(2) of the BIT, which refers to “*all matters governed by this Agreement*” is sufficiently broad to cover the substantive and procedural protections contained in the BIT.
392. The Tribunal notes that other subsections of Article IV of the BIT as well as the Protocol contain explicit carve-outs to the application of MFN treatment. Article IV(3) of the BIT provides that MFN treatment shall not extend to the treatment either Party extends to third States by virtue of their common participation in a free trade area, a customs union, a common market, a regional integration agreement or an organization of mutual economic assistance. Article IV(4) of the BIT provides that MFN treatment shall not extend to the treatment either Party extends to investors of third States concerning tax deductions or similar provisions. In addition, paragraph 1 of the Protocol to the BIT sets out that MFN treatment shall not extend to the specific treatment reserved by either Party for foreign investors in respect of investments made in the context of concessionary funding provided for in a bilateral agreement concluded by that Party

³⁸⁶ Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of investments, United Nations Treaty Series (202:1992) (A RA-263).

with the country to which the aforementioned investors belong. Matters of dispute resolution are absent from these explicit carveouts.

393. In conclusion, the Tribunal finds with respect to the first prong of its analysis that the “*all matters*” language of the Article IV(2) MFN clause is sufficiently broad to cover the substantive and procedural protections contained in the BIT. Accordingly, the Claimant may rely on Article IV(2) of the Treaty to make use of more favorable dispute resolution provisions contained in other BITs concluded by Argentina.
394. The Tribunal’s finding is consistent with the findings by other tribunals. All of the cases that have addressed Article IV(2) of the BIT have consistently concluded that the broad language of the MFN clause applies to the dispute settlement provision of Article X.³⁸⁷ The Tribunal sees no reason to depart from the findings of these other tribunals which have decided the same issue under the BIT.
395. With respect to the second prong of the Tribunal’s analysis, the Tribunal notes that the Claimant relies on both the Australia-Argentina BIT and the US-Argentina BIT.
396. Article 13 of the Australia-Argentina BIT provides:

1. Any dispute which arises between a Contracting Party and an investor of the other Contracting Party relating to an investment shall, if possible, be settled amicably. If the dispute cannot so be settled, it may be submitted, upon request of the investor, either to:

(a) the competent tribunal of the Contracting Party which has admitted the investment; or

(b) international arbitration in accordance with paragraph 3 of this Article.

2. Where an investor has submitted a dispute to the aforementioned competent tribunal of the Contracting Party which has admitted the investment or to international arbitration in accordance with paragraph 3 of this Article, this choice shall be final.

3. In the case of international arbitration, the dispute shall be submitted, at the investor's choice, either:

³⁸⁷ *Teinver v. Argentina (CL-15)*, ¶¶ 126, 129, 184-186; *Maffezini v. Spain (CL-6)*, ¶ 64; *Suez, Sociedad General de Aguas de Barcelona S.A., and Interaguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006 (CL-483), ¶¶ 55, 60, 63, 66; *Urbaser v. Argentina (CL-20)*, ¶¶ 132, 148, 202-203; *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006 (CL-16), ¶¶ 102-105; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006 (CL-118), ¶¶ 55, 65, 68; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 (CL-17), ¶¶ 29-31, 49.

(a) to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as “the Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on 18 March 1965 (hereinafter referred to as “the Convention”),[1] provided that the Contracting Parties are both parties to the Convention; or

(b) to an arbitration tribunal set up from case to case in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law; or

*(c) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.*³⁸⁸

397. The US-Argentina BIT provides in Article VII(2)-(3):

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the [ICSID Convention], provided that the Party is a party to such convention: or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

³⁸⁸ Treaty between the Government of Australia and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment dated 23 August 1995 (CL-135), Article 13.

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNICTRAL) [sic]: or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

*(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.*³⁸⁹

398. The Tribunal is of the view that the dispute resolution provisions of both the Australia-Argentina BIT and US-Argentina BIT are more favorable than the Argentina-Spain BIT. They allow the Claimant direct access to ICSID arbitration instead of stipulating the requirement of having to resort to domestic courts for 18 months before going to arbitration. Accordingly, the Claimant may take advantage of the more favorable treatment provided to investors in the Australia-Argentina BIT or US-Argentina BIT with respect to dispute settlement. This is all the more undisputable in the present case as the Claimant would have had to pay a substantial filing fee for its claims before the Argentine courts, pursuant to Article 2 of Law No. 23,898 dated 23 October 1990, which provides that “[t]o all actions, whatever their nature, based on a pecuniary calculation, a fee rate of *THREE PERCENT (3%) shall be applied.*”³⁹⁰
399. With respect to the third prong of the Tribunal’s assessment, the Tribunal notes that under Article 13(3) of the Australia-Argentina BIT, an investor may pursue ICSID arbitration if the investor has not submitted the dispute for resolution to the competent Argentine tribunal. Under Article VII(3)(a) of the US-Argentina BIT, an investor may pursue ICSID arbitration if the investor has not submitted the dispute for resolution to Argentine courts or tribunals or in accordance with any previously agreed dispute-settlement procedures, and six months have elapsed from the date on which the dispute arose, during which period the parties should initially seek a resolution through consultation and negotiation.
400. In the case at hand, the Claimant has fulfilled the requirements of both instruments it invokes: it has not submitted the dispute under the BIT to any tribunal or court in Argentina or any other previously agreed alternative dispute settlement procedure. To the extent that the Claimant has filed administrative appeals in Argentina, these were not made by the Claimant itself and did not relate to any claims made under international

³⁸⁹ Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments dated 14 November 1991 (CL-5), Article VII.

³⁹⁰ Law No. 23,898 dated 23 October 1990 (C-139).

law.³⁹¹ The Claimant has also notified the dispute to Argentina through a letter dated 14 February 2018, as well as in a subsequent letter dated 4 June 2018, but was unable to solve the dispute amicably with Argentina within six months. The Claimant then filed its Request for Arbitration on 30 August 2019, *i.e.*, over six months after it notified Argentina of the dispute.

401. In light of the foregoing reasons, considered both together and independently, the Tribunal finds that the local litigation requirement set forth in Article X(2) of the BIT does not apply. The Tribunal therefore does not need to address whether the local litigation requirement has become futile or whether the Respondent's invocation of Article X of the BIT constitutes an abuse of process. The objection based on Article X of the BIT must be rejected.

IV. The Respondent's claim that the Tribunal lacks jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* and its allegation that the Claimant abused its rights

402. Turning to the fourth issue, the Tribunal must assess the Tribunal's jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*, as well as the allegation that the Claimant abused its rights.

1. The Respondent's position

403. The Respondent submits that the Tribunal lacks jurisdiction *ratione temporis* because the Claimant's investment occurred in 2016 and, thus, after the impugned measures.
404. The Respondent recalls that the investment invoked by the Claimant in these proceedings was owned by the US-company Duke Energy during the 1999-2016 period and was ultimately sold to I Squared Capital on 20 December 2016, *i.e.*, long after the adoption of the 2003 measures.³⁹²

³⁹¹ See for example: Cerros Colorados, Submission Joining AGEERA's Administrative Appeal Against Resolution 240/03 dated 25 March 2004 (C-288); Administrative Appeal filed by AGEERA against Resolution 240/2003 dated 30 September 2009 (A RA-331); Administrative Petition filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat dated 14 August 2017 (C-38); Administrative Petition filed by Cerros Colorados before the Ministry of Energy and Mining dated 9 February 2018 (C-41).

³⁹² Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 118-120.

405. Duke Energy Cerros Colorados S.A. became part of the portfolio of companies known as the Orazul Energy group and was renamed Orazul Energy Cerros Colorados S.A. in January 2017.³⁹³
406. The Respondent considers that the 2016 I Squared Capital SPA produced by the Claimant confirms that I Squared Capital acquired an indirect interest in Cerros Colorados from Duke Energy through a newly created vehicle, Orazul Energía Holdings LLC.
407. Consequently, I Squared Capital did not make or own the alleged investment in the territory of the Argentine Republic prior to 2016.³⁹⁴
408. In addition, the change of control over Cerros Colorados is confirmed by a presentation made by affiliated companies to the Orazul group before the CNDC, where they considered I Squared Capital’s investment in 2016 to fall under the “first landing” exception, enshrined in section 10(c) of the Argentine Antitrust Law, and applies to acquisitions by foreign companies that hold no assets or shares of other companies in Argentina.³⁹⁵
409. The Respondent submits that it is only once Duke Energy’s assets became part of I Squared Capital’s portfolio in December 2016 that the Claimant brought proceedings in late August 2019.³⁹⁶
410. The Respondent considers that allowing the Claimant to bring an *ex post facto* claim against the measures in dispute, whereas Duke Energy did not do so, “*would amount to going beyond the scope of jurisdiction under the ICSID Convention and the BIT and would constitute a clear abuse of process.*”³⁹⁷ In this sense, according to the Respondent, the Claimant has failed to prove that it is a Spanish investor that made an investment prior to the adoption of the measures for which it claims and the Tribunal thus lacks jurisdiction *ratione temporis*.³⁹⁸ The Respondent argues that it is the Claimant’s burden to prove ownership of the investment “*at all relevant times of the dispute*”, in particular at the dates of the measures for which it claims.³⁹⁹ The

³⁹³ *Ibid*; Minutes of Shareholders’ Meeting of Duke Energy Cerros Colorados S.A. dated 27 January 2017 (C-235).

³⁹⁴ Respondent’s Comments on the Claimant’s Produced Documents, pp. 1-2.

³⁹⁵ *Id.*, p. 2.

³⁹⁶ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 124.

³⁹⁷ *Id.*, ¶ 124.

³⁹⁸ Respondent’s Reply on Preliminary Objections, ¶ 151.

³⁹⁹ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 127; Respondent’s Reply on Preliminary Objections, ¶ 154; *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009 [hereinafter: *Cementownia v. Turkey*] (AL RA-51), ¶ 112; *CCL Oil v. Kazakhstan*, SCC Case No. 122/2001, Decision on Jurisdiction, 1 January 2003 (AL RA-256), ¶¶ 81-82; *Philip*

Respondent relies *inter alia* on the tribunal’s reasoning in *Renée Rose Levi v. Peru*, which held that “*the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over breach of that Treaty’s substantive standards affecting that investment.*”⁴⁰⁰

411. The Respondent further submits that even if one were to find that the Claimant’s investment consisted of Duke Energy’s 2003 restructuring, the Claimant’s claim would also be inadmissible for abuse of process because the dispute was already foreseeable for all electricity generators in December 2003.⁴⁰¹ Since the restructuring intervened after the first measures that the Claimant complains of, the Respondent submits that it is up to the Claimant to prove that there is no abuse of right.⁴⁰² The Respondent states that an abuse of right is determined in each case, taking into account all the circumstances of the case. The Respondent submits that knowledge of the situation of the investment at the time of its acquisition is a decisive factor in the assessment of abuse of right along with “*the timing of the purported investment, the timing of the claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring.*”⁴⁰³ According to the Respondent, arbitral tribunals are of the view that corporate acquisitions or restructurings made when a dispute was already foreseeable constitute an abuse of right that requires the case to be dismissed as inadmissible.⁴⁰⁴ The Respondent submits that the dispute was manifestly foreseeable because AGEERA had filed an administrative appeal against Resolution 240/03 in September 2003, *i.e.*, months before Duke Energy even acquired Cerros Colorados.⁴⁰⁵ According to the Respondent, the appeal expressly stated that in the event that resolutions consistent with Resolution 240/03 continued to be issued, the challenge would be extended to every administrative act and/or any other

Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Decision on Jurisdiction and Admissibility, 17 December 2015 [hereinafter: *Philip Morris v. Australia*] (AL RA-54), ¶ 509; *Vito G. Gallo v. Canada*, PCA Case No. 55798, Award, 15 September 2011 (AL RA-77), ¶¶ 328, 332.

⁴⁰⁰ *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015 (AL RA-53), ¶ 146.

⁴⁰¹ Respondent’s Reply on Preliminary Objections, ¶ 161; Resolution 240/2003 dated 14 August 2003 (C-8); Resolution 1,069/2004 dated 14 October 2004 (C-174); Administrative Appeal filed by AGEERA against Resolution 240/2003 dated 30 September 2009 (A RA-331).

⁴⁰² Respondent’s Reply on Preliminary Objections, ¶ 169; Expert Report of Jorge E. Viñuales, ¶¶ 154-155; *Philip Morris v. Australia* (CL-193), ¶ 554.

⁴⁰³ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 151; Respondent’s Reply on Preliminary Objections, ¶ 164; Expert Report of Jorge E. Viñuales, ¶ 138; *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, 2 June 2016 [hereinafter: *Transglobal v. Panama*] (JV-25), ¶ 103.

⁴⁰⁴ Respondent’s Reply on Preliminary Objections, ¶ 166; Expert Report of Jorge E. Viñuales, ¶ 141; *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (CL-286), ¶¶ 136, 143.

⁴⁰⁵ Respondent’s Reply on Preliminary Objections, ¶ 164; Administrative appeal filed by AGEERA against Resolution 240/2003 dated 30 September 2003 (A RA-331), p. 1.

type of act already issued or to be issued in the future.⁴⁰⁶ Since the Claimant effected its restructuring after the first measures it complains of were adopted, the Respondent submits that the Claimant bears the burden of proof that there was no abuse of right.⁴⁰⁷

412. According to the Respondent, the Tribunal also lacks jurisdiction because the Claimant has not established that it was a protected investor under the BIT.⁴⁰⁸ In this respect, the Respondent’s international legal expert considers that the Claimant must prove that the reorganization within Duke that led to the incorporation of the Spanish Claimant was mainly effected for a different reason than to rely on the provisions of the Argentina-Spain BIT.⁴⁰⁹ The Respondent recalls that Article I(1) of the BIT sets forth two conditions for a legal person to qualify as an investor, namely that a legal person be constituted in accordance with the legislation of a Party and that have its main office (“*sede*” in the Spanish version of the BIT) in the territory of that Party, which requires more than constitution in the State and means more than merely reporting a domicile.⁴¹⁰ The Respondent argues that the Claimant has failed to produce any documents that would evidence that the company has its effective main office in Spain.⁴¹¹ The Respondent purports that the Claimant is in fact ostensibly a shell company with no real activity in Spain used “*as a vehicle by a US company in order to unduly gain access to the protection afforded by the Argentina-Spain BIT.*”⁴¹² In particular, the Respondent asserts that the Claimant has reported its domicile at an address in Spain shared with at least 19 other companies⁴¹³ and that the Claimant has “*presented itself as a US investor*” before the Argentine authorities.⁴¹⁴ The Respondent refers in particular to meetings between Argentine officials and Orazul Energy Argentina’s CEO, Ms. Mariana Schoua, who is a member of the Board of Directors of the American Chamber of Commerce.⁴¹⁵ The Respondent considers that the Claimant’s attempt to obtain protection from the BIT and the ICSID Convention through a shell company in order to bring its claim is a clear abuse of process and renders the Claimant’s claim inadmissible.⁴¹⁶ The Respondent adds that the *Westmoreland Coal Company v. Canada* case supports its position: in that case, the tribunal decided that (i) a sham transaction will be fatal to jurisdiction, (ii) just

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Respondent’s Reply on Preliminary Objections, ¶ 169.

⁴⁰⁸ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, II.C.3.

⁴⁰⁹ Expert Report of Jorge E. Viñuales, ¶ 160.

⁴¹⁰ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 132-133.

⁴¹¹ *Id.*, ¶ 138.

⁴¹² *Id.*, ¶¶ 116; 139; see also Expert Report of Jorge E. Viñuales, ¶ 136.

⁴¹³ List of companies having their domicile at Calle Serrano 41, 4th floor, 28001, Madrid (A RA-47).

⁴¹⁴ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 139.

⁴¹⁵ Single Register of Hearings, Hearing of 16 August 2017 (A RA-49); Single Register of Hearings, Hearing of 13 September 2019 (A RA-51); Board of Directors of AmCham Argentina (A RA-52).

⁴¹⁶ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 146-155.

because a transaction is *bona fide* does not in itself guarantee jurisdiction; and (iii) there must be beneficial ownership at all relevant times with an investor.⁴¹⁷

413. Finally, the Respondent argues that the Tribunal lacks jurisdiction because the Claimant has failed to prove that it made a protected investment under the BIT. According to the Respondent, such proof requires “*showing an action of investing by the claimant invoking its status as investor,*” which the Claimant has not done.⁴¹⁸ The Respondent relies on the Preamble of the Treaty which refers to “*investments made by investors*” (“*inversiones realizadas por inversores*”) and on the BIT’s Article IV which guarantees fair and equitable treatment to “*investments made by investors.*”⁴¹⁹ The Respondent also recalls that the term “*investment*” in Article 25 of the ICSID Convention must be interpreted on an autonomous basis and is composed of the constitutive elements highlighted by the *Salini* tribunal: (a) a contribution, (b) of a certain duration, (c) an entailment of risk, and (d) a contribution to the economic development of the host State of the investment.⁴²⁰ The Respondent argues that the Claimant is merely a holding company and cannot be considered as the one who made an investment in the sense of a “*contribution.*”⁴²¹ Furthermore, the Respondent contends that the Orazul group acknowledged that the investment in Cerros Colorados was in December 2016, that it constituted its first deal in Argentina and it did not previously own any assets or shares in Argentina.⁴²²

2. The Claimant’s position

414. The Claimant refutes the Respondent’s claim according to which it is not a protected investor with a protected investment under the BIT. On the contrary, the Claimant states that it is bringing BIT claims on its own behalf as a Spanish company qualifying as an investor under the BIT and that it owns a protected investment under the BIT.⁴²³

415. The Claimant’s position is that it is an investor protected under the Treaty since its incorporation in Spain in December 2003 when it acquired its participation in Cerros

⁴¹⁷ *Westmoreland Mining Holdings v. Canada*, ICSID Case No. UNCT/20/3, Award, 31 January 2022 (AL RA-326), ¶ 195.

⁴¹⁸ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 142.

⁴¹⁹ *Id.*, ¶¶ 142-145.

⁴²⁰ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 143; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001 (AL RA-89), ¶ 52.

⁴²¹ Respondent’s Reply on Preliminary Objections, ¶ 140.

⁴²² *Id.*, ¶¶ 144-145. In particular, Respondent refers to the fact that Claimant invoked a legal exception under Argentine Antitrust Law which exempts companies from giving notice of transaction in the case where “[t]he acquisitions of a single company by a single foreign company that has not previously owned assets or shares of other companies in Argentina.”

⁴²³ Claimant’s Observations on Respondent’s Request for Bifurcation, I.I.C.

Colorados.⁴²⁴ The Claimant disputes the Respondent’s contention according to which the Tribunal should assume that I Squared Capital and not Orazul is the claimant in these proceedings.⁴²⁵ The Claimant submits that tribunals have rejected similar attempts by respondent States seeking to pierce the corporate veil by arguing that a holding company controlled by nationals of a third State is not a qualifying investor.⁴²⁶ According to the Claimant, this is particularly the case when the applicable investment treaty does not define corporate nationality based on the nationality of the entities or persons that control the claimant, as in the case at hand.⁴²⁷ The Claimant also argues that the Respondent’s position is at odds with its own arguments in other investment arbitration cases “*where it argued that indirect investors do not qualify for investment treaty protection.*”⁴²⁸

416. The Claimant states that contrary to the Respondent’s view, Duke Energy International España Holdings S.L.U. and the Claimant are not different entities. Rather, the Claimant has been the same entity with an indirect ownership interest in Cerros Colorados since its incorporation. The Claimant says that Orazul (formerly Duke Energy International España Holdings, S.L.U.) has at all times retained legal and beneficial ownership of the totality of its investments in Argentina through its direct ownership of Orazul Energy Generating S.A. (formerly Duke Energy Generating S.A.).⁴²⁹ The Claimant notes that “*whether Orazul was historically part of the Duke Energy group of companies is irrelevant for purposes of jurisdiction.*”⁴³⁰ The Claimant also asserts that the corporate

⁴²⁴ Claimant’s Rejoinder on Preliminary Objections, ¶ 18.

⁴²⁵ *Id.*, ¶ 19.

⁴²⁶ *Id.*, ¶ 21 citing, *inter alia*, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 [hereinafter: *Saluka v. Czech Republic*] (CL-11), ¶¶ 229, 241; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (CL-289), ¶¶ 24-52; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 (AL RA-83), ¶¶ 71-110; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001 (CL-292), ¶¶ 110-122; *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability, and Principles of Quantum, 11 July 2022 (CL-594), ¶ 415.

⁴²⁷ Claimant’s Rejoinder on Preliminary Objections, ¶ 26.

⁴²⁸ *Id.*, ¶ 22, citing, *inter alia*, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003 (CL-195), ¶ 63; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (CL-186), ¶¶ 137-140; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (CL-196), ¶ 44; *Teinver v. Argentina* (CL-15), ¶¶ 208-214.

⁴²⁹ Claimant’s Observations on Respondent’s Request for Bifurcation, ¶ 84; Claimant’s Rejoinder on Preliminary Objections, ¶ 23; Bylaws of Duke Energy International España Holdings, S.L. dated 22 October 2003 (C-48), p. 1; Copies of the Orazul Companies Stock Ledgers for Law No. 23,299 dated 1992-2020 (C-3) pp. 6, 24, 27, 28 and 30 ; Unsecured Promissory Note between Orazul Energia España Holdings, S.L. and Orazul International España Holdings, S.L. dated 14 June 2017 (C-411); Letter from Orazul Energia España Holdings, S.L. accepting transfer of shares from Orazul International España Holdings, S.L. dated 14 June 2017 (C-410); Transfer of Shares Agreement between Orazul Energia España Holdings, S.L. and Orazul International España Holdings, S.L. dated 14 June 2017 (C-412).

⁴³⁰ Claimant’s Observations on Respondent’s Request for Bifurcation, ¶ 82.

changes resulting from the acquisition by I Squared Capital of Duke Energy group assets took place upstream from the Claimant and did not affect, in any way, the Claimant's status as an indirect owner of Cerros Colorados, nor its standing to bring claims under the BIT.⁴³¹

417. According to the Claimant, the BIT does not require the Claimant to be the ultimate shareholder in order for it to bring a treaty claim.⁴³² The Claimant states that it was in any event not incorporated for purposes of obtaining treaty protection and that because some of the Claimant's parent companies have been American, it could have otherwise obtained protection under the US-Argentina BIT.⁴³³
418. Furthermore, the Claimant argues on the basis of different indicia that it is a protected investor. In particular, the Claimant relies on the fact that it is incorporated in Spain, has its registered office in Spain, and is managed by a Spanish citizen based in Spain and a Spanish management company.⁴³⁴ The Claimant fully rejects the Respondent's contention that it has not brought any evidence in this regard. The Claimant also rejects the Respondent's interpretation of the BIT. The Claimant relies on a different translation of the BIT than the Respondent, which does not include any reference to a "*main office*" requirement contrary to the Respondent's version. Accordingly, the Claimant notes that there is no requirement in the Treaty that the investor has its main office in one of the State parties.⁴³⁵ In any event, the Claimant notes that were there to be a "*main office*" requirement under the BIT, it would be fulfilled, which is evidenced by different documents produced by the Claimant.⁴³⁶ The Claimant adds that under Spanish law, there is a presumption that the domicile of a corporation coincides with its effective place of management. It notes that the Respondent has not presented any evidence to overturn this presumption, nor has it indicated where it believes the Claimant's actual place of management to be.⁴³⁷
419. The Claimant also rejects the Respondent's argument pertaining to its participation in the American Chamber of Commerce in Argentina. The Claimant notes that "*AmCham*

⁴³¹ Claimant's Comments on the Claimant's Produced Documents, pp. 3-4.

⁴³² Claimant's Observations on Respondent's Request for Bifurcation, ¶ 83.

⁴³³ *Id.*, ¶ 84.

⁴³⁴ *Id.*, ¶ 86.

⁴³⁵ *Id.*, ¶¶ 87-89.

⁴³⁶ *Id.*, ¶ 92; Documents produced by Claimant include correspondence from and to Claimant indicating its address in Madrid or signed in Madrid (Exhibits C-27, C-28, C-34), a Resolution of Claimant's joint managers, who are Spanish and based in Spain, approving the initiation of the ICSID arbitration and the issuance of a power of attorney to White & Case (C-32), a Resolution of Claimant's board of directors changing the governing body to include Mr. José Arango, Intertrust Spain S.L.U, and Willem Frans sent to Claimant's domicile in Spain (C-319), certificates indicating Claimant's tax residency in Spain (C-320), Claimant's account opening agreement with a bank in Spain (C-318).

⁴³⁷ Claimant's Observations on Respondent's Request for Bifurcation, ¶ 95.

is the main binational chamber of commerce in Argentina, made up of more than 580 companies belonging to different trades, industries, and nationalities, most of which are not even of American origin.”⁴³⁸ It further notes that in any event, it is one of the Claimant’s Argentine subsidiaries rather than the Claimant itself that is a member of the chamber.⁴³⁹

420. Concerning the Claimant’s investment and whether it is protected under the BIT, the Claimant asserts that it has demonstrated that it made an investment within the meaning of Article 25 of the ICSID Convention.⁴⁴⁰ The Claimant notes that its indirect shareholding participation through Orazul Generating in Cerros Colorados as well as in the FONINVEMEM and its indirect rights through Cerros Colorados arising under the Concession Contract and the Electricity Law is “*quintessentially an investment within any notion of an investment under the ICSID Convention.*” It also notes that the BIT’s definition of an investment is particularly broad and expressly includes “*shares and other forms of participation in companies,*” “*rights derived from any kind of contribution,*” “*movable and immovable property,*” and any “*concession granted by law or by virtue of a contract.*”⁴⁴¹
421. Finally, the Claimant submits that there is no abuse of process in this case as the Claimant was constituted long before it sought protection under the BIT.⁴⁴² According to the Claimant, the dispute was not reasonably foreseeable in December 2003 as the Government’s measures were supposed to be only temporary and the reorganization’s goal was not to obtain treaty protection.⁴⁴³

3. The Tribunal’s analysis

422. The Tribunal must determine four issues under the Respondent’s objection, namely its jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*, as well as the allegation of an abuse of right.

⁴³⁸ *Id.*, ¶ 94.

⁴³⁹ *Id.*, ¶ 94.

⁴⁴⁰ *Id.*, ¶ 97.

⁴⁴¹ *Id.*, ¶ 100.

⁴⁴² Claimant’s Counter-Memorial on Preliminary Objections, ¶¶ 208 *et seq.*

⁴⁴³ Claimant’s Rejoinder on Preliminary Objections, ¶¶ 31 *et seq.*

a) The Tribunal’s jurisdiction *ratione personae*

423. Turning to its *ratione personae* jurisdiction, the Tribunal finds that the Claimant must qualify as a national of Spain within the meaning of Article 25(1) and (2)(b) of the ICSID Convention and Article I(1)(b) of the BIT.

424. Article 25 of the ICSID Convention provides in relevant part:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. [...]

(2) “National of another Contracting State” means: [...]

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

425. It is well accepted that Article 25 of the ICSID Convention leaves it to the contracting parties to determine nationality.⁴⁴⁴ The BIT contracting parties thus enjoy wide latitude in defining what legal entities are to be considered as nationals for the purpose of the ICSID Convention. In this regard, the Tribunal notes that Spain and Argentina have defined the criteria of nationality in the BIT as follows:

426. Article I(1)(b) of the English translation of the BIT provided by the Claimant defines the term “investor” as:

*[a]ny legal entity, including any company, business firm, and other organizations which have been incorporated in accordance with the law of that Party and have their seat in the territory of the same party.*⁴⁴⁵

427. The Spanish version of the BIT provides that “investors” (*inversores*) are:

[l]as personas jurídicas incluidas compañías, asociaciones de compañías, sociedades mercantiles y otras organizaciones que se encuentren

⁴⁴⁴ *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018 (CL-470), ¶ 85.

⁴⁴⁵ Treaty (CL-246), Article I(1)(b).

*constituidas según el derecho de esa Parte y tengan su sede en el territorio de esa misma Parte.*⁴⁴⁶

428. It is undisputed between the Parties that the BIT establishes two criteria to determine the nationality of legal entities: the legal entity must (1) be constituted in accordance with the law of Spain and (2) have what is referenced as “*sede*” in the original Spanish version of the BIT in Spain.
429. With respect to the first criterion, the Parties are in agreement. They agree that it requires an assessment of whether the Claimant is a company incorporated in accordance with the laws of Spain. While the Respondent is of the view that the Claimant is a “*shell company*” sharing its domicile “*with, at least, 19 other companies,*”⁴⁴⁷ it does not dispute that the Claimant is a company incorporated in accordance with the laws of Spain.⁴⁴⁸ The Tribunal therefore finds that the Claimant fulfills the first criterion.
430. With respect to the second criterion, the Parties are in disagreement.
431. The Respondent contends that the term “*sede*” means “*main office*” and that the Claimant must have its effective main office in Spain. According to the Respondent, the requirement that a legal entity must have its main office in one of the State parties means something more than merely reporting a domicile in that territory, which is already covered by the requirement of constitution in one of the State parties. According to the Respondent, the Claimant has in fact no real activity in Spain as it is a shell company used “*as a vehicle by a US company in order to unduly gain access to the protection afforded by the Argentina-Spain BIT.*”⁴⁴⁹
432. Conversely, the Claimant is of the view that “*sede*” means “*seat*” and that there is no requirement in the BIT that the investor have its main office or place of effective management in one of the State parties. According to the Claimant, such requirement would in any event be fulfilled.
433. In this regard, even if the term “*sede*” requires more than simply reporting a domicile, the Tribunal notes that the Claimant appears to have its actual place of management in Spain.
434. The Tribunal recalls that the tribunal in *Tenaris and Talta v. Venezuela* found:

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 139.

⁴⁴⁸ Articles of Incorporation of Duke Energy International España Holdings, S.L. dated 22 October 2003 (C-48), Article 1; Resolutions of the Sole Shareholder of Duke Energy International España Holdings, S.L.U. dated 17 January 2017 (C-212), Resolution 7.

⁴⁴⁹ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 116, 139.

In assessing whether Tenaris' and Talta's actual or effective management was located in Luxembourg and Portugal respectively, the Tribunal considers it critical to take into account the actual nature of each company, and its actual activities.

In so far as either entity is no more than a holding company, or a company with little or no day-to-day operational activities, its day-to-day "management" will necessarily be very limited, and so will its physical links with its corporate seat. Put another way, it would be entirely unreasonable to expect a mere holding company, or a company with little or no operational responsibility, to maintain extensive offices or workforce, or to be able to provide evidence of extensive activities, at its corporate location. And yet holding companies, and companies with little or no operational responsibility, have "management", and are certainly not excluded from the Treaties in this case. Indeed, countries such as Luxembourg and Portugal clearly consider it to their respective benefit to attract such companies, and to maintain a corporate regulatory regime that allows for them.

*To this end, the Tribunal considers that the test of actual or effective management must be a flexible one, which takes into account the precise nature of the company in question and its actual activities.*⁴⁵⁰

435. The Tribunal agrees with the *Tenaris and Talta v. Venezuela* tribunal that the test of actual or effective management must be a flexible one which considers the precise nature of the company in question.
436. In the case at hand, the Claimant is a holding company, whose purpose is limited, as set out in its Articles of Incorporation dated 22 October 2003, to “*manage and administer shares and other securities that represent funds of entities residing outside the territory of Spain.*”⁴⁵¹
437. In addition, the Tribunal has considered the following elements of the record, which constitute indicia that the Claimant’s domicile coincides with its effective place of management:
- The Claimant’s Articles of Incorporation, which show that the company was initially domiciled in Bilbao at Gran Vía Don Diego López de Haro 45, sexta

⁴⁵⁰ *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016 [hereinafter: *Tenaris v. Venezuela*] (CL-450), ¶¶ 198-200.

⁴⁵¹ Articles of Incorporation of Duke Energy International España Holdings, S.L. dated 22 October 2003 (C-48), Article 2.

planta,⁴⁵² later in Madrid at Calle Hermosilla 11, 4^oA,⁴⁵³ and eventually in Madrid at Calle Serrano 41, 4;⁴⁵⁴

- The Claimant’s sole shareholder is INTERTRUST (SPAIN), S.A., a company of Spanish nationality domiciled in Madrid;⁴⁵⁵
- Two out of three of the Claimant’s directors have Spanish nationality;⁴⁵⁶
- Certificates indicating that the Claimant’s tax residency is in Spain;⁴⁵⁷
- The Claimant’s account opening agreement with Banco Santander in Spain;⁴⁵⁸
- The absence of any indication that the Claimant would have any other offices outside of Spain;
- The Plan of Reorganization which entered into force on 6 November 2003, which foresaw that the Claimant was “*a newly formed Spanish company,*”⁴⁵⁹
- The unrebutted presumption existing under Spanish law that the domicile of a corporation coincides with its effective place of management.⁴⁶⁰

438. Thus, even if the notion of “*sede*” requires more than simply reporting a domicile, the Tribunal finds that the Claimant has its actual place of management in Spain.

439. The Tribunal therefore concludes that the Claimant is a protected investor under the BIT and that it has jurisdiction *ratione personae*.

b) The Tribunal’s jurisdiction *ratione materiae*

440. Turning to the Tribunal’s jurisdiction *ratione materiae*, the Tribunal refers to Article 25(1) of the ICSID Convention, which provides in relevant part:

⁴⁵² *Id.*, Article 3.

⁴⁵³ Decision of the Sole Shareholder of Duke Energy International España Holdings, S.L.U. dated 7 June 2010 (C-83), 2.

⁴⁵⁴ Decision of the Joint Managers of Orazul International España Holdings, S.L. dated 17 November 2017 (C-82), 2.

⁴⁵⁵ Decision of the Sole Shareholder of Duke Energy International España Holdings, S.L.U. dated 7 June 2010 (C-83), 1.

⁴⁵⁶ Certificate of Orazul International España Holdings S.L. and Power of Attorney dated 1 August 2019 (C-32); Resolution of the Board of Directors dated 29 June 2020 (C-319).

⁴⁵⁷ Tax residency certificates for Orazul International España Holdings S.L. dated June 2019 and August 2020 (C-320).

⁴⁵⁸ Account opening contract for Orazul International España Holdings S.L. with Banco Santander dated 1 October 2018 (C-318), 1.

⁴⁵⁹ Reorganization Plan for the Ownership of Certain Companies Owned by Duke Energy International Latin America, Ltd, effective as of 6 November 2003 (C-568), ¶ 3.

⁴⁶⁰ Law on Corporations, Legislative Decree 1/2010 dated 2 July 2010 (C-322), Article 9; Spanish Mercantile Registry Regulation, Legislative Decree 1784/1996 dated 19 July 1996 (C-315), Article 7.

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

441. Article I(2) of the BIT defines protected “investments” as:

any kind of asset, such as goods and rights of any kind, acquired or effected in accordance with the laws of the host country and, in particular, but not exclusively, the following:

shares and other kinds of interests in companies.

rights arising from any kind of contribution intended to create economic value, including loans directly related to a specific investment, whether or not capitalized.

personal and real property, as well as property rights such as mortgages, liens, pledges, usufructs, and similar rights.

any kind of intellectual property rights, including invention patents and trademarks, as well as manufacturing licenses and know-how.

any right to engage in economic and business activities conferred by law or by contract, in particular those related to prospection, cultivation, extraction, and development of natural resources.

The contents and scope of the rights relating to each category of assets shall be as determined by the laws and regulations of the Party in whose territory the investment is located.

*No change in the legal form in which the assets and capital have been invested or reinvested shall affect their qualifying as investments in accordance with this Agreement.*⁴⁶¹

442. The Tribunal’s jurisdiction may only be entertained as long as there is an “investment” in both the sense of the BIT and the ICSID Convention.

443. With respect to the notion of investment under the BIT, the Tribunal notes that the BIT contains a broad definition of the term “investment.” The term expressly includes “shares and other kinds of interests in companies,” “rights arising from any kind of contribution,” “personal and real property,” “any kind of intellectual property rights,”

⁴⁶¹ Treaty (CL-246), Article I(2).

and “any right to engage in economic and business activities conferred by law or by contract” among the non-exhaustive list provided therein.⁴⁶²

444. Contrary to what the Respondent says, the BIT does not limit the scope of the notion of investment to an active investment. On the contrary, the BIT applies to “any kind of asset” “acquired” or “effected.”
445. In the case at hand, the Claimant indirectly owned 90.87% of the Cerros Colorados shares through Orazul Generating, which shareholding was eventually decreased to 86.33%.⁴⁶³ The Tribunal finds that this satisfies the requirements for an investment under the BIT.
446. With respect to the notion of investment under the ICSID Convention, the Tribunal recalls that the ICSID Convention does not define such term. As held by a number of investment tribunals, the notion of investment must be given an objective definition, which cannot be circumvented by the Parties.⁴⁶⁴ The Tribunal considers that the ordinary meaning of the term “investment” comprises at a minimum the features of (i) a contribution or allocation of resources, (ii) a duration; and (iii) risk.⁴⁶⁵
447. The Tribunal therefore turns to the question of whether these three features of an investment are fulfilled. Having carefully reviewed the evidence on the record, the Tribunal has come to the conclusion that they are:
- The Claimant’s investment involved a significant financial commitment to operate power plants in the Argentine electricity sector: while the Claimant acquired its shareholding free of charge by means of a restructuring within the Duke group of companies, it appears that Duke Energy International initially acquired a portfolio of hydroelectric, natural gas and diesel power generation businesses in Argentina, Belize, Bolivia and Peru for a substantial sum of

⁴⁶² *Ibid.*

⁴⁶³ Copies of the Orazul Companies Stock Ledgers for Law No. 23,299 dated 1992-2020 (C-3), 28; Unsecured Promissory Note between Orazul Energia España Holdings, S.L. and Orazul International España Holdings, S.L. dated 14 June 2017 (C-411); Letter from Orazul Energia España Holdings, S.L. accepting transfer of shares from Orazul International España Holdings, S.L. dated 14 June 2017 (C-410); Transfer of Shares Agreement between Orazul Energia España Holdings, S.L. and Orazul International España Holdings, S.L. dated 14 June 2017 (C-412).

⁴⁶⁴ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (AL RA-85), ¶¶ 49-50; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005 (CL-201), ¶ 278; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (AL RA-95), ¶¶ 61, 211 *et seq.*

⁴⁶⁵ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (CL-302), ¶ 295 (“The development of ICSID case law suggests that only three [...] criteria, namely contribution, risk and duration should be used as the benchmarks of investment [...].”).

approximately \$405 million in August 1999⁴⁶⁶ and transmitted its shareholding interest in Cerros Colorados to the Claimant in 2003 through the restructuring of the investment; this indeed refers to the strictest definition of an indirect investment;⁴⁶⁷

- The Claimant’s investment is evidently a long-term project, and was in place for nearly two decades before the filing of its claims;
- Orazul has assumed risks when investing in Argentina.

448. The Tribunal accordingly concludes that the Claimant has made an investment within the meaning of the Argentina-Spain BIT and the ICSID Convention.

c) The Tribunal’s jurisdiction *ratione temporis*

449. The Tribunal turns to its jurisdiction *ratione temporis*. In this respect, the Tribunal agrees with the Respondent that the Claimant must prove it has made an investment prior to the moment when the event on which its claims are based occurred.⁴⁶⁸

450. The Respondent does not dispute that Duke Energy International España Holdings S.L.U. acquired a 99.92% interest in Duke Energy Generating S.A. and thus acquired an indirect 90.80% interest in Cerros Colorados in December 2003.⁴⁶⁹ The Tribunal also finds that the evidence on the record shows that the Claimant has held the investment at all times since its acquisition. The only change in corporate ownership concerns the decrease of the Claimant’s indirect participation in Cerros Colorados from 90.87% to 86.33%, which could have a consequence on the calculation of the claimed damages.⁴⁷⁰ The Claimant also changed its corporate name but such change does not have any effect on the Claimant’s continued ownership of the investment.

451. The fact that the Claimant’s ultimate parent company acquired the Claimant in 2016 likewise has no bearing on the Claimant’s claim.

452. The Claimant has thus proven that it owned its investment since December 2003.

⁴⁶⁶ Duke Energy Corporation, 10-K for the Fiscal Year ended 31 December 1999 dated 20 March 2000 (available at <http://getfilings.com/o0000950109-00-001035.html>) (C-94), 41, 148.

⁴⁶⁷ See above paragraph 446.

⁴⁶⁸ *Cementownia v. Turkey* (AL RA-51), ¶¶ 112-114; see also *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 [hereinafter: *Libananco v. Turkey*] (AL RA-52), ¶¶ 121-128; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008 (CL-397), ¶¶ 106–107; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011 (AL RA-243), ¶ 170; *ST-AD GmbH v. Bulgaria*, Decision on Jurisdiction, 18 July 2013 (AL RA-42), ¶ 300; *Philip Morris v. Australia* (AL RA-54), ¶ 529.

⁴⁶⁹ Copies of the Orazul Companies Stock Ledgers for Law 23,299 dated 1992-2020 (C-3).

⁴⁷⁰ *Id.*, 6, 24, 27, 30.

453. The Claimant takes issue with resolutions adopted in 2003, in particular Resolutions 240/03 and 406/03,⁴⁷¹ to the extent that these were not reversed by mid-2006 or, in the alternative, by February 2010, *i.e.*, after December 2003.
454. Accordingly, the Tribunal finds that the Claimant made an investment prior to the moment when the events on which its claims are based occurred and that the Claimant owned the investment at all relevant time. The Tribunal thus has jurisdiction *ratione temporis*.

d) Whether the Claimant has abused its right

455. Finally, the Tribunal turns to the allegation that the Claimant abused its right to bring a claim.
456. It is undisputable that the threshold for finding an abusive initiation of an investment claim is high.⁴⁷² A tribunal must conduct an objective test for a finding of an abuse, taking all relevant factors into consideration, including, for example, the timing of the investment, the timing of the claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring.⁴⁷³
457. An abuse of right may be present if the dispute was reasonably foreseeable at the time the nationality was adopted. The Tribunal agrees with the finding of the *Pac Rim* tribunal that for a dispute to be foreseeable, a party must “*see an actual dispute or [...] foresee a specific future dispute as a very high probability and not merely as a possible controversy.*”⁴⁷⁴
458. The Tribunal finds that the Claimant’s dispute was not foreseeable at the time of the Claimant’s investment at the end of 2003. As held above, the Tribunal notes that although Resolutions 240/03 and 406/03, adopted before the Claimant’s investment, are central to the Claimant’s case, the Claimant is not bringing a dispute against them. The Claimant’s claims are rather based on the Government’s alleged continuous failure to

⁴⁷¹ Resolution 240/2003 dated 14 August 2003 (C-8); Resolution 406/2003 dated 8 September 2003 (C-9).

⁴⁷² *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020 (JV-27), ¶ 6.9; *Caratube International Oil Company LLP and Devincei Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 (CL-553), ¶ 395; *Philip Morris v. Australia* (CL-193), ¶ 554; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014 (CL-580), ¶ 295; *Chevron Corporation (U.S.A) and Texaco Petroleum Company (USA) v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 (AL RA-236), ¶ 354.

⁴⁷³ *Transglobal v. Panama* (JV-25), ¶ 103.

⁴⁷⁴ *Pac Rim v. El Salvador* (CL-251), ¶ 2.99.

reverse Resolutions 240/03 and 406/03, described as “*transitory*” measures, as well as a number of other measures spanning a decade after the Claimant’s investment.

459. The Tribunal also notes that the Respondent cites the findings of tribunals, such as in the *Phoenix v. Czech Republic* or *Venezuela Holdings v. Venezuela* cases, in which a dispute was not only foreseeable but pre-existed. It is however clear from the case at hand that although there was a pending dispute between AGEERA and the Argentine Republic at the time of the Claimant’s incorporation in Spain,⁴⁷⁵ the Claimant did not have a pre-existing dispute with the Respondent. The Claimant joined the AGEERA appeal only later on 25 March 2004.⁴⁷⁶
460. The Tribunal is likewise not convinced by the Respondent’s allegation that the Claimant has adopted a Spanish seat solely to acquire treaty protection. Specifically, the Respondent has not shown that the investment was restructured for the sole purpose of unduly obtaining access to investment treaty protection.
461. On the contrary, the Tribunal notes from the Reorganization Plan for the Ownership of Certain Companies Owned by Duke Energy International Latin America, Ltd submitted as Exhibit C-568 that the restructuring of the Claimant’s investment was done to
- (i) facilitate compliance with newly issued Resolution 7/2003 Section 1 of the Argentine Superintendency of Corporations, (ii) relocate certain holding companies to countries more favorable for Argentine purposes, (iii) streamline the organizational structure and thus minimize administration costs, and (iv) obtain certain Argentine tax benefits derived from the tax treaty between Spain and Argentina.*⁴⁷⁷
462. The Claimant’s witnesses confirmed the tax-driven reorganization during the Hearing. The Claimant’s witness Ms. Bertone confirmed that “*the purpose of that reorganization was exclusively tax*” and that “*nobody was thinking about bringing any claims against Argentina at that point in time.*”⁴⁷⁸ Mr. McGee also clarified that the purpose of the reorganization was “*primarily tax-driven.*”⁴⁷⁹

⁴⁷⁵ Administrative appeal filed by AGEERA against Resolution 240/2003 dated 30 September 2003 (A RA-331), p. 1.

⁴⁷⁶ Cerros Colorados, Submission Joining AGEERA’s Administrative Appeal Against Resolution 240/03 dated 25 March 2004 (C-288).

⁴⁷⁷ Reorganization Plan for the Ownership of Certain Companies Owned by Duke Energy International Latin America, Ltd dated 6 November 2003 (C-568).

⁴⁷⁸ Hearing Transcript, Day 3, p. 739; see also Hearing Transcript, Day 3, p. 579.

⁴⁷⁹ Hearing Transcript, Day 2, pp. 359, 464, 474.

463. Against this background, the Tribunal finds no evidence to support the Respondent's assertion that the investment was restructured for the sole purpose of unduly obtaining access to investment treaty protection.
464. Furthermore, the Tribunal finds it not credible that the Claimant's parent company would have restructured its investments so as to create a Spanish holding company to acquire treaty protection, when a BIT was in any event in force between Argentina and the United States, *i.e.*, the country of nationality of the Claimant's parent company, and the dispute was brought more than 16 years after the reorganization.
465. The Tribunal thus rejects the Respondent's claim that the Claimant abused its right to bring claims.

V. The Respondent's claim that the Claimant has consented to the contested measures and waived its right to bring any claims concerning the contested measures

466. The Tribunal moves on by addressing the Respondent's fifth preliminary objection, which is based on the allegation that the Claimant has consented to the measures and waived its right to bring any claims concerning the contested measures.

1. The Respondent's position

467. The Respondent submits that the Claimant's claims are inadmissible because the measures at issue in this arbitration were contemporaneously consented to and the right to claim for them has been waived.⁴⁸⁰
468. According to the Respondent, the principles of estoppel and good faith prevent the Claimant from acting inconsistently.⁴⁸¹
469. For the principle of estoppel to apply, the Respondent states that it is sufficient for one party to make a representation on which the other party relies, when such situation generates a benefit for the party that made the representation. The Respondent's expert, Prof. Viñuales, submits that no formality in the representations is required for them to be deemed valid.⁴⁸² According to the Respondent, the Tribunal must take into account the context of the representations made by the parties.⁴⁸³

⁴⁸⁰ Respondent's Reply on Preliminary Objections, II.D; Respondent's Post-Hearing Brief, ¶¶ 39 *et seq.*

⁴⁸¹ *Id.*, ¶ 179.

⁴⁸² *Id.*, ¶ 183; Expert Report of Jorge E. Viñuales, ¶¶ 124 *et seq.*

⁴⁸³ Respondent's Reply on Preliminary Objections, ¶ 184; Expert Report of Jorge E. Viñuales, ¶ 128; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 [hereinafter: *ADC v. Hungary*] (CL-41), ¶ 475.

470. In the present case, the Respondent asserts that the Claimant’s entry into various agreements with the State starting in 2004⁴⁸⁴ – together with the Claimant’s adhesion to the remuneration regime provided for in Resolution 95/13 and agreement to the payment of the claims relating to the application of Resolutions 406/03, 95/13, 529/14, 482/15, 22/16, and other supplementary regulations – has had the consequence that the Parties have accepted all challenged measures and waived all rights to bring claims based on those measures.⁴⁸⁵ The Respondent states that the Claimant again as recently as May 2021 expressed its agreement with the cost remuneration scheme by adhering to Resolution 440/21.⁴⁸⁶
471. In addition, the 2016 I Squared Capital SPA explicitly provides that certain commitments may need to be undertaken by Cerros Colorados, which further confirms the Respondent’s position.⁴⁸⁷
472. The Respondent states that the wording of the waivers is unambiguous and that the terms “*any rights*” and “*any actions and/or claims*” include not only domestic claims but also international claims.⁴⁸⁸ According to the Respondent, the fact that Resolution 95/13 does not mention international arbitration but judicial and administrative claims only does not change the fact that the Claimant consented and voluntarily submitted to the average cost remuneration scheme of such Resolution.⁴⁸⁹ In any event, the Claimant consented again to the average cost remuneration scheme by virtue of Resolution 440/21, in the context of which the Claimant expressly stated that it agreed to “*avoid any type of filing, claim or lawsuit that may eventually be filed by any shareholder, within the Argentine Republic or abroad, or before international organizations and/or courts.*”⁴⁹⁰
473. The Respondent disputes the Claimant’s contention that the waivers were obtained under duress. According to the Respondent, the Claimant has not produced any evidence to support its account and merely refers to isolated paragraphs from other arbitrations

⁴⁸⁴ According to Respondent, these include *inter alia* the FONINVEMEM I Agreement executed in 2005, the FONINVEMEM II Agreement executed in 2010, and the 2019 Agreement for the Regularization and Payment of Receivables with the Wholesale Electric Market. See Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 13.

⁴⁸⁵ Respondent’s Objections to Jurisdiction, II.D.; Respondent’s Reply on Preliminary Objections, ¶ 177.

⁴⁸⁶ Letter from Orasul Energy Cerros Colorados S.A. to CAMMESA, 17 June 2021 (A RA-332).

⁴⁸⁷ Purchase and Sale Agreement by and among Duke Energy Brazil Holdings II, C.V., Duke Energy International Uruguay Investments SRL, Duke Energy International Group S.A.R.L., Duke Energy International España Holdings SL, Duke Energy International Investments No. 2 LTD., ISQ Enerlam Aggregator, L.P., and Enerlam (UK) Holdings LTD dated 10 October 2016 (C-596); Respondent’s Comments on the Claimant’s Produced Documents, p. 4.

⁴⁸⁸ Respondent’s Reply on Preliminary Objections, ¶ 192.

⁴⁸⁹ *Id.*, ¶ 193.

⁴⁹⁰ Respondent’s Reply on Preliminary Objections, ¶ 194; Letter from Orasul Energy Cerros Colorados S.A. to CAMMESA, 17 June 2021 (A RA-332).

against the Respondent, where tribunals have considered facts bearing no resemblance to the Claimant's situation.⁴⁹¹

474. The Respondent also rejects the Claimant's argument that the Respondent would not have complied with its own commitments.⁴⁹² On the contrary, the Respondent argues that the generators and the Argentine Republic had a "*close and mutually cooperative relationship*" and all readjustments of commitments were decided in consultation with the generators.⁴⁹³
475. The Respondent disagrees with the Claimant's argument according to which waivers are not enforceable against it because there is no identity of parties. In particular, the Respondent submits that because Duke Energy as the majority shareholder of Cerros Colorados formed the corporate will of Cerros Colorados at the time the waivers were granted, all agreements and waivers must necessarily have been consented to by the Claimant.⁴⁹⁴ The Respondent recalls that the Claimant and its expert quote *El Paso v. Argentina* and note that tribunals are unlikely to impute purported waivers by local companies to their foreign shareholders. According to the Respondent, the Claimant fails to mention that the tribunal in *El Paso v. Argentina* took into account the fact that El Paso only held a minority interest in the domestic company and did not control it. This circumstance differs from this case, where Duke Energy formed the corporate will of Cerros Colorados at the time the waivers were granted.⁴⁹⁵
476. The Respondent also disagrees with the Claimant's international legal expert's argument according to which the Claimant's waiver has no basis under international law and "*a forum selection clause in a contract pointing to domestic courts will not be regarded as a waiver of the jurisdiction of an international tribunal based on a treaty.*"⁴⁹⁶ According to the Respondent, the Claimant's argument is not applicable as the Tribunal is not faced with a discussion over a forum selection clause in a contract pointing only to domestic courts.
477. The Respondent further disagrees with the Claimant's contention that a "*waiver of future claims*" would be "*unlawful under Argentine law*" and that "*the waiver is inconsequential [...] because it is specific to administrative and/or judicial claims.*"⁴⁹⁷ According to the Respondent, the Claimant fails to explain what it means when it states

⁴⁹¹ Respondent's Reply on Preliminary Objections, ¶¶ 202, 208 *et seq.*

⁴⁹² *Id.*, ¶¶ 204 *et seq.*, 219 *et seq.*

⁴⁹³ *Ibid.*

⁴⁹⁴ *Id.*, ¶¶ 196-198.

⁴⁹⁵ *Id.*, ¶ 197.

⁴⁹⁶ Respondent's Reply on Preliminary Objections, ¶¶ 188-189 referring to Counter-Memorial on Preliminary Objections, ¶ 259; Legal Opinion of Christoph Schreuer, ¶ 263.

⁴⁹⁷ Claimant's Reply on the Merits, ¶¶ 286 *et seq.*

that the waiver contained in the FONINVEMEM II Agreement includes a “*waiver of future claims*.” The Claimant also fails to explain how the Opinion issued by the Legal Department of the Federal Planning and Investment Ministry, which is enclosed to allegedly support its argument despite the fact that it does not refer to the FONINVEMEM II Agreement, applies to this case. In any event, under Argentine law, the rule is that economic rights can be waived, even if the rights in question are contingent or conditional.

2. The Claimant’s position

478. The Claimant rejects the Respondent’s argument according to which the Claimant would have waived claims against the Argentine Republic.⁴⁹⁸
479. As a preliminary matter, the Claimant is of the view that the Respondent’s objection is flawed because questions of waiver have no bearing upon a tribunal’s jurisdiction.⁴⁹⁹ In any event, the Claimant submits that it has not waived any claims.
480. According to the Claimant, the waivers, if any, by Cerros Colorados are irrelevant because they have no effect *vis-à-vis* Orazul.⁵⁰⁰ The Claimant submits that the tribunals in *El Paso v. Argentina* as well as in *Sempra v. Argentina* unequivocally found that the waivers expressed by the relevant subsidiaries did not affect the rights of the foreign investors since they were *res inter alios acta*.⁵⁰¹ According to the Claimant, the Respondent confuses two ideas: (i) that a locally-incorporated entity can share its expectations with its foreign parent company (particularly when, as in the instant case, the local entity is wholly-owned by the foreign shareholder); and (ii) the well-established international investment law principle that a local company’s waiver does not apply to its foreign parent company because of the non-identity of the parties and subject matter. The Respondent also ignores the basic principle that a legal entity can only validly waive its own rights or rights over which it has the power to dispose. Here, the right to claim against Argentina under the BIT belongs to Orazul and, thus, cannot be waived by Cerros Colorados.⁵⁰²

⁴⁹⁸ Claimant’s Observations on Respondent’s Request for Bifurcation, II.D.

⁴⁹⁹ Claimant’s Rejoinder on Preliminary Objections, ¶ 132.

⁵⁰⁰ Claimant’s Counter-Memorial on Preliminary Objections, ¶¶ 264 *et seq.*

⁵⁰¹ Claimant’s Counter-Memorial on Preliminary Objections, ¶ 269; Claimant’s Rejoinder on Preliminary Objections, ¶ 140; Legal Opinion of Christoph Schreuer, ¶¶ 288, 290; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 [hereinafter: *Sempra v. Argentina*] (CL-27), ¶¶ 224-228; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 [hereinafter: *El Paso v. Argentina*] (CL-23), ¶¶ 549-551.

⁵⁰² Claimant’s Rejoinder on Preliminary Objections, ¶ 142.

481. Furthermore, by the terms of the agreements the Respondent invokes (*i.e., inter alia*, Resolutions 240/03, 406/03 and subsequent measures issued by the Energy Secretariat between 2003 and December 2011, as well as Resolution 95/13), the entities allegedly waiving any claims are the “*generators*,” not their foreign parent companies or the direct or indirect investors.⁵⁰³ In this respect, the Claimant contrasts the alleged waiver with a waiver recently imposed on Cerros Colorados, whereby it agreed to “*dismantle any type of presentation, claim or demand that could eventually be formulated by any of its shareholders, within the Argentine Republic or abroad, or before international bodies and/or courts.*”⁵⁰⁴
482. The Claimant also states that the alleged waiver does not extend to rights under the BIT. In this respect, the Claimant’s international legal expert submits that there is an “*established . . . principle that a forum selection clause in a contract pointing to domestic courts will not be regarded as a waiver of the jurisdiction of an international tribunal based on a treaty*”⁵⁰⁵ and extends this finding to independent waiver clauses in contracts.⁵⁰⁶ The Claimant relies on the finding of the tribunal in *Toto Costruzioni v. Lebanon*, which held that when a party waives its contractual claims, it does not waive its treaty claims.⁵⁰⁷
483. The Claimant alleges that the waiver of future claims is unlawful under Argentine law, as recognized by the Federal Planning and Investment Ministry.⁵⁰⁸ In addition, the waiver is inconsequential for purposes of this dispute because it is specific to administrative and/or judicial claims and Cerros Colorados cannot waive the Claimant’s rights under the BIT. Furthermore, the Claimant submits that under Argentine law, waivers of rights must be interpreted restrictively and cannot be presumed.⁵⁰⁹
484. The Claimant’s expert Prof. Schreuer explained that for any waiver to operate at a treaty claim level it must be clear and explicit.⁵¹⁰ For the present case, the Claimant submits, this means that a waiver cannot affect the Claimant’s right to bring its treaty claims unless the waiver expressly refers to the rights under the Treaty, including the waiver of the right of action through ICSID arbitration against the Respondent, which is not the

⁵⁰³ Claimant’s Counter-Memorial on Preliminary Objections, ¶ 264; Claimant’s Rejoinder on Preliminary Objections, ¶¶ 134-135.

⁵⁰⁴ Claimant’s Rejoinder on Preliminary Objections, ¶ 136; CAMMESA’s Note B-156035-1 and Template Waiver dated 21 May 2021 (C-334), ¶¶ 2-3.

⁵⁰⁵ Legal Opinion of Christoph Schreuer, ¶ 263.

⁵⁰⁶ *Id.*, ¶¶ 259 *et seq.*

⁵⁰⁷ *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Award, 7 June 2012 [hereinafter: *Toto v. Lebanon*] (CL-65), ¶ 85.

⁵⁰⁸ Claimant’s Memorial, ¶ 254; Legal Department, Ministry of Federal Planning, Public Investment and Services, *Legal Opinion in Administrative Docket No EXP-S01:0060219/2013 (Part 13)* dated 23 June 2015 (C-254), 7.

⁵⁰⁹ Claimant’s Reply, ¶ 279; Civil and Commercial Code (C-330), Article 948.

⁵¹⁰ Legal Opinion of Christoph Schreuer, ¶¶ 277-286.

case here.⁵¹¹ In this regard, the ILC has explained by reference to the ICJ's *Nauru* case that for a waiver to exist "*the conduct or statement must be unequivocal.*"⁵¹²

485. Had the Respondent wished for the Claimant to waive its rights to arbitration, the Claimant submits, the Respondent could have included specific language in that respect.⁵¹³ In particular, the Claimant refers to wording the Respondent used in an agreement with another foreign investor, which specifically waived the investor's right to bring arbitral proceedings against Argentina.⁵¹⁴ According to the Claimant, had the Government intended to impose the alleged waivers on foreign investors or with respect to arbitral claims, it should have specified so in the alleged waivers.⁵¹⁵ Thus, on their own terms, none of the alleged waivers that the Respondent invokes can result in Orazul's waiver of its BIT claims.⁵¹⁶
486. The Claimant also submits that the alleged waivers are not enforceable. In particular, the Claimant argues that the alleged waivers were unilaterally imposed by the Government on Cerros Colorados and, therefore, Cerros Colorados had no choice but to accept the agreements and resolutions containing the waivers.⁵¹⁷ According to the Claimant, participating in FONINVEMEM I was the only way for Cerros Colorados to collect the receivables that it had accumulated during 2004-2007, and FONINVEMEM II the only way for it to collect the receivables it was owed for 2008-2011, during a time when Cerros Colorados was undergoing severe financial difficulties as a result of the Government's continued extension of the measures and its failure to comply with its commitments under Resolution 724/08.⁵¹⁸ The Claimant submits that the Government provided no alternatives for repayment to generators that chose not to participate in the FONINVEMEM.⁵¹⁹ With respect to the Respondent's argument that the 2016 SPA shows that the Claimant willingly supported Cerros Colorados entering into successive agreements, the Claimant submits that the statements made therein are neutral and merely indicate that certain commitments may need to be undertaken relating to: (i) the

⁵¹¹ Claimant's Rejoinder on Preliminary Objections, ¶ 143.

⁵¹² *ILC's Articles on State Responsibility: Responsibility of States for Internationally Wrongful Acts*, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (CL-131) Article 45, comment 5.

⁵¹³ Claimant's Observations on Respondent's Request for Bifurcation, ¶¶ 111-112.

⁵¹⁴ Agreement entered between Argentina and Camuzzi Gas del Sur SA, 23 October 2008 (C-316), Article 18.

⁵¹⁵ Claimant's Rejoinder on Preliminary Objections, ¶ 137.

⁵¹⁶ *Ibid.*

⁵¹⁷ Claimant's Counter-Memorial on Preliminary Objections, ¶¶ 271 *et seq.*; Claimant's Rejoinder on Preliminary Objections, ¶¶ 154 *et seq.*

⁵¹⁸ Claimant's Rejoinder on Preliminary Objections, ¶ 155; Bertone, ¶ 21.

⁵¹⁹ Tierno II, ¶ 56; Tierno I, ¶ 66. See *Duke Energy Argentina, Government Affairs* dated March 2005 (C-341), pp. 8-9. See also Letter from Duke Energy Argentina and Hidroeléctrica Cerros Colorados S.A. to the Undersecretary of Energy dated 18 April 2005 (A RA-199); Note SE No. 0359 dated 21 April 2005 (A RA-201); Meeting Minutes between the Energy Secretariat and Cerros Colorados dated 23 May 2005 (C-517).

FONINVEMEM companies “in order to [...] amend to the original conditions of repayment and operation conditions;” and (ii) “agreements with the Ministry of Energy and/or CAMMESA related to the assignment or contribution of Duke Energy Cerros Colorados SA’s outstanding CAMMESA receivables” and/or future outstanding CAMMESA receivables to be accrued. According to the Claimant, if anything, these statements confirm the uncertainty surrounding Cerros Colorados’ ability to collect its outstanding receivables and Argentina’s failure to observe its commitments under FONINVEMEM.⁵²⁰

487. The Claimant also submits that the Respondent breached the agreements containing the alleged waivers and, therefore, cannot now enforce any alleged waivers.⁵²¹ Specifically, within the FONINVEMEM Adhesion Contract, the FONINVEMEM I Agreement, and other public statements made in the context of FONINVEMEM I, the Government expressly committed to restoring the WEM in accordance with the Electricity Law. The Government conditioned its ability to fulfill these obligations on the construction and operation of the FONINVEMEM Plants. However, the Government failed to honor its commitments despite the plants becoming operational in February 2010.⁵²² The Claimant submits that the Government also breached its promises under Resolution 95/13 and its amendments. Thus, in light of the Respondent’s breaches, the Respondent cannot now enforce any of these alleged waivers.
488. The Claimant rejects the Respondent’s estoppel argument. The Claimant refers to the ICJ case law which has found that estoppel requires: (i) a clear and unequivocal representation by one party upon which the other party has relied; and (ii) reliance to the other party’s detriment.⁵²³ The Claimant submits that instead of applying the relevant test under international law, the Respondent argues that the principle of

⁵²⁰ Claimant’s Comments on the Claimant’s Produced Documents, pp. 5-6.

⁵²¹ Claimant’s Counter-Memorial on Preliminary Objections, ¶¶ 280 *et seq.*

⁵²² Termoeléctrica Manuel Belgrano Webpage (C-220) (available at <http://www.tmba.com.ar/empresa/>); Termoeléctrica José de San Martín Webpage (C-221) (available at <http://www.tsm.com.ar/>); Presentation prepared by CAMMESA for the period February 2010 – April 2010 (C-561), 38.

⁵²³ Claimant’s Rejoinder on Preliminary Objections, ¶ 145; *Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Brazil)*, 1929 PCIJ (ser. A) Nos. 20/21, Judgment of 12 July 1929, (CL-377), ¶ 80; *North Sea Continental Shelf Cases (Federal Republic of Germany v. The Netherlands; Federal Republic of Germany v. Denmark)*, Judgment of 20 February 1969, I.C.J. Reports 1969, p. 3 (CL-378), ¶ 30; *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962 (Separate Opinions of Judge Alfaro and Judge Fitzmaurice), I.C.J. Reports 1962, p. 6 (AL RA-19), 39-40, 62-63; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment of 12 October 1984, I.C.J. Reports 1984, p. 246 (CL-379), ¶¶ 130, 145; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Judgment of 13 September 1990, I.C.J. Reports 1990, p. 350 (AL RA-18), ¶ 63; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 11 June 1998, I.C.J. Reports 1998, p. 275 (AL RA-59), ¶ 57; *Sovereignty over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment of 23 May 2008, I.C.J. Reports 2008, p. 12 (CL-584), ¶ 228; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment 1 October 2018, I.C.J. Reports 2018, p. 507 (AL RA-304), ¶ 158. See also Legal Opinion of Christoph Schreuer, ¶¶ 67-73.

estoppel simply means that Orazul (through Cerros Colorados) cannot act inconsistently. Inconsistency, however, is insufficient for the principle of estoppel to apply. The Respondent's allegations concerning the Claimant's purported inconsistency are vague. Furthermore, the Respondent does not explain how it would have relied on Orazul's representations (if any) and what the consequences of such reliance would be. Even assuming that Cerros Colorados was inconsistent in its approach to solving its disputes with the Government, which it was not, this would not suffice for the estoppel objection. The detrimental reliance element, which must be proven by the party alleging estoppel, is missing in the present case. The Respondent and its expert Prof. Viñuales do not argue, let alone demonstrate, that the Respondent relied on the Claimant's or Cerros Colorados' representations to the Respondent's detriment.

489. Furthermore, according to the Claimant, the authorities cited in Prof. Viñuales' expert report do not support the Respondent's position on estoppel. With respect to Prof. Viñuales' opinion that "*the Claimant is estopped from resuscitating the claims settled in the agreements unless it can prove that it was coerced,*" the Claimant submits that it is for the Respondent, not the Claimant, to prove that the test for estoppel under international law has been met.⁵²⁴ The Claimant thus submits that the Tribunal should reject the Respondent's estoppel arguments as the Respondent has not shown that Orazul ever represented it would abandon its claims. In any case, the Respondent has not explained why the Government relied on Orazul's alleged representations or that there was any prejudice as a result of its reliance on any purported representations by the Claimant.

3. The Tribunal's analysis

490. With regard to the Claimant's alleged waiver of its claims and acceptance of the terms of the agreements entered into, the Respondent's case is based on the following alleged agreements and acts:

- Cerros Colorados' acceptance of the terms of the FONINVEMEM I Agreement;⁵²⁵
- Cerros Colorados' acceptance of the terms of the FONINVEMEM II Agreement;⁵²⁶

⁵²⁴ Claimant's Rejoinder on Preliminary Objections, ¶ 151.

⁵²⁵ Resolution 771/2005 dated 27 May 2005, Article 1 (C-207); FONINVEMEM I Agreement (C-36); Resolution 1371/2005 dated 27 October 2005 (C-177), Article 1.

⁵²⁶ FONINVEMEM II Agreement (C-37).

- Cerros Colorados’ acceptance of the remuneration regime provided for in Resolution 95/13 and its alleged agreement to waive any administrative and/or judicial claims against the Argentine Republic, the Energy Secretariat, and/or CAMMESA with regard to the FONINVEMEM II Agreement and Resolution 406/03;⁵²⁷
- Cerros Colorados’ acceptance of the terms of the 2019 Agreement for the Regularization and Settlement of Receivables, whereby it allegedly agreed on the settlement of the outstanding receivables under Resolution 406/03, Resolution 95/13, Resolution 529/14, Resolution 482/15, and Resolution 22/16, as supplemented, and allegedly waived the right to bring any claims in such respect;⁵²⁸ and
- Cerros Colorados’ acceptance of the terms of Resolution 440/21, in which it allegedly waived any claim in relation to the adjustment of remuneration under article 2 of Resolution 31/20 and agreed to avoid any type of filing, claim or lawsuit that could be made by any shareholder, within the Argentine Republic or abroad, or before international organizations and/or courts.⁵²⁹

491. The Tribunal has to decide whether these acts and agreements amount to a waiver or otherwise estop the Claimant from asserting its claims in this arbitration.

a) Waiver

492. Turning to the alleged waiver of claims, the Tribunal starts its analysis by referring to the ILC Articles which codify the grounds for the loss of the right to invoke the responsibility of a State. The Tribunal follows the approach of the tribunal in *Salini Impregilo v. Argentina*, which found that such grounds also apply to investment claims.⁵³⁰

493. Article 45(a) of the ILC Articles provides:

*The responsibility of a State may not be invoked if: [...] (a) the injured State has validly waived the claim; [...]*⁵³¹

⁵²⁷ Resolution 95/2013 dated 22 March 2013 (C-21).

⁵²⁸ Agreement for the Regularization and Payment of Receivables with the WEM between Cerros Colorados and CAMMESA dated 9 August 2019 (C-290).

⁵²⁹ Resolution 440/2021 dated 21 May 2021 (C-331); Letter from Orazul Energy Cerros Colorados S.A. to CAMMESA dated 17 June 2021 (A RA-332).

⁵³⁰ *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018 (CL-184), ¶ 87.

⁵³¹ *ILC’s Articles on State Responsibility: Responsibility of States for Internationally Wrongful Acts*, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (CL-131).

494. The Tribunal must thus ascertain whether the Claimant waived its claims through the different agreements the Respondent references. In this regard, the Tribunal takes note of the following facts:

495. Cerros Colorados undertook in the FONINVEMEM II Agreement to

*expressly and irrevocably waive any rights they may eventually invoke and any pending or current actions and/or claims filed against the NATIONAL STATE and/or the SECRETARIAT OF ENERGY and/or CAMMESA due to the application of Resolution SE No. 406/2003, as amended and supplemented, and other instructions issued by the SECRETARIAT, during the period from the effective date of the aforementioned resolutions through December 31, 2011.*⁵³²

496. Pursuant to Resolution 95/13, Cerros Colorados was required to withdraw “*administrative or judicial claims against the Energy Secretariat and CAMMESA related to FONINVEMEM and Resolution No. 406/03.*”⁵³³

497. Pursuant to the agreement signed in 2019 between the Energy Secretariat and Cerros Colorados, Cerros Colorados waived bringing any claims “*whether administrative and/or in court*” against the Argentine Republic, including the Energy Secretariat and CAMMESA regarding the receivables it would obtain repayment for.⁵³⁴

498. Pursuant to Resolution 440/2021, generators were required to withdraw

*any ongoing administrative claim or judicial process, filed by them against the NATIONAL STATE, the Secretary of Energy and/or CAMMESA, related to Article 2 of Resolution No. 31/20 of the SECRETARY OF ENERGY, as well as a waiver to file in the future any administrative and/or judicial claim against the NATIONAL STATE, this Secretary and/or CAMMESA, in relation to that same article.*⁵³⁵

499. In June 2021, Cerros Colorados

fully and unconditionally declare[d] the withdrawal of any administrative claim or judicial proceeding in progress brought against the NATIONAL STATE, the ENERGY SECRETARIAT and/or CAMMESA in relation to Article 2 of Resolution No. 31/2020, issued by the ENERGY SECRETARIAT, as well as the dismissal to file any future administrative and/or judicial

⁵³² FONINVEMEM II Agreement (C-37), Article 3.2(iv).

⁵³³ Resolution 95/2013 dated 22 March 2013 (C-21), Article 12; Note 1808 dated 11 April 2013 (C-252).

⁵³⁴ Agreement for the Regularization and Payment of Receivables with the WEM between Cerros Colorados and CAMMESA dated 9 August 2019 (C-290).

⁵³⁵ Resolution 440/2021 (C-331), Article 4.

*claim before the NATIONAL STATE, the ENERGY SECRETARIAT and CAMMESA related to Article 2 of Resolution No. 31/2020, issued by the ENERGY SECRETARIAT.*⁵³⁶

500. In addition, Cerros Colorados undertook to

*avoid and disarticulate any type of filing, claim or lawsuit in relation to Article 2 of Resolution No. 31/2020, issued by the ENERGY SECRETARIAT that may be filed by any shareholder of my principal, within the Argentine Republic or abroad, or before international organizations and/or tribunals.*⁵³⁷

501. The Tribunal finds that the Claimant has not waived its rights to bring claims under the BIT in the different agreements Cerros Colorados entered into.

502. First, the Tribunal notes that none of the agreements were entered into by the Claimant, but by its subsidiary, Cerros Colorados, which has a distinct legal personality. In this respect, the Tribunal, in principle, agrees with the findings of the tribunals in *El Paso v. Argentina* and *Sempra v. Argentina*, which held that the waivers expressed by the relevant subsidiaries did not affect the rights of the foreign investors since they were *res inter alios acta*.⁵³⁸ However, it is at least questionable whether the principle of *res inter alios acta* applies because the Claimant is a majority shareholder in Cerros Colorados.

503. In any event, the Tribunal finds that the subject matter of the waivers does not include ICSID arbitration claims.⁵³⁹ While the wording of the waivers includes wide-ranging terms such as “any rights” and “any actions and/or claims,” the Tribunal finds that such wording is not sufficiently unequivocal, clear and specific so as to include international investment law claims. For a waiver to operate at a treaty claim level the waiver must be clear and explicit.⁵⁴⁰ In this regard, the ILC has explained by reference to the ICJ’s *Nauru* case that for a waiver to exist “the conduct or statement must be unequivocal.”⁵⁴¹ Had the Respondent wished for the Claimant’s shareholders to waive their rights to ICSID arbitration, the Respondent could have included specific language in that respect.

⁵³⁶ Letter from Orazul Energy Cerros Colorados S.A. to CAMMESA, 17 June 2021 (A RA-332).

⁵³⁷ *Ibid.*

⁵³⁸ *Sempra v. Argentina* (CL-27), ¶¶ 224-228; *El Paso v. Argentina* (CL-23), ¶¶ 549-551.

⁵³⁹ Prof. Pellet does not concur with this conclusion and considers that the language is clear and that “any rights” means “any”.

⁵⁴⁰ Legal Opinion of Christoph Schreuer, ¶¶ 277-286.

⁵⁴¹ *ILC’s Articles on State Responsibility: Responsibility of States for Internationally Wrongful Acts*, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (CL-131), Article 45, comment 5.

504. In conclusion, the Tribunal finds that the Claimant has not waived its rights. The Tribunal therefore does not need to address whether the alleged waivers would also lack validity for other reasons.
505. This finding is without prejudice to the Tribunal's findings on the merits. As the Tribunal will set out in further detail in its analysis of the merits, the Tribunal has come to the conclusion that Cerros Colorados voluntarily participated in the FONINVEMEM scheme and that this matters for the assessment of whether the Respondent has breached its obligations under the BIT.

b) Estoppel

506. Turning to the notion of estoppel, the Tribunal recalls the conditions of estoppel established under international law. The *Encyclopedia of Public International Law* referred to by the Claimant describes the concept of estoppel, as follows:

In public international law, the doctrine of estoppel protects legitimate expectations of States induced by the conduct of another State. The term stems from common and Anglo-American law, without being identical with the different forms found in domestic law. It is supported by the protection of good faith (bona fide) in the traditions of civil law. Despite varying perceptions and definitions in doctrine and practice, the following features and essential components of estoppel in public international law are generally accepted today, as stated by Judge Spender in the Temple of Preah Vihear Case,

“the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.” (Case concerning the Temple of Preah Vihear [Cambodia v Thailand] [Merits] [Dissenting Opinion of Sir Percy Spender] 143–44).⁵⁴²

507. The Tribunal also subscribes to the position summarized in the *Pope & Talbot v. Canada* case, in which the tribunal noted:

⁵⁴² Thomas Cottier and Jörg Paul Müller, Estoppel, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. III (CL-375), p. 672.

*In international law it has been stated that the essentials of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorised; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement. That statement is cited without disapproval by Professor Brownlie in Public International Law 5th Ed. 646. At the same place Brownlie suggests that the essence of estoppel is the element of conduct which causes the other party in reliance on such conduct detrimentally to change its position or to suffer some prejudice.*⁵⁴³

508. The Respondent has failed to prove that these requirements are fulfilled in the present case. Already the first requirement for estoppel has not been shown to exist. The statements relied upon by the Respondent were made by Cerros Colorados and not by the Claimant. Analogous to what has been said with respect to the alleged waivers by Cerros Colorados, the Tribunal finds that any statements by Cerros Colorados cannot necessarily be seen as statements by the Claimant.
509. Leaving aside that the Respondent has failed to establish the first requirement for estoppel, the Respondent has also failed to show that it relied in good faith upon the alleged waivers either to its detriment or to the advantage of the Claimant.
510. In conclusion, the Tribunal therefore also rejects the Respondent's estoppel argument.

VI. Summary of the Tribunal's findings on jurisdiction and admissibility

511. In conclusion, the Tribunal rejects the Respondent's objections to jurisdiction and admissibility. The Tribunal has jurisdiction to decide upon the dispute and the Claimant's claims are admissible.

F. LIABILITY

512. The Tribunal now turns to the question of liability. The Tribunal takes note that the Parties are in dispute as to eleven key issues:
- What is the applicable law?

⁵⁴³ *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 [hereinafter: *Pope & Talbot v. Canada*] (CL-73), ¶ 111.

- Did the Respondent frustrate the Claimant’s legitimate expectations and fail to provide a stable and predictable legal environment in breach of Article IV(1) of the BIT?
- Did the Respondent fail to act transparently and accord due process in breach of Article IV(1) of the BIT?
- Did the Respondent act arbitrarily in breach of Article IV(1) of the BIT?
- Did the Respondent act discriminatorily in breach of Article IV(1) of the BIT?
- Did the Respondent abuse its authority in breach of Article IV(1) of the BIT?
- Did the Respondent impair the Claimant’s investments through unjustified and discriminatory measures in breach of Article III(1) of the BIT?
- Did the Respondent fail to protect the Claimant and its investments in breach of Article III(1) of the BIT and Article 4(2) of the Australia-Argentina BIT imported by virtue of Article IV(2) of the BIT?
- Did the Respondent unlawfully expropriate the Claimant’s investments in breach of Article V of the BIT?
- Did the Respondent fail to observe obligations it entered into with regard to the Claimant’s investments in breach of Article II(2)(c) of the US-Argentina BIT imported by virtue of Article IV(2) of the BIT?
- May the Respondent rely on its defense of necessity?

513. In what follows, the Tribunal will set out its analysis of these issues, which constitutes, in part, a majority view (see Dissent of co-arbitrator Mr. Haigh of 12 December 2023) and, for the rest, a unanimous analysis.

I. Applicable law

514. The first issue to be determined concerns the applicable law.

1. The Claimant’s position

515. It is the Claimant’s position that international law applies with priority over domestic Argentine law.⁵⁴⁴ In particular, the BIT, as *lex specialis*, applies as the primary source

⁵⁴⁴ Claimant’s Memorial, ¶¶ 367-369; Claimant’s Reply on the Merits, ¶¶ 451-461.

of law. Argentine law may apply only to the extent that it is relevant to establish the nature of the governmental acts at issue.

516. According to the Claimant, its position as to domestic law is consistent with a basic principle of international law codified in Article 27 of the VCLT, which stipulates that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁵⁴⁵ The Claimant submits that the issue before the Tribunal is whether the Government violated international standards established in the BIT, irrespective of how Argentine law characterizes such conduct.
517. In addition, the Claimant refers to the findings of the *Suez and Vivendi v. Argentina* tribunal. The tribunal primarily resorted to the text of the respective BITs and found that Argentine law, by itself, “cannot legally override or modify Argentina’s commitments and obligations in treaties to which it is a party.”⁵⁴⁶ The Claimant submits that international jurisprudence supports the proposition that where there is a conflict between the BIT or international law and local law, the former must prevail.⁵⁴⁷
518. Moreover, the Claimant submits that as a matter of Argentine law, the BIT takes precedence over other sources of law because Article 31 of the Argentine Constitution provides that “treaties with foreign powers are the supreme law of the Nation.” Besides, Article 75(22) of the Argentine Constitution provides that “treaties and concordats are hierarchically superior to the laws.”⁵⁴⁸

2. The Respondent’s position

519. According to the Respondent, pursuant to Article X(5) of the BIT, the Tribunal must collectively apply the BIT, other treaties in force between the Parties, the law of the Argentine Republic, and principles of international law.
520. According to the Respondent, Article X(5) of the BIT constitutes a form of agreement between the parties to the BIT that must be respected pursuant to Article 42(1) of the ICSID Convention.⁵⁴⁹ As a third party beneficiary, which is not a party to the BIT, the Claimant cannot change this choice of law.⁵⁵⁰ Accordingly, there is no basis for the

⁵⁴⁵ VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 311, entered into force 27 January 1980 (CL-258), Article 27.

⁵⁴⁶ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010 [hereinafter: *Suez v. Argentina*] (CL-100), ¶¶ 61, 63-64.

⁵⁴⁷ Claimant’s Reply on the Merits, ¶ 458.

⁵⁴⁸ *Id.*, ¶ 460; Constitution of the Argentine Nation dated 22 August 1994 (C-80), Articles 31, 75(22).

⁵⁴⁹ Respondent’s Counter-Memorial, ¶ 378.

⁵⁵⁰ *Id.*, ¶ 381.

Claimant to argue that the BIT is *lex specialis* which applies as the primary source of law.

521. The Respondent seeks the harmonious application of rules of domestic and international law without them cancelling each other out.⁵⁵¹ The Respondent submits that Article 42(1) of the ICSID Convention expressly involves resolving the dispute with domestic law in conjunction with international law. The Respondent also argues that the Argentine Republic and the Claimant are familiar with the application of Argentine law because it is the context in which the Claimant's investment was made.
522. The Respondent submits that contrary to the Claimant's view, the Tribunal must apply Argentine law to the dispute in order to determine the nature and scope of the rights available to the investor as a result of its investment as well as in relation to the determination of the commitments allegedly undertaken by the Respondent in the electricity sector when the Claimant acquired its indirect stake in Cerros Colorados.⁵⁵²

3. The Tribunal's analysis

523. The Parties agree that Article 42(1) of the ICSID Convention is the relevant provision on applicable law, which must guide the Tribunal's determination of the law applicable to the merits.
524. Article 42(1) of the ICSID Convention provides the following:
- The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*
525. In accordance with Article 42(1) of the ICSID Convention, the Tribunal shall decide the dispute in accordance with such rules of law as may be agreed upon by the parties. The term "*parties*" in the context of Article 42(1) of the ICSID Convention refers to the parties to the dispute.⁵⁵³
526. In the case at hand, the Parties to the dispute have reached an agreement on the applicable law on the basis of Article X(5) of the Argentina-Spain BIT, which provides:

⁵⁵¹ *Id.*, ¶ 388, referring to Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Investments*, Recueil des Cours de l'Académie de Droit International, vol. 269, 251, 371 (AL RA-138).

⁵⁵² Respondent's Rejoinder on the Merits, ¶ 571.

⁵⁵³ Christoph Schreuer *et al.* (eds.), *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. 2nd ed. Cambridge England: Cambridge University Press, 2009 (AL RA-278), Article 42.

The arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.

527. While the Claimant is not a party to the Argentina-Spain BIT, it has accepted the choice of law clause contained therein by accepting the Respondent's offer to arbitrate contained in the Argentina-Spain BIT.⁵⁵⁴ On this basis, the Parties to the dispute have reached an agreement on the applicable law.
528. Accordingly, the Tribunal finds that the BIT as well as general principles of international law and the relevant rules of the Argentine domestic legal framework are applicable to the dispute. At this stage, the Tribunal does not need to address the interplay between the different sources in the abstract. The Tribunal will do so, where appropriate, in its below analysis, if required.

II. The Claimant's claim that the Respondent frustrated the Claimant's legitimate expectations and failed to provide a stable and predictable environment in breach of Article IV(1) of the BIT

529. The second issue to be determined is whether the Respondent frustrated the Claimant's legitimate expectations and failed to provide a stable and predictable environment in breach of Article IV(1) of the BIT. The Parties' allegations in this respect lie at the heart of the Parties' dispute on liability.

1. The Claimant's position

530. The Claimant submits that Argentina breached its FET obligation by wrongly converting a temporary set of measures into a permanent and unsustainable regime, which, among other things, breached the Claimant's legitimate expectations and breached the obligation to provide a stable and predictable environment.

a) The applicable standard

531. According to the Claimant, the FET standard is concerned with ensuring that States act fairly and equitably towards investors. The Claimant submits that the FET standard enshrined in Article IV(1) of the BIT is an autonomous treaty standard and not the customary international law minimum standard of treatment as submitted by the

⁵⁵⁴ *Id.*, at ¶ 23.

Respondent. The Claimant states that this interpretation follows from Article 31(1) of the VCLT since the BIT does not mention the customary international law minimum standard of treatment. This position was confirmed by the *Teinver v. Argentina* tribunal.⁵⁵⁵

532. Even if the BIT's FET obligation could be interpreted as referencing the customary international law minimum standard, the Claimant submits, such standard has evolved beyond its initial formulation in the *Neer* case and the minimum standard has converged with the FET standard "*such that the standards are essentially the same.*"⁵⁵⁶ The NAFTA cases referenced by the Respondent, which reference the international minimum standard, are inapposite because Article 1105 of NAFTA explicitly links the treatment to the international minimum standard, so that it is of limited relevance for the interpretation of BITs which do not contain such a link.
533. The Claimant submits that FET encompasses "*a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality.*"⁵⁵⁷ The Claimant submits that while aspects of FET may overlap, its "*most important function*" remains the protection of the investor's legitimate expectations in relation to their investments in the host country.⁵⁵⁸
534. The Claimant argues that while the term "*legitimate expectations*" is not expressly contained in the BIT, the tribunal in *Teinver v. Argentina* interpreted the FET standard in the context of Article X of the Treaty as

*oblig[ing] a state not to frustrate an investor's legitimate expectations, either at the time of the investment or in the course of the investment, as long as those expectations were objectively reasonable, created by the State (the State intended for the investor to rely upon them) and relied upon by the investor.*⁵⁵⁹

535. The Claimant submits that in assessing an investor's legitimate expectations, a tribunal must first examine the Claimant's subjective expectations, and then examine them from "*an objective and reasonable point of view.*" Relying on *RREEF v. Spain*, the Claimant submits that this fact-specific inquiry requires tribunals to consider "*first, whether the*

⁵⁵⁵ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017 [hereinafter: *Teinver v. Argentina – Award*] (CL-99), ¶ 666.

⁵⁵⁶ Claimant's Reply on the Merits, ¶ 497.

⁵⁵⁷ Claimant's Memorial, ¶ 390; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (CL-33), ¶ 109; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012 (CL-34), ¶ 405.

⁵⁵⁸ Claimant's Memorial, ¶¶ 394, 396.

⁵⁵⁹ *Teinver v. Argentina – Award* (CL-99), ¶ 667.

State's conduct and representations gave rise to expectations; second, whether the expectations are legitimate and reasonable;" third, whether the investor relied on the State's conduct or representations; and, "*fourth, [whether] its expectations were frustrated by the Disputed Measures.*"⁵⁶⁰

536. The Claimant further submits that an investor's legitimate expectations are closely connected to a State's duty to provide a stable legal and business framework for investments, and to not act arbitrarily or adopt disproportionate measures.⁵⁶¹ The Claimant relies on the tribunal's ruling in *LG&E v. Argentina* 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.*⁵⁶²

537. Similarly, the *Occidental v. Ecuador* tribunal underscored that the FET standard encompasses "*an obligation not to alter the legal and business environment in which the investment has been made.*"⁵⁶³

538. The Claimant stresses that tribunals have emphasized the importance of a stable and predictable legal framework in finding violations of the FET standard.⁵⁶⁴ For instance, the *PSEG Global v. Turkey* tribunal found that the FET standard had been "*seriously breached [in that case] by [...] the 'roller-coaster' effect*" of "*numerous changes in the legislation and inconsistencies in the administration's practice*" governing the investor's project and the regime of its concession.⁵⁶⁵ Similarly, the *Lauder v. Czech Republic* tribunal explained that States may "*not engage in inconsistent conduct, e.g. by reversing to the detriment of the investor prior approvals on which he justifiably relied.*"⁵⁶⁶

539. The Claimant submits that a host State's legal framework is often the basis for an investor's legitimate expectations and that "*investors [may reasonably] deriv[e] their expectations from the laws and regulations adopted by the host country, act[] in*

⁵⁶⁰ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 [hereinafter: *RREEF v. Spain*] (CL-48), ¶ 388.

⁵⁶¹ Claimant's Memorial, ¶ 394.

⁵⁶² *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 [hereinafter: *LG&E v. Argentina*] (CL-24), ¶ 131.

⁵⁶³ *Occidental Exploration and Production Company v. The Republic of Ecuador (I)*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (CL-119), ¶ 191.

⁵⁶⁴ Claimant's Reply on the Merits, ¶ 502.

⁵⁶⁵ *PSEG Global, Inc. and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (CL-31), ¶¶ 239, 250-252.

⁵⁶⁶ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (CL-59), ¶ 290.

reliance upon those laws and regulations and change[] their economic position as a result.”⁵⁶⁷ The Claimant points to *Suez v. Argentina* as an example of the Respondent creating expectations through its legal framework.⁵⁶⁸ The Claimant argues that such expectations can be legitimate even in the absence of specific promises or commitments by the Government on the basis of the findings of the *Total v. Argentina* tribunal.⁵⁶⁹ The Claimant submits that a State wrongfully denies an investor FET when it “*create[s] [legitimate expectations] by [its] laws,*” encouraging investors to “*invest[] their capital in reliance on the laws,*” and then, “*sudden[ly] change[s]... those laws that led to a determination that the host country had not accorded protected investments [FET].*”⁵⁷⁰ The Claimant further quotes Prof. Schreuer’s expert report, noting that “*the requirement of stability, which is inherent in the FET standard, requires not only the stability of the legal framework under which the investor operates but also the uniform and consistent application of legal rules.*”⁵⁷¹ Prof. Schreuer further affirms that “[*f*]or a foreign investor it is important not only that the law displays a certain degree of transparency and stability, but also that such law is applied by the courts and administrative agencies in a predictable, i.e. coherent and consistent fashion.”⁵⁷²

540. The Claimant argues that a number of investment treaty tribunals have addressed the relationship between legitimate expectations and the stability and predictability of the legal framework, noting that a “*goal of international investment law is to establish a predictable, stable legal framework for investments.*”⁵⁷³ For this reason, the Claimant submits that previous tribunals have found that Argentina’s “*alter[ing off] the legal and business environment [through] a series of radical measures*”⁵⁷⁴ was a breach of the BIT’s FET requirement.⁵⁷⁵
541. Furthermore, the Claimant argues that the requirement to act consistently and to provide a stable framework is not only in accordance with the BIT but also with the Respondent’s decision to be a signatory to the ICSID Convention. According to the Claimant, ICSID membership signals a State’s commitment to attract foreign investment and full implementation of investment treaty obligations and contributes to

⁵⁶⁷ Claimant’s Memorial, ¶ 401.

⁵⁶⁸ *Id.*, ¶ 402; *Suez v. Argentina (CL-100)*, ¶ 208.

⁵⁶⁹ Claimant’s Memorial, ¶ 403; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 [hereinafter: *Total v. Argentina (CL-29)*], ¶ 333.

⁵⁷⁰ Claimant’s Memorial, ¶ 401.

⁵⁷¹ Legal Opinion of Christoph Schreuer, ¶ 348.

⁵⁷² *Ibid.*

⁵⁷³ *Suez v. Argentina (CL-100)*, ¶ 182; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 [hereinafter: *CMS v. Argentina (CL-10)*], ¶ 276.

⁵⁷⁴ *BG Group v. Argentina (CL-54)*, ¶ 307; *CMS v. Argentina (CL-10)*, ¶¶ 274, 281.

⁵⁷⁵ Claimant’s Memorial, ¶ 409.

a State's efforts to maximize finance for development by encouraging private investment and stable investment climates.⁵⁷⁶

542. The Claimant submits that an investor is entitled to “*the legitimate expectation that they would be able to make a reasonable return of and on their investment.*”⁵⁷⁷ The Claimant notes to this end that the *LG&E v. Argentina* tribunal found that the Argentine legal framework created an expectation that “*tariffs were to provide an income sufficient to cover all costs and a reasonable rate of return.*”⁵⁷⁸ Relying on *MTD v. Chile*, the Claimant argues that a State can breach its obligations by refusing to change its regulatory structure after promising to do so.⁵⁷⁹ Similarly, on the basis of *Eiser v. Spain*, the Claimant asserts that the obligation to accord FET “*does protect investors from a fundamental change to the regulatory regime.*”⁵⁸⁰
543. The Claimant cites three elements identified by Prof. McLachlan as being sufficient to find a breach of the FET standard with respect to regulatory or legislative changes, namely: (i) a specific assurance or promise of a competent organ attributable to the State upon which the investor reasonably relied in deciding to invest; (ii) regulations that are substantively arbitrary or discriminatory in their application to foreign investors; or (iii) a total alteration of the entire regulatory framework for foreign investments in the particular field that has the effect of virtually eliminating the benefits that the investor reasonably anticipated upon making the investment.⁵⁸¹

b) Application to the facts

544. The Claimant claims that the Respondent failed to protect the Claimant's legitimate expectations and failed to provide a stable and predictable legal environment.⁵⁸²
545. The Claimant specifically submits that the Government breached Orazul's legitimate expectations by failing to restore Cerros Colorados' rights under the Electricity Law, maintaining the allegedly transitory 2003 disputed measures for over a decade (beyond mid-2006, as the Claimant had expected), capping the spot price and detaching it from the real economic cost, failing to adjust the significantly reduced capacity payments to

⁵⁷⁶ Claimant's Reply on the Merits, ¶ 506; World Bank Website, Special Features and Benefits of ICSID Membership (C-335).

⁵⁷⁷ Claimant's Memorial, ¶ 399; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013 (CL-116), ¶ 398.

⁵⁷⁸ Claimant's Memorial, ¶ 399; *LG&E v. Argentina* (CL-24), ¶ 119.

⁵⁷⁹ Claimant's Memorial, ¶¶ 392, 407.

⁵⁸⁰ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 (CL-336), ¶ 363.

⁵⁸¹ Claimant's Reply on the Merits, ¶ 508; Campbell McLachlan et al., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2d ed. 2017) (CL-305), ¶ 7.165.

⁵⁸² Claimant's Memorial, ¶ 404.

the equivalent US dollar value they had (USD 10/MWh), partially restricting and ultimately fully blocking Orazul's ability to sell electricity in the term market, forcing Orazul to participate and invest in the FONINVEMEM Agreements, specifically committing in the FONINVEMEM Agreements to restoring the original market-based rules and Cerros Colorados' rights under the Electricity Law and increasing capacity payments to an adequate level and then refusing to comply with those commitments, discriminating against Orazul by offering new power plants better prices and the ability to freely enter into PPAs through *Energía Plus* and *Energía Delivery Plan*, and acknowledging that its measures departed from the Electricity Law, renewing its promises to restore the rights set forth in such law, and promising compensation, but failing to implement any of these actions.⁵⁸³

546. According to the Claimant, the Claimant's expectations of a reversal of the measures taken in 2003 were well-founded and based on:⁵⁸⁴

- The Electricity Law;⁵⁸⁵
- The Selling Memorandum;⁵⁸⁶
- The Concession Contract;⁵⁸⁷
- The express language of Resolution 240/03 and Resolution 406/03 declaring that these were transitory and partial measures;⁵⁸⁸
- Renewed commitments in the 2004-2008 National Energy Plan;⁵⁸⁹
- The FONINVEMEM Adhesion Contract and FONINVEMEM Agreement;⁵⁹⁰
- The FONINVEMEM II Agreement;⁵⁹¹
- The alleged unsustainability of the “temporary” regime;⁵⁹²

⁵⁸³ Claimant's Reply on the Merits, ¶ 579.

⁵⁸⁴ Claimant's Memorial, ¶ 333.

⁵⁸⁵ Electricity Law (C-2).

⁵⁸⁶ Selling Memorandum (C-6), pp. 111, 121.

⁵⁸⁷ Concession Contract (C-79).

⁵⁸⁸ Resolution 240/2003 dated 14 August 2003 (C-8), fifth whereas clause; Resolution 406/2003 dated 8 September 2003 (C-9), third whereas clause and Article 1. See also Energy Secretariat, *Technical Report in Administrative Docket EXP-S01:143056/2003 (Part 1)* undated (C-103), p. 2; Note 334/2004 from the Energy Secretariat to CAMMESA dated 15 April 2004 (C-158).

⁵⁸⁹ Minister of Federal Planning, Investment, and Services and Energy Secretary, *National Energy Plan 2004-2008* (C-154), p. 21. See also Resolution 712/2004 dated 12 July 2004 (C-11), twenty-second whereas clause; Resolution 826/2004 dated 6 August 2004 (C-13), fourth whereas clause.

⁵⁹⁰ FONINVEMEM Adhesion Contract (C-211), Article 1; FONINVEMEM I Agreement (C-36), Article 1.

⁵⁹¹ FONINVEMEM II Agreement (C-37).

⁵⁹² Resolution 1,281/2006 dated 4 September 2006 (C-176), Annex II first whereas clause.

- The new administration’s alleged acknowledgement of the inconsistency of the measures with the Electricity Law and recognition of the harmful effects that the Government’s intervention had on the electricity sector;⁵⁹³
- Subsequent governmental measures and meetings through which the Government allegedly reiterated the inconsistency of the temporary measures with the Electricity Law.⁵⁹⁴

547. The Claimant initially submitted that it was entitled to rely upon the expectations of Cerros Colorados and its former parent corporation, Duke Energy, at the time of the investment, namely, that the disputed measures were temporary.⁵⁹⁵ However, during the Hearing, the Claimant asserted that it was “*not anywhere seeking to inherit the expectations of any other member of the corporate group.*”⁵⁹⁶

548. Specifically with respect to the Electricity Law, the Claimant alleges that it continuously remained in force since its enactment and promised power generators a market-driven regulatory framework in which investors have the right to (i) a spot price that is “*uniform for all*” generators based on the economic cost of the system;⁵⁹⁷ (ii) capacity payments for the capacity that they make available for dispatch;⁵⁹⁸ and (iii) the right to freely negotiate and sell electricity in the term market through PPAs.⁵⁹⁹ The Claimant also refers to the Concession Contract which specifically states that Law No. 15,336 and the Electricity Law are part of the applicable law governing the contract.⁶⁰⁰ Accordingly, the Claimant submits, Cerros Colorados had a contractual right to operate pursuant to the Electricity Law and the principles set therein (*i.e.*, economic dispatch, uniform price for all generators calculated in accordance with economic parameters, and freely agreed PPAs).⁶⁰¹

549. According to the Claimant, the purpose of the Electricity Law was to provide investors stability and predictability.⁶⁰² According to the Claimant, the Respondent, through a series of lower-ranked and inconsistent regulations, eviscerated the basic tenets of the

⁵⁹³ Decree 134/2015 dated 16 December 2015 (C-24), twenty-fourth whereas clause.

⁵⁹⁴ Resolution 6/2016 dated 25 January 2016 (C-199); Resolution 21/2016 dated 22 March 2016 (C-188); Resolution 22/2016 dated 30 March 2016 (C-189); Resolution 19/2017 dated 27 January 2017 (C-59); Resolution 20/2017 dated 27 January 2017 (C-187); Resolution 70/2018 dated 6 November 2018 (C-202).

⁵⁹⁵ Claimant’s Memorial, ¶ 407.

⁵⁹⁶ Hearing Transcript, Day 10, pp. 2677.

⁵⁹⁷ Electricity Law (C-2), Article 36; Selling Memorandum (C-6), 77.

⁵⁹⁸ Electricity Law (C-2).

⁵⁹⁹ *Id.*, Article 6.

⁶⁰⁰ Concession Contract (C-79), Article 70.

⁶⁰¹ Claimant’s Memorial, ¶ 404.

⁶⁰² Claimant’s Reply on the Merits, ¶ 536; The Republic of Argentina’s Sessions Diary, Senate Chamber of the Nation, 40th Reunion dated 8 November 1991 (C-337), 3876.

Electricity Law. Specifically, the disputed measures imposed a cap on the spot price;⁶⁰³ altered the market-based, “*uniform for all*” generators, marginal price mechanism;⁶⁰⁴ detached the economic cost of the system from the spot price;⁶⁰⁵ restricted Cerros Colorados’ access to the term market and to freely enter into PPAs;⁶⁰⁶ and significantly reduced capacity payments.⁶⁰⁷

550. The Claimant submits that the Respondent enacted temporary measures in 2003 to address an abnormal situation in the power generation market.⁶⁰⁸ Specifically, the Government issued Resolution 240/03, which set forth a transitory pricing mechanism that altered in a limited way the market-based and uniform for all mechanism (excluded all liquid fuel operation costs from the spot price calculation and imposed a maximum cap on the spot price). The Government also issued Resolution 406/03, which established a “*temporary mechanism for the assignment of the scarce and insufficient resources*” whereby CAMMESA would make partial payments to power generators for their electricity sales in the spot market.⁶⁰⁹

551. The Claimant submits that the very text of the measures explicitly describe them as temporary and partial, and commits to restoring the electricity market.⁶¹⁰ The Claimant’s expectation was that the 2003 measures would be reverted by mid-2006.⁶¹¹ When the Claimant invested in Cerros Colorados, it relied on these representations and reasonably expected that the disputed measures would be reverted promptly.⁶¹² Moreover, by the end of 2003, it was not even clear if, and to what extent, the Government would actually utilize Resolution 240/03, as the Government was already working to resolve the gas shortages that prompted the 2003 disputed measures.⁶¹³ The Claimant states that at the time it invested, the gas shortages were not expected for several months, and the Government was negotiating a price path to increase gas prices

⁶⁰³ Resolution 240/2003 dated 14 August 2003 (C-8), Articles 1.1-1.2.

⁶⁰⁴ *Id.*, Article 1.1.

⁶⁰⁵ *Id.*

⁶⁰⁶ Resolution 1,281/2006 dated 4 September 2006 (C-176), Annex II, Article 2; Resolution 95/2013 dated 22 March 2013 (C-21), Article 9.

⁶⁰⁷ Resolution 246/2002 dated 4 July 2002 (C-191), Annex I, 2.5.2.1.2.

⁶⁰⁸ Claimant’s Reply on the Merits, ¶ 563.

⁶⁰⁹ *Ibid.*

⁶¹⁰ Claimant’s Memorial, ¶ 413; Claimant’s Reply on the Merits, ¶ 564; Resolution 240/2003 dated 14 August 2003 (C-8), fifth whereas clause (“*partial and transitory rules*”); Resolution 406/2003 dated 8 September 2003 (C-9), third whereas clause (“*establish a transitory mechanism*”), Article 1 (“*[T]he methodology described in this resolution is hereby temporarily established*”), and paragraph 3 after the “WHEREAS” (“*transitory mechanism for the assignment of scarce and insufficient resources*”); Resolution 712/2004 dated 12 July 2004 (C-11), twenty-second whereas clause (“*Whereas the provisions in this resolution constitute partial and transitory rules*”). See also Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:143056/2003 (Part 1) (C-103).

⁶¹¹ Claimant’s Reply on the Merits, ¶ 564.

⁶¹² Claimant’s Memorial, ¶ 413.

⁶¹³ *Id.*, ¶ 413.

and encourage investment in the sector.⁶¹⁴ The Claimant submits that an agreement providing for price increases between the Government and gas producers was imminent in late 2003, rendering the application of Resolution 240/03 unlikely in the future.⁶¹⁵ Shortly after the Claimant invested, the Energy Secretariat entered into an agreement with gas producers to execute a “*normalization scheme of natural gas prices . . . in accordance with the guidelines established in [Decree 181/04].*”⁶¹⁶ The Claimant’s witness Mr. McGee submits that “*based on the Government’s assurances, [DEI Group’s] assumption for [its] 2004 budget was that prices would reach LRMC [the long run marginal cost] by mid-2006.*”⁶¹⁷

552. The Claimant submits more generally that Argentina’s treaties, laws, statements, and more specifically, its general and specific commitments within the FONINVEMEM and communications with respect to Orazul’s investments, all gave rise to the expectation that the measures were only temporary and adopted in the context of an emergency.⁶¹⁸ The Claimant adds that such temporariness was recognized by the Government in 2017 and 2019.⁶¹⁹
553. According to the Claimant, its expectations were well-founded and reasonable, as Orazul was entitled to rely on the general and specific assurances made by the Government and could not have reasonably expected that an economically unsustainable regime would be maintained indefinitely, nor that the Respondent would double-down on that unsustainable regime and also give new plants more favorable, market-based terms.⁶²⁰ The Claimant additionally expected the Government to promptly revert the measures. According to the Claimant, the objective and reasonable nature of its expectations was re-confirmed by the Government’s own statements and specific commitments following Orazul’s investment.⁶²¹ However, the Government

⁶¹⁴ *Id.*, ¶ 414.

⁶¹⁵ Claimant’s Reply on the Merits, ¶ 565; *The Government Reviews the Price of Gas*, EL LITORAL dated 12 December 2003 (C-239).

⁶¹⁶ Resolution 208/2004 dated 21 April 2004 (C-242), Annex I, Article 1.

⁶¹⁷ McGee I, ¶ 21; *see also* DEI Group, 2004 Budget Review: Executive Summary dated 30 September 2003 (C-62).

⁶¹⁸ Claimant’s Memorial, ¶ 404; Claimant’s Reply on the Merits, ¶ 525.

⁶¹⁹ Resolution 19/2017 dated 27 January 2017 (C-59), third and fourth whereas clauses; Energy Secretariat, *Balance de Gestion en Energia 2016-2019* dated December 2019 (C-101), 22; *see also* Alejandro Bercovich, Noelia Barral Grigera, Alejandro Wall and Nahuel Prado, Pasaron Cosas, Radio News Program, <https://anchor.fm/pasaroncosas/episodes/Dario-Martinez-La-justicia-deber-determinar-si-el-subsidio-algas-se-dise-para-beneficiar-a-Techint-y-perjudicar-a-YPF-en-Vaca-Muerta-endieu> (C-502).

⁶²⁰ Claimant’s Memorial, ¶ 404.

⁶²¹ Claimant’s Reply on the Merits, ¶ 570, referring to: Resolution 1,069/2004 dated 14 October 2004 (C-174), 2-5; Ministry of Federal Planning, Investment, and Services and Energy Secretary, *National Energy Plan 2004-2008* (C-154), 21; Energy Secretary Mr. Daniel Cameron’s Speech, UIA Conference Transcript dated 23-25 November 2004 (C-109), 150; Resolution 208/2004 dated 21 April 2004 (C-242), Annex I, Article 1; FONINVEMEM

kept “*moving the goal post*”, i.e., creating new expectations as to when Argentina would repeal the disputed measures and apply the Electricity Law.⁶²²

554. The Claimant also argues that it relied on the Respondent’s express commitment to restore the electricity market as part of the FONINVEMEM programs.⁶²³ The Claimant submits that Argentina’s representations are evidenced both by the written documentation explicitly describing such commitments and in Orazul’s and Cerros Colorados’ internal documents, where in 2004 they assumed and planned for prices to recover once the FONINVEMEM plants were in operation (expected to occur at first in 2007).⁶²⁴ The Claimant submits that in each FONINVEMEM agreement the Government expressly reiterated its commitment to Cerros Colorados that it would normalize the WEM to be consistent with the Electricity Law.⁶²⁵ Specifically, the Claimant expected that the former market rules would be reinstated with both energy prices and capacity payments recovering by 2007, once the FONINVEMEM combined-cycle plants started operating.⁶²⁶ However, as of 2013, Argentina stopped describing its erratic measures as temporary and for the first time failed to indicate when it planned to normalize the electricity market.⁶²⁷
555. The Claimant submits that it further relied on the fact that Argentina would not be able to maintain the heavily regulated, unsustainable “*temporary*” regime for an extended period of time as its terms did not incentivize the investment necessary to meet the country’s growing demand for electricity.⁶²⁸ Instead, Argentina continued imposing additional measures that locked the Claimant further into the unsustainable regime, while at the same time offering new power plants more favorable, market based terms,

Adhesion Contract (C-211), Annex, Article 1, Article 4.1 (iii) and (iv); Energy Secretariat, *Technical Report in Administrative Docket No. EXP-S01:0176178/2004* dated 2005 (Part 3) (C-106), 484; FONINVEMEM I Agreement (C-36), Article 1; FONINVEMEM II Agreement (C-37), Article 1, whereas clause (e); *The Minister Juan Jose Aranguren Declares the “Electrical Emergency” Until 2017*, LA NACIÓN dated 15 December 2015 (C-127); Decree 134/2015 dated 16 December 2015 (C-24), eighth and twenty fourth whereas clauses; Presidency of the Nation, *El Estado del Estado* dated December 2015 (C-171) p. 118; Minister of Energy Press Conference, *Changes to the Electricity Tariff Were Announced* dated 31 January 2017 (C-487); Tierno I, ¶ 75; Energy Secretariat, *Balance de Gestion en Energia 2016-2019* dated December 2019 (C-101), 22.

⁶²² McGee I, ¶ 30; Tierno I, ¶¶ 22-23; see also Bertone, ¶ 11.

⁶²³ Claimant’s Memorial, ¶ 415.

⁶²⁴ FONINVEMEM Adhesion Contract (C-211), Article 4.1 and 4.2; Resolution 1,427/2004 dated 6 December 2004 (C-65), first whereas clause; Tierno I, ¶¶ 22, 24, 25.

⁶²⁵ FONINVEMEM Adhesion Contract (C-211), Article 1; Energy Secretariat, *Technical Report in Administrative Docket No. EXP-S01:0176178/2004* dated 2005 (Part 3) (C-106), 484; FONINVEMEM I Agreement (C-36), Article 1; FONINVEMEM II Agreement (C-37), whereas clause (e), Article 1.

⁶²⁶ Bailey, ¶ 12.

⁶²⁷ Claimant’s Reply on the Merits, ¶ 528; Resolution 95/2013 dated 22 March 2013 (C-21), eleventh whereas clause.

⁶²⁸ Claimant’s Memorial, ¶ 416.

in order to attract investment and thus meet Argentina's growing demand for electricity.⁶²⁹

556. According to the Claimant, Orazul was not the only entity which relied on the Government's representations.⁶³⁰ In addition, the Respondent's representations were reinforced by the prior ratification of over 50 BITs, including the Argentina-Spain BIT, with the purpose of "*strengthen[ing] economic cooperation for the economic benefit of both [Spain and Argentina],*" and "*creat[ing] favorable conditions for investments.*"⁶³¹
557. The Claimant concludes that Argentina's failure to provide the legal certainty it promised, compounded by the fact that the Government has not implemented any actions or negotiated in good faith, amount to an FET breach for failure to provide a stable legal framework.⁶³²
558. Finally, according to the Claimant, the Respondent may not justify its conduct by asserting that States retain the right to regulate. The Claimant submits that a State cannot be deemed to have a "*right to regulate*" a particular issue that is not permitted or that otherwise goes beyond the scope of principles enshrined under its own laws. The Claimant recalls the finding of the *Total v. Argentina* tribunal, which held that regulatory changes "*can be considered unfair if they are contrary to commonly recognized financial and economic principles of 'regulatory fairness' or 'regulatory certainty'.*"⁶³³
559. According to the Claimant, the Respondent's reliance on the Electricity Law as a source of its regulatory powers is unavailing because the regulatory functions of the Energy Secretariat under the Electricity Law do not authorize it to subvert its fundamental principles and generators' rights under the Electricity Law through lower-ranked and inconsistent resolutions. The Claimant argues that issuing lower-ranking regulations inconsistent with the higher-ranking law violates principles of rule of law and separation of powers.⁶³⁴ Moreover, the Electricity Law itself demands the Energy Secretariat to "*guarantee the transparency and fairness*" when issuing its regulations.⁶³⁵ The Claimant argues that in any event, a State's right to regulate cannot be considered, as the Respondent submits, without due regard to investors' substantive protections under

⁶²⁹ *Ibid.*

⁶³⁰ Claimant's Reply on the Merits, ¶ 567.

⁶³¹ *Id.*, ¶ 568; Treaty (CL-246), Preamble.

⁶³² Claimant's Reply on the Merits, ¶ 538.

⁶³³ *Total v. Argentina* (CL-29), ¶¶ 309(g)-(h), 331.

⁶³⁴ Claimant's Reply on the Merits, ¶ 517.

⁶³⁵ Electricity Law (C-2), Article 35; see also Message from the National Executive Power to Congress regarding draft Electricity Law dated 13 June 1991 (C-337), 3876.

international investment treaties, including the obligation to accord investors FET.⁶³⁶ In this respect, the *El Paso v. Argentina* tribunal noted that “a balance should be established between the legitimate expectation of an investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest.”⁶³⁷ The Claimant thus concludes that the Respondent’s right to regulate, even if properly exercised, is not a *carte blanche* to ignore treaty obligations that it willingly entered into.⁶³⁸

560. The Claimant submits that the Respondent’s argument on its right to regulate constitutes an effort to escape liability and justify its egregious conduct. According to the Claimant, the Respondent’s attempt to frame egregious conduct, that contravenes its own laws, within the purview of “regulatory powers” under the Electricity Law is unavailing and must be rejected.⁶³⁹ The Claimant submits that a State cannot be deemed to have a “right to regulate” a particular issue that is not permitted or that otherwise goes beyond the scope of principles enshrined under its own laws, by virtue of the principle of legal certainty. The Claimant cites the findings of the *Total v. Argentina* tribunal, which recognized that “changes to the regulatory framework applicable to capital intensive long term investments and the operation of utilities can be considered unfair if they are contrary to commonly recognized financial and economic principles of ‘regulatory fairness’ or ‘regulatory certainty’ applied to investments of that type (be they domestic or foreign) [...]”⁶⁴⁰ The Claimant submits that the legal regime upon which the Respondent relies requires it to act transparently and equitably, which it has failed to do.⁶⁴¹

561. The Claimant submits that, in any event, a State’s right to regulate cannot be considered without due regard to the investors’ substantive protections under international investment treaties, including the obligation to accord investors FET. The *El Paso v. Argentina* tribunal recognized that “a balance should be established between the legitimate expectation of an investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest.”⁶⁴²

⁶³⁶ Claimant’s Reply on the Merits, ¶ 519.

⁶³⁷ *El Paso v. Argentina* (CL-23), ¶ 358.

⁶³⁸ Claimant’s Reply on the Merits, ¶ 520.

⁶³⁹ *Id.*, ¶ 515.

⁶⁴⁰ *Total v. Argentina* (CL-29), ¶ 309(g)-(h); see also *Saluka v. Czech Republic* (CL-11), ¶ 305 (explaining that “a foreign investor protected by the Treaty may in any case properly expect that the [Government] implements its policies bona fide by conduct that is, as far as it affects the investor’s investment, reasonably justifiable by public policies and that such conduct does not violate the requirements of consistency, transparency, even-handedness and non-discrimination.”).

⁶⁴¹ Claimant’s Reply on the Merits, ¶ 518.

⁶⁴² *El Paso v. Argentina* (CL-23), ¶ 358.

562. According to the Claimant, multiple other tribunals have found that Argentina breached a BIT by violating the basic principles of the regime in place, such as the Electricity Law, e.g., *CMS v. Argentina*, *Azurix v. Argentina*, *National Grid v. Argentina*, *Suez and Interaguas v. Argentina*, *BG v. Argentina*, *Suez and Vivendi v. Argentina*, *LG&E v. Argentina*, *Compañía de Aguas v. Argentina*, *Impregilo v. Argentina*, *Total v. Argentina*, *EDF v. Argentina*, *Urbaser v. Argentina*, *AWG v. Argentina*, *Continental Casualty v. Argentina*, *Mobil v. Argentina*, *Enron v. Argentina*, *El Paso v. Argentina*, and *Sempra v. Argentina*.
563. The Claimant adds that both investment tribunals that evaluated Argentina’s conduct in the power generation sector, *i.e.*, *Total* and *El Paso*, held that Argentina breached the FET standard protected under the BITs.⁶⁴³
564. According to the Claimant, the *El Paso* and *Total* tribunals, which did not have the opportunity to consider the Government’s subsequent conduct in the power generation sector, would have concluded to a breach in the case at hand. Specifically, those tribunals did not have to address the Government’s subsequent conduct, which – the Claimant submits – was even more egregious.⁶⁴⁴

2. The Respondent’s position

565. The Respondent rejects the Claimant’s allegations.

a) The applicable standard

566. The Respondent’s position is that the standard of fair and equitable treatment under the Argentina-Spain BIT corresponds to the minimum standard of treatment provided for under customary international law.⁶⁴⁵ Its purpose is to ensure that the treatment afforded to an investment does not fall below treatment considered to be appropriate under the generally accepted principles of customary international law. The Respondent refers to the definition of the standard as established in the *Neer* case:

[T]he propriety of governmental acts should be put to the test of international standards [...] [T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental

⁶⁴³ Claimant’s Memorial, ¶ 379.

⁶⁴⁴ *Id.*, ¶ 417; Claimant’s Reply on the Merits, ¶ 473.

⁶⁴⁵ Respondent’s Counter-Memorial, ¶¶ 413 *et seq.*; Rejoinder on the Merits, ¶¶ 596 *et seq.*

*action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*⁶⁴⁶

567. The Respondent accepts that, more recently, tribunals such as the ones in *International Thunderbird Gaming Corporation v. Mexico*, *Glamis Gold v. United States* and *Waste Management II* have reflected the evolution of customary international law and found that a breach of FET exists where there is an act falling below acceptable international standards, and which, when weighed against the given factual circumstances, amount to a gross denial of justice, manifest arbitrariness, discrimination, or lack of due process leading to an outcome which offends judicial propriety.⁶⁴⁷ However, according to the Respondent, the fact that the standard reflects the evolution of customary international law does not mean that it includes the elements of FET invoked by the Claimant, such as the expectations of investors or the stability of the regulatory framework.⁶⁴⁸ The Respondent submits that the ICJ rejected the argument that legitimate expectations exist as an autonomous obligation under general international law.⁶⁴⁹
568. The Respondent submits that international rules on treaty interpretation do not support the incorporation of the elements suggested by the Claimant into the content of FET. Specifically, neither the notion of “*stability*” nor that of “*legitimate expectations*” are mentioned in the BIT, or any other BIT signed by the Argentine Republic.⁶⁵⁰ The Respondent rejects the Claimant’s exclusively literal interpretation of the BIT, which does not comply with the interpretation rules contained in Articles 31 and 32 of the VCLT. In this respect, the Respondent submits that a good faith interpretation in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose commands to give effect to the recognized meaning under customary international law of FET, *i.e.*, the minimum standard of treatment under customary international law. In addition, the Respondent submits, contrary to the Claimant’s view, that rulings by tribunals under the NAFTA may help to determine the ordinary meaning of FET under customary international law. The Respondent submits that its construction of the minimum standard of treatment as not

⁶⁴⁶ *Neer Case*, 15 October 1926, UNRIAA, vol. IV, (AL RA-156), pp. 61-62.

⁶⁴⁷ Respondent’s Rejoinder on the Merits, ¶ 611; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL/NAFTA Arbitration, Award, 26 January 2006 (AL RA-132), ¶ 194 (emphasis added); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL/NAFTA Arbitration, Award, 8 June 2009 [hereinafter: *Glamis v. USA*] (CL-36), ¶ 616; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 [hereinafter: *Waste Management v. Mexico*] (CL-55), ¶ 98.

⁶⁴⁸ Respondent’s Rejoinder on the Merits, ¶ 606.

⁶⁴⁹ ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 1 October 2018 (AL RA-304), ¶ 162 (emphasis added).

⁶⁵⁰ Respondent’s Rejoinder on the Merits, ¶ 609.

including legitimate expectations is in line with the interpretation of this clause made by other States, such as the one expressed by the United States in *Omega v. Panama*.⁶⁵¹

569. The Respondent argues that even if the Tribunal were to consider that the FET standard is broader in scope, absent express promises or specific commitments made by the State, which have to be specific and unequivocal, an investor may not rely on any expectations it may have had as these do not give rise to binding obligations on States.⁶⁵² As explained in *Blusun v. Italy*, tribunals have declined to “*sanctify laws as promises*.”⁶⁵³ The *Muszynianka v. Slovakia* tribunal recently confirmed that “*absent specific assurances, FET does not protect expectations in relation to the stability of a State’s legal framework*.”⁶⁵⁴
570. Furthermore, according to the Respondent, the FET standard only protects legitimate expectations if they were created prior to the initial investment and the investor has relied upon them.⁶⁵⁵ In this regard, the Respondent relies on *REENERGY v. Spain* to assert that the existence of a legitimate expectation is to be assessed at the time when the investment was made, and that it is not the subjective belief of the investor in question that counts in the assessment of legitimate expectations.⁶⁵⁶ The Respondent also relies on *Alejandro Diego Diaz Gaspar v. Costa Rica* to affirm that the legitimate expectations that are relevant are those generated at the moment when the investment is made, not those that may have been generated in the course of its operation.⁶⁵⁷
571. In response to the Claimant’s assertion that the *Total v. Argentina* tribunal recognized that it was possible for an investor to base its expectations on a general law such as the Electricity Law, the Respondent states that more recent case law, such as *RREEF v. Spain*, has found that general statements contained in a State’s laws and regulations,

⁶⁵¹ *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States of America of 3 February 2020 (**AL RA-164**), ¶ 24.

⁶⁵² Respondent’s Counter-Memorial, ¶ 419; Respondent’s Rejoinder on the Merits, ¶¶ 621 *et seq.*; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 [hereinafter: *EDF v. Romania*] (**CL-37**), ¶ 217; see also *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016 [hereinafter: *Philip Morris v. Uruguay*] (**AL RA-141**), ¶ 424; *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 January 2016 [hereinafter: *Charanne v. Spain*] (**AL RA-157**), ¶¶ 490, 499.

⁶⁵³ *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (**AL RA-158**), ¶ 367.

⁶⁵⁴ *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020 (**AL RA-305**).

⁶⁵⁵ Respondent’s Counter-Memorial, ¶ 459; *LG&E v. Argentina (CL-24)*, ¶ 130; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 [hereinafter: *CCC v. Argentina*] (**CL-120**), ¶ 259; *CMS v. Argentina (CL-10)*, ¶ 275.

⁶⁵⁶ *REENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022 (**AL RA-328**), ¶ 638.

⁶⁵⁷ *Alejandro Diego Diaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022 (**AL RA-327**), ¶ 368.

which because of their nature can evolve, may not be deemed specific commitments made directly to an investor.⁶⁵⁸

572. The Respondent also cites the distinction drawn by the tribunal in *Eskosol v. Italy* between statements made specifically to ensure investors that they would not be subject to regulatory changes and merely political or general legislative statements.⁶⁵⁹
573. The Respondent rejects the Claimant’s assertion that the exercise of the sovereign right to regulate amounts to a violation of the FET standard if the changes entail a “*fundamental change to the regulatory regime.*”⁶⁶⁰
574. The Respondent adds that the Claimant’s position according to which a number of tribunals have rejected the argument that a specific commitment to stability is required in order for the FET standard to be deemed breached is not backed by the precedents it relies upon.
575. With respect to *RREEF v. Spain*, the Respondent asserts that while the Claimant cites the holding of the tribunal according to which “*the obligation to create a stable environment certainly excludes any unpredictable radical transformation in the conditions of the investments,*” it omits to specify that such conclusion was exclusively applicable to Article 10(1) of the Energy Charter Treaty, which, unlike the BIT, provides for specific guarantees of stability.⁶⁶¹ The Respondent applies the same conclusion to the Claimant’s reference to *Eiser v. Spain*.⁶⁶²
576. The Respondent also refers to the findings of the *CMS v. Argentina* tribunal, in which the tribunal did not find that any regulatory change is incompatible with the BIT, but only those that completely undo the regulatory framework altogether, in breach of specific commitments made with respect to the investment.⁶⁶³ Furthermore, the Respondent refers to the decision in *Impregilo v. Argentina*, where the tribunal found that “*fair and equitable treatment cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements.*”⁶⁶⁴

⁶⁵⁸ Respondent’s Rejoinder on the Merits, ¶ 669; *RREEF v. Spain (CL-48)*, ¶ 245.

⁶⁵⁹ *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020 [hereinafter: *Eskosol v. Italy*] (CL-541), ¶ 426.

⁶⁶⁰ Respondent’s Rejoinder on the Merits, ¶ 621.

⁶⁶¹ *Id.*, ¶ 626.

⁶⁶² *Id.*, ¶ 627.

⁶⁶³ *CMS v. Argentina (CL-10)*, ¶ 277.

⁶⁶⁴ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 [hereinafter: *Impregilo v. Argentina*] (CL-18), ¶ 290; *El Paso v. Argentina (CL-23)*, ¶ 368.

577. Likewise, in *El Paso v. Argentina*, the tribunal decided not to follow the line of cases in which the fair and equitable treatment clause was viewed as implying the stability of the legal framework stating that “[e]conomic and legal life is by nature evolutionary.”⁶⁶⁵
578. Assuming in the alternative that legitimate expectations are part of the FET standard, the Respondent cites the finding of the *Eskosol v. Italy* tribunal, according to which “it is axiomatic that legitimate expectations must be based on some form of State conduct, and not simply on the investor’s own subjective expectations.”⁶⁶⁶
579. The Respondent adds that the case law cited by the Claimant for its argument that an investor may inherit the predecessor investor’s legitimate expectations do not support its position. According to the Respondent, first, the findings of *Saluka v. Czech Republic* referred to by the Claimant⁶⁶⁷ are inapplicable because the relationship between the Claimant and its parent company in that case were different from the relationship between Duke Energy and Orazul. Second, *Cube v. Spain* is also inapplicable because the tribunal in that case derived its conclusions from an analysis of the Energy Charter Treaty, which is substantially different from the Argentina-Spain BIT.⁶⁶⁸

b) Application to the facts

580. The Respondent submits that the Claimant’s allegations in relation to regulatory stability are unfounded. Even if the Tribunal were to consider that the FET standard includes legitimate expectations, the Respondent submits that there is no specific commitment, and even if there had been, Orazul fails to demonstrate that it had the expectations it now claims to have at the time when the investment was made and that those expectations were both objective and reasonable.⁶⁶⁹
581. The Respondent asserts that no specific commitment has been assumed towards the Claimant, neither as of December 2003, to re-establish the marginal cost remuneration system in force in the 1990s and to reverse the measures adopted by the Argentine Republic by 2006, nor as of December 2016.⁶⁷⁰ The Respondent submits that even assuming *arguendo* that the FET standard would guarantee that the State will not modify the legal framework upon which the investor relies on despite the lack of a specific

⁶⁶⁵ *El Paso v. Argentina* (CL-23), ¶¶ 350-352.

⁶⁶⁶ *Eskosol v. Italy* (CL-541), ¶ 452.

⁶⁶⁷ Respondent’s Counter-Memorial, ¶ 464; *Saluka v. Czech Republic* (CL-11), ¶¶ 70-71.

⁶⁶⁸ Respondent’s Counter-Memorial, ¶ 465; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019 [hereinafter: *Cube v. Spain*] (CL-51), ¶ 389.

⁶⁶⁹ Respondent’s Rejoinder on the Merits, ¶¶ 621 *et seq.*

⁶⁷⁰ *Id.*, ¶ 672.

commitment, the Claimant has failed to show that the disputed measures shattered the essential characteristics of the investment.⁶⁷¹

aa) Spot pricing mechanism

582. With respect to the changes undertaken to the spot pricing mechanism, the Respondent argues that Orazul’s claim regarding the modification of the fundamental characteristics of the regulatory framework of the remuneration mechanism based on marginal costs in force in the nineties is untenable. According to the Respondent, the fact that different remuneration mechanisms were used in calculating those payments does not render the measures incompatible with the Electricity Law, let alone with the FET standard.
583. First, concerning the remuneration of generators, the Respondent recalls that Article 36 of the Electricity Law provides that it is up to the Energy Secretariat to establish a “*uniform price*” for electricity sold reflecting the economic cost of the system, which is achieved by setting the same remuneration at a given point of delivery for generators operating under the same or similar conditions. The Respondent argues that the imposition of a maximum cap of ARS 120/MWh and the exclusion from its calculation of machines operating with fuels other than natural gas is compatible with the principles set forth in the Electricity Law and the powers vested in the Energy Secretariat to regulate the WEM. Accordingly, these changes cannot be deemed “*fundamental*.”⁶⁷²
584. Second, concerning the creation of energy commercialization schemes applying differential remuneration guidelines that the Claimant complains of, the Respondent submits that establishing incentives to increase the supply of electricity generation and discriminating between new and old investments, based on the fact that the former is not amortized, is a perfectly reasonable practice from a legal and economic standpoint.⁶⁷³
585. Third, concerning the application of different remuneration arrangements for generators on the basis of the used technology, the Respondent argues that distinctions made on the basis of the technology used and the size of the plant are consistent with the principles embodied in the Electricity Law, insofar as all generators situated in similar conditions are paid a uniform price.⁶⁷⁴ With respect to CAMMESA becoming the sole and exclusive fuel buyer, fuel provider and off-taker of electricity as a result of Resolution 95/13, the Respondent submits that the measure was devised with the sole

⁶⁷¹ *Id.*, ¶¶ 631 *et seq.*

⁶⁷² *Id.*, ¶ 634.

⁶⁷³ *Id.*, ¶ 637.

⁶⁷⁴ *Id.*, ¶ 639.

aim of simplifying a scheme under which, in practice, CAMMESA went from being a supplier of last resort to providing almost 85% of all fuel supplied.⁶⁷⁵

bb) Capacity payments

586. With respect to capacity payments, the Respondent asserts again that the adjustments made to capacity payments were reasonable and do not constitute fundamental changes to the regulatory framework. In addition, the capacity payment prices challenged by the Claimant had already been set by the Energy Secretariat, in accordance with its powers granted under the Electricity Law, before the investment was made.⁶⁷⁶
587. According to the Respondent, the Electricity Law does not set out any provision as to how those payments should be made.⁶⁷⁷ The tribunal in *Total v. Argentina* expressly recognized that the regulatory powers of the Energy Secretariat to fix capacity payments were so broad that the authority could have even “*abolished such payments.*”⁶⁷⁸
588. The Respondent asserts that the Claimant fails to acknowledge that the capacity payments were set, as a result of pesification pursuant to Resolution 246/02, at ARS 12/MW-hrp already in July 2002, *i.e.*, long before the Claimant acquired its shareholding in Cerros Colorados in December 2003.⁶⁷⁹ In addition, the Respondent recalls that the Electricity Law delegates to the Energy Secretariat the power to determine the price, currency and method for the calculation of capacity payments, which it has done since the inception of the WEM.⁶⁸⁰
589. The Respondent disagrees with the Claimant’s contention that generators had to be compensated for capacity “*regardless of whether it is actually dispatched.*”⁶⁸¹ According to the Respondent’s witness, Mr. Ruisoto, “[*d*]uring the 1990s and part of the 2000s, capacity payments were linked exclusively to energy dispatch” and it was not until 2013 that available capacity was remunerated regardless of whether the generating

⁶⁷⁵ *Id.*, ¶ 639; Cameron II, ¶ 81.

⁶⁷⁶ Respondent’s Rejoinder on the Merits, ¶ 651.

⁶⁷⁷ Respondent’s Counter-Memorial, ¶ 436.

⁶⁷⁸ *Total v. Argentina (CL-29)*, ¶ 311.

⁶⁷⁹ Respondent’s Rejoinder on the Merits, ¶ 642.

⁶⁸⁰ Electricity Law (C-2), Article 36. See also Selling Memorandum (stating that “[t]he SE is responsible for setting capacity payments. The value of capacity has been set at USD 5 per MW per hour for the period from November 1, 1992 to April 30, 1994. It has been decided to increase the value of capacity to USD 10 per MW per hour from April 30, 1994 and it is currently expected that the value will remain at this level over the medium-term”) (emphasis added) (C-6), p. 84.

⁶⁸¹ Claimant’s Reply on the Merits, ¶ 130.

unit dispatched or not.⁶⁸² This is also confirmed in the Selling Memorandum for the Privatization of Hidroeléctrica Norpatagónica S.A.⁶⁸³

590. The Respondent also submits that the decrease in investments in the electricity generation sector cannot be attributed, as the Claimant seeks to do, to the implementation of the measures by the Argentine Republic since 2002. The Respondent recalls that even before the crisis broke out in 2001, the electricity sector was already in need of adjustment as was acknowledged by the Argentine Minister of Infrastructure and Housing in 2001.⁶⁸⁴
591. Finally, the Respondent disputes that it acknowledged that capacity payments “*were too low and, therefore, adjusted them in Resolution 19/17, and then abruptly changed course shortly thereafter.*” According to the Respondent and its witness Mr. Sruoga, the remuneration methodology set forth in Resolution 19/17 “*was closely linked to the prevailing situation*” but in no way constituted a benchmark for the calculation of capacity payments.⁶⁸⁵ The Respondent states that, once available capacity reached a level that would allow the system to operate in a safe and reliable manner, it was to be expected that the price would be reduced.

cc) Regulation of the term market

592. The Respondent notes that the suspension of certain term contracts established under Resolution 95/13, which was expressly accepted by the Claimant, was a reasonable regulation given the conditions of the sector at the time. The Respondent submits that such regulation did not result in the complete abandonment of private contracts, which could still be made under other schemes.⁶⁸⁶
593. The Respondent adds that the Claimant fails to mention that in early 2002 less than 13% of the electricity produced was sold in the term market, as most of the sales were concentrated in the spot market. According to the Respondent’s witness Mr. Ruisoto, between 2002 and 2003, the electricity sold under term contracts amounted to 20% on average and reached its peak (*i.e.*, 29%) between April and August 2003.⁶⁸⁷

⁶⁸² Ruisoto II, ¶ 16; Resolution 95/2013 dated 22 March 2013 (C-21); Respondent’s Rejoinder on the Merits, ¶ 644.

⁶⁸³ Selling Memorandum (C-6), p. 84.

⁶⁸⁴ House of Representatives, 22nd meeting, continuation of the 10th ordinary session, 22 August 2001 (A RA-443), p. 89.

⁶⁸⁵ Sruoga II, ¶ 24; Respondent’s Rejoinder on the Merits, ¶ 649.

⁶⁸⁶ Respondent’s Counter-Memorial, ¶ 435; Respondent’s Rejoinder on the Merits, ¶ 654.

⁶⁸⁷ Ruisoto II, ¶ 66.

594. Contrary to the Claimant's allegation, the Respondent further submits that all generators had the opportunity to choose to participate in the *Energía Plus* program on an equal footing and Duke Energy could have chosen this alternative if it had so wished.⁶⁸⁸
595. The Respondent's witness, Mr. Ruisoto, adds that Duke Energy International Southern Cone S.R.L., a company owned by the same shareholders as Cerros Colorados, in fact participated in the *Energía Plus* program and was able to increase its capacity by more than 700% through the program.⁶⁸⁹

dd) Adjustments to the payment of part of the receivables and the agreements in which Orazul voluntarily participated

596. The Respondent submits that the Claimant complains about the order of priority for the allocation of resources to cover WEM agents' receivables as per Resolution 406/03, even though such measure was already in place when the Claimant acquired its indirect interest in Cerros Colorados.⁶⁹⁰ Accordingly, the Claimant knew or should have known about the applicability of Resolution 406/03 when it acquired its interest in Cerros Colorados.⁶⁹¹
597. The Respondent also submits that Resolution 406/03 was a reasonable and necessary measure. The Respondent describes the adjustments to the payment of receivables as resulting from the 2001 crisis, which required regulating the increase in seasonal prices so that users would be able to pay for the service. While the difference in prices was initially absorbed by the Seasonal Stabilization Fund, the fund eventually became depleted in June 2003 and it became impossible to cover all the receivables payable to WEM creditors with funds obtained from demand. The Respondent submits that partial payment of receivables was never on the table. Rather, the Respondent sought to prioritize payments, which entailed the postponement of certain payments. The sums that could not be paid due to the shortage of resources were recognized in full, without reductions, and they were recorded as debt payable by the Seasonal Stabilization Fund and registered as receivables, at the request of generators.⁶⁹²
598. In addition, the Respondent submits that the agreements that the Claimant voluntarily chose to enter into were the result of joint work to achieve the readaptation of the

⁶⁸⁸ Ruisoto II, ¶ 69; Respondent's Rejoinder on the Merits, ¶ 655.

⁶⁸⁹ Ruisoto I, ¶ 110; Duke Energy International Southern Cone S.R.L., Annual Report to the Financial Statements for the fiscal year beginning on 1 January 2010 and ended on 31 December 2010, (A RA-451), p. 16. *See also* Duke Energy International Southern Cone S.R.L., Annual Report to the Financial Statements for the fiscal year beginning on 1 January 2011 and ended on 31 December 2011 (A RA-452), p. 15.

⁶⁹⁰ Respondent's Rejoinder on the Merits, ¶ 659.

⁶⁹¹ *Id.*, ¶ 664.

⁶⁹² *Id.*, ¶ 663.

system. The generators were not forced to enter into the FONINVEMEM agreements and those agreements were not the only option to collect the amounts owed. On the contrary, the Respondent alleges that the Energy Secretariat presented generators with different alternatives for payment of their receivables and the execution of the FONINVEMEM agreements was the culmination of a negotiation process.⁶⁹³ Furthermore, any generator (such as Orazul) could have resorted to the courts to collect their debt, but none did.⁶⁹⁴

599. More generally, according to the Respondent, the Electricity Law on which Orazul attempts to base its expectations does not establish the commitments it invokes. The Law does not set a specific remuneration system to be applied, but establishes general principles and delegates the power to determine such system to the Energy Secretariat.⁶⁹⁵
600. In addition, noting that the Claimant acknowledges that both Resolution 240/03 and Resolution 406/03 were passed before the December 2003 investment but insists that these were transitory, the Respondent submits that, like general laws, resolutions, which were not specifically aimed at Duke Energy, cannot be deemed to constitute a specific commitment by the State to the investor.⁶⁹⁶ Furthermore, contrary to the Claimant's allegation, the resolutions did not provide that the measures would be reversed by mid-2006. In particular, Resolution 406/03 specifically states that it will apply "*until [the] Secretariat of Energy provides otherwise.*"⁶⁹⁷
601. According to the Respondent, since legitimate expectations cannot be based on an "*investor's own subjective expectations,*"⁶⁹⁸ the Claimant's attempt to draw a specific commitment from Resolutions 240/03 and 406/03 cannot be admitted.⁶⁹⁹
602. In addition, the Respondent states that, contrary to the Claimant's view, its prior ratification of bilateral investment treaties may not validly constitute a commitment that the regulatory measures adopted by the Energy Secretariat would be reversed by mid-2006.⁷⁰⁰
603. Even if there had been a specific commitment, the Respondent submits that the Claimant failed to prove that it had the expectations it invokes at the time of making its

⁶⁹³ Respondent's Counter-Memorial, ¶ 489; Respondent's Rejoinder on the Merits, ¶ 665; Ruisoto I, ¶ 94.

⁶⁹⁴ Cameron III, ¶ 13.

⁶⁹⁵ Respondent's Rejoinder on the Merits, ¶ 673; Ruisoto II, ¶ 10; Expert Report of Rodriguez Pardina, ¶ 92.

⁶⁹⁶ Respondent's Rejoinder on the Merits, ¶ 676.

⁶⁹⁷ Resolution 406/2003 dated 8 September 2003 (C-9), Article 8.

⁶⁹⁸ *Eskosol v. Italy (CL-541)*, ¶ 452.

⁶⁹⁹ Respondent's Rejoinder on the Merits, ¶ 677.

⁷⁰⁰ *Id.*, ¶ 678.

investment. The Respondent states that the Claimant has not refuted that the FET standard only protects legitimate expectations if they were created prior to the initial investment and the investor has relied upon them.⁷⁰¹ The Claimant has also not refuted that an investor may not inherit the legitimate expectations of the predecessor investor.⁷⁰² The Respondent submits that the Claimant's cited case law (*Frontier Petroleum v. Czech Republic*) expressly ruled that any expectations arising after the date of the investment are not covered by the notion of legitimate expectations.⁷⁰³ The Respondent adds that the same criterion was followed in *Charanne v. Spain*, which held that “regulatory measures must not have been reasonably foreseeable at the time of the investment.”⁷⁰⁴

604. According to the Respondent, the Claimant was never incited to invest on the promise that the pricing mechanism in force prior to the 2001 crisis (in particular, the marginal cost system set forth by Resolution 61/92) would be reinstated by mid-2006 and would remain unchanged in the future.⁷⁰⁵ The Electricity Law contradicts the existence of any commitment to readapt the regulatory framework. Rather, the Energy Secretariat was empowered by the Law to issue any necessary regulations in relation to the compensation payable to electricity generators. Furthermore, the possibility of new adjustments to the regulatory framework was foreseeable considering that Resolution 8/2002 (modifying the spot price calculation methodology and setting an ARS 120/MW cap), Resolution 240/03 (excluding from spot price formation machines that operated with fuels other than natural gas), and Resolution 406/03 (setting an order of priority for payments to WEM creditors) were all in force when Duke Energy acquired the initial investment back in December 2003.⁷⁰⁶ The Respondent argues that the Claimant could not have possibly ignored the regulatory powers of the Energy Secretariat and the lack of due diligence in corporate behavior cannot be attributed to the host State and be used as an excuse to prove BIT violations.⁷⁰⁷
605. Finally, the Respondent claims that the Claimant's alleged expectations are neither objective nor reasonable, but must be so, or else they can result in the imposition of absurd obligations inconsistent with the State's duty to deal with issues that are of public

⁷⁰¹ Expert Report of Jorge E. Viñuales, ¶ 163; Respondent's Counter-Memorial, ¶ 459; Respondent's Rejoinder on the Merits, ¶ 680.

⁷⁰² Respondent's Rejoinder on the Merits, ¶ 681.

⁷⁰³ *Id.*, ¶¶ 681-683; *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 [hereinafter: *Frontier v. Czech Republic*] (CL-80/CL-542), ¶¶ 287-288.

⁷⁰⁴ *Charanne v. Spain* (AL RA-157), ¶ 505.

⁷⁰⁵ Respondent's Rejoinder on the Merits, ¶ 689.

⁷⁰⁶ *Id.*, ¶ 686.

⁷⁰⁷ *Id.*, ¶ 688.

interest.⁷⁰⁸ According to the Respondent, the objective and reasonable expectations of any investor entering Argentina's electricity market in the 1990s had to include the possibility of changes and modifications to the relevant regulatory framework. This was even more distinct in December 2003 and December 2016, when most (or at least many) of the measures now challenged by the Claimant had already been legitimately adopted by the Energy Secretariat.⁷⁰⁹

606. In addition, the Respondent argues that the findings of the decision rendered in *Total v. Argentina* should be rejected. Apart from the fact that there are no binding precedents in investment arbitration, according to the Respondent, it is clear that the facts of that case and, in particular, the behavior of the investor concerned were entirely different from those of the instant case.⁷¹⁰
607. With respect to *El Paso v. Argentina*, the Respondent contends that the tribunal based its conclusion on the cumulative impact of the disputed measures, on the legitimate expectations of the investor, as well as on how those measures had influenced El Paso's decision to sell its investments in Argentina in 2003. The Respondent submits that none of those circumstances apply in the case at hand because Orazul invested in the Argentine electricity sector, when most of the challenged measures had already been implemented by the Energy Secretariat.⁷¹¹
608. According to the Respondent, all measures adopted by it have been taken with the aim of having sufficient supply under safety and sustainability conditions in order to ensure the supply of electricity to all users.⁷¹²
609. In any event, the Respondent submits that the regulatory framework on which the Claimant seeks to base its claim recognizes the Respondent's right and obligation to regulate the electricity market.
610. Specifically, the Electricity Law sets the national policy goals for electricity supply, transmission and distribution (including the protection of users' rights) and confers upon the Energy Secretariat the power to regulate the electricity market and, in particular, to define the manner in which the remuneration payable to generators is to be determined. The Electricity Law refers to the right to regulate power generation as being "*of public interest, dedicated to such utility and subject to the rules and regulations that ensure normal operation thereof.*"⁷¹³

⁷⁰⁸ *Id.*, ¶ 691.

⁷⁰⁹ *Id.*, ¶ 695.

⁷¹⁰ Respondent's Counter-Memorial, ¶¶ 434 *et seq.*

⁷¹¹ Respondent's Rejoinder on the Merits, ¶ 629.

⁷¹² *Id.*, ¶ 613.

⁷¹³ Electricity Law (C-2), Article 1.

611. The Respondent explains that, under the Electricity Law, the national policy goals are set for electricity supply, transmission and distribution and the Energy Secretariat is given authority to regulate the WEM and, specifically, to define the manner in which the remuneration payable to generators is to be determined.⁷¹⁴ According to the Respondent, since the 1990s, the Energy Secretariat adopted reasonable measures to pursue the energy policy goals established in the Electricity Law, including the protection of users' right to access electric power as a utility. In addition, some of the measures disputed by the Claimant were already in force when Duke Energy acquired a stake in Cerros Colorados, thus rendering Orazul's claim that regulations governing electricity generation should remain unaltered absurd.⁷¹⁵
612. The Respondent submits that the Claimant has been unable to demonstrate any conduct by the Respondent that would overstep the limits of a legitimate exercise of a State's own power and obligation to regulate.⁷¹⁶

3. The Tribunal's analysis

a) The applicable standard

613. Article IV(1) of the BIT, titled "*Treatment*", establishes the obligation on the contracting States to provide fair and equitable treatment in the following terms:

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

614. In terms of the nature of such treatment, the Parties disagree on whether the FET standard contained in the BIT should be given an autonomous meaning or whether it refers to the minimum standard of treatment under customary international law.
615. The Tribunal notes that the Argentina-Spain BIT does not contain any reference to customary international law specifically with regard to fair and equitable treatment. It thus finds no basis to equate the FET standard of the BIT without further analysis with the minimum standard of treatment under customary international law. The Tribunal is also mindful that there has been a strong tendency among tribunals to give FET provisions in international investment agreements an autonomous meaning,⁷¹⁷ with the

⁷¹⁴ *Id.*, Article 36.

⁷¹⁵ Respondent's Counter-Memorial, ¶ 432; Respondent's Rejoinder on the Merits, ¶ 635. See in particular, Resolution 8/2002 dated 5 April 2002 (A RA-182) and Resolution 240/2003 dated 14 August 2003 (C-8)..

⁷¹⁶ Respondent's Counter-Memorial, ¶ 411.

⁷¹⁷ *Teinver v. Argentina – Award (CL-99)*, ¶ 666; *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017 (CL-563), ¶ 530; *Belenergia S.A. v. The Italian Republic*, ICSID Case No. ARB/15/40, Award, 28 August 2019 (CL-409), ¶ 568.

notable exception of tribunals constituted under NAFTA. However, the FET standard under NAFTA differs from the one contained in the BIT in that it expressly refers to the customary international law standard.⁷¹⁸

616. Turning, thus, to the specific content of the obligation to accord fair and equitable treatment, the Tribunal applies the VCLT, which provides that the Treaty “*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”

617. The object and purpose of the BIT is reflected in its Preamble, which provides:

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

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

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

618. As recalled by the *Teinver v. Argentina* tribunal,⁷¹⁹ the stated purpose of the BIT is to “*intensify economic cooperation,*” “*create favorable conditions for investments,*” and to promote and protect investments in order to encourage investment. The object of the BIT’s FET standard is not the investor but the “*investments made by investors of the other Party.*”

619. The Tribunal finds that it is in line with this object and purpose to give protection to an investor’s legitimate expectations. In this respect, the Tribunal agrees with the finding in *Duke Energy v. Ecuador*, in which the tribunal held:

*The stability of the legal and business environment is directly linked to the investor’s justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. **To be protected, the investor’s expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that***

⁷¹⁸ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001 (AL RA-302).

⁷¹⁹ *Teinver v. Argentina – Award (CL-99)*, ¶ 665.

*the State offered the investor and the latter must have relied upon them when deciding to invest.*⁷²⁰ (emphasis added)

620. Notably, the Claimant has relied in this arbitration on the findings in *Duke Energy v. Ecuador*, even if in another context.⁷²¹
621. The Tribunal therefore applies the following three-prong test to examine whether the Respondent has breached its obligations to protect Orazul's legitimate expectations:
- Did the Respondent create expectations of Orazul that were legitimate?
 - Did Orazul rely on those legitimate expectations?
 - Did the Respondent breach the legitimate expectations?
622. As far as the first prong of this test is concerned, the Tribunal must consider all relevant circumstances. For example, the tribunal in *Continental Casualty v. Argentina* assessed the following factors:
- (i) *the specificity of the undertaking allegedly relied upon, [...] considering that political statements have the least legal value [...];*
 - (ii) *general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and ius cogens;*
 - (iii) *unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve clearly more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance;*
 - (iv) *centrality to the protected investment and impact of the changes on the operation of the foreign owned business in general including its profitability is also relevant; - good faith, absence of discrimination (generality of the measures challenged under the standard), relevance of the public interest pursued by the State, accompanying*

⁷²⁰ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 [hereinafter: *Duke v. Ecuador*] (CL-124), ¶ 340.

⁷²¹ Claimant's Memorial, ¶ 512; *Duke v. Ecuador* (CL-124), ¶ 318.

*measures aimed at reducing the negative impact are also to be considered in order to ascertain fairness.*⁷²²

623. Specifically with respect to the second of the above-referenced factors (general legislative statements), the Tribunal agrees that care must be taken when seeking to base an investor's legitimate expectation on a State's general legal framework. The Tribunal finds that an investor's expectation must have arisen from a specific assurance, commitment or representation given by the State at the time when the investor made its investment.⁷²³ This is due to the fact that States have regulatory authority, which includes the authority to adapt the applicable regulatory framework to changed circumstances.

624. The Tribunal finds support for its view in the decision rendered by the tribunal in *Impregilo v. Argentina*. The latter tribunal held that the

*legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but investors must be protected from unreasonable modifications of that legal framework.*⁷²⁴

625. Similarly, in *El Paso*, the tribunal held:

*There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total.*⁷²⁵

626. The tribunal in *Philip Morris v. Uruguay* held:

[C]hanges to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power

⁷²² *CCC v. Argentina (CL-120)*, ¶ 261.

⁷²³ *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008 [hereinafter: *National Grid v. Argentina*] (CL-64), ¶ 173; *Duke v. Ecuador (CL-124)*, ¶ 340; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 [hereinafter: *Feldman v. Mexico*] (AL RA-161), ¶¶ 148-149; *Frontier v. Czech Republic (CL-80/CL-542)*, ¶ 287; *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 29 February 2008 (CL-312), ¶ 490; *El Paso v. Argentina (CL-23)*, ¶¶ 375-379; *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶ 10.3.17; *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017 [hereinafter: *Venezuela Holdings v. Venezuela*] (AL RA-7), ¶ 256; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 [hereinafter: *Infinito Gold v. Costa Rica*] (CL-299), ¶ 515.

⁷²⁴ *Impregilo v. Argentina (CL-18)*, ¶ 291.

⁷²⁵ *El Paso v. Argentina (CL-23)*, ¶ 374.

*in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment “outside of the acceptable margin of change.”*⁷²⁶

627. The tribunal in *Parkerings v. Lithuania* found:

In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.

*By deciding to invest notwithstanding this possible instability, the Claimant took the business risk to be faced with changes of laws possibly or even likely to be detrimental to its investment. The Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes.*⁷²⁷

628. The above case law does not exclude that a change of the normative framework may in a given case breach the obligation to accord fair and equitable treatment. However, the threshold to be passed is high.

629. Having thus defined the applicable standard of FET under the BIT, before turning to the facts of the present case, the Tribunal finds it necessary to further elaborate also on the timing for the legitimate expectations. The Tribunal finds that the investor’s legitimate expectations must be assessed at the time of making the investment.⁷²⁸

630. In the present case, the decisive point in time to assess the Claimant’s legitimate expectation is December 2003. To recall, Duke Energy International España Holdings

⁷²⁶ *Philip Morris v. Uruguay* (AL RA-141), ¶ 423.

⁷²⁷ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, (AL RA-159), ¶¶ 335-336.

⁷²⁸ *National Grid v. Argentina* (CL-64), ¶ 173; *Duke v. Ecuador* (CL-124), ¶ 340; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 [hereinafter: *Bayindir v. Pakistan*] (CL-323), ¶¶ 190-191; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, (CL-58), ¶ 264; *The PV Investors v. Spain*, PCA Case No. 2012-14, Award, 28 February 2020 (AL RA-170), ¶ 740.

S.L.U. was incorporated in Spain in October 2003,⁷²⁹ thereby bringing the company under the protection of the Argentina-Spain BIT, under which the Claimant brings its claims in these proceedings. In December 2003, the newly formed Duke Energy International España Holdings S.L.U. acquired a 99.92% interest in Duke Energy Generating S.A. and thereby an indirect 90.80% interest in Cerros Colorados.⁷³⁰ Duke Energy International España Holdings S.L.U. was ultimately renamed on 17 January 2017 to the Claimant's current name, "*Orazul International España Holdings S.L.U.*"⁷³¹ December 2003 is therefore the crucial point in time at which to consider the Claimant's legitimate expectations as it marks the completion of the restructuring process within Duke Energy and the acquisition of the Claimant's interest in Cerros Colorados.

631. The Tribunal understands that both Parties agree that the decisive point in time to assess Orazul's legitimate expectations is December 2003. While the Claimant initially alleged that it should be entitled to rely on its predecessor's legitimate expectations, it announced during the Hearing that it was "*not anywhere seeking to inherit the expectations of any other member of the corporate group*" and that there was no "*need to delve into issues that don't need to be decided for this case.*"⁷³² Accordingly, the Tribunal does not need to assess whether the Claimant may rely on any expectations of its predecessor and only takes into consideration the Claimant's own expectations as they existed in December 2003. The Respondent's international legal expert Prof. Viñuales has taken the same view and stated in his expert report that

*it would be contradictory to consider that the 'legitimate expectations' of an investor other than the Spanish investor, formed at a time other than in December 2003 when the investment was acquired, can serve to assess the claim for alleged breach of the fair and equitable treatment standard.*⁷³³

632. The Tribunal conversely finds that the alleged representations of the Government it should consider are also only those prior to the Claimant's investment, to the exclusion of any subsequent governmental conduct.

⁷²⁹ Bylaws of Duke Energy International España Holdings, S.L. dated 22 October 2003 (C-48).

⁷³⁰ Copies of the Orazul Companies Stock Ledgers for Law 23,299 dated 1992-2020 (C-3).

⁷³¹ Resolutions of the Sole Shareholder of Duke Energy International España Holdings, S.L.U. dated 17 January 2017 (C-212).

⁷³² Hearing Transcript, Day 10, pp. 2677.

⁷³³ Expert Report of Jorge E. Viñuales, ¶ 162.

b) Application to the facts

633. Having made these findings regarding the applicable legal standard and the decisive point in time for assessing the Claimant’s legitimate expectations, the Tribunal turns to the facts of this case.
634. As a preliminary observation, the Tribunal notes that the facts of the present case are special and different from the ones underlying other cases discussed by the Parties. This is not a case in which an investor claims that the Respondent failed to preserve the stability of the regulatory framework as applicable in 2003 at the time of the Claimant’s investment. Quite to the contrary, the Claimant argues that the Respondent should have changed the regulatory framework as applicable in 2003. Specifically, the Claimant claims to have had the expectation that the market would be “*restored*” by mid-2006, which is the basis for the Claimant’s damages calculation.⁷³⁴ In the alternative, the Claimant submits that it expected the market to be restored at the latest in 2010 when the two FONINVEMEM I Plants went into operation. Such expectation forms the basis for the Claimant’s alternative damages calculation.⁷³⁵
635. The relevant question to be determined is therefore not whether the Claimant had a legitimate expectation of stability and immutability of the legal framework in principle with regard to the Electricity Law or specifically with regard to the legal framework as existing in 2003. The relevant question to be determined in this case is rather whether the Claimant had a legitimate expectation that the regulatory framework as existing in 2003 would be modified and, specifically, that it would be modified in the way alleged by the Claimant by mid-2006 or 2010.
636. As set forth in greater detail below, the Tribunal has come to the conclusion that there was no State conduct based on which the Claimant could form such a legitimate expectation.
637. The Tribunal will set out its findings in six analytical steps:
- First, the Tribunal will set out that the Claimant’s subjective expectations do not suffice as a basis for legitimate expectations.
 - Second, the Tribunal will explain that the conditions in place at the time of the investment were marked by the ongoing crisis and ongoing changes. In this situation, there was from an objective perspective no basis for the legitimate expectation that the Respondent would restore the regulatory framework as

⁷³⁴ Claimant’s Memorial, ¶¶ 569 *et seq.*

⁷³⁵ Claimant’s Post-Hearing Brief, ¶ 134.

applicable in the 1990s and that this would be done within the specific time-frame indicated by the Claimant.

- Third, even if there had been a legitimate expectation that the Respondent would take regulatory measures on the basis of the Electricity Law, the Claimant’s claim would not be founded. This is because the Electricity Law did not contain a guarantee of stability with respect to the regulatory conditions as applicable during the 1990s.
- Fourth, the resolutions adopted after the Claimant’s investment were not a basis for any legitimate expectations of the Claimant at the time of the investment. The Claimant has failed to show how the Respondent otherwise breached the obligation to accord fair and equitable treatment by adopting these resolutions.
- Fifth, similar observations hold true for the FONINVEMEM Agreements.
- Sixth, this case can be distinguished on the facts from existing cases on which the Claimant relies.

In what follows below, the Tribunal will set out its analysis in greater detail.

aa) The Claimant’s subjective expectations are not a sufficient basis for the Claimant’s legitimate expectations

638. Turning to the first point, the Tribunal has duly considered that the Claimant – over the time of its investment – expected the regulatory framework as applicable at the time of its investment to change.

639. This subjective expectation is, for example, reflected in Duke’s 2004 Budget Review, which stated:

Energy prices [...] consider a 2 and 1/2 year transition period to reach the long run marginal cost currency participation.

[...]

Revenues from 2003 to 2004 are flat due to current government resolutions; we do not believe these are sustainable and that from 2004-2005 prices will recover and by mid-2006 will reach LRMC.⁷³⁶

640. Mr. McGee, a witness for the Claimant, confirmed during the Hearing that these budget assumptions were made before or contemporaneously to the Claimant’s investment.⁷³⁷

⁷³⁶ DEI Group, 2004 Budget Review: Executive Summary dated 30 September 2003 (C-62).

⁷³⁷ Hearing Transcript, Day 2, pp. 352-353.

Mr. McGee also testified about the nature of such budget assumptions. According to Mr. McGee,

*the budget documents are important because they reflect a record of what was the state of mind of the Company at that point in time [...] and [...] would summarize all the relevant considerations that one would take into account when putting together that type of forward-looking budget for a company.*⁷³⁸

641. When questioned on whether alternative scenarios were considered at the time of its investment, another of the Claimant's witnesses, Ms. Bertone, indicated that the 2004 Budget Review

*made some assumptions of when the market was going to go back to low marginal cost, which means [...] unregulated, and we were thinking the end of 2006, but that was [...] the only analysis we have made. [...] We were trusting that things were going to take the right path at that point.*⁷³⁹

642. Ms. Bertone also confirmed that what led the Claimant to believe that the governmental resolutions in place in 2003 would be lifted was the unsustainability of such measures:

And the reason why we say it's untenable is because, when we did our forecast, we did the forecast with the mind of a businessperson, not with the mind of a politician. And so, what we saw was the prices were being held, the prices of energy. The tariffs were artificially being manipulated to be low [...].

With that, people started using a lot of energy because it was pretty much free; right? It was very cheap. And at the same time, there was a crisis in Argentina that, you know, had started way back in sort of 2001, and the economy started to pick up at more or less at that time, end of 2003, beginning of 2004. It started to pick up. So, you have two factors moving the event up. We could do, like, forecasts of how much power the system was going to have, and how much the demand was going to grow. Obviously, this was not 100 percent scientific, but it was pretty good. And we saw that, you know, pushing that from 2003 to 2006, we were going--if the demand continued to grow, and if the tariffs continued to be artificially low, that the demand was not going to meet--the offer was not going to meet the demand. And we also saw, because this was happening, that nobody was interested in it for an investment because the way you get the return from your

⁷³⁸ *Id.*, p. 332.

⁷³⁹ Hearing Transcript, Day 3, p. 765.

investment is in a free market where the tariffs have the price that they need to have.

So, we, maybe, looking back 20 years later, maybe we were naive to think that. But we thought, well, the Government is going to stop manipulating the market, let the market forces come back naturally. You know, the prices are going to go up. People are going to start using less energy, it is going to become again, a market that is interesting for people to invest, and we are going to get to balance again.⁷⁴⁰

643. While the Tribunal thus accepts that it may well have been the Claimant's subjective expectation that the market would be restored by mid-2006, the Tribunal recalls that the expectations warranting protection under the FET standard of the BIT are those that are objectively reasonable, created by the host State, and relied upon by the investor. The Claimant itself has acknowledged that subjective expectations of the investor, in and of themselves, do not suffice as a basis for legitimate expectations.⁷⁴¹

bb) At the time of the investment, there was no basis for the expectation that the Respondent would restore the regulatory framework as applicable in the 1990s and that this would be done within the specific time-frame indicated by the Claimant

644. The Tribunal therefore turns to the second point and proceeds by examining whether there was State conduct at the time of the investment that could have served as a basis for an objectively reasonable legitimate expectation that the Respondent would restore the regulatory framework as applicable in the 1990s in the timeframe allegedly relied upon by the Claimant.

645. In this respect, the Tribunal recalls that an investor must take the host law as it finds it. This was recognized *inter alia* by the tribunals in *Continental Casualty v. Argentina*,⁷⁴² *El Paso v. Argentina*,⁷⁴³ *Generation Ukraine v. Ukraine*,⁷⁴⁴ and *Methanex v. United States*.⁷⁴⁵

646. At the time of the Claimant's investment in Argentina in December 2003, the regulatory framework was in a state of flux. In fact, a number of regulatory measures adopted by

⁷⁴⁰ *Id.*, pp. 761-763.

⁷⁴¹ Claimant's Memorial, ¶ 396; Claimant's Reply on the Merits, ¶ 541.

⁷⁴² *CCC v. Argentina (CL-120)*, ¶ 255.

⁷⁴³ *El Paso v. Argentina (CL-23)*, ¶ 363.

⁷⁴⁴ *Generation v. Ukraine (AL RA-135)*, § 20.37.

⁷⁴⁵ *Methanex Corporation v. United States of America*, UNCITRAL, Award, 3 August 2005 [hereinafter: *Methanex v. USA*] (AL RA-133), § IV.D ¶¶ 9-10.

the Energy Secretariat were in place that were modifying the regulatory framework of the 1990s. They included:

- **Resolution 2/2002** of 14 March 2002, whereby the fees for transactions in the WEM spot market previously set in US dollars were converted into Argentine pesos (including the payments for capacity made available, which were set at USD 10/MW and thus fixed at ARS 10/MW-hrp);
- **Resolution 8/2002** of 4 September 2002, which partially modified the mechanism for setting the spot price of energy and established a cap of ARS 120/MWh;
- **Resolution 246/2002** of 4 July 2002, as amended by Resolution 317/2002 of 18 July 2002, which set forth a new methodology for capacity payments and increased the value of payments from ARS 10/MW-hrp to ARS 12/MW-hrp;
- **Resolution 240/03** of 14 August 2003, which excluded machines that operated with fuels other than natural gas from the spot pricing mechanism;
- **Resolution 406/03** of 8 September 2003, which set an order of priority for payments to cover the receivables of WEM agents as a result of the critical situation of the Seasonal Stabilization Fund, which had been in deficit since June 2003;
- **Resolution 943/03** of 27 November 2003, which modified Resolution 406/03 and established a transitory mechanism for a priority system requiring CAMMESA to make partial payments to power generators for their electricity sales in the spot market.⁷⁴⁶ The Resolution quantified the amounts owed to generators into two categories: i) those that would be paid on certain due dates, based on available resources; and ii) those that would be paid on uncertain due dates, determined by the Energy Secretariat;
- **Law 25,820** extending the Emergency Law by a year to 31 December 2004.⁷⁴⁷ The Emergency Law *inter alia* explicitly empowered the Executive Branch to “*regulate, temporarily, the prices of critical materials, goods and services, in order to protect the rights of users and consumers.*”

647. And it was not only the regulatory regime that had been in a state of flux. The entire energy sector was marked by the crisis that Argentina was undergoing.

648. For example, the Seasonal Stabilization Fund, which compensated generators for the difference between the spot price and the seasonal price, had been in deficit already

⁷⁴⁶ Resolution 943/2003 dated 27 November 2003 (C-209).

⁷⁴⁷ Law No. 25,561 dated 6 January 2002 (A RA-170); Law 25,820 dated 4 December 2003 (QE-14).

since June 2003.⁷⁴⁸ Accordingly, as from that month it was not possible to cover all of the receivables due to generators of the WEM with the funds obtained from electricity demand. The Claimant itself recognizes that at the time of its investment, generators had not been able to collect their receivables in full since June 2003.⁷⁴⁹

649. There were also structural issues affecting the electricity sector at the time of the Claimant's investment. Indicators showed that additional generation capacity was necessary and little to no investments were being made in Argentina.⁷⁵⁰ This was confirmed *inter alia* by:

- The Respondent's regulatory expert, Dr. Pardina, who confirmed during the Hearing that by the end of the 1990s, the performance of the electricity sector was showing some structural problems, in particular with regard to new investments.⁷⁵¹
- Other actors in the Argentine electricity market, who stated in 2000 that "*there is a major financing problem within the sector, caused by the lack of contracts which, [...] would dramatically help to finance those investments properly.*"⁷⁵²
- Furthermore, as noted by the Vice-President of AGEERA in 2001, "*[i]f demand continues to grow at normal rates, that is an annual rate of 5%, the risk of shortages in 2004 increases [...] Generators invest in a market where there is freedom between supply and demand, but in Argentina, starting in 1995, distorting regulations were introduced, wrong rules by which we receive 10% less than what we should.*"⁷⁵³

650. In addition, contemporaneously to the Claimant's investment, CAMMESA indicated in a risk evaluation report in December 2003 titled "*Assessment of Medium- and Long-term Risks – 2004-2007 Period*" that the "*economic and financial conditions of the sector do not allow it to ensure an operation enabling to cover future requirements at a sustainable cost.*"⁷⁵⁴

⁷⁴⁸ Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:0176178/2004 (Part 1) dated 28 July 2004 (C-105).

⁷⁴⁹ Claimant's Request for Arbitration, ¶ 62.

⁷⁵⁰ Oral reports of the Minister of Infrastructure and Housing before the Chamber of Deputies, 22 August 2001 (MRP-14).

⁷⁵¹ Hearing Transcript, Day 8, pp. 1955-1958.

⁷⁵² Rafael Fernández Morandé, Speech at the 2nd International Exhibition of the Argentine Electricity Market, 30 November 2000 (A RA-471).

⁷⁵³ Mercado, "Polémica en el sector eléctrico," 6 November 2001 (MRP-12).

⁷⁵⁴ CAMMESA, Assessment of Medium- and Long-term Risks – 2004-2007 Period dated December 2003 (A RA-55).

651. The Claimant’s witness Mr. McGee confirmed in relation to a risk evaluation report for the 2005-2007 period, in which it was stated that “[i]n order to maintain a peak reserve level similar to the current one, it would be necessary to have between 1500 and 2500 MW of additional peak capacity in new equipment”:⁷⁵⁵

*I think that us and all the generation players were aware that there was a capacity shortfall relative to demand.*⁷⁵⁶

652. Taken together, the above circumstances did not give rise to a legitimate expectation that the regulatory framework as applicable in the 1990s would be restored by mid-2006 or by 2010. Quite to the contrary, the Tribunal finds that the regulatory framework was marked by the ongoing crisis and the need to adjust generation capacity to the growing electricity demand. It was a time of regulatory change and a time of constant economic changes and there was no clarity as to which further changes would happen and within which timeframe.

653. The Tribunal’s findings are in line with the actual developments that happened after the Claimant’s investment. In this respect, the Tribunal has taken note of the following facts:

- A technical report prepared by the Energy Secretariat in July 2004, which indicated that the “ongoing situation in the [W]EM does not, in the short term, make it foreseeable for the concurrence of risk capitals that make the necessary investments to promote the readaptation of that Market, also posing a potential risk of shortage.”⁷⁵⁷
- The Energy Secretariat found it “convenient to define and implement a procedure to fund and manage necessary investments that help to increase the electric power supply available in the demand plants at affordable costs for the normal operation of the MEM, achieving its realignment. To the extent that the aforementioned investments are not carried out, the operating costs of the electricity sector will be higher and more difficult to bear each day.”⁷⁵⁸
- CAMMESA’s assessment in its medium and long-term risk assessment plan for the period 2005-2007, where it noted that the readjustment of the electricity

⁷⁵⁵ CAMMESA, WEM Risk Report 2005-2007 dated 2005 (C-551).

⁷⁵⁶ Hearing Transcript, Day 2, p. 490.

⁷⁵⁷ Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:0176178/2004 (Part 1) dated 28 July 2004 (C-105), p. 7.

⁷⁵⁸ *Ibid.*

framework was subject to the incorporation of additional capacity of 1200 MW to 1600 MW by 2007.⁷⁵⁹

- A speech given by the Chairman of AES Argentina, another company involved in the electricity sector in Argentina, who stated that “[a]s a consequence of the 2001 crisis, the electricity demand dropped, tariffs and prices were freezed, and the private sector massively defaulted, all of which prevented it from projecting new investments in power generation. Furthermore, as of 2003, Argentina has experienced a period of economic expansion which brought about a strong demand of electric power. Therefore, the absolute need to install additional capacity to meet our economic growth.”⁷⁶⁰

654. These macroeconomic challenges faced by Argentina coupled with the necessity to install additional capacity were known to the Claimant, as confirmed by the Claimant’s witness Mr. McGee.⁷⁶¹ In this situation, the Claimant has failed to show State conduct that could have served as a basis for a legitimate expectation that the regulatory framework would have changed in the way asserted by the Claimant and in the time-frames alleged by the Claimant. Specifically, there was no sufficient basis for a legitimate expectation that the regulatory framework as applicable in the 1990s would be restored by 2006 or 2010.

655. The Tribunal notes that the Claimant relies *inter alia* on the findings of the *Cube v. Spain* tribunal, which underscored that

*provided that the representations are sufficiently clear and unequivocal, it is enough that a regulatory regime be established with the overt aim of attracting investments by holding out to potential investors the prospect that the investments will be subject to a set of specific regulatory principles that will, as a matter of deliberate policy, be maintained in force for a finite length of time.*⁷⁶²

656. However, the Tribunal finds that the Claimant has failed to show any sufficiently clear or unequivocal representation to the effect that the Respondent would restore the regulatory framework as applicable in the 1990s by 2006 or 2010.

657. The Claimant’s witness Mr. McGee testified during the Hearing:

⁷⁵⁹ CAMMESA, WEM Risk Report 2005-2007 dated 2005 (C-551), p. 5.

⁷⁶⁰ Speech by Mr. Eduardo Dutrey, President of AES Argentina, Event at the Government House dated 27 October 2005 (A RA-390).

⁷⁶¹ Hearing Transcript, Day 2, p. 490.

⁷⁶² *Cube v. Spain* (CL-51), ¶ 388.

*[T]hese were styled as Temporary Measures, and, based on the interactions that our employees on the ground were having with the Government, the expectation was, and the Government was, in effect, representing, that these measures would be temporary, and that over a 2.5-year period, there would be a normalization of the market and a reversal of the interventions.*⁷⁶³

658. But even if the Government had represented that there would be a normalization of the market and a reversal of the interventions (for which the Claimant has not presented any documentary evidence), this would not be a sufficient basis for the expectation that the State would simply revert to the old regime of the 1990s (which had led to an anticipated shortage of generation capacity in view of the increased demand) and that the State would do so by 2006 or 2010. Rather, it was clear that the Government would need to take action to provide for the additional capacity needed, which, for example, CAMMESA projected to be 1200 MW to 1600 MW by 2007.⁷⁶⁴ What this action would look like and when and what kind of regulations would be (re-)implemented was at the time fully unclear.

659. When questioned on the risks existing at the time of the Claimant's investment, Mr. McGee conceded:

*[T]he measures were in place, and the measures represented, you know, a clear risk that was in place and we knew was in place at the time.*⁷⁶⁵

660. When questioned on whether a specific commitment was made to the Claimant or Cerros Colorados in 2003, the Claimant's witness Mr. Bailey indicated that he could not point to a written document in which any such commitment had been given.⁷⁶⁶ According to his witness testimony, a "large part of [the Claimant's] understanding was [...] based on verbal communications between in-country personnel, other generators, and the representatives of the Argentine Government."⁷⁶⁷ However, no evidence of any verbal communication that could be the basis for a legitimate expectation has been put on record.

661. The Tribunal therefore turns to the text of the measures containing the alleged representation that they would be lifted in a two-and-a-half-year period.

662. Resolution 240/03 specifically sets out that its provisions

⁷⁶³ Hearing Transcript, Day 2, pp. 318-319.

⁷⁶⁴ CAMMESA, WEM Risk Report 2005-2007 dated 2005 (C-551), p. 5.

⁷⁶⁵ Hearing Transcript, Day 2, p. 488.

⁷⁶⁶ *Id.*, p. 526.

⁷⁶⁷ *Id.*, p. 526.

*contain partial and transitory rules which are both necessary and urgent to address the state of emergency affecting the country's economy, in as much as it has a detrimental effect on the WHOLESale ELECTRIC MARKET (WEM).*⁷⁶⁸

663. Resolution 240/03 also explicitly states that it was enacted to

*address the state of emergency affecting the country's economy [and] until such day as this ENERGY SECRETARIAT decides that the grounds for the enactment hereof no longer exist and revokes this Resolution.*⁷⁶⁹

664. Resolution 406/2003 states:

*given the country's current state of public and economic emergency, this Office deems it convenient to establish a transitory mechanism for the assignment of scarce and insufficient resources to settle the receivables of the Agents of the Wholesale Electricity Market (WEM), in a manner that prioritizes the payment of accepted costs, with the purpose of ensuring the availability of supply to meet demands not backed by Electric Power Agreements in the Term Market.*⁷⁷⁰

665. Resolution 406/03 mentions the country's "current state of public and economic emergency" as a reason for the enactment of the Resolution and that it would apply "until the ENERGY SECRETARIAT provides otherwise."

666. The Claimant additionally refers to a report issued by the Energy Secretariat in 2003 in relation to Resolution 406/03, which noted that it would "establish a temporary mechanism for the assignment of the scarce and insufficient resources to pay credits of the Creditors Argents of the Wholesale Electricity Market (WEM)."⁷⁷¹

667. Resolution 406/03 was modified by Resolution 943/03, which established a transitory mechanism for a priority system requiring CAMMESA to make partial payments to power generators for their electricity sales in the spot market.⁷⁷²

668. Although the language of Resolutions 240/03, 406/03, the Energy Secretariat's report of 2003 and Resolution 943/03 describe the changes undertaken to the electricity

⁷⁶⁸ Resolution 240/2003 dated 14 August 2003 (C-8), fifth whereas clause.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ Resolution 406/2003 dated 8 September 2003 (C-9).

⁷⁷¹ Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:143056/2003 (Part 1) dated 2003 (C-103).

⁷⁷² Resolution 943/2003 dated 27 November 2003 (C-209).

regulatory framework as “*transitory*”⁷⁷³ or “*temporary*”,⁷⁷⁴ such a description is neither a specific promise nor an assurance to the Claimant that the Argentine electricity regulatory framework would be restored to the *status quo ante*, *i.e.*, the framework prevailing during the 1990s, even less so under the specific timeframe foreseen by the Claimant.

669. In conclusion, the Tribunal finds that the Claimant has not provided tangible evidence of a specific representation attributable to Argentina that the regulatory regime would be changed in the way it describes at the time it invested in the Argentine electricity market in December 2003. Specifically, there was no State conduct based on which the Claimant could have had the legitimate expectation that the Respondent would reinstate the regulatory framework as applicable in the 1990s.

cc) Even if there had been a legitimate expectation that the Respondent would take regulatory measures on the basis of the Electricity Law, the Claimant’s claim would not be founded

670. The Tribunal turns to its third point. Even if there had been a legitimate expectation that the Respondent would take regulatory measures on the basis of the Electricity Law, the Claimant’s claim would not be founded. This is because the Electricity Law did not contain a guarantee of stability with respect to the regulatory conditions as applicable during the 1990s.

671. The Tribunal has carefully examined the Electricity Law in its entirety. It has noted that Article 2 of the Electricity Law provides:

The goals of the national policy regarding electricity supply, transmission, and distribution are hereby determined as follows:

a) To adequately protect the rights of the users;

b) To promote competitiveness in the electricity production and demand markets, and to encourage investments to ensure long-term supply;

⁷⁷³ Resolution 240/2003 dated 14 August 2003 (C-8), fifth whereas clause (“*partial and transitory rules*”); Resolution 406/2003 dated 8 September 2003 (C-9), third whereas clause (“*establish a transitory mechanism*”) Article 1 (“[*T*]he methodology described in this resolution is hereby temporarily established”) and Article 4 (“*temporary mechanism for the assignment of the scarce and insufficient resources*”); Resolution 943/2003 dated 27 November 2003 (C-209), Article 1 (“*to clarify that the transitory modification introduced [...] by Resolution No. 406/2003 [...] divides each said receivable in two categories*”).

⁷⁷⁴ Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:143056/2003 (Part 1) dated 2003 (C-103).

- c) *To promote the operation, reliability, equality, free availability, non-discrimination, and generalized use of electricity transmission and distribution services and installation;*
- d) *To regulate electricity transmission and distribution activities, guaranteeing that any tariffs applied to services are fair and reasonable;*
- e) *To stimulate the supply, transmission, distribution, and efficient use of electricity by setting proper pricing methodologies;*
- f) *To promote private investments in production, transmission and distribution, guaranteeing market competitiveness whenever possible.*

The actions of the National Electricity Regulatory Entity (Ente Nacional Regulator de la Electricidad, or ENRE), created in Article 54 hereunder, shall be governed by the principles and provisions of this Law, and this regulator shall control whether the activity of the electricity sector is performed in accordance therewith.⁷⁷⁵

672. While this language does indeed, among others, set out the goal of creating a favorable regime for investments, it is not sufficiently specific to form the basis for a legitimate expectation that the regulatory conditions as applicable in the 1990s, for example through Resolution 61/92, would be restored.
673. Specifically with respect to capacity payments, the Electricity Law delegates to the Energy Secretariat the authority to issue the “*economic dispatch rules to be applied.*”⁷⁷⁶ Article 35 of the Electricity Law specifically provides:

The technical dispatch of the Argentine Interconnection System (SADI), shall be a responsibility of the National Load Dispatch Agency (Despacho Nacional de Cargas, or DNDC), an agency to be established as a stock company with capital represented by registered, non-endorsable shares, the majority of which shall be initially held by the Energy Secretariat. Subsequently, the different participants in the Wholesale Electricity Market (WEM) shall be entitled to have an interest therein. State participation, which shall at first represent a majority stake, may be reduced by the National Executive Branch up to ten per cent (10 %) of the corporate capital; however, this percentage shall ensure participation and veto rights in the Board of Directors.

⁷⁷⁵ Electricity Law (C-2).

⁷⁷⁶ *Id.*, Article 36.

The Energy Secretariat shall lay down the rules to govern the operation of the DNDC. Such rules shall ensure transparency and fairness in decisions, and the following principles shall be considered:

a) To allow the execution of freely agreed contracts between the parties, such parties being generation companies (other than those listed in Article 1 of Law 23,696, and the Argentine section of binational entities), large users and distribution companies (term market);

b) To dispatch the required demand on the basis of recognition of energy and capacity prices as set in the following article, which market participants shall expressly undertake to accept, in order to be entitled to supply or receive electricity not freely agreed upon by the parties.⁷⁷⁷

674. Article 35 of the Electricity Law thus empowers the Energy Secretariat with broad regulatory powers entitling it to lay down the rules for the operation of the DNDC. As testified by the Respondent's expert, Dr. Pardina, Article 35 sets the Energy Secretariat at the center of the governance mechanism of the Argentine electricity framework.⁷⁷⁸

675. Article 36 of the Electricity Law provides as follows:

The Energy Secretariat shall issue a resolution with the economic dispatch rules to be applied by the DNDC to the energy and capacity transactions provided in Article 35(b) above. This rule shall provide that all generation companies shall receive a uniform price for the electricity they sell at each point of delivery to be defined by the DNDC, based on the economic cost of the system. In calculating such price, the cost that unsupplied electricity represents for the community shall be taken into account.

Likewise, offtakers (distributors) pay a uniform rate, stabilized every ninety (90) days, measured at the reception points, which will include what the generators receive for the concepts indicated in the preceding paragraph, and transportation costs between the supply and reception points.⁷⁷⁹

676. The Tribunal finds that the language of Articles 35 and 36 of the Electricity Law leaves considerable discretion to the Energy Secretariat in the setting of capacity payments. It does not prescribe any specific currency, method of calculation or price that the Energy Secretariat should reflect in its resolutions.

⁷⁷⁷ *Id.*, Article 35.

⁷⁷⁸ Hearing Transcript, Day 8, pp. 1953-1954.

⁷⁷⁹ Electricity Law (C-2).

677. Furthermore, the Selling Memorandum of 1992 explicitly addressed the Energy Secretariat's authority:

*[t]he SE is responsible for setting the capacity payment. The value of capacity has been set at US\$5 per MW per hour for the period from November 1, 1992 to April 30, 1994. It has been decided to increase the value of capacity to US\$ 10 per MW per hour from April 30, 1994 and it is currently expected that the value will remain at this level over the medium-term.*⁷⁸⁰

678. The tribunal in *Total v. Argentina* recognized that the regulatory powers of the Energy Secretariat to fix capacity payments were so broad that it could have even “abolished such payments.”⁷⁸¹

679. In addition, the Tribunal notes that the tribunal in *El Paso v. Argentina* understood that:

*the law does not provide for capacity payments to be stated in dollars. [...] [I]f the parameters for deciding the level of the capacity payments were indeed provided by the law, no amount was fixed in it, again contrary to what the Claimant contends, and the parameters of reference left a margin of appreciation which has been used by the administration.*⁷⁸²

680. Specifically with regard to the notion of a uniform spot price based on the economic cost of the system, according to the Claimant's regulatory experts, Synex, the uniform price requirement means that for the energy injected, all generation companies are paid the same price to be determined according to the economic cost of the system. The Claimant's regulatory experts argue that this economic cost refers to the “short-term marginal cost” of electricity at any given hour and is equal to the variable cost of the last operating generation unit dispatched to supply one additional kWh of demand, once the total demand of the system has been supplied at such hour,⁷⁸³ *i.e.*, can be equated with the marginal cost system prevailing in Argentina in the 1990s.

681. The Respondent's regulatory expert, Dr. Pardina, disagrees. According to Dr. Pardina, Synex's definition of the economic cost of the system does not derive from the Electricity Law nor is it a generally accepted definition in the field of economics or regulation. According to Dr. Pardina, in a hydro-thermal system such as the Argentine one, in which there is a reservoir storage capacity of several months, the variable operation cost is not necessarily equal to the marginal cost of the system. Furthermore,

⁷⁸⁰ Selling Memorandum (C-6), p. 84.

⁷⁸¹ *Total v. Argentina* (CL-29), ¶ 311.

⁷⁸² *El Paso v. Argentina* (CL-23), ¶ 419.

⁷⁸³ Expert Report of Renato Agurto and Sebastian Bernstein – Synex, ¶ 19.

Dr. Pardina argues that there are other electricity pricing mechanisms consistent with the uniform price for all generators, such as a system of price bids (instead of costs), which is the system adopted in England and Wales, self-dispatched contracts or hourly auctions of electricity prices.⁷⁸⁴ Dr. Pardina adds that Synex omits that Resolution 61/92 created the concept of “*forced dispatch*”, which is excluded from the determination of the spot price. According to Dr. Pardina, Synex’s position would imply that the existence of excluded machines, even in the 1990s, would be in breach of the Electricity Law.⁷⁸⁵

682. The Tribunal agrees with Dr. Pardina’s understanding of the Electricity Law and his statement that the “*uniform price requirement is compatible with multiple remuneration schemes.*”⁷⁸⁶ The Electricity Law does not contain any express wording that energy prices are to be determined by a “*marginal cost*” system. The Electricity Law only provides for a general principle that the uniform price should reflect the economic cost of the system, such economic cost not being defined. The Tribunal is of the view that the marginal cost system was implemented through Resolution 61/92, which was considered the appropriate system under the circumstances at the time of its adoption, but could have been modified in accordance with the Energy Secretariat’s broad regulatory powers.

683. Specifically with respect to the alleged restriction of the Claimant’s ability to sell on the term market through Resolution 956/04, Resolution 1,281/06, and Resolution 95/13, the Tribunal notes that the Parties do not dispute that the right to conclude PPAs in the term market is enshrined in the Electricity Law.

684. As recalled above, Article 35 of the Electricity Law provides in relevant part:

The Energy Secretariat shall lay down the rules to govern the operation of the DNDC. Such rules shall ensure transparency and fairness in decisions, and the following principles shall be considered:

*a) To allow the execution of freely agreed contracts between the parties, such parties being generation companies (other than those listed in Article 1 of Law 23,696, and the Argentine section of binational entities), large users and distribution companies (term market);*⁷⁸⁷

⁷⁸⁴ Expert Report of Rodríguez Pardina, ¶¶ 95-96.

⁷⁸⁵ Presentation by Dr. Pardina (RD-5), p. 32.

⁷⁸⁶ Hearing Transcript, Day 8, p. 1962.

⁷⁸⁷ Electricity Law (C-2).

685. However, even if the Energy Secretariat was supposed to lay down rules allowing the execution of PPAs according to the Electricity Law, the Claimant has not shown that it relied on the prospect of concluding PPAs at the time of its investment.

686. The Claimant's own witness Mr. Tierno testified:

Q. In the case of Cerros Colorados, as of July 2004, capacity sold under PPAs by Planicie Banderita was equivalent to an amount of electricity of 50 megawatts; right?

A. The contracted capacity was roughly 50 megawatts, that's correct. But one clarification there is that we have to separate between contracted capacity and the energy we are selling through that contracted capacity.

Q. And do you have this difference between installed capacity and the Contract capacity before Resolution 556/2004; right?

A. Correct. That was part of our situation and strategy, given the situation of the market back then, but when you take into account that we were not collecting, the strategy shifted, changed, adapted, to be able to--if I'm selling to the Spot Market and I'm not collecting anything, and I'm selling to the PPA market and I'm collecting, obviously our response will be, we are trying to sell everything we can to PPA.⁷⁸⁸

687. Accordingly, the Tribunal is of the view that no legitimate expectations of the Claimant were frustrated in relation to PPAs either. Notably, the Claimant has also not formulated a damage claim specifically in relation to the inability to sell power through PPAs on the term market.⁷⁸⁹

688. To conclude, the Tribunal finds that the Electricity Law did not contain a guarantee of stability with respect to the conditions as applicable in the 1990s. Rather, the Electricity Law was in and of itself only a general law which could have been changed by Argentina absent a guarantee of stability.

689. In addition, the Tribunal is of the view that, contrary to the Claimant's position that the "*Electricity Law has remained continuously in force since its enactment,*"⁷⁹⁰ parts of the Electricity Law, including Article 36, were actually modified by Decree 804/2001 in June 2001, *i.e.*, prior to the Claimant's investment.⁷⁹¹ Although this modification was

⁷⁸⁸ Hearing Transcript, Day 3, pp. 846-847.

⁷⁸⁹ Hearing Transcript, Day 9, pp. 2311-2312.

⁷⁹⁰ Claimant's Memorial, ¶ 423.

⁷⁹¹ Decree 804/2001 dated 19 June 2001 (C-264).

ultimately abrogated, it hence cannot be argued that the Electricity Law remained unchanged.

dd) Resolutions adopted after the Claimant's investment cannot be a basis for any legitimate expectations of the Claimant at the time of the investment

690. The Tribunal turns to its fourth point, which concerns the resolutions taken after the Claimant's investment. The Tribunal finds that these resolutions, even if they confirmed the transitory and temporary nature of the measures, cannot serve as a basis for the Claimant's legitimate expectations at the time of the investment.
691. Specifically with respect to the alleged restriction of the Claimant's ability to sell on the term market through Resolution 956/04, Resolution 1281/06, and Resolution 95/13, the Tribunal notes that all these resolutions were adopted after the Claimant's investment.
692. Resolution 956/04, adopted in September 2004, applied a surcharge to existing PPAs that exceeded contracted capacity in November 2004 *vis-à-vis* the term May-July 2004.⁷⁹² Any surpassing amount of revenue arising out of PPAs was automatically offset by deducting those amounts from payments due to power generators.
693. Resolution 1281/06, adopted in September 2006, mandated large users and large customers in the WEM that wanted to contract more demand than in 2005 to contract such demand via PPAs entered with new plants and established *Energia Plus*, a price scheme that benefited generators operating new power plants, allowing them to freely negotiate PPAs with large users, customers, and distributors, if their demand exceeded the base demand.⁷⁹³
694. Resolution 95/13, adopted in March 2013, temporarily suspended the execution of new PPAs in the term market, to the exception of contracts resulting from Resolution 1281/06.⁷⁹⁴
695. All of these resolutions date from a point in time after the Claimant's investment and the Claimant has failed to show how they could have been a basis for its legitimate expectations.

⁷⁹² Resolution 956/2004 dated 28 September 2004 (C-210).

⁷⁹³ Resolution 1,281/2006 dated 4 September 2006 (C-176).

⁷⁹⁴ Resolution 95/2013 dated 22 March 2013 (C-21), Article 9.

ee) The FONINVEMEM Agreements were also not a basis for the Claimant's alleged legitimate expectations at the time of the investment

696. The Tribunal turns to the fifth point, which concerns the FONINVEMEM Agreements. These legal acts also date from a point in time after the Claimant's investment and the Claimant has not shown that they breached its legitimate expectations.

697. Article a1 of the Adhesion Contract sets out that:

the aim of this document is to establish the basis on which the WHOLESale ELECTRIC MARKET (MEM) would be restored, meaning that it would be readjusted to normalize the regular operation of the MEM as a competitive market, with sufficient supply, in which Generators, Distributors, Traders, Participants and Large energy Users can buy and sell electricity at prices determined by the offer and the demand, without regulatory distortions and within the framework established by Law 24,065.⁷⁹⁵

698. At the same time, the Adhesion Contract also defined “*the supply increases necessary for the restoration of the MEM*”, which were foreseen to range between a minimum of 800 MW and a maximum of 1600 MW.⁷⁹⁶

699. Moreover, the Adhesion Contract sets out a number of commitments to be undertaken by the parties to the agreement, namely the Energy Secretariat and private generators. The Adhesion Contract provided that the Energy Secretariat shall *inter alia*:

(i) Set seasonal prices transferrable to tariffs for medium and large users so that, from 1 July 2005, those prices can cover, at least, the MEM's total monomic costs resulting from the application of Resolution 240 of 14 August 2003 issued by the ENERGY SECRETARIAT, as supplemented.

(ii) Set seasonal prices transferrable to tariffs –excluding the social tariff– so that by 1 November 2006, those prices can cover at least the total monomic costs of the WHOLESale ELECTRICITY MARKET (MEM) resulting from the application of Resolution 240 of 14 August 2003 issued by the ENERGY SECRETARIAT, as supplemented. The National State, for reasons of opportunity, merit and convenience, may opt not to apply this measure in whole or in part to residential users, in which case the respective remuneration shall be made.

⁷⁹⁵ FONINVEMEM Adhesion Contract (C-211), Article a1. The purpose of the FONINVEMEM I Agreement was to “*establish the framework to initiate the readjustment process of the [] WEM.*” (FONINVEMEM I Agreement (C-36), Article 1). The purpose of the FONINVEMEM II Agreement was to “*continue with the process to readjust the [] WEM.*” (FONINVEMEM II Agreement (C-37), Article 1).

⁷⁹⁶ FONINVEMEM Adhesion Contract (C-211), Article 2.

(iii) Set, on or before the first seasonal schedule following the start of business operation of the investment projects conducted under this Adhesion Contract, seasonal prices which enable to secure payment to the MEM Generators through tariff collection. The National State, for reasons of opportunity, merit and convenience, may opt not to apply this measure in whole or in part to residential users, in which case the respective remuneration shall be made.

As of the commencement of commercial operations of the new equipment built with FONINVEMEM resources, remunerate the capacity in the hours in which the power is remunerated at the equivalent in PESOS (\$) of what was paid prior to the issuance of Law 25,561, and the energy delivered, establishing the Variable Production Costs as a basis for the calculation, the maximum VPC to be used being equivalent to the Reference Price plus FIFTEEN PERCENT (15%) in accordance with Annex 13 to "THE PROCEDURES."

(iv) When the Market is restored once the new equipment built with FONINVEMEM resources commences commercial operations, abrogate Resolution 240 of the ENERGY SECRETARIAT dated 14 August 2003, and remunerate generators with the System's Marginal Price as set under "THE PROCEDURES", in a free spot market, considering the cost of unsupplied energy, with a water value that represents the thermal replacement value.⁷⁹⁷

700. The Adhesion Contract also set out that private generators shall:

(i) Contribute, by way of a performance bond for the necessary MEM restoration projects, between a minimum of SIXTY-FIVE PER CENT (65%) and the aggregate Sales Liquidations with Expiration Date to be Determined arising from paragraph (c) of Resolution 406 by the ENERGY SECRETARIAT dated 8 September 2003, as clarifying Resolution 943 by the ENERGY SECRETARIAT dated 27 November 2003, considering that, for the calculation of the contribution, the capacity contracted by each generator in the Term Market for the May-July 2004 quarter will remain unchanged.

(ii) Manage the necessary projects to restore the MEM, undertaking a commitment to carry out the respective Projects and works so they are in conditions to initiate commercial operations in 2007.

⁷⁹⁷ *Id.*, Article 4.1.

(iii) Obtain the necessary financing to conduct the projects and the works necessary to accomplish the restoration of the MEM by the agreed dates.⁷⁹⁸

701. The Tribunal considers that the FONINVEMEM I Agreement did not, in any event, entail any obligation to restore the WEM by a certain date. Only “when the Market is restored once the new equipment built with FONINVEMEM resources commences commercial operation” was Resolution 240/03 supposed to be abrogated and a remuneration of generators “with the System’s Marginal Price as set under “THE PROCEDURES”” envisaged. The FONINVEMEM Plants, however, only commenced commercial operation in 2010. And even for that point in time, the Agreement entailed an alignment of the “legal and regulatory framework” and the “recognition of fixed and variable costs” and did not promise with precision and specificity to return to the 1990s legal regime.

ff) Prior investment arbitration cases on the Argentine electricity framework do not change the Tribunal’s conclusion

702. In reaching its conclusion that the Government did not violate the Claimant’s legitimate expectations, the Tribunal has taken due consideration of other investment cases in which the Argentine electricity regulatory framework was at issue.

703. The Tribunal recalls the Claimant’s position that although *stare decisis* is not recognized in international law, it is widely accepted that the decisions of international tribunals constitute an important means for determining principles of international law.⁷⁹⁹ The Claimant has also noted that investment tribunals, such as *Suez and Vivendi v. Argentina* have recognized that tribunals must follow the

*basic judicial principle that ‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones [and that] a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues.*⁸⁰⁰

704. In this case, the Claimant argues, among others, that both the *Total* and *El Paso* tribunals, which assessed Argentina’s conduct in the power generation sector during time periods that overlap with the present case, found that Argentina had breached the FET standard.

⁷⁹⁸ *Id.*, Article 4.2.

⁷⁹⁹ Claimant’s Reply on the Merits, ¶¶ 462 *et seq.*

⁸⁰⁰ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 (CL-117), ¶ 189.

705. While the Tribunal recognizes the Claimant’s view that achieving a coherent body of law is an important objective, the Tribunal finds that it has strong reasons to distinguish the circumstances of this case from those of both the *Total* and *El Paso* cases.
706. The *Total v. Argentina* tribunal found that there was a breach of the FET standard in relation to what it described as “*the complete overhaul of the electricity regime established by the Electricity Law*”⁸⁰¹ and in particular the *Energía Plus* program and the FONINVEMEM scheme.
707. The *El Paso v. Argentina* tribunal found that the individual measures at issue were “*reasonable measures to cope with a difficult economic situation*” but that “*the cumulative effect of the measures was a total alteration of the entire legal setup for foreign investments.*”⁸⁰²
708. The facts of the present case differ. Total and El Paso invested long before the Claimant did in fully different circumstances. Total invested in Argentina in July 2001 and El Paso made its investments in Argentina between 1997 and 2001. Both Total and El Paso made their investments in a favorable legal environment where the Electricity Law and the regime prevailing in the 1990s was the relevant benchmark against which to assess any rights or expectations.
709. The Claimant’s investment, in contrast, took place as late as in December 2003, *i.e.*, in a crisis environment where the Emergency Law and a different regulatory regime under the Electricity Law were in place, generators had not been able to collect their receivables in full since June 2003⁸⁰³ and where, pursuant to Resolution 943/03, past and future receivables would be paid only when the Unified Fund was able to do so, at a date to be determined by the Energy Secretariat in the future. Accordingly, Total’s or El Paso’s situations are not comparable to that of the Claimant and, thus, those tribunals’ findings do not change the Tribunal’s conclusion.
710. Against this background, the Tribunal rejects the Claimant’s claim that Argentina failed to protect the Claimant’s legitimate expectations and to provide a stable and predictable legal environment in violation of Article IV(1) of the BIT.

⁸⁰¹ *Total v. Argentina* (CL-29), ¶ 331.

⁸⁰² *El Paso v. Argentina* (CL-23), ¶¶ 515, 517.

⁸⁰³ Claimant’s Request for Arbitration, ¶ 62.

III. The Claimant's claim that the Respondent failed to act transparently and to accord due process in breach of Article IV(1) of the BIT

711. The third issue to be determined concerns the Claimant's claim that the Respondent failed to act transparently and to accord due process in breach of Article IV(1) of the BIT. Before addressing this issue in greater detail, the Tribunal wishes to record that the Parties' allegations with respect to this claim overlap with the Parties' allegations concerning the alleged violation of legitimate expectations and failure to ensure a stable and predictable framework. The Tribunal will not repeat its above findings but will instead focus on key allegations that specifically concern the claim that the Respondent failed to act transparently and to accord due process in breach of Article IV(1) of the BIT.

1. The Claimant's position

712. The Claimant claims that the Respondent failed to act transparently and to accord due process.

713. The Claimant submits that case law stresses the importance of host States acting consistently, unambiguously, transparently, and predictably, so that investors know the rules and regulations beforehand.⁸⁰⁴ Citing *Electrabel v. Hungary*, the Claimant says that the transparency requirement

*indicate[s] an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect investments, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue.*⁸⁰⁵

714. The Claimant submits on the basis of Prof. Schreuer's expert report that

*[t]ransparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework.*⁸⁰⁶

715. According to the Claimant, due process is another element of the FET standard requiring fairness in procedure which

⁸⁰⁴ Claimant's Memorial, ¶ 422.

⁸⁰⁵ Claimant's Memorial, ¶ 419; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 [hereinafter: *Electrabel v. Hungary*] (CL-101), ¶ 7.79.

⁸⁰⁶ Legal Opinion of Christoph Schreuer, ¶¶ 339, 345.

*includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principle legal systems of the world.*⁸⁰⁷

716. The Claimant adds that a host State cannot justify a procedure or measure because it arguably respects domestic law; the FET standard provides a “*basic and general standard*” with respect to transparency and procedural fairness, which is “*detached from the host State’s domestic law.*”⁸⁰⁸
717. The Claimant submits that the disputed measures (including lower-ranked measures) are inconsistent with the Electricity Law and thus enacted without transparency or due process. According to the Claimant, the patchwork of laws and regulations enacted was ambiguous and uncertain, even more so as they were adopted by Argentina in the context of a temporary “*emergency*” that was continuously extended for over a decade.⁸⁰⁹
718. The Claimant says that, in 2004, Argentina admitted—but never respected—that the Claimant’s acquired rights could only be affected by reasonable, *i.e.*, temporary, regulations.⁸¹⁰ Accordingly, by maintaining the Electricity Law while enacting temporary measures, the Government gradually dismantled its previous system in an unpredictable fashion, and consequently engaged in a textbook example of lacking transparency. Argentina could have amended or abrogated the Electricity Law, but it did not. Instead, the Government maintained two parallel but completely contradictory systems, and overhauled the law in place by taking administrative actions inconsistent with it.⁸¹¹
719. For example, the Claimant points to:
- the Respondent’s announcement in 2013 that it was moving away from the marginalist system, but did not specify what type of system it was moving towards.⁸¹² The Claimant contends that the Respondent also did not explain the reason for which it was changing systems.⁸¹³
 - the Respondent’s alleged enactment of a discriminatory system. The Claimant cites the example of the *Energía Plus* and *Energía Delivery Plan* programs,

⁸⁰⁷ Rudolf Dolzer, *Fair and Equitable Treatment: Today’s Contours*, V.12 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 7 (CL-32), 29-30.

⁸⁰⁸ *Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (CL-56), ¶ 367.

⁸⁰⁹ Claimant’s Memorial, ¶ 423.

⁸¹⁰ Resolution 1,069/2004 dated 14 October 2004 (C-174), 2-5.

⁸¹¹ Claimant’s Reply on the Merits, ¶ 591.

⁸¹² *Id.*, ¶ 593.

⁸¹³ *Id.*, ¶ 593.

under which the Government imposed different spot prices and capacity payments for new and existing generators.⁸¹⁴

- the Respondent’s alleged reduction of capacity payments and consistent failure to restore values consistent with the Electricity Law. Although the Government committed to restoring the energy market to comport with the Electricity Law once the new plants were fully operational, it never did so.⁸¹⁵ Even though the Respondent conceded in 2017 that capacity payments did not conform with the Electricity Law and thus adjusted their values,⁸¹⁶ it still lowered capacity payments two years later.⁸¹⁷
- the Respondent’s enactment of Resolution 95/13, in which the Government alleged that it was creating a new system based on costs, but that was not the case.⁸¹⁸
- the Respondent’s restriction and *de facto* elimination of Cerros Colorados’ ability to sell energy and capacity in the term market through PPAs.⁸¹⁹
- the commitments made in relation to the FONINVEMEM. The Claimant states that while the plants have been operational for over a decade, the Government has nevertheless not fulfilled any of the promises under the agreements.⁸²⁰ The Claimant states that the Respondent failed to clearly and transparently explain its reason for not fulfilling the agreements.⁸²¹
- the Government’s alleged public commitments to abide by the rights and principles set forth in the Electricity Law⁸²² and recognition that the dispute measures were inconsistent with it.⁸²³ With respect to the Claimant’s meetings with the Government between 2015 and 2019, the Claimant argues that the Respondent has not been “*forthcoming and transparent.*” For example, the Government requested during the Macri administration that Cerros Colorados

⁸¹⁴ Resolution 1,281/2006 dated 4 September 2006 (C-176).

⁸¹⁵ Claimant’s Reply on the Merits, ¶ 595.

⁸¹⁶ Resolution 19/2017 dated 27 January 2017 (C-59), third and fourth whereas clauses.

⁸¹⁷ Resolution 1/2019 dated 1 March 2019 (C-31); Resolution 31/2020 dated 26 February 2020 (C-193), Articles 1, 2; Resolution 440/2021 dated 21 May 2021 (C-331).

⁸¹⁸ Claimant’s Reply on the Merits, ¶ 596.

⁸¹⁹ *Id.*, ¶¶ 597-598.

⁸²⁰ *Id.*, ¶¶ 599-600.

⁸²¹ Claimant’s Memorial, ¶ 429.

⁸²² Claimant’s Reply on the Merits, ¶ 601.

⁸²³ Claimant’s Memorial, ¶¶ 431, 432; Claimant’s Reply on the Merits, ¶ 590; Resolution 6/2016 dated 25 January 2016 (C-199), third and fifth whereas clauses.

file its claims in writing, and then failed to respond.⁸²⁴ The Claimant submits that the Respondent continued to adopt increasingly arbitrary measures, despite their apparent temporary nature and their incompatibility with the Electricity Law, while consistently postponing its commitment to reinstate the framework to one compliant with the Electricity Law.⁸²⁵ The Claimant further submits that it was treated “*non-transparently or inconsistently*” when the Respondent acknowledged the Government’s wrongdoing in perpetuating the “*transitory*” measures that dissociated prices and costs and negatively impacted the sector, but then refused to compensate the Claimant.⁸²⁶ In this regard, the Claimant states that, contrary to the Respondent’s assertion, the disputed measures did not benefit the power generation sector or Orazul.⁸²⁷

720. With respect to due process in particular, the Claimant submits that it did not have an opportunity to appear before the adverse measures were put in place.⁸²⁸ Although the Claimant did attempt to discuss with officials after the fact, its attempts were futile because the Respondent ignored the Claimant’s requests and continued to implement adverse measures, while misleading the Claimant into believing that the measures were only temporary. The Claimant adds that the Respondent failed to clearly and transparently explain its reason for breaking the FONINVEMEM Agreements. According to the Claimant, the Respondent violated its due process obligation when it failed to respect key components of the Electricity Law, *i.e.*, by enacting low-level, erratic, administrative measures that eviscerated the law in place and refused to even answer any administrative petitions that Orazul has filed in response in a clear violation of the right to be heard under any standard.⁸²⁹ The Claimant invokes the finding of the *Total* tribunal, which concluded that Argentine “*administrative authorities do not have such broad discretion to make radical changes to the system under the Electricity Law, as Argentina claims.*”⁸³⁰ Similarly, the *Mobil v. Argentina* tribunal found that the

⁸²⁴ Claimant’s Reply on the Merits, ¶ 602; Tierno I, ¶¶ 74-76; Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before Energy Secretariat dated 14 August 2017 (C-38); *see also* Universidad de Buenos Aires, damages assessment filed before the Ministry of Energy and Mining and the Energy Secretariat dated 17 November 2017 (C-64).

⁸²⁵ Claimant’s Memorial, ¶¶ 424, 425.

⁸²⁶ *Id.*, ¶ 430; Energy Secretariat, *Balance de Gestión en Energía 2016-2019* dated December 2019 (C-101).

⁸²⁷ Claimant’s Reply on the Merits, ¶¶ 604-605.

⁸²⁸ Claimant’s Memorial, ¶ 429.

⁸²⁹ Administrative Petition filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before Energy Secretariat dated 14 August 2017 (C-38); Administrative Petition filed by Cerros Colorados before the Ministry of Energy and Mining dated 9 February 2018 (C-41).

⁸³⁰ *Total v. Argentina* (CL-29), ¶ 335.

Energy Secretariat exceeded the scope of its authority by preventing power generators from factoring gas into their calculation for spot prices.⁸³¹

2. The Respondent's position

721. The Respondent contends that it acted transparently and that the Claimant has not furnished any evidence that the measures were adopted for reasons other than those laid out or with no transparency.⁸³² In particular, all of the measures adopted by the Energy Secretariat were duly based on the powers vested in it under the Electricity Law, with the aim of protecting users, guaranteeing long-term supply and ensuring that the tariffs applied were both fair and reasonable. The Respondent was always clear and transparent about its intention to bring the electricity sector, which was severely affected by the 2001 crisis, back to normal operation, but this did not entail an acknowledgement that the measures adopted since 2003 were in violation of the Electricity Law.⁸³³
722. The Respondent further submits that the Claimant failed to provide evidence of the alleged existence of gross injustice or lack of due process. The Respondent alleges that the Claimant had the opportunity to file administrative, judicial, and even arbitration claims disputing all of the measures that it is challenging now, in some cases, almost 20 years after their adoption. According to the Respondent, if these measures had actually constituted a gross denial of justice or lack of due process, Orazul (or, in any case, Duke Energy) would have commenced these proceedings long before, as Duke Energy did against Peru and Ecuador.⁸³⁴
723. The Respondent further states that all the measures now disputed by Orazul were adopted by the relevant competent authorities, in compliance with the guidelines set forth under the Electricity Law and were duly based on factual and legal considerations.⁸³⁵

⁸³¹ *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 [hereinafter: *Mobil v. Argentina*] (CL-103), ¶ 438.

⁸³² Respondent's Counter-Memorial, ¶¶ 438 *et seq.*

⁸³³ Respondent's Rejoinder on the Merits, ¶ 616.

⁸³⁴ *Id.*, ¶ 617; *Duke v. Ecuador* (CL-124), ¶ 74.

⁸³⁵ Respondent's Counter-Memorial, ¶ 439.

3. The Tribunal's analysis

a) Transparency

724. The Tribunal first turns to the issue of whether Argentina acted transparently. The Tribunal is of the view that the FET standard encompasses an obligation for the State to act transparently. The Tribunal shares the view developed by the tribunal in *Frontier Petroleum v Czech Republic*, which held:

*Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework.*⁸³⁶

725. The obligation upon a State to be transparent involves an obligation of publicity, whereby the State must make available in an accessible form the legal and administrative requirements applicable to the investor, as well as an obligation to act with candour. Under such standard, the Tribunal is to ascertain in light of all factual circumstances whether the State has failed to be transparent with respect to its laws and regulations and whether such failure was fundamental.

726. In the case at hand, the Tribunal finds that the Respondent made accessible the legal and administrative requirements applicable to the Claimant's investment and that all acts could be traced to the applicable legal framework. It was apparent for the Claimant that the Respondent would be adopting a number of the measures it enacted. For example, Resolution 943/03, which was enacted in November 2003 (*i.e.*, prior to the Claimant's investment), explicitly set out that generators' receivables that did not have a payment date pursuant to Resolution 406/03 "*do not constitute a liquid and enforceable debt according to Article 819 of the Civil Code*"⁸³⁷ and laid the ground for the future FONINVEMEM scheme.

727. The Tribunal is also of the view that the Claimant knew and the Respondent was clear about its intention to restore the electricity sector by adding new capacity and attracting new investments. The Claimant's knowledge was demonstrated by Mr. McGee at the Hearing, who testified:

*I think that us and all the generation players were aware that there was a capacity shortfall relative to demand.*⁸³⁸

⁸³⁶ *Frontier v. Czech Republic* (CL-80/CL-542), ¶ 285.

⁸³⁷ Resolution 943/2003 dated 27 November 2003 (C-209), Article 1.

⁸³⁸ Hearing Transcript, Day 2, p. 490.

728. Furthermore, the record of the case confirms that the regulatory framework was continuously adapted to the existing circumstances. As testified by the Respondent's regulatory expert Dr. Pardina during the Hearing, in accordance with the regulatory powers of the Energy Secretariat, the regulatory framework applicable to the electricity generation sector was continuously modified even already during the 1990s. Dr. Pardina testified:

*In the period 1992-2001, there were 13 changes in the rules per year with a minimum of five in 1992, it was a partial year, and a maximum of 25 in the year 2000.*⁸³⁹

729. As an example of such adjustment, Resolutions 61/92 and 167/1993 of respectively 1992 and 1993 temporarily excluded certain generators from the price calculation mechanism of Article 36 of the Electricity Law and limited capacity payments at USD 5/MW-hrp until 30 April 1994.⁸⁴⁰

730. In addition, throughout its numerous regulations, the Government consistently recalled the objective of adapting the applicable rules to the current circumstances and of securing additional investments to develop generation capacity in Argentina.⁸⁴¹

731. With respect to the Government's communications, the Tribunal finds that the Claimant has not shown how such communications entailed a violation of the FET standard.

b) Due process

732. The Tribunal turns to the issue of whether Argentina acted in accordance with due process. Under the FET standard, a State is required to provide due process, meaning that a host State is under the obligation to establish a judicial system that allows the effective exercise of substantive rights granted to investors.⁸⁴² The Tribunal adheres to the finding of the *Waste Management II* tribunal, which held that the failure to accord due process must lead to

*an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.*⁸⁴³

⁸³⁹ Hearing Transcript, Day 8, p. 1954; **RD-5**, p 14.

⁸⁴⁰ Resolution 61/1992, as amended dated 29 April 1992 (**C-4**); Resolution 167/1993 dated 3 June 1993 (**C-184**).

⁸⁴¹ See for example: Resolution 712/2004 dated 12 July 2004 (**C-11**), first, ninth, and eleventh whereas clauses; Decree 134/2015 dated 16 December 2015 (**C-24**), eleventh and thirty third whereas clauses.

⁸⁴² Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed.) (**CL-173**), p. 217.

⁸⁴³ *Waste Management v. Mexico* (**CL-55**), ¶ 98.

733. The Tribunal finds that the threshold for such a finding is high as it must offend a sense of judicial propriety. The Tribunal is of the view that the Claimant has not provided evidence for Argentina's alleged failure to accord due process. Specifically, the Claimant has not shown how Argentina's judicial system would have failed to afford the Claimant fair and equitable treatment.
734. The mere fact that the Energy Secretariat allegedly did not reply to all petitions made by Cerros Colorados does not amount to a due process breach. Cerros Colorados could have challenged the Energy Secretariat's failure to respond before the Argentine courts. Furthermore, the Tribunal notes that the Claimant complains of the alleged contradiction between the Electricity Law and Argentina's subsequent administrative measures when, at the time of its investment, the Claimant found that the regime was already diverging from the one established under the Electricity Law.
735. The Tribunal has carefully considered the Claimant's contention that the Claimant did not have an opportunity to appear before the adverse measures were put in place. However, the key adverse measures the Claimant challenges in this arbitration are acts such as regulations which were issued not specifically *vis-à-vis* Cerros Colorados but applied to a large number of generators. The Tribunal finds that the Respondent did not have an obligation to individually invite each individual generator for comments before issuing such regulations. In the negotiations of the FONINVEMEM Agreements, Cerros Colorados was not involved in any event, be it via AGEERA or on its own initiative in the context of FONINVEMEM II. The possibility for the Claimant to challenge measures taken on the basis of such regulations sufficed to respect due process.
736. The Tribunal also rejects the Claimant's contention that the Respondent failed to respect key components of the Electricity Law and that the administrative authorities enacted erratic, administrative measures in breach of the law in place. Even assuming that there had been a breach of the Electricity Law, which the Tribunal doubts given the broad regulatory powers of the Energy Secretariat, the Tribunal finds that this did not lead to an outcome which offends judicial propriety considering the individual circumstances of the case.
737. The Tribunal therefore rejects the Claimant's allegation that the Respondent failed to act transparently and to accord due process in breach of Article IV(1) of the BIT.

IV. The Claimant's claim that the Respondent acted arbitrarily in breach of Article IV(1) of the BIT

738. The fourth issue to be determined is the Claimant's claim that the Respondent acted arbitrarily in breach of Article IV(1) of the BIT. Before addressing this issue in greater

detail, the Tribunal wishes to record that its above observations regarding the various manifestations of the obligation to accord fair and equitable treatment apply *mutatis mutandis*: the Claimant’s allegation overlaps with some of the other claims made with respect to a breach of Article IV(1) of the BIT. The Tribunal will not repeat its above findings with respect to Article IV(1) of the BIT but will instead focus on key allegations that specifically concern the claim that the Respondent acted arbitrarily in breach of Article IV(1) of the BIT.

1. The Claimant’s position

739. The Claimant submits that a State must act non-discriminatorily, non-arbitrarily, and rationally.⁸⁴⁴ Relying on *CMS v. Argentina*, it says that “[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to [FET].”⁸⁴⁵ Such a violation does not require bad faith.⁸⁴⁶ Relying on *Electrabel v. Hungary*, the Claimant submits that “a measure will not be arbitrary if it is reasonably related to a rational policy... [T]his includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought.”⁸⁴⁷ Likewise, “unjustified” measures are arbitrary, which can include when a State fails to observe a commitment to the investor.⁸⁴⁸
740. The Claimant argues that Argentina’s measures are arbitrary as they violate Argentine law, impose an economically unsustainable regime, and are inconsistent with each other.⁸⁴⁹ The Government created two parallel systems that co-exist, but are completely contradictory. The Claimant claims that the Respondent acted arbitrarily in violation of the FET standard by adopting measures that: (i) inflicted damage without serving any apparent purpose; (ii) were taken for reasons different than those put forward; (iii) were not based on legal standards; and (iv) were taken in willful disregard of due process.⁸⁵⁰
741. The Claimant argues that the Government contradicted itself, first, by its acknowledgement of the inconsistency of the measures with the Electricity Law⁸⁵¹ and by admitting that, despite being allegedly temporary, the measures had “severe and

⁸⁴⁴ Claimant’s Memorial, ¶ 434.

⁸⁴⁵ *Id.*, ¶ 433; *CMS v. Argentina (CL-10)*, ¶ 290.

⁸⁴⁶ Claimant’s Memorial, ¶ 433; *Total v. Argentina (CL-29)*, ¶ 110.

⁸⁴⁷ *Electrabel v. Hungary (CL-101)*, ¶ 179.

⁸⁴⁸ *Teinver v. Argentina – Award (CL-99)*, ¶¶ 823-857, 925.

⁸⁴⁹ Claimant’s Reply on the Merits, ¶¶ 641 *et seq.*

⁸⁵⁰ Claimant’s Memorial, ¶ 441; *EDF v. Romania (CL-37)*, ¶ 303.

⁸⁵¹ Claimant’s Memorial, ¶ 441; Decree 134/2015 dated 16 December 2015 (C-24); Resolution 6/2016 dated 25 January 2016 (C-199); Resolution 21/2016 dated 22 March 2016 (C-188).

negative consequences over the entire sector.”⁸⁵² Second, while Minister Aranguren recognized that Cerros Colorados had been harmed, met with the company to discuss potential mechanisms to compensate it, and encouraged Cerros Colorados to file an administrative petition, once Cerros Colorados did so, the Government did not address its claim.⁸⁵³ Instead, Argentina continued to contradict itself—at one point discussing how the Government could potentially compensate the Claimant for the damages it suffered under the Concession Contract, and then later changing its position.⁸⁵⁴ To date, the Claimant has not been compensated for its losses and the Government ignored the petitions without any explanation.⁸⁵⁵

742. Furthermore, the Claimant argues that the Respondent’s measures injured its investment without serving or relating to any rational purpose or policy and for reasons different from those put forward. The Claimant argues that, although the Respondent asserts that the measures were adopted to normalize the electricity market and restore the electricity sector, time has shown that they were not. The Claimant refers to the FONINVEMEM agreements as examples, and how the Respondent forced the Claimant and other generators to invest in the construction of new power plants, promising them that an increase in Argentina’s generation capacity would stabilize the market and enable Argentina to revert the measures. While the Claimant invested in the plants, Argentina never revoked the measures even after they were put into operation.⁸⁵⁶
743. Further, the Claimant argues that there is no rational policy that Argentina could point to that would justify why new power generators were given favorable, market-based terms, why the temporary measures were maintained indefinitely, why an unsustainable pricing system remained in place, or why the Claimant had to invest in the FONINVEMEM in order to receive a partial payment of its outstanding receivables. While the Government celebrated the recovery of the economy, it also adopted and maintained measures that were purportedly necessary to address an emergency.⁸⁵⁷

⁸⁵² Energy Secretariat, Balance de Gestión en Energía 2016-2019 dated December 2019 (C-101).

⁸⁵³ Administrative Petition filed by Cerros Colorados and other Hydroelectric Generators before the Energy Secretariat and the Ministry of Energy and Mining dated 3 November 2016 (C-40); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before the Ministry of Energy and Mining dated 14 August 2017 (C-39); Administrative Appeal filed by Cerros Colorados and other Hydroelectric Generators before Energy Secretariat dated 14 August 2017 (C-38); Administrative Petition filed by Cerros Colorados before the Ministry of Energy and Mining dated 9 February 2018 (C-41); Tierno I, ¶¶ 74, 76.

⁸⁵⁴ Tierno I, ¶ 75.

⁸⁵⁵ Claimant’s Memorial, ¶ 442.

⁸⁵⁶ *Id.*, ¶ 442.

⁸⁵⁷ *Id.*, ¶ 443.

2. The Respondent's position

744. The Respondent asserts that the Tribunal is not hearing a case of manifest arbitrariness and that the measures challenged by the Claimant were not unreasonable. On the contrary, the Respondent states that the Claimant seeks to set aside over 20 years of complex and well-founded regulations which were adopted by the competent authorities in the exercise of the powers set forth in the Electricity Law and which, on many occasions, were expressly adhered to and accepted by the majority of generators.
745. With respect to the Claimant's argument according to which the Claimant was forced to invest its outstanding receivables in new power plants to be built under the FONINVEMEM programs and the trust fund created under Resolution 95/13, the Respondent states that the Claimant voluntarily consented to investing its receivables in the construction of power plants as well as to the implementation of Resolution 95/13.⁸⁵⁸ According to the Respondent, the Claimant economically benefited from such measures.
746. With respect to the Claimant's argument that the measures were incompatible with the Electricity Law as well as each other, the Respondent states that the values established under Resolution 19/17 were not meant to serve as a benchmark for the calculation of capacity payments, and that their subsequent repeal was perfectly compatible with the purpose of the measure. Once the term of the emergency declared in the Argentine electricity sector expired and increased operational reserves were achieved, the Respondent submits that it was reasonable to expect that the values established under Resolution 19/17 would be adjusted. Therefore, the Claimant cannot contend that the Argentine Republic changed course "*abruptly*" and reversed the progress made.
747. With respect to the Claimant's argument that the Respondent would have recognized that damages had been suffered as a result of Argentina's regulatory measures, the Respondent submits that it never recognized the alleged illegality of the measures nor that any damage was caused to Cerros Colorados.⁸⁵⁹
748. Finally, the Respondent disputes the Claimant's contention that the "*purported emergency*" and scarcity in natural gas were merely excuses fabricated to implement and maintain measures contrary to the Electricity Law, allegedly demonstrating the Respondent's bad faith. On the contrary, the Respondent considers that such contention demonstrates the Claimant's own bad faith, as the Claimant tries to diminish the importance of the circumstances resulting from the 2001 crisis that led to the adoption

⁸⁵⁸ Respondent's Rejoinder on the Merits, ¶ 713.

⁸⁵⁹ Respondent's Rejoinder on the Merits, ¶ 714; Sruoga II, ¶¶ 16, 19, 31-33.

of the disputed measures, circumstances which were known to the Claimant because they preceded the investment invoked by Orazul.⁸⁶⁰

3. The Tribunal's analysis

749. The Tribunal turns to the issue of whether the Respondent acted arbitrarily and unreasonably. The Tribunal notes that the Parties have used the terms interchangeably in their submissions and it appears to be widely accepted that arbitrary measures are unjustified. The Tribunal further notes that the Parties agree on the standard of arbitrariness as set out by the ICJ in the *ELSI* case:

*[a]rbitrariness is not so much something opposed to a rule of law [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.*⁸⁶¹

750. The Parties also agree that a measure may be considered arbitrary if it has not been taken through a rational decision-making process.⁸⁶² In deciding whether a measure is arbitrary, tribunals have assessed whether such measure inflicted damage on the investor without serving any apparent legitimate purpose, was taken for reasons that are different from those put forward by the decision maker, was not based on legal standards but on discretion, prejudice or personal preference, or was taken in willful disregard of due process and proper procedure.⁸⁶³

751. In making this assessment, it is not the role of a tribunal to second guess the merits of the Government's policy considerations or whether the measures were the best measures in the circumstances.⁸⁶⁴

752. With this standard in mind, the Tribunal proceeds to assess whether the measures challenged by the Claimant were arbitrary or unreasonable. The Tribunal finds that they were not.

753. To begin with, the Tribunal finds that all of the Respondent's policies at issue in these proceedings postdating the crisis affecting Argentina in 2001 had the overarching public purpose objective of "normalizing" the WEM, which faced serious difficulties as of 2001.

⁸⁶⁰ Respondent's Rejoinder on the Merits, ¶ 716.

⁸⁶¹ *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ Decision, 20 July 1989 (AL RA-148), ¶ 128; Claimant's Reply on the Merits, ¶ 631; Respondent's Counter-Memorial, ¶ 500.

⁸⁶² Claimant's Memorial on the Merits, ¶ 436; Respondent's Counter-Memorial on the Merits, ¶ 501.

⁸⁶³ *EDF v. Romania (CL-37)*, ¶ 303.

⁸⁶⁴ *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (CL-511), ¶ 501.

754. The Tribunal notes that the objective of “*normalization*”, “*restoration*” or “*readaptation*” of the WEM was spelled out by the Government on numerous other occasions, including in the 2004-2008 National Energy Plan,⁸⁶⁵ the Technical Report of the Energy Secretariat of July 2004,⁸⁶⁶ a speech by the Energy Secretary Mr. Daniel Cameron in November 2004,⁸⁶⁷ the Adhesion Contract,⁸⁶⁸ the FONINVEMEM I Agreement,⁸⁶⁹ the FONINVEMEM II Agreement,⁸⁷⁰ and Resolution 95/13,⁸⁷¹ amongst others.
755. The Parties disagree on the meaning to be given to the notions of “*restoration*” or “*readaptation*” and the moment at which this should occur. While the Claimant is of the view that such words should be interpreted to imply a return to “*a pre-crisis state*”,⁸⁷² the Respondent is of the view that such words entail a dynamic definition. The Respondent argues that “*readaptation*” or “*restoration*” means an adjustment of the electricity framework to the circumstances of the situation.
756. For example, in the context of the commitments made under FONINVEMEM I, the Respondent is of the view that the readjustment to the competitive framework of the Electricity Law was conditioned upon the installation of additional capacity by 2007.⁸⁷³
757. Mr. Daniel Cameron, a witness for the Respondent, testified at the Hearing that:
- Readjust the system means that the energy supply and the gas supply have to be enough for operations to continue as the Generators were operating in 2002 taking into account the increases in demand that took place at the time. Everybody was trying to commit efforts for that to happen. Obviously, if in 2007, both plants had been generating power, and in 2007, the gas producers had met the volumes that they committed to under the Agreements that they signed, well, obviously at that time we would be readjusting the sector.*⁸⁷⁴
758. In addition, Article a1 of the Adhesion Contract sets out that:

⁸⁶⁵ Minister of Federal Planning, Public Investment, and Services and the Energy Secretariat, *National Energy Plan 2004-2008* dated May 2004 (C-154).

⁸⁶⁶ Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:0176178/2004 (Part 1) dated 28 July 2004 (C-105).

⁸⁶⁷ Energy Secretary Mr. Daniel Cameron, *UIA Conference Transcript* dated 23-25 November 2004 (C-109).

⁸⁶⁸ FONINVEMEM Adhesion Contract (C-211).

⁸⁶⁹ FONINVEMEM I Agreement (C-36).

⁸⁷⁰ FONINVEMEM II Agreement (C-37).

⁸⁷¹ Resolution 95/2013 dated 22 March 2013 (C-21).

⁸⁷² Hearing Transcript, Day 2, pp. 477-478.

⁸⁷³ Hearing Transcript, Day 5, pp. 1197 *et seq.*

⁸⁷⁴ Hearing Transcript, Day 4, pp. 1149-1150.

the aim of this document is to establish the basis on which the WHOLESALE ELECTRIC MARKET (MEM) would be restored, meaning that it would be readjusted to normalize the regular operation of the MEM as a competitive market, with sufficient supply, in which Generators, Distributors, Traders, Participants and Large energy Users can buy and sell electricity at prices determined by the offer and the demand, without regulatory distortions and within the framework established by Law 24,065.⁸⁷⁵

759. Although Article a1 refers to the framework of the Electricity Law, it does not spell out that the adjustment of the market should be made to return to a pre-crisis system. Article a1 of the Adhesion Contract is clear in the fact that the readaptation is a process of normalization, which entails prerequisites, and not an immediate result to be activated. Specifically, Article a1 of the Adhesion Contract spells out that sufficient supply is *inter alia* necessary for such normalization to occur.
760. Against this background, the Tribunal finds that the notion of readaptation cannot be given the immediate meaning proposed by the Claimant, implying a return to a “*pre-crisis state*.”⁸⁷⁶ Rather, the notion implies an adjustment of the electricity framework to the circumstances of the situation, as the Energy Secretariat has done since the inception of the WEM.
761. The Tribunal finds that the measures impugned by the Claimant all bore a reasonable relationship with the objective of normalizing the WEM. Whether those measures effectively reached such objective or other measures could have achieved other results is a different issue, which does not matter for the purposes of the present analysis. Rather, what matters is whether at the time of their adoption the measures were neither arbitrary nor unreasonable.
762. In addition, the Tribunal is of the view that the recognition by the State with the benefit of hindsight of time that the remuneration mechanisms adopted since 2003 did not meet their objectives is irrelevant.⁸⁷⁷
763. Likewise, with respect to the meetings held between the Energy Secretariat and representatives of generators in December 2017 to discuss their request to be compensated for the alleged low income earned under their Concession Contracts as a result of regulatory amendments, the Tribunal finds that the Claimant has not provided tangible evidence that the Government promised such compensation. In particular, none

⁸⁷⁵ FONINVEMEM Adhesion Contract (C-211), Annex, a1.

⁸⁷⁶ Hearing Transcript, Day 2, pp. 477-478.

⁸⁷⁷ See for example Decree 134/2015 dated 16 December 2015 (C-24); Resolution 6/2016 dated 25 January 2016 (C-199); Resolution 21/2016 dated 22 March 2016 (C-188).

of the Claimant's witnesses were parties to any discussions nor did they have any first-hand knowledge of any meetings with the Government.

764. With respect to the alleged contradiction of the measures with the Electricity Law, the Tribunal recalls its previous finding that the inconsistency between the Electricity Law and the acts adopted by the Government from 2003 onwards, if any, does not amount to a breach of the FET standard, as the Claimant was aware of the regulatory framework in which it invested.
765. In conclusion, the Tribunal finds no evidence that Argentina's conduct was arbitrary or unreasonable.

V. The Claimant's claim that the Respondent acted discriminatorily in breach of Article IV(1) of the BIT

766. The fifth issue to be determined is the Claimant's claim that the Respondent acted discriminatorily in breach of Article IV(1) of the BIT. Before addressing this issue in greater detail, the Tribunal again wishes to record that its above observations regarding the various manifestations of the obligation to accord fair and equitable treatment apply *mutatis mutandis*: the Claimant's allegation overlaps with some of the other claims made with respect to a breach of Article IV(1) of the BIT. The Tribunal will not repeat its above findings with respect to Article IV(1) of the BIT but will instead focus on key allegations that specifically concern the claim that the Respondent acted discriminatorily in breach of Article IV(1) of the BIT.

1. The Claimant's position

767. Relying on *Saluka v. The Czech Republic*, the Claimant submits that "*State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.*"⁸⁷⁸ The Claimant submits that discrimination is not limited to conduct against foreign investors.⁸⁷⁹
768. The Claimant argues that the Respondent discriminated against the Claimant *vis-à-vis* similar investors through the following actions:⁸⁸⁰

⁸⁷⁸ *Saluka v. Czech Republic* (CL-11), ¶ 313.

⁸⁷⁹ Claimant's Memorial, ¶ 446; *National Grid v. Argentina* (CL-64), ¶ 198.

⁸⁸⁰ Claimant's Memorial, ¶¶ 447 *et seq.*

- First, by enacting Resolution 956/04,⁸⁸¹ which applied a surcharge to existing PPAs that in November 2004 exceeded the contracted capacity for the May-June 2004 term;
- By enacting *Energía Plus*,⁸⁸² which provided new generators a more favorable regulatory regime, including the ability to freely negotiate PPAs with large users, customers and distributors if their demand exceeded the base demand, while maintaining the unsustainable measures for established power generators (*i.e.*, pre-2006);
- By enacting *Energía Delivery Plan*, which approved the execution of PPAs between new generators and CAMMESA, including incentives like dollar-based prices and linking prices to the economic cost of the system, but not for existing generators;⁸⁸³ and
- By significantly reducing capacity payments for non-Government facilities by almost 50%, while reducing the same for State-owned facilities by only 4.5%.⁸⁸⁴

2. The Respondent's position

769. The Respondent contends that none of the measures disputed by the Claimant have been discriminatory. Rather, all regulations were equally applied to all similarly situated generators, regardless of their nationality, *i.e.*, whether they were aliens or nationals. Furthermore, the Claimant had the possibility, if it had so wished, of applying for all incentive programs and resorting to all regulatory adjustments as the rest of the generators at arm's length.⁸⁸⁵
770. The Respondent also submits that the Claimant's argument that the Respondent had no authority to provide incentives to increase electricity generation supply and make distinctions according to whether or not investments were amortized is not only absurd but also contrary to the Electricity Law.⁸⁸⁶
771. In any event, the Respondent submits that the measures are duly justified based on the regulatory powers of the Energy Secretariat to establish incentives in order to achieve increased generation supply and to distinguish between investments already recouped

⁸⁸¹ Resolution 956/2004 dated 28 September 2004 (C-210).

⁸⁸² Resolution 1,281/2006 dated 4 September 2006 (C-176).

⁸⁸³ Energy Secretariat Resolution 220/2007 dated 18 January 2007 (C-190); Resolution 1,836/2007 dated 27 November 2007 (C-178).

⁸⁸⁴ Claimant's Memorial, ¶ 327; Resolution 31/2020 dated 26 February 2020 (C-193).

⁸⁸⁵ Respondent's Rejoinder on the Merits, ¶ 615.

⁸⁸⁶ *Ibid.*

and not already recouped, which is a completely reasonable practice from a legal and economic standpoint.⁸⁸⁷

3. The Tribunal's analysis

772. The Tribunal finds that the FET standard also protects investors from discrimination by host States. As the *Waste Management II* tribunal held, the FET standard is “*infringed by conduct attributable to the State and harmful to the claimant if the conduct [...] is discriminatory.*”⁸⁸⁸

773. However, not every form of differential treatment constitutes a breach of the FET standard. Rather, discrimination entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.⁸⁸⁹ The Tribunal subscribes to the holding of the *Metalpar v. Argentina* tribunal, which held that “[t]reating different categories of subjects differently is not unequal treatment.”⁸⁹⁰

774. As held by the *Saluka* tribunal,

*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 investments over the foreign-owned investment.*⁸⁹¹

775. Accordingly, a measure will not be discriminatory where there is a rational justification of any different treatment of a foreign investor. The Tribunal further finds that it is not decisive or essential for a finding of discrimination that there be an intent to discriminate against the investor.

776. The Tribunal first turns to Resolution 956/04. The Tribunal recalls that this Resolution applied a surcharge to existing PPAs that in November 2004 exceeded the contracted capacity for the May-June 2004 term.⁸⁹² Such measure was adopted in order to increase foreseeability of the cash volume that would be contributed by generators to FONINVEMEM. The Tribunal finds that the Claimant has not shown how such measure was discriminatory. On the contrary, Resolution 956/04 applied indistinctly to all

⁸⁸⁷ *Id.*, ¶ 715.

⁸⁸⁸ *Waste Management v. Mexico (CL-55)*, ¶ 98.

⁸⁸⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (AL RA-130), ¶ 184.

⁸⁹⁰ *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008 [hereinafter: *Metalpar v. Argentina*] (AL RA-172), ¶ 162.

⁸⁹¹ *Saluka v. Czech Republic (CL-11)*, ¶ 307.

⁸⁹² Resolution 956/2004 dated 28 September 2004 (C-210).

generators with existing contracts on the term market. Accordingly, the Tribunal rejects the Claimant's claim with respect to Resolution 956/04.

777. With respect to Resolution 1281/06, the Tribunal recalls that this Resolution *inter alia* established *Energía Plus*, a price scheme that only benefited new power plants, allowing generators to freely negotiate PPAs with large users, customers, and distributors, if their demand exceeded the base demand.⁸⁹³ It is clear that Resolution 1281/06 treated new power plants and existing power plants differently but all generators in Argentina could choose to participate in the scheme in equal terms. Indeed, the Tribunal finds that the Claimant could have acceded to the *Energía Plus* scheme had it wished to install new generation supply. In this regard, the Tribunal is convinced by Mr. Ruisoto's testimony that the Claimant even envisaged such possibility.⁸⁹⁴ When questioned about this possibility at the Hearing, the Claimant's witness Mr. Tierno confirmed that "*a project [had been] identified many years ago in hydro facility and even if the conditions were good, we thought [...] that maybe one day that could be an option.*"⁸⁹⁵
778. The Claimant has thus not shown that its generators were treated differently, nor that Resolution 1281/06 reflected a nationality or other bias. Accordingly, the Tribunal also rejects the Claimant's claim with respect to Resolution 1281/06.
779. The Tribunal comes to a similar conclusion with respect to Resolution 220/07. The Tribunal recalls that under this Resolution, the Energy Secretariat approved the execution of PPAs between new generators and CAMMESA, providing incentives to new power plants (*i.e.*, US dollar prices for fixed-terms). Just like in the case of Resolution 1,281/06, the Claimant could have acceded to the scheme of Resolution 220/07 had it wished to install new generation supply. The Claimant has again also not shown that its generators were treated differently, nor that Resolution 220/07 reflected a nationality or other bias. Accordingly, the Tribunal also rejects the Claimant's claim with respect to Resolution 220/07.
780. With respect to Resolution 31/20, the Tribunal recalls that this Resolution converted power generators' prices to pesos with an adjustment formula to mitigate the conversion on a monthly basis. The Tribunal notes that Annex IV of the Resolution sets forth specific remuneration conditions for the "*Binational Hydroelectric Power Plants*

⁸⁹³ Resolution 1,281/2006 dated 4 September 2006 (C-176), Annex II, Article 2.

⁸⁹⁴ Ruisoto II, ¶ 69; EnerNews, "Neuquén I: Duke Energy quiere instalar una central hidráulica" [Neuquén I: Duke Energy wants to install a hydroelectric plant], May 29, 2007, available at: <http://enernews.com/nota/195316/neuquen-i-duke-energy-quiere-instalar-una-central-hidraulica> (JR-99); Río Negro, "Quieren instalar una central hidráulica en El Chañar" [A hydroelectric plant to be installed in El Chañar], 29 de mayo de 2007, available at: <https://www.rionegro.com.ar/quieren-instalar-una-central-hidraulica-en-el-chanar-LTHRN200755292001/> (JR-100).

⁸⁹⁵ Hearing Transcript, Day 4, p. 975.

Yacretá and Salto Grande.”⁸⁹⁶ The Tribunal is of the view that privately and publicly owned generators are not similar actors and thus do not have to be treated equally. The Tribunal thus concludes that Resolution 31/20 was not discriminatory.

781. The Tribunal concludes that the Claimant has not shown that Cerros Colorados was treated differently from other generators, nor specifically that the measures would have reflected a nationality or other bias. Accordingly, the Tribunal rejects the Claimant’s claim.

VI. The Claimant’s claim that the Respondent abused its authority in breach of Article IV(1) of the BIT

782. The sixth issue to be determined concerns the Claimant’s claim that the Respondent abused its authority in breach of Article IV(1) of the BIT. Before addressing this issue in greater detail, the Tribunal again wishes to record that its above observations regarding the various manifestations of the obligation to accord fair and equitable treatment apply *mutatis mutandis*: the Claimant’s allegation overlaps with some of the other claims made with respect to a breach of Article IV(1) of the BIT. The Tribunal will not repeat its above findings with respect to Article IV(1) of the BIT but will instead focus on key allegations that specifically concern the claim that the Respondent abused its authority in breach of Article IV(1) of the BIT.

1. The Claimant’s position

783. The Claimant submits that the FET standard requires a host State to refrain from “*harassment, coercion, abuse of power or other bad faith conduct*” *vis-à-vis* a foreign investor.⁸⁹⁷ This includes not exercising unreasonable pressure on an investor to reach certain goals.⁸⁹⁸ Citing *LG&E v. Argentina*, *Suez & Vivendi* and *National Grid v. Argentina*, the Claimant submits that tribunals have previously found Argentina liable for violating the FET standard for coercing foreign investors to enter into contractual agreements.⁸⁹⁹
784. The Claimant argues that it is not necessary for it to demonstrate bad faith on the State’s behalf. Consequently, even if a State’s conduct is “*related to a rational policy*,” it can

⁸⁹⁶ Resolution 31/2020 dated 26 February 2020 (C-193), Annex IV.

⁸⁹⁷ Claimant’s Memorial, ¶ 453; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2015 [hereinafter: *Glencore v. Colombia*] (CL-61), ¶ 1310.

⁸⁹⁸ Claimant’s Memorial, ¶ 453; Claimant’s Reply on the Merits, ¶ 61; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 [hereinafter: *Burlington v. Ecuador – Decision & Award*] (CL-62), ¶¶ 170-171.

⁸⁹⁹ Claimant’s Memorial, ¶¶ 454, 455.

still be a FET standard violation. A State's acts must be "*appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors.*"⁹⁰⁰

785. The Claimant claims that the Respondent abused its authority by refusing to pay the Claimant its receivables, even at the reduced values resulting from the measures.⁹⁰¹ Even after the construction of the FONINVEMEM plants, Argentina did not respect or reinstate the principles set forth in the Electricity Law, as promised, and granted itself the right to increase its stock share in the FONINVEMEM plants.⁹⁰² The Claimant also submits that it was repeatedly forced to waive certain rights to receive payments for its receivables and that the Government withheld payment to Cerros Colorados.⁹⁰³ The Claimant argues that entering into the agreements was the only way for the Claimant to recover any of its outstanding receivables.⁹⁰⁴
786. Citing *Total v. Argentina*,⁹⁰⁵ the Claimant submits that, although participating in the FONINVEMEM program appeared voluntary, the Respondent through Resolutions 826/04 and 1427/2004, forced the Claimant to invest its outstanding receivables in the FONINVEMEM, thereby giving the Government a below market loan. The Claimant submits that the findings of the *Total* tribunal are sufficiently clear and can assist the Tribunal, and the fact that the *Total* tribunal issued its findings 10 years ago is irrelevant.⁹⁰⁶
787. The Claimant submits that its participation in the FONINVEMEM was not voluntary. The Claimant recalls that the Respondent owed Orazul receivables that originated between 2004 and 2006 for spot market sales, but provided no indication of when it would pay them until it created the FONINVEMEM program. The Government gave Orazul two options: (i) invest the unpaid receivables in the FONINVEMEM along with a plan to receive payment or (ii) refuse to participate in the FONINVEMEM and have even less certainty of payment.⁹⁰⁷ According to the Claimant, the same holds true for the FONINVEMEM I extension and FONINVEMEM II, where Cerros Colorados had even less of a choice because it was already locked into the program and any access to its withheld receivables depended on the program's success.⁹⁰⁸ The Claimant submits

⁹⁰⁰ *Id.*, ¶ 392; *Ioan Micula, Viorel Micula, and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (CL-39), ¶ 525.

⁹⁰¹ Claimant's Memorial, ¶ 456; Claimant's Reply on the Merits, ¶ 612.

⁹⁰² Claimant's Memorial, ¶ 456.

⁹⁰³ Claimant's Reply on the Merits, ¶ 614.

⁹⁰⁴ Bertone, ¶ 12; McGee II, ¶ 13; Tierno II, ¶¶ 18, 22.

⁹⁰⁵ Claimant's Memorial, ¶ 457.

⁹⁰⁶ Claimant's Reply on the Merits, ¶ 620.

⁹⁰⁷ *Id.*, ¶ 615.

⁹⁰⁸ *Id.*, ¶ 617.

that investing in FONINVEMEM II was the only alternative left for Cerros Colorados to mitigate its damages from CAMMESA having defaulted on its payments within the framework of Resolution 724/08, whereby the Government authorized the execution of supply agreements between power generators and CAMMESA.⁹⁰⁹ FONINVEMEM II was even more egregious because it required Cerros Colorados to waive future claims, which underscores the Government's abuse of authority as such waiver is not lawful as a matter of Argentine law.⁹¹⁰ Additional waivers were imposed on Cerros Colorados through Resolution 95/13 and its amendments,⁹¹¹ to which the Claimant repeatedly objected,⁹¹² the Credit Agreement of 2019,⁹¹³ and Resolution 440/21.⁹¹⁴ According to the Claimant, the only reason that the Government had the opportunity to force generators, including Cerros Colorados, to agree to the alleged waivers was because it blatantly refused to pay generators on multiple occasions.⁹¹⁵

788. Finally, the Claimant denies that it failed to meet any obligation arising out of the FONINVEMEM Agreements. Rather, the Government was the party that failed to comply with its obligations.⁹¹⁶

2. The Respondent's position

789. The Respondent states that the Claimant has not met its burden of proof with respect to the content of the FET violation for abuse of authority as it does not present a standard based on arbitral decisions.⁹¹⁷ The Respondent argues that tribunals have set a high standard for what is to be considered such a violation. For example, in *Burlington v. Ecuador*, cited by the Claimant, the tribunal clearly described the State's behavior as harassment.⁹¹⁸ The Respondent adds that the *Joshua Dean* tribunal took the seriousness of the facts into consideration.⁹¹⁹

⁹⁰⁹ Claimant's Memorial, ¶ 271; Tierno I, ¶ 40.

⁹¹⁰ Claimant's Reply on the Merits, ¶ 617.

⁹¹¹ Tierno I, ¶¶ 64-71.

⁹¹² Letter from Duke Energy to Contract and Regulatory Manager dated 13 June 2013 (C-144); Resolution 95/2013 dated 22 March 2013 (C-21); Letter from Cerros Colorados to the Energy Secretariat dated 4 April 2013 (C-148); Letter from Cerros Colorados to the Energy Secretariat dated 19 June 2014 (C-146); Letter from Cerros Colorados to the Energy Secretariat dated 3 September 2014 (C-149); Letter from Cerros Colorados to the Energy Secretariat dated 26 January 2016 (C-147).

⁹¹³ Agreement for the Regularization and Payment of Receivables with the WEM between Cerros Colorados and CAMMESA dated 9 August 2019 (C-290), Article 3.

⁹¹⁴ Resolution 440/2021 dated 21 May 2021 (C-331), Article 4.

⁹¹⁵ Claimant's Reply on the Merits, ¶ 619.

⁹¹⁶ *Id.*, ¶ 621.

⁹¹⁷ Respondent's Rejoinder on the Merits, ¶¶ 696, 698.

⁹¹⁸ *Id.*, ¶ 699; *Burlington v. Ecuador* – Decision & Award (CL-62), ¶ 172.

⁹¹⁹ Respondent's Rejoinder on the Merits, ¶ 700; *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020 (AL RA-310), ¶ 363.

790. Aside from claiming that the Claimant has not discharged its burden of proof with respect to the standard under which it makes its claim, the Respondent submits that it never forced the Claimant to carry out any acts, so no abuse can be considered to have been committed.⁹²⁰
791. The Respondent contends that the Claimant was not forced to invest in the FONINVEMEM, which should rule out any accusation of abuse of authority. The Respondent submits that there is no evidence in the record proving such alleged coercion to enter into the agreements reached.⁹²¹ The Respondent submits that, on the contrary, the Claimant accepted them voluntarily and derived a benefit from them. In addition, the fact that the Claimant's adherence to Resolution 95/13 was maintained over time proves that such situation was never deemed to violate the BIT. The Respondent thus submits that the Claimant seeks to obtain a double benefit: the benefit it gained from an agreement that was freely negotiated and the damages it seeks based on the coercion allegedly used for the signing of that agreement.⁹²²
792. With respect to FONINVEMEM II in particular, the Respondent recalls that the scheme was offered in order to finance the proposed projects. Generators would contribute their receivables corresponding to the January 2008-December 2011 period, except for those already committed under Resolution 724/08. The Respondent states that Cerros Colorados itself requested that the Energy Secretariat allocate its receivables initially committed under Resolution 724/08 to the FONINVEMEM II Agreement, which the Energy Secretariat accepted.⁹²³

3. The Tribunal's analysis

793. As far as the legal standard is concerned, the Tribunal agrees with the Claimant that the obligation to accord fair and equitable treatment requires a host State to refrain from "*harassment, coercion, abuse of power or other bad faith conduct*" vis-à-vis a foreign investor.⁹²⁴ Such an obligation has been recognized in the case law invoked by the Claimant.⁹²⁵ The Respondent has not substantially disputed such obligation, but asserted that the Claimant has failed to discharge its burden of proof.

⁹²⁰ Respondent's Rejoinder on the Merits, ¶¶ 696 *et seq.*

⁹²¹ Respondent's Counter-Memorial, ¶ 445.

⁹²² Respondent's Rejoinder on the Merits, ¶ 701.

⁹²³ Respondent's Counter-Memorial, ¶ 301; Respondent's Rejoinder on the Merits, ¶ 433; Letter SE 4143 dated 26 July 2013 (A RA-122); Letter SE 5423 dated 9 September 2013 (A RA-123); Letter B-84532-1 from CAMMESA dated 24 October 2013 (C-56); *see also* Cameron I, ¶ 38; Gallo Mendoza I, ¶ 66.

⁹²⁴ Claimant's Memorial, ¶ 453; *Glencore v. Colombia* (CL-61), ¶ 1310.

⁹²⁵ *Ibid.*

794. The Tribunal therefore turns to the facts of the present case. In this respect, the Tribunal finds that the Claimant has not proven any form of harassment, coercion, abuse of power or other bad faith conduct on the Respondent's part. Specifically, as far as the FONINVEMEM agreements are concerned, the Tribunal rejects the Claimant's contention that the Claimant was forced to enter into these agreements. On the contrary, the Tribunal finds that the Claimant willingly joined both the FONINVEMEM I and the FONINVEMEM II Agreements. The Tribunal bases its findings on the drafting history of the FONINVEMEM I and the FONINVEMEM II Agreements.

795. The Tribunal recalls that the Energy Secretariat adopted Resolution 1427/2004 formalizing the Energy Secretariat's invitation to generators to participate in the FONINVEMEM program. Resolution 1427/2004 spelled out that

*[e]stablishing general guidelines as well as essential organizational aspects [...] and the commitments undertaken both by [the] ENERGY SECRETARIAT and the [generators] [...] is convenient and appropriate, leaving for a subsequent stage the drafting of the "Final Agreement" to be signed.*⁹²⁶

796. Article 1 of Resolution 1427/2004 provided that the generators were invited to state their intention to participate in the FONINVEMEM program, by signing the Adhesion Contract attached to Resolution 1427/2004 in a first step. In a second step, such generators were invited to sign the "*Final Agreement to be proposed by th[e] Energy Secretariat.*" As spelled out in the Adhesion Contract annexed to Resolution 1427/2004, the Adhesion Contract constituted the "*basic guidelines*" to be used to reach a "*Final Agreement for the exchange of receivables specified in paragraph c) of Resolution 406 of 8 September 2003 and clarifying Resolution 943 of 27 November 2003.*"⁹²⁷

797. The invitation to participate in FONINVEMEM was extended on a number of occasions by the Respondent.⁹²⁸

798. Cerros Colorados, although initially reluctant to adhere to the Adhesion Contract, ultimately adhered after a number of communications with the Government. Specifically:

- On 17 December 2004, Cerros Colorados sent a letter to the Energy Secretariat advising that its participation in FONINVEMEM was conditioned to the finding

⁹²⁶ Resolution 1,427/2004 dated 6 December 2004 (C-65), seventh whereas clause.

⁹²⁷ FONINVEMEM Adhesion Contract (C-211), introductory clause.

⁹²⁸ *Inter alia*: Resolution 833/2004 dated 17 August 2004 (A RA-59); Resolution 936/2004 dated 30 August 2004 (A RA-60); Resolution 948/2004 dated 17 September 2004 (A RA-61); Resolution 971/2004 dated 12 October 2004 (A RA-62); Resolution 1097/2004 dated 26 October 2004 (A RA-63); Resolution 1225/2004 dated 18 November 2004 (A RA-64).

of an agreement on a number of issues. Cerros Colorados referred to its “*intention to collaborate with the restoration of the regular functioning of the WEM as a competitive market ... without regulatory distortions and within the framework established by [the Electricity Law].*”⁹²⁹

- On 15 March 2005, the Energy Secretariat proposed to issue a new invitation to other electricity generators who had not signed the Adhesion Contract attached to Resolution 1427/2004.⁹³⁰
- During the same month, Duke Energy noted in a memorandum regarding Argentina and *inter alia* addressing FONINVEMEM that it had “*opted out of this investment mechanism*” as “*Duke Energy refuses to participate in forced investments.*”⁹³¹
- That same month, Duke Energy also noted in an internal presentation that it “*rejected the Government’s proposal to invest in two thermal plants through FONINVEMEM because [...] [t]he money corresponding to Duke Energy accounts receivable should not be subject to any additional investment [and] [a]t the time of the invitation [Duke Energy] did not have enough information to make a decision.*”⁹³²
- On 6 April 2005, through Resolution 622/2005, the Energy Secretariat ordered CAMMESA to issue a new invitation to electricity generators who had not yet signed the Adhesion Contract.⁹³³
- On 14 April 2005, the Energy Secretariat requested CAMMESA to extend the call until 25 April 2005 in light of the number of clarifications requested by electricity generators.⁹³⁴
- On 18 April 2005, Cerros Colorados sent a letter to the Undersecretary of Electric Energy requesting clarifications on Resolution 622/2005,⁹³⁵ including on the “*manner in which the 35% of receivables will be paid for the year 2004*

⁹²⁹ Letter from Cerros Colorados to the Energy Secretary dated 17 December 2004 (C-145 and C-547).

⁹³⁰ Memorandum of Agreement for a New Invitation to Participate in the FONINVEMEM dated 15 March 2004 (A RA-69).

⁹³¹ Duke Energy, Memorandum regarding Argentina dated March 2005 (C-368).

⁹³² Duke Energy Argentina, *Government Affairs* dated March 2005 (C-341), p. 8.

⁹³³ Resolution 622/2005 dated 6 April 2005 (C-200).

⁹³⁴ Letter SSEE 0339 dated 14 April 2005 (A RA-198).

⁹³⁵ Letter from Duke Energy Argentina - Hidroeléctrica Cerros Colorados S.A. to the Undersecretary of Electricity dated 18 April 2005 (A RA-199).

for those generators deciding not to participate in the second call,” to which the Undersecretary replied on 21 April 2005.⁹³⁶

- On 25 April 2005, Cerros Colorados sent a letter to the Deputy Secretary of Energy indicating that it was its “*intention [...] to accept*” the latest call made under Resolution 622/2005 but that it required additional time to express its acceptance “*for regulatory reasons and due to internal procedures.*”⁹³⁷
- On 12 May 2005, the Energy Secretariat granted an extension of time until 17 May 2005 to allow electricity generators who had not done so, such as Cerros Colorados, to join the FONINVEMEM program.⁹³⁸
- On 13 May 2005, Cerros Colorados stated its intention to enter into the FONINVEMEM program.⁹³⁹
- On 23 May 2005, a meeting was held between representatives of Duke and the Energy Secretariat. According to the minutes of such meeting, Duke “*thanked*” the Energy Secretariat for “*the actions taken that concluded in the participating of [Duke] in the Foninvemem.*”⁹⁴⁰

799. In light of this, the Tribunal is convinced that there was nothing forced about the FONINVEMEM I program with regard to the Claimant. Rather, although initially reluctant, Cerros Colorados took a calculated risk to adhere to the Adhesion Contract without any reservations made towards the Government.

800. The FONINVEMEM I Agreement was then eventually entered into in October 2005, following discussions with working groups constituted of generators and generators’ associations.⁹⁴¹ As testified by the former Energy Secretary, Mr. Cameron:

As a result of the negotiations between the Secretariat of Energy and generators, through the working groups, in October 2005 it was possible to adopt the text of the Final Agreement, annexed to Resolution SE No. 1193/2005, whereby MEM agents were called to express their decision to

⁹³⁶ Letter SSEE 0359 dated 21 April 2005 (A RA-201).

⁹³⁷ Letter B-29137-1 from CAMMESA dated 26 April 2005 (A RA-70); See also Letter from Cerros Colorados to the Subsecretary of Energy and CAMMESA dated 25 April 2005 (C-66).

⁹³⁸ Resolution 751/2005 dated 12 May 2005 (C-206), Article 1.

⁹³⁹ Cerros Colorados, *Digital Acceptance to Participate in the Adhesion Contract* dated 13 May 2005 (C-292); Letter B-29137-2 from CAMMESA dated 17 May 2005 (A RA-71).

⁹⁴⁰ Minutes of the meeting between Undersecretary of Energy Marcheschi and Cerros Colorados dated 23 May 2005 (C-517).

⁹⁴¹ As provided for by Article 3 of the Adhesion Contract. See for example, FONINVEMEM Working Groups, Report issued by the Technical-Environmental Commission dated 30 March 2005 (A RA-377), p. 3; FONINVEMEM Working Groups, Report issued by the Commercial Commission dated 4 April 2005 (A RA-378), p. 3; FONINVEMEM Working Groups EM, Report issued by the Corporate-Tax Commission dated 17 March 2005 (A RA-379), pp. 3-6.

*subscribe it and participate in the construction, operation and maintenance of the power plants provided for in the Final Agreement.*⁹⁴²

801. The Tribunal takes note that one of the Claimant's witnesses, Mr. Tierno, alleges that:

*Cerros Colorados did not participate in those groups, because they had been created months before Cerros Colorados agreed to sign the Adhesion Contract and were composed only of those generators that had already signed the Adhesion Contract.*⁹⁴³

802. However, this does not change the Tribunal's conclusion that the FONINVEMEM I Agreement was the result of a negotiated process to which generators could choose to adhere or not. As appears from a letter from CAMMESA to the Energy Secretary dated 20 October 2005, the Tribunal notes that not all generators that adhered to the Adhesion Contract adhered to the FONINVEMEM I Agreement.⁹⁴⁴ This further confirms the non-coercion in relation to the program.

803. The testimony of the Claimant's witness Ms. Bertone confirms the Tribunal's findings. Notably, Ms. Bertone testified:

*Well, nobody held a gun to the Generators and said "sign here." Of course, it was possible to not participate.*⁹⁴⁵

804. The Tribunal arrives at the same conclusion with respect to the FONINVEMEM II Agreement. The Claimant submits that it was forced to invest in FONINVEMEM II to mitigate its damages from CAMMESA having defaulted on its payments within the framework of Resolution 724/08. However, the Tribunal is not convinced by this argument.

805. The FONINVEMEM II Agreement, concluded in 2010, explicitly set out that the receivables committed under Resolution 724/08 were excluded from the FONINVEMEM II Agreement.⁹⁴⁶ Accordingly, the Claimant could not have expected that allocating its Resolution 724/08 receivables to the FONINVEMEM II Agreement would allow it to recover the payments allegedly defaulted upon. Indeed, the receivables committed under Resolution 724/2008 were ultimately allocated to the FONINVEMEM

⁹⁴² Cameron I, ¶ 20.

⁹⁴³ Tierno II, ¶ 25.

⁹⁴⁴ Note B-31305-1 from CAMMESA dated 20 October 2005 (A RA-72), pp. 3 *et seq.*

⁹⁴⁵ Hearing Transcript, Day 3, p. 662.

⁹⁴⁶ FONINVEMEM II Agreement (C-37), Article 3.2.i.

II Agreement upon request of Cerros Colorados itself, which CAMMESA accepted in 2013.⁹⁴⁷

806. In addition, the Claimant's witnesses confirmed that they made an informed business decision to follow what other larger generators had done, *i.e.*, adhere to FONINVEMEM II. In this regard, Mr. Tierno testified at the Hearing:

*[...] we received a call from the other Generators that were managing the negotiations [...] and they say they let the Government let them know that they wanted to change the way that the initial Agreement was described, was written, and they wanted to change that, and they wanted to get 70 percent. And they say that the Generators that are not adhering it would be left out of this Project. So, basically, they said that they will subscribe that so they didn't fight against that. So, we felt that we should follow that, no? And we also received—I received a call from somebody that—I cannot recall his name, but somebody that works—that he says—he said he worked as a consultant back then, and the Secretary of Energy saying that confirming what the Generators was saying, that we were expected to sign that second Amendment, and, if not, we would bear the risk of being left out of the Project, no?*⁹⁴⁸

807. The Tribunal turns to the question of whether the Respondent's conduct in setting its shareholding participation at 70% within the context of FONINVEMEM II constituted harassment, coercion, abuse of power or other bad faith conduct, as alleged by the Claimant. The Tribunal is not convinced by the Claimant's argument that this was forced or otherwise unfair. The FONINVEMEM II Agreement explicitly set forth that the percentage of shareholder interest of the private generators and the State in the plants that were to be built under the agreement would only be determined later through the execution of supplementary addenda.⁹⁴⁹ The first addendum provided that the shareholding interest in the Managing Company would be determined in proportion to the funds contributed by each party, relative to the total funds allocated to the project.⁹⁵⁰

⁹⁴⁷ Letter SE 4143 dated 26 July 2013 (A RA-122); Letter SE 5423 dated 9 September 2013 (A RA-123); Letter B-84532-1 from CAMMESA dated 24 October 2013 (C-56); Letter from AGEERA to the Energy Secretariat dated December 2009 (C-102); Letter from generators submitted to the Secretariat of Energy dated 28 April 2011 (A RA-98).

⁹⁴⁸ Hearing Transcript, Day 4, p. 973.

⁹⁴⁹ FONINVEMEM II Agreement (C-37), Article 8.

⁹⁵⁰ Addendum No. 1 to the 2008-2011 Agreement for the Management and Operation of Projects, Increase of Thermal Generation Availability and Adjustment of Generation Compensation, 12 April 2011 (C-117), section 3.

808. The Tribunal finds that the Government’s contribution of funds in the construction of the plants was indeed proportionate to its shareholding interest. Accordingly, the Tribunal is of the view that the addenda were neither forced nor otherwise unfair.

809. If anything, the Claimant’s argument is not one of coercion and abuse of power in a legal sense but an economic one pursuant to which the Claimant would have had no other choice but to accept to avoid suffering losses. In this regard, the Claimant’s witness Ms. Bertone testified:

*I can imagine, like, you just lock me in a room without food for one day, two days, three days, five days, I don’t eat. Then, you come to me with a bowl of stinky soup and give it to me and you say here, eat this soup. I’m starving. I’m going to eat the soup. Now, the question is, was I forced to eat that soup, or did I eat the soup because I want it? So, you know, I think it’s the same way here. Like we had no option. We didn’t like this. I was the one who had to explain it. I know how hard it was, you know.*⁹⁵¹

810. However, even if the Claimant had no economically viable alternative to agreeing to the FONINVEMEM Agreements, this does not suffice to meet the threshold for harassment, coercion, abuse of power or other bad faith conduct because this economically difficult situation already existed at the time of the Claimant’s investment.

811. The Tribunal finds that this is one of the key factors distinguishing the present case from the facts underlying the decision in *Total v. Argentina*. The latter tribunal concluded the Argentina had adopted the FONINVEMEM scheme in breach of the obligation to accord fair and equitable treatment. It held that

*[i]f not “forced”, [the conversion of receivables into a stake into FONINVEMEM] was certainly strongly induced by putting generators in a situation where they had no choice other than to accept the scheme or otherwise risk suffering higher losses.*⁹⁵²

812. Unlike *Total*, the Claimant’s investment took place at a time of a highly unstable climate where generators were no longer being paid for the electricity they produced and Resolution 943/03 explicitly set out that generators’ receivables which did not have a payment date pursuant to Resolution 406/03 “do not constitute a liquid and enforceable debt according to Article 819 of the Civil Code.”⁹⁵³ To recall, Resolution 943/03 also quantified the amounts owed to generators into two categories: i) those that would be paid on certain due dates, based on available resources; and ii) those that would be paid

⁹⁵¹ Hearing Transcript, Day 3, pp. 667-668.

⁹⁵² *Total v. Argentina (CL-29)*, ¶ 337.

⁹⁵³ Resolution 943/2003 dated 27 November 2003 (C-209), Article 1.

on uncertain due dates, determined by the Energy Secretariat. Accordingly, the risk of suffering “*high losses*” was pre-existent at the time of the Claimant’s investment. The Tribunal finds that contrary to *Total*, the Claimant was aware of the risks it took when coming under the protection of the BIT and of the potentially limited options for recovery of its receivables. In addition, that tribunal only dealt with the earlier days of the FONINVEMEM scheme and *Total* did not even participate in the FONINVEMEM Agreement. That situation was, thus, different from the Claimant’s.

813. In any event, as testified by the Claimant’s quantum expert Mr. Dellepiane, the FONINVEMEM program was highly profitable. At the Hearing, Mr. Dellepiane testified that

*FONINVEMEM actually attracted a very, very attractive list of plans received from the Government, including an incredibly attractive remuneration scheme, that is much higher, in fact, than our but for analysis.*⁹⁵⁴

814. The Tribunal is also convinced by the Respondent’s argument that entering into the FONINVEMEM scheme was not the only available scheme for generators who had not collected their receivables.

815. Furthermore, the Tribunal notes that the Claimant benefited from such agreements. This is confirmed by the fact that after its investment Duke Energy reported very favorable results for its generation assets in Argentina:

- The summary of Duke Energy’s Annual Report for 2005 included the following information as part of its 2005 “*highlights*”:

*DEI exceeded expectations with segment EBIT of \$314 million, compared to \$222 million in 2004. Those results were largely driven by improved Latin American operations (due primarily to favorable pricing and weather conditions in Peru and Argentina).*⁹⁵⁵

- Such “*favorable pricing*” conditions were also noted as a reason for the increase of Duke’s EBIT and “*higher electricity generation, prices and increased gas marketing sales*” in Argentina were noted as the reason for the increase in Duke’s increase in operating revenues in Duke Energy’s Form 10-K filing with the SEC in 2006.⁹⁵⁶

⁹⁵⁴ Hearing Transcript, Day 8, p. 2256.

⁹⁵⁵ Duke Energy Corp., Summary Annual Report 2005 dated 2005 (A RA-236), p. 27.

⁹⁵⁶ Duke Energy Corp., 10-K 2006 dated 2006 (A RA-237), pp. 60-61.

- In 2015, during Duke Energy’s Year-End 2015 Earnings Conference Call, the President and CEO of Duke Energy noted that Argentina was a “*generally very good market*[].”⁹⁵⁷

816. Finally, the Tribunal turns to Resolution 95/13 and the choice left open to generators to participate in this program. Again, the Tribunal arrives at the same conclusion that the generators were not coerced into entering this program and there was otherwise no form of harassment, abuse of power or other bad faith conduct. The Claimant has not provided sufficient evidence to substantiate its claim. Accordingly, the Tribunal also rejects the Claimant’s claim based on Resolution 95/13.
817. Having found that none of the agreements and schemes were forced, the Tribunal also arrives at the conclusion that the waivers contained therein do not amount to substantive unfairness. The Tribunal moreover finds that the Claimant has not provided tangible evidence that the Agreement of 2019 on the Regularization and Payment of Receivables⁹⁵⁸ and Resolution 440/21 were forced upon it and thus concludes that the waivers contained therein do not amount to a substantive unfairness.⁹⁵⁹
818. For the reasons set forth above, the Tribunal rejects the Claimant’s claim that the Respondent abused its authority in breach of Article IV(1) of the BIT.

VII. The Claimant’s claim that the Respondent impaired the Claimant’s investments through unjustified and discriminatory measures in breach of Article III(1) of the BIT

819. The seventh issue to be determined concerns the Claimant’s claim that the Respondent impaired the Claimant’s investments through unjustified and discriminatory measures in breach of Article III(1) of the BIT. Before addressing this issue in greater detail, the Tribunal again wishes to record that its above observations regarding the obligations to accord fair and equitable treatment and not to act discriminatorily in breach of Article IV(1) apply *mutatis mutandis*: The Tribunal will not repeat its above findings in this respect but will instead focus on key allegations that specifically concern the claim that the Respondent impaired the Claimant’s investments through unjustified and discriminatory measures in breach of Article III(1) of the BIT.

⁹⁵⁷ Duke Energy Corporation, FQ4 2015 Earnings Call Transcripts (A RA-234), p. 18.

⁹⁵⁸ Agreement for the Regularization and Payment of Receivables with the WEM between Cerros Colorados and CAMMESA dated 9 August 2019 (C-290), Article 3.

⁹⁵⁹ Resolution 440/2021 dated 21 May 2021 (C-331), Article 4.

1. The Claimant's position

820. The Claimant is of the view that the Respondent impaired the Claimant's investments through unjustified and discriminatory measures.⁹⁶⁰

a) The applicable standard

821. The Claimant submits that arbitrary measures impairing the management, maintenance, use, enjoyment or disposal of investments, which may result in a deprivation of the value of the investment, violate the non-impairment obligation enshrined in Article III(1) of the BIT. Relying on *Teinver*, the Claimant submits that it is sufficient to demonstrate that Argentina enacted unjustified or arbitrary measures, or that Argentina's measures were discriminatory to show a breach of Article III(1) of the BIT.⁹⁶¹ According to the Claimant, such arbitrary measures are necessarily unjustified.⁹⁶²

822. The Claimant submits that the non-impairment obligations require the same standard of reasonableness as the FET standard; namely, that the State's conduct "*bears a reasonable relationship to some rational policy*"⁹⁶³ and that, like FET, the standard prohibits "*a measure taken for reasons that are different from those put forward by the decision maker.*"⁹⁶⁴ The Claimant argues that an act is arbitrary, *i.e.*, unjustified, if it "*shocks or at least surprises, a sense of juridical propriety*" as noted by the ICJ in the *ELSI* case.⁹⁶⁵ The Claimant also adds, based on the *Pope & Talbot v. Canada* case, that establishing an act to be arbitrary

*leaves out any requirement that every reasonable and impartial person be dissatisfied and perhaps permits a bit less injury to the psyche of the observer, who need no longer be outraged, but only surprised by what the government has done.*⁹⁶⁶

823. As to discriminatory measures, the Claimant submits that tribunals consider two elements: (1) "*the measures directed against a particular party must be for reasons unrelated to the substance of the matter;*" and (2) "*like persons [must be] treated in an*

⁹⁶⁰ Claimant's Memorial, ¶¶ 459-467; Claimant's Reply on the Merits, ¶¶ 623-633, 653-687.

⁹⁶¹ Claimant's Memorial, ¶ 460; *Teinver v. Argentina – Award (CL-99)*, ¶¶ 667, 923.

⁹⁶² *Teinver v. Argentina – Award (CL-99)*, ¶ 923; see also *National Grid v. Argentina (CL-64)*, ¶ 197.

⁹⁶³ Claimant's Memorial, ¶ 461; *Saluka v. Czech Republic (CL-11)*, ¶ 460.

⁹⁶⁴ Claimant's Memorial, ¶ 461. See e.g., *EDF v. Romania (CL-37)*, ¶ 303; *Toto v. Lebanon (CL-65)*, ¶ 157.

⁹⁶⁵ *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ Decision, 20 July 1989 (AL RA-148), ¶ 128.

⁹⁶⁶ *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on Damages, 31 May 2002 (AL RA-200), ¶ 64.

inequivalent manner.”⁹⁶⁷ According to the Claimant, discriminatory intent is not required and discriminatory treatment is not limited to discrimination against foreign investors on the basis of their nationality.⁹⁶⁸

b) Application to the facts

824. The Claimant claims that the Respondent’s measures have impaired the management, maintenance, use, enjoyment, or disposal of the Claimant’s investments in violation of Article III(1) of the BIT. The Claimant considers that the Respondent’s measures were unjustified, arbitrary, and discriminatory.⁹⁶⁹
825. First, the Claimant contends that the Respondent impaired its ability to operate its business as it *de facto* removed Cerros Colorados’ ability to control and conduct business.⁹⁷⁰ Specifically, the Respondent (i) exercises complete control over the market and refuses to abide by the principles set forth under the Electricity Law, and (ii) directs where and when Orazul re-invests such revenues.⁹⁷¹ In addition, Cerros Colorados is prevented by the Respondent from entering into and selling power through freely-negotiated PPAs. As a result, Cerros Colorados can only sell electricity to CAMMESA under Government-imposed terms, affecting its right to operate, freedom to contract and to make commercial decisions. The Claimant thus concludes that since it is unable to manage and make decisions *vis-à-vis* its investments, the Government breached Article III(1) of the BIT.⁹⁷² The Claimant submits that the same conclusion applies to the Claimant’s forced participation in the FONINVEMEM program,⁹⁷³ the impairment of the Claimant’s access to the term market,⁹⁷⁴ and the Claimant’s most basic business decisions such as repairs to Cerros Colorados plants for which the Government had to approve the financing.⁹⁷⁵
826. Second, the Claimant submits that the Respondent further impaired its investment by imposing unreasonable, arbitrary and discriminatory measures.⁹⁷⁶ The Claimant considers that the Respondent enacted arbitrary measures because they violate Argentine law, impose an economically unsustainable regime, and are inconsistent with

⁹⁶⁷ Claimant’s Memorial, ¶ 469; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 [hereinafter: *Azurix v. Argentina*] (CL-38), ¶ 372.

⁹⁶⁸ Claimant’s Memorial, ¶ 469; *National Grid v. Argentina* (CL-64), ¶ 198.

⁹⁶⁹ Claimant’s Memorial, ¶ 471; Claimant’s Reply on the Merits, ¶ 626.

⁹⁷⁰ Claimant’s Reply on the Merits, ¶¶ 635 *et seq.*

⁹⁷¹ *Id.*, ¶ 635.

⁹⁷² *Ibid.*

⁹⁷³ *Id.*, ¶ 636.

⁹⁷⁴ *Id.*, ¶¶ 637-638.

⁹⁷⁵ Claimant’s Reply on the Merits, ¶ 639; Tierno II, ¶ 60.

⁹⁷⁶ Claimant’s Reply on the Merits, ¶¶ 641 *et seq.*

each other. According to the Claimant, the Respondent created two parallel co-existing but contradictory systems violating Cerros Colorados' basic rights under the Electricity Law (*i.e.*, the right to a uniform spot price for all generators based on the economic cost of the system; capacity payments for capacity made available for dispatch; the right to freely negotiate and sell electricity in the term market through PPAs).⁹⁷⁷ As an example of measures which were inconsistent with each other, the Claimant submits that the Government acknowledged that capacity payments were too low and, therefore, adjusted them in Resolution 19/17, and then changed course shortly thereafter and reversed any progress that had been achieved through the adjustments in such resolution.⁹⁷⁸ In addition, the Claimant submits that the Government contradicted itself in the context of meetings to discuss a “*remediation of Cerros Colorados' situation*” but then “*changed stance and no longer seemed willing to continue with the negotiations.*”⁹⁷⁹ Furthermore, the Claimant argues that its forced participation in the FONINVEMEM programs constitutes an unreasonable coercion under which Cerros Colorados was forced to waive its rights.⁹⁸⁰ That the Government's actions were arbitrary is also supported by the fact that the disputed measures resulted in an unsustainable system, as evidenced by the FONINVEMEM, *Energía Plus*, and the *Energía Delivery Plan* programs, the latter two also being discriminatory as new generators received more favorable spot prices on the spot market and had the ability to freely enter into PPAs on the term market.⁹⁸¹

827. Finally, the Claimant argues that the Respondent's own analysis and authorities support the Claimant's case. Specifically, with respect to the Respondent's reliance on *Glamis Gold v. United States* to argue that the measures were not arbitrary because the Government “*had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy,*”⁹⁸² the Claimant states that there was no such “*reasonable connection*” here.⁹⁸³ Furthermore, to the extent that the Respondent refers to the purported “*emergency,*” a lack of natural gas, and the construction of the FONINVEMEM plants, the Claimant argues that these were mere excuses designed to maintain the measures and extend the “*goalpost*” for the restoration of the rights set forth in the Electricity Law. Moreover, there was no reasonable connection between the measures and any purported “*harm,*” as evidenced by the unsustainability of the system.

⁹⁷⁷ Electricity Law (C-2), Articles 35, 36.

⁹⁷⁸ Claimant's Reply on the Merits, ¶ 644.

⁹⁷⁹ Tierno I, ¶ 75.

⁹⁸⁰ Claimant's Reply on the Merits, ¶ 646.

⁹⁸¹ *Id.*, ¶¶ 648-650.

⁹⁸² *Glamis v. USA (CL-36)*, ¶ 805.

⁹⁸³ Claimant's Reply on the Merits, ¶ 651.

The Claimant concludes that these arguments are not a justification and underscore that the Government acted in bad faith by improperly extending the measures notwithstanding its representations and specific commitments that they would be temporary.⁹⁸⁴

2. The Respondent's position

a) The applicable standard

828. The Respondent's position is that arbitrariness must be defined as in the *ELSI* case as a "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."⁹⁸⁵ However, contrary to what the Claimant suggests, it is not enough that a person only be surprised for an act to be deemed arbitrary.⁹⁸⁶ While a measure may be considered arbitrary if not taken through a rational decision-making process, the analysis must be limited to whether or not there was a manifest lack of reasons for the legislation.⁹⁸⁷ Thus, where a measure is pursued with a legitimate purpose and there is a proven connection between the objective pursued by the State and the usefulness of the measure, there is no arbitrariness.⁹⁸⁸ However, it is not enough for an investor to make unfounded statements and present hypotheses about alleged motives behind a measure as the investor bears the burden of proving that this was actually the case.⁹⁸⁹
829. Furthermore, the Respondent submits that the exercise of a State's regulatory and administrative power entails an assumption of legitimacy, as held by the tribunal in *Tza Yap Shum v. Peru*.⁹⁹⁰ According to the Respondent, it is in this respect not appropriate to review a State's public policy or to inquire into the investor's subjectivity in order to determine whether the measure is to their liking or not.⁹⁹¹
830. In addition, the Respondent considers that the Claimant has not explained how its claim for unjustified measures differs from its claim for measures that allegedly breached the FET standard.⁹⁹²

⁹⁸⁴ *Ibid.*

⁹⁸⁵ *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ Decision, 20 July 1989 (AL RA-148), ¶ 128.

⁹⁸⁶ Respondent's Rejoinder on the Merits, ¶¶ 702-703.

⁹⁸⁷ *Glamis v. USA (CL-36)*, ¶ 805.

⁹⁸⁸ Respondent's Counter-Memorial, ¶ 502, relying on *Philip Morris v. Uruguay (AL RA-141)*, ¶¶ 390, 391, 409.

⁹⁸⁹ Respondent's Counter-Memorial, ¶ 504.

⁹⁹⁰ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 (CL-60), ¶ 95.

⁹⁹¹ Respondent's Rejoinder on the Merits, ¶ 705, referring to *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. the Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 (CL-536), ¶ 429.

⁹⁹² Respondent's Rejoinder on the Merits, ¶ 706.

831. As to the notion of discrimination, while the Respondent agrees that the existence of discrimination under Article III(1) of the BIT entails affording less favorable treatment than that accorded to other investors in like circumstances, the Respondent submits that as decided by the *Urbaser v. Argentina* tribunal, such treatment must be accorded with an intent to harm the foreign investor, must cause actual harm to the foreign investor, and must not be based on any reasonable grounds.⁹⁹³ Such requirements are cumulative.⁹⁹⁴ To support its argument, the Respondent also submits that the tribunal in *RFCC v. Morocco* found that a measure is discriminatory where the State affords less favorable treatment to an investment based on political reasons or without any objective reason to justify such different treatment.⁹⁹⁵

b) Application to the facts

832. The Respondent's position is that none of the disputed measures were unreasonable or discriminatory.⁹⁹⁶

833. The Respondent considers that all the measures disputed by the Claimant were reasonable and that the Claimant has failed to prove that there was a specific promise made to the Claimant that the regulatory measures adopted by the Argentine Republic would revert by mid-2006, and let alone that the operation of the WEM would be restored to that of the 1990s.⁹⁹⁷ Moreover, the Respondent submits that it cannot be claimed either that the material characteristics of the regulatory framework changed.⁹⁹⁸

834. With respect to the FONINVEMEM program, the Respondent asserts that Cerros Colorados voluntarily consented to investing its receivables in the construction of power plants and was economically benefitted, as the receivables were repaid plus appropriate interest rates.⁹⁹⁹ The Respondent submits that the Claimant also benefitted from the payment for the management of the plants in which it had an equity interest. In addition, the Claimant consented to and benefitted from the implementation of Resolution 95/13, which the Claimant now challenges as unreasonable.

⁹⁹³ Respondent's Counter-Memorial, ¶ 506; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, 1995 (AL RA-173), p. 62.

⁹⁹⁴ Respondent's Rejoinder on the Merits, ¶ 708, referring to *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 [hereinafter: *Urbaser v. Argentina - Award*] (CL-113), ¶ 1088.

⁹⁹⁵ *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003 (AL RA-311), ¶ 97.

⁹⁹⁶ Respondent's Rejoinder on the Merits, ¶¶ 710 *et seq.*

⁹⁹⁷ *Id.*, ¶ 711.

⁹⁹⁸ *Ibid.*

⁹⁹⁹ *Id.*, ¶ 713.

835. With respect to the Claimant’s argument that the measures were not only incompatible with the Electricity Law, but also among each other, the Respondent submits that the values established under Resolution 19/17 were not meant to serve as a benchmark for the calculation of capacity payments, and that their subsequent repeal was perfectly compatible with the purpose of the measure.¹⁰⁰⁰
836. With respect to the Government’s alleged recognition that damages had been suffered by Cerros Colorados and should be redressed, the Respondent reiterates that it never recognized the alleged illegality of the existing regulations, let alone that any damage was caused to Cerros Colorados which should be compensated.¹⁰⁰¹
837. With respect to the alleged discriminatory character of the *Energía Plus* and *Energía Delivery* programs, the Respondent indicates that the disputed measures were general in scope and do not discriminate against similarly situated investors or on the basis of their nationality.¹⁰⁰²
838. Finally, with respect to the alleged fabricated excuses of the Respondent in relation to the emergency and scarcity in natural gas, the Respondent considers that the Claimant unsuccessfully tries to diminish the importance of the circumstances that led to the adoption of the disputed measures, and of the economic, political and social conditions that resulted from the 2001 crisis, circumstances which were known by the Claimant because they preceded the investment invoked by Orazul.¹⁰⁰³

3. The Tribunal’s analysis

a) The applicable standard

839. Article III(1) BIT, titled ‘*Protection*’, provides:

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

840. Article III(1) of the BIT sets out an obligation for the Respondent not to obstruct an investor’s investment through unjustified (unreasonable) or discriminatory measures. The Tribunal is of the view that the concepts of reasonableness and discrimination do

¹⁰⁰⁰ *Id.*, ¶ 712.

¹⁰⁰¹ *Id.*, ¶ 714.

¹⁰⁰² *Id.*, ¶ 715.

¹⁰⁰³ *Id.*, ¶ 716.

not differ substantially from the concepts such as they are understood under the FET provision. In this regard, the Tribunal agrees with the *Saluka v. Czech Republic* tribunal, which held that

*insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not [...] differ substantially from a violation of the 'fair and equitable' standard. The non-impairment requirement merely identifies more specific effects of such violation.*¹⁰⁰⁴

841. In the context of non-impairment, the standard of “*reasonableness*” thus also requires a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of “*non-discrimination*” also requires a rational justification of any different treatment of a foreign investor. Arbitrary conduct that shocks or at least surprises a sense of juridical propriety is not compatible with the non-impairment obligation.

b) Application to the facts

842. The Tribunal turns to the question of whether the Respondent impaired the Claimant’s investment. The Tribunal finds that the Respondent did not.

843. The Claimant has failed to prove that the Respondent engaged in unreasonable (unjustified) and discriminatory measures. For the reasons set forth above (see above paragraphs 749 *et seq.* and 772 *et seq.*), the Tribunal rejects the Claimant’s allegation that the Respondent removed Cerros Colorados’ ability to control and conduct its business in a way that would amount to unreasonable or discriminatory treatment.

844. Specifically, the Tribunal rejects the Claimant’s contention that the Respondent exercised complete control over the market and breached its obligations under Article III(1) of the BIT by refusing to abide by the principles set forth under the Electricity Law and directing where and when Cerros Colorados re-invests such revenues. As set forth above, the Claimant invested at a time of economic crisis. At this point in time, the Respondent had adopted a number of emergency regulations to respond to the economic crisis. The Respondent’s measures bore a reasonable relationship to a rational policy of responding to the economic crisis and were not discriminatory.

845. The Tribunal also rejects the Claimant’s allegations to the effect that the Respondent prevented the Claimant from entering into and selling power through the freely-negotiated PPAs, forced the Claimant to participate in the FONINVEMEM scheme,

¹⁰⁰⁴ *Saluka v. Czech Republic (CL-11)*, ¶ 461.

impaired the Claimant's access to the term market and the Claimant's most basic business decisions. Again, the Tribunal recalls its above findings. It specifically recalls its finding that the Claimant took the free decision to participate in the FONINVEMEM scheme. While the macroeconomic circumstances may have induced the Claimant to take this decision, this was part of the risks that the Claimant accepted when making its investment at a time of economic crisis.

846. Contrary to the Claimant's assertions, for the reasons set out above, a breach of the non-impairment obligation may also not be grounded on the allegation that the Respondent would have taken measures that violate Argentine law, impose an unsustainable regime, and are inconsistent with each other. The Tribunal also rejects the Claimant's allegations as to inconsistencies in the Respondent's measures (see paragraph 764 above).
847. Having found that the measures were neither unreasonable nor discriminatory, the Tribunal concludes that they did not obstruct the "*management, maintenance, use, enjoyment, extension, sale and, where appropriate, liquidation of such investments*" through unjustified or discriminatory measures. The Tribunal therefore rejects the Claimant's claim.

VIII. The Claimant's claim that the Respondent failed to protect the Claimant and its investments in breach of Article III(1) of the BIT and Article 4(2) of the Australia-Argentina BIT

848. The eighth issue to be determined concerns the Claimant's claim that the Respondent failed to protect the Claimant and its investments in breach of Article III(1) of the BIT and Article 4(2) of the Australia-Argentina BIT. Before addressing this issue in greater detail, the Tribunal again wishes to record that its above observations regarding the obligations to accord fair and equitable treatment in accordance with Article IV(1) apply *mutatis mutandis*: The Tribunal will not repeat its above findings in this respect but will instead focus on key allegations that specifically concern the claim that the Respondent failed to protect the Claimant's investments in breach of Article III(1) of the BIT and Article 4(2) of the Australia-Argentina BIT.

1. The Claimant's position

849. The Claimant submits that the Respondent failed to protect it in violation of Article III(1) of the BIT and Article 4(2) of the Australia-Argentina BIT.

a) The applicable standard

850. According to the Claimant, Article III(1) of the BIT requires the Respondent to provide regulatory and legal security to the Claimant's investment through a standard of due diligence, *i.e.*, to enforce its laws in a manner reasonably expected under the circumstances to protect covered investments.¹⁰⁰⁵ The Claimant submits that full protection and security includes protection from physical harm as well as the enforcement of laws and maintenance and availability of a legal system capable of providing adequate remedies against harm more generally.
851. The Claimant invokes the decision in *Vivendi v. Argentina* to support the contention that the obligation to give full protection and security is not limited to the provision of physical security.¹⁰⁰⁶ In addition, the Claimant notes that some tribunals have found that where a treaty defines investments as including intangible property, as does the BIT, which explicitly protects intellectual property, the right to engage in economic and business activities, and property rights, it is incompatible to limit protection and security only against physical harm.¹⁰⁰⁷
852. For example, in *Goetz v. Burundi*, the tribunal found that the State breached the protection standard when it, *inter alia*, (i) blocked the claimants' investment's ability to export gold for six months in an attempt to force the claimants to obtain a license in violation of an agreement providing that no license was required, and (ii) later suspended export duty exemptions to which the investor was entitled pursuant to the same agreement. The tribunal held that, as a result of these actions, the State had failed to protect the investment.¹⁰⁰⁸ The Claimant adds that the tribunal in *National Grid v. Argentina* found that Argentina's enactment of legal changes to the regulatory framework, including *inter alia*, changing the way that tariffs would be calculated, breached the obligation to provide protection.¹⁰⁰⁹
853. According to the Claimant, legal scholars have concluded that since its origins, the customary obligation to exercise reasonable diligence to provide protection and security

¹⁰⁰⁵ Claimant's Reply on the Merits, ¶ 654, citing *inter alia* *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (CL-78), ¶ 613; Rudolf Dolzer and Margrete Stevens, *BILATERAL INVESTMENT TREATIES* (1995) (CL-110), p. 61.

¹⁰⁰⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 [hereinafter: *Vivendi v. Argentina*] (CL-75), ¶ 7.4.15; see also *Biwater Gauff (Tanzania) Limited. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (CL-79), ¶ 729.

¹⁰⁰⁷ Claimant's Reply on the Merits, ¶ 661; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 [hereinafter: *Siemens v. Argentina*] (CL-22), ¶ 303; *National Grid v. Argentina* (CL-64), ¶ 187.

¹⁰⁰⁸ *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012 [hereinafter: *Goetz v. Burundi*] (CL-317), ¶¶ 190, 205, 209.

¹⁰⁰⁹ *National Grid v. Argentina* (CL-64), ¶¶ 59-60, 189-90.

was never limited exclusively to police protection in relation to physical harms but also includes the exercise of reasonable due diligence to ensure that legal protection and security is provided against economic losses.¹⁰¹⁰

854. To the extent that it is more favorable than the protection provided in Article III(1) of the BIT, the Claimant also invokes the MFN clause of the BIT to rely on Article 4(2) of the Australia-Argentina BIT, which includes a “*full legal protection and security*” obligation.¹⁰¹¹ Citing *inter alia* *Frontier Petroleum v. Czech Republic* and *Azurix v. Argentina*, the Claimant submits that such a provision also ensures regulatory and legal security for investments,¹⁰¹² and that a State will, as in *Azurix*, violate its obligation when it “*fail[s] to apply the regulatory framework and the Concession Agreement and thus destroy[s] the security provided by them.*”¹⁰¹³
855. The Claimant submits that it is entitled to import more favorable substantive protections of other treaties by virtue of Article IV(2) of the BIT. The Claimant argues that the notion of “*full protection and security*” constitutes an improvement of the treatment accorded by the BIT, as was found by the *Teinver v. Argentina* tribunal, although there is no significant difference between the duty to protect investments under the BIT and the imported provision.¹⁰¹⁴ Further, contrary to the Respondent’s view, the Claimant argues that because the term “*treatment*” applies to “*all matters*” in the MFN clause, the Claimant is entitled to benefit from substantive guarantees of other treaties entered into by Argentina. The Claimant contends that Argentina and Spain could have narrowed the scope of MFN or even excluded it but chose not to do so in the Treaty. Further, contrary to the Respondent’s view, later agreements made by both Spain and Argentina narrowing the scope of the MFN provision are irrelevant for establishing the meaning to be given to the BIT.¹⁰¹⁵ Finally, the Claimant sustains that multiple tribunals under the Argentina-Spain BIT have agreed to import more beneficial clauses in other BITs through the MFN clause.¹⁰¹⁶

¹⁰¹⁰ Claimant’s Reply on the Merits, ¶ 665, referring to George Foster, *Recovering “Protection and Security”: The Treaty Standard’s Obscure, Forgotten Meaning, and Key Current Significance*, 45 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1095 (2012) (CL-319), pp. 1116-1149.

¹⁰¹¹ Claimant’s Memorial, ¶ 462; Claimant’s Reply on the Merits, ¶¶ 655 *et seq.*

¹⁰¹² Claimant’s Memorial, ¶¶ 464-466.

¹⁰¹³ *Azurix v. Argentina* (CL-38), ¶ 396.

¹⁰¹⁴ Claimant’s Reply on the Merits, ¶ 671, referring to *Teinver v. Argentina – Award* (CL-99), ¶ 895.

¹⁰¹⁵ Claimant’s Reply on the Merits, ¶ 675 referring to *El Paso v. Argentina* (CL-23), ¶ 591.

¹⁰¹⁶ Claimant’s Counter-Memorial on Preliminary Objections, ¶¶ 13, 131; Claimant’s Reply on the Merits, ¶ 682.

b) Application to the facts

856. The Claimant claims that the Respondent breached its duty to accord the Claimant full protection and security in respect of the procedural and substantive safeguards guaranteed by the BIT.
857. The Claimant submits that the Respondent continuously postponed its commitments regarding the temporary nature of the disputed measures, despite the content of its treaties, laws, statements and, in particular, its agreements and communications with the Claimant.¹⁰¹⁷ As in *Azurix v. Argentina*, the Respondent “fail[ed] to apply the regulatory framework and the concession agreement and thus destroy[ed] the security” guaranteed under the Treaty, while the Government’s actions violated basic notions of rule of law and lacked good faith.¹⁰¹⁸
858. In addition, the Claimant argues that the Government has dismantled the rights of Orazul’s investment under the Electricity Law through its measures by failing to protect its key provisions (*i.e.*, a uniform spot price for all generators; adequate capacity payments; and the ability to freely enter into PPAs on the term market).¹⁰¹⁹ Similar to the factual matrix of *Goetz v. Burundi*, where the claimants’ ability to export gold was blocked and export duty exemptions were suspended, the Government breached its obligation to protect Orazul’s investment by extending allegedly temporary measures and failing to restore the rules that continue to be enshrined in the Electricity Law, beyond mid-2006.¹⁰²⁰ The Claimant adds that as in *National Grid v. Argentina*, the “changes introduced in the Regulatory Framework . . . effectively dismantled it,” and “the uncertainty” this has caused is “contrary to the protection and constant security which the Respondent agreed to provide for investments under the Treaty.” The Claimant submits that even the Government conceded that the measures effectively dismantled the principles of the Electricity Law, which had induced Orazul’s investment,¹⁰²¹ and tribunals evaluating these same measures (at least up to 2006) agree that there was such an overhaul.¹⁰²²
859. Moreover, the Respondent failed to protect the Claimant by forcing it to invest its unpaid receivables in the FONINVEMEM plants.¹⁰²³ The Claimant recalls that the *Goetz v. Burundi* tribunal found a full protection and security violation in the attempted coercion

¹⁰¹⁷ Claimant’s Memorial, ¶ 472.

¹⁰¹⁸ *Id.*, ¶ 472.

¹⁰¹⁹ Claimant’s Reply on the Merits, ¶ 689.

¹⁰²⁰ *Ibid.*

¹⁰²¹ McGee I, ¶ 20; Bailey, ¶ 10; Tierno I, ¶¶ 5-20.

¹⁰²² *Total v. Argentina (CL-29)*, ¶ 325.

¹⁰²³ Claimant’s Reply on the Merits, ¶ 691.

of the State.¹⁰²⁴ In the case at hand, the Claimant argues that by forcibly withholding unpaid receivables, the Government put Orazul in a position where it had no choice but to invest them in the FONINVEMEM plants. As the *Total* tribunal explained, “generators [were] in a situation where they had no choice other than to accept the scheme or otherwise risk suffering higher losses.”¹⁰²⁵ Furthermore, the Government failed to abide by the specific commitments it had made in the FONINVEMEM Agreements, which included its obligation to revert the disputed measures and restore capacity payments at levels in line with the Electricity Law (USD 10/MWh) by 2010.¹⁰²⁶ The forced waivers Orazul entered into also constitute a breach of the obligation to protect for the same reason.¹⁰²⁷

2. The Respondent’s position

a) The applicable standard

860. The Respondent’s position is that standards of treatment not included in the Argentina-Spain BIT cannot be invoked through the MFN clause.¹⁰²⁸ According to the Respondent, the scope of the MFN clause, provided for in Article IV(2) of the BIT, is specifically limited to the fair and equitable treatment referred to in Article IV(1). The Respondent submits that had the Parties to the BIT intended that the MFN clause contained in Article IV(2) would apply to *any* treatment related to the matters governed by the BIT, they would have so agreed and written, as is common practice among States and as have done Spain and Argentina in other agreements.

861. Furthermore, even if the MFN clause applied to all matters governed by the BIT and not just to the FET standard, importing rights not provided for in the BIT would not be admissible as it would run counter to the *ejusdem generis* principle, which requires that the treaty include the MFN clause and the invoked treaty contain a provision on the same matter.¹⁰²⁹ Claims made under the standard of full protection and security are contrary to such principle as they are not standards referred to in the underlying treaty. The Respondent submits that Spain agrees with this interpretation of the BIT as it has argued in the *Maffezini v. Spain* case that the “reference in the most favored nation

¹⁰²⁴ *Goetz v. Burundi* (CL-317), ¶¶ 190, 205, 209.

¹⁰²⁵ *Total v. Argentina* (CL-29), ¶ 337.

¹⁰²⁶ Claimant’s Reply on the Merits, ¶ 691.

¹⁰²⁷ *Id.*, ¶ 692.

¹⁰²⁸ Respondent’s Counter-Memorial, ¶¶ 534-554; Respondent’s Rejoinder on the Merits, ¶¶ 800-819.

¹⁰²⁹ Respondent’s Counter-Memorial, ¶ 540, citing International Law Commission, *Report of the International Law Commission on its thirtieth session*, Yearbook of the International Law Commission, 1978, vol. II, Part Two, *Draft Articles on most-favoured-nation clauses with commentaries* (AL RA-181), Article 9 (10-11).

clause of the Argentine-Spain BIT to ‘matters’ can only be understood to refer to substantive matters or material aspects of the treatment granted to investors.”¹⁰³⁰

862. In any event, the Respondent submits that it has not violated the standard of full protection and security.¹⁰³¹ The Respondent submits that the standard of full protection and security is limited to the physical protection of the investor.¹⁰³² The Respondent argues that the Claimant unjustifiably broadens the scope of “*full legal protection and security*” and relies on the term “*legal*” to affirm that the standard includes an obligation to ensure legal certainty and regulatory stability. The Respondent submits that Article 4(2) of the Argentina-Australia BIT only provides for police protection against criminal acts that may physically damage the investor or its investments.¹⁰³³ The Respondent submits based on *Indian Metals v. Indonesia* and *Infinito Gold v. Costa Rica* that absent treaty language indicating that legal security is covered, the obligation to accord full protection and security is intended to ensure physical protection and integrity of the investor and its property within the territory of the host State.¹⁰³⁴ According to the Respondent, the aim of the “*full protection and security*” clause is not to protect the investment against any sort of damage, but to specifically protect “*the physical integrity of an investment against interference by use of force.*”¹⁰³⁵ The Respondent submits that the tribunals in the cases cited by the Claimant dealt with the fair and equitable treatment jointly with the full protection and security standard, which is an approach incompatible with the BIT.
863. The Respondent alternatively submits that if the Tribunal were to consider that the inclusion of “*legal*” in Article 4(2) of the Australia-Argentina BIT expands the scope of that provision, it would only be forced to comply with the “*due diligence*” standard, *i.e.*, to provide a reasonable degree of care or in the words of the tribunals in *ELSI v. Italy* and *AAPL v. Sri Lanka* “*the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.*”¹⁰³⁶ According to the Respondent, the due diligence standard does not

¹⁰³⁰ *Maffezini v. Spain*, (CL-6), ¶ 41.

¹⁰³¹ Respondent’s Counter-Memorial, ¶¶ 547-566; Respondent’s Rejoinder on the Merits, ¶¶ 820-826, 832-843.

¹⁰³² Respondent’s Rejoinder on the Merits, ¶ 820; *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Final Award issued on 29 March 2019 [hereinafter: *Indian Metals v. Indonesia*] (AL RA-316), ¶ 267.

¹⁰³³ Respondent’s Counter-Memorial, ¶ 548, relying on *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 [hereinafter: *Enron v. Argentina*] (CL-26), ¶ 286.

¹⁰³⁴ Respondent’s Rejoinder on the Merits, ¶¶ 822-823; *Indian Metals v. Indonesia* (AL RA-316), ¶ 267; *Infinito Gold v. Costa Rica* (CL-299), ¶ 623.

¹⁰³⁵ *Saluka v. Czech Republic* (CL-11), ¶ 484.

¹⁰³⁶ *Elettronica Sicula, S.p.A. (ELSI) (United States v. Italy)*, ICJ, Reports 1989, Judgement (CL-309), ¶ 108; *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 [hereinafter: *AAPL v. Sri Lanka*] (CL-87), ¶ 77.

mean that a State is under an obligation to prevent all situations entailing damage or loss for investors, as if it were an insurer.¹⁰³⁷ Rather, it entails the adoption of the reasonable measures of prevention which a well-administered government could exercise under similar circumstances, in consideration of the facts and circumstances of the case.¹⁰³⁸

b) Application to the facts

864. The Respondent submits that it respected the full legal protection and security standard with respect to the Claimant's investments. The Respondent contends that the Claimant has neither alleged nor proven any physical damage that may be linked to an action or omission by the State and that the Respondent provided the Claimant with sufficient legal protection at all times.¹⁰³⁹ In the alternative, the Respondent submits that the Claimant does not submit evidence to suggest that the Argentine Republic failed in its duty of due diligence with respect to Orazul's investments.
865. The Respondent points to the Claimant's absence of proof to affirm that it did not provide sufficient physical protection, that the investment was affected by third parties or that the due process under Argentine law and the Argentine legal system was not complied with. The Respondent asserts, on the contrary, that it received and processed every claim from the Claimant and, in many cases, granted its requests. In addition, the Claimant could have resorted to the local legal system in the event of disagreement regarding any of its administrative claims, but it decided not to, which cannot be blamed upon the Respondent. According to the Respondent, States cannot be held accountable for the decisions of investors not to resort to available legal resources, so long as there are rules and procedures available for them to settle their claims.¹⁰⁴⁰
866. With respect to the Claimant's contention that no "*certainty and predictability*" was provided, because the provisions it considered "*temporary*" continued to apply over time, the Respondent considers that the full legal protection and security clause does not entail in any way an obligation to ensure absolute regulatory or economic stability, even in terms of "*due diligence*."¹⁰⁴¹ With respect to the Electricity Law's key provisions,

¹⁰³⁷ Respondent's Counter-Memorial, ¶ 552, referring to *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 [hereinafter: *Tecmed v. Mexico*] (CL-9), ¶ 177.

¹⁰³⁸ Respondent's Counter-Memorial, ¶ 552, referring to *AWG Group v. Argentine Republic*, UNCITRAL Case, Decision on Liability, 30 July 2010 [hereinafter: *AWG v. Argentina*] (CL-30), ¶¶ 162-164; *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020 (AL RA-183), ¶ 668; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 [hereinafter: *Tulip v. Turkey*] (AL RA-123), ¶ 430.

¹⁰³⁹ Respondent's Counter-Memorial, ¶¶ 555 *et seq.*

¹⁰⁴⁰ *Id.*, ¶ 556.

¹⁰⁴¹ *Id.*, ¶ 557.

the Respondent contends that it acted at all times in accordance with the objectives and guidelines of the Electricity Law.¹⁰⁴² In addition, the Respondent argues that it always guaranteed Orazul and its related parties, as well as Cerros Colorados, access to justice in order to allow them to bring legal actions seeking to exercise the rights that they understood to have been violated based on their situation, fully exercising their right to due process, and neither Orazul nor Cerros Colorados resorted to this possibility. With respect to the alleged forced investment of receivables in the FONINVEMEM projects, the Respondent considers that it did not force Cerros Colorados or any other generator to allocate their outstanding receivables in 2004 to the programs promoted under the FONINVEMEM.¹⁰⁴³ According to the Respondent, this was an entirely free and wilful decision of the company, out of which it even obtained substantial benefits. Contrary to the Claimant's allegation, the Respondent considers that it did not fail to comply with the commitments undertaken in the Adhesion Contract and the FONINVEMEM I Agreement. Finally, the Respondent considers that the Claimant's claim that it would have been unaware of the several waivers that were signed is unfounded and is an attempt to contradict the Claimant's own acts.¹⁰⁴⁴

3. The Tribunal's analysis

a) The applicable standard

867. Article III(1) of the BIT provides the following:

Each Party shall protect within its territory investments made in accordance with its laws, or investors of the other Party [...].

868. The wording of this provision is not limited to physical protection. It is sufficiently broad to also include an obligation to give legal protection. This interpretation is also in line with the context of Article III(1) of the BIT. As correctly pointed out by the Claimant, the BIT does not only apply to investments in the form of tangible property. It also includes investments in the form of intangible property. This indicates that the obligation to protect may in a given case also include an obligation to give legal protection. The Tribunal agrees with the tribunal in *Siemens v. Argentina*, which held

As a general matter and based on the definition of investment, which includes tangible and intangible assets, [...] the obligation to provide full protection and security is wider than "physical" protection and security. It

¹⁰⁴² Respondent's Rejoinder on the Merits, ¶ 830.

¹⁰⁴³ *Id.*, ¶ 831.

¹⁰⁴⁴ *Id.*, ¶ 831.

*is difficult to understand how the physical security of an intangible asset would be achieved.*¹⁰⁴⁵

869. As far as the specific content of the obligation to protect is concerned, the Tribunal finds that Article III of the BIT is not an obligation of result but an obligation of means. It requires the Respondent to offer protection based on a standard of due diligence. Under such standard, the State is required to exercise due diligence and adopt “*the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.*”¹⁰⁴⁶ Where a State reasonably exercises its right to regulate, the obligation to protect is not breached.¹⁰⁴⁷
870. Having made these findings as to the obligation to protect under Article III(1) of the BIT, the Tribunal notes that the Claimant also invokes the obligation to accord full legal protection and security under Article 4(2) of the Australia-Argentina BIT based on the MFN clause. However, the Claimant only does so to the extent that Article 4(2) of the Australia-Argentina BIT is more favorable than the protection provided in Article III(1) of the BIT.
871. The main textual difference between Article 4(2) of the Australia-Argentina BIT and Article III(1) of the BIT consists of the fact that Article 4(2) of the Australia-Argentina BIT sets forth an obligation to grant “*full legal protection and security to investments*”, whereas Article III(1) BIT sets forth an obligation to “*protect*” investments. Article III(1) BIT neither makes express reference to “*full legal*” protection nor to “*security.*”
872. For the purpose of the present case, this textual difference is immaterial. The Tribunal recalls its above findings that the obligation to protect may also extend to “*legal*” protection, even though this is not expressly mentioned in Article III(1) of the BIT. Leaving this aside, the Claimant has not shown how “*full legal protection and security*” under the Australia-Argentina BIT would otherwise exceed the scope of protection under Article III(1) of the Argentina-Spain BIT for present purposes and the Tribunal does not find any reason to the contrary.
873. Against this background, the Tribunal need not address whether the Claimant can incorporate the obligation to give full legal protection and security based on the MFN clause.

¹⁰⁴⁵ *Siemens v. Argentina* (CL-22), ¶ 303.

¹⁰⁴⁶ *Elettronica Sicula, S.p.A. (ELSI)* (*United States v. Italy*), ICJ, Reports 1989, Judgement (CL-309), ¶ 108; *AAPL v. Sri Lanka* (CL-87), ¶ 77.

¹⁰⁴⁷ *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 [hereinafter: *AES v. Hungary*] (CL-71), ¶ 13.3.2.

b) Application to the facts

874. With this standard in mind, the Tribunal turns to the facts of the present case. In this respect, the Tribunal has carefully reviewed the Claimant's submissions. They include the allegation that the Respondent:

- continuously postponed its commitments regarding the temporary nature of the disputed measures, despite the content of its treaties, laws statements, agreements and communications with the Claimant,
- violated basic notions of rule of law and lacked good faith through its actions,
- dismantled rights of the Claimant's investment under the Electricity Law by failing to protect its key provisions,
- forced the Claimant to invest its unpaid receivables in the FONINVEMEM plants and failed to abide by the commitments made in the FONINVEMEM agreements.¹⁰⁴⁸

875. The Tribunal has already examined these allegations when assessing whether the Respondent breached its obligation to accord fair and equitable treatment and its obligation not to impair the Claimant's investments. Consistent with its above findings, the Tribunal also rejects a breach of the obligation to protect under Article III(1) of the BIT. The Claimant has not shown that the Respondent's conduct, which was in line with the obligation to accord fair and equitable treatment and not to impair the Claimant's investments, would nevertheless breach the obligation to protect the Claimant's investments.

876. In reaching this finding, the Tribunal has taken into account that there is considerable overlap between the obligation to protect the Claimant's investments and the obligation to accord fair and equitable treatment and to refrain from impairing the Claimant's investments. The *Teinver* tribunal, whose award the Claimant has cited to, made similar observations with regard to the interplay between the obligation to accord fair and equitable treatment and the obligation to give full protection and security. It held:

[T]he Tribunal accepts there is considerable overlap between the concepts of fair and equitable treatment and full protection and security, as submitted by Claimants. In the Tribunal's view, the fair and equitable treatment standard is broader than that of full protection and security. As a result, while a breach of the full protection and security clause would likely constitute a violation of fair and equitable treatment, the converse is not

¹⁰⁴⁸ Claimant's Reply on the Merits, ¶¶ 689 *et seq.*

*necessarily the case. Not all violations of the fair and equitable treatment standard automatically constitute violations of the full protection and security standard.*¹⁰⁴⁹

877. In conclusion, the Tribunal rejects a breach of the obligation to protect the Claimant under Article III(1) BIT and/or Article 4(2) of the Australia-Argentina BIT.

IX. The Claimant's claim that the Respondent unlawfully expropriated the Claimant's investments in breach of Article V of the BIT

878. The ninth issue to be determined concerns the Claimant's claim that the Respondent unlawfully expropriated the Claimant's investments in breach of Article V of the BIT. Before addressing this issue in greater detail, the Tribunal again wishes to record that its above observations regarding the obligations to accord fair and equitable treatment in accordance with Article IV(1) apply *mutatis mutandis*: The Tribunal will not repeat its above findings in this respect but will instead focus on key allegations that specifically concern the claim that the Respondent unlawfully expropriated the Claimant's investments in breach of Article V of the BIT.

1. The Claimant's position

879. The Claimant submits that the Respondent unlawfully expropriated the Claimant's investments in breach of Article V of the BIT.

a) The applicable standard

880. According to the Claimant, Article V of the BIT protects foreign investors both from a direct taking of assets and an indirect taking, and the protection extends to both tangible assets, such as company shares, sums of money or real estate property, and intangible assets like returns and contractual rights.¹⁰⁵⁰ The Claimant argues that the finding of a direct expropriation does not preclude the Tribunal from also finding indirect expropriation in relation to the same investment.¹⁰⁵¹

881. With respect to direct expropriations, the Claimant argues that these comprise the transfer of assets to the State, which commonly occurs by explicit government decree,

¹⁰⁴⁹ *Teinver v. Argentina – Award (CL-99)*, ¶ 905.

¹⁰⁵⁰ Claimant's Memorial, ¶ 477.

¹⁰⁵¹ Claimant's Reply on the Merits, ¶ 700; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016 (CL-515) ¶¶ 6.123, 7.29; *Teinver v. Argentina – Award (CL-99)*, ¶¶ 941, 949; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 [hereinafter: *Quiborax v. Bolivia*] (CL-68), ¶ 239.

law or regulation.¹⁰⁵² The Claimant asserts that there is no dispute between the Parties as to the legal standard for a direct taking.¹⁰⁵³

882. With respect to indirect expropriations, the Claimant submits that these may result from a series of measures that, through interference with the use, enjoyment, or disposal of property, substantially deprive an investor of the economic benefit of their investment.¹⁰⁵⁴ The Claimant relies on the finding of the tribunal in *Tecmed v. Mexico* to affirm that there is an indirect expropriation “if the assets or rights subject to such measure have been affected in such a way that ‘...any form of exploitation thereof...’ has disappeared.”¹⁰⁵⁵ Referring to *Siemens v. Argentina* and Article 15 of the ILC Articles, the Claimant argues that an indirect expropriation may also arise through a “creeping expropriation” by which acts are only expropriatory in nature and effect in aggregate.¹⁰⁵⁶
883. With respect to the Respondent’s claim that there are three cumulative requirements for an indirect expropriation to exist, the Claimant is of the view that there are only two, *i.e.*, that the investor must show (i) a material impairment of (ii) property rights. The Claimant submits that the purported third requirement (*i.e.*, that the regulatory measures based on a State’s police power never give rise to an indirect expropriation and an obligation to compensate under the BIT) is a self-serving carve-out from the expropriation protection in the BIT that is inconsistent with the BIT’s plain language and legal authorities, and that in any event, is based on the incorrect assumption that properly exercised regulatory powers are at issue.¹⁰⁵⁷
884. On the issue of material impairment, the Claimant disputes the Respondent’s view that a deprivation cannot be material if the investor remains in control of its investment.¹⁰⁵⁸ In particular, the Claimant relies on *Casinos Austria v. Argentina* to assert that the mere fact that an investor controls certain elements of its investment does not defeat an indirect expropriation claim.¹⁰⁵⁹

¹⁰⁵² Claimant’s Memorial, ¶ 479.

¹⁰⁵³ Claimant’s Reply on the Merits, ¶ 696.

¹⁰⁵⁴ Claimant’s Memorial, ¶¶ 478, 481; Louis B. Sohn & R.R. Baxter, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, Draft No. 12, 55 AM. J. INTERNATIONAL L. 545 (1961) (CL-107), p. 553, Article (10)(3)(a).

¹⁰⁵⁵ *Tecmed v. Mexico* (CL-9), ¶ 116 (internal citation removed).

¹⁰⁵⁶ Claimant’s Memorial, ¶¶ 486 – 488; Claimant’s Reply on the Merits, ¶ 699; See *Tecmed v. Mexico* (CL-9), ¶ 114.

¹⁰⁵⁷ Claimant’s Reply on the Merits, ¶ 701.

¹⁰⁵⁸ *Id.*, ¶ 702.

¹⁰⁵⁹ *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021 (CL-593), ¶ 353.

885. The Claimant contends that the Respondent's reliance on *Pope & Talbot* is misplaced because the tribunal did not articulate the standard that the Respondent seeks to apply. According to the Claimant, the test applied by the *Pope & Talbot* tribunal was as follows: whether interference with property rights constitutes a compensable indirect taking turns on the degree of interference with property rights.
886. The Claimant also states that the other investment treaty awards that the Respondent cites likewise emphasized the degree of interference with property rights as an important criterion for indirect expropriation but did not endorse a rule that maintaining control over property by itself defeats an indirect expropriation claim. In this respect, the Claimant submits that the tribunal in *UP and C.D v. Hungary* recently affirmed that ongoing control over the investment at issue does not defeat or otherwise is a criterion of an indirect expropriation claim.¹⁰⁶⁰ The Claimant submits that the relevant consideration is whether a substantial deprivation or interference has taken place with respect to the specific property at issue. The Claimant cites the findings of the *Ampal-American v. Egypt* tribunal in this respect.¹⁰⁶¹
887. On the issue of property rights, the Claimant disputes the Respondent's contention that Orazul is lowering the standard of the requirement that an indirect expropriation must involve an impairment of a foreign investor's property rights. Specifically, the Claimant disputes that it would have argued that an indirect expropriation claim may arise based on an interference with expectations, as opposed to an interference with property rights. The Claimant's view is that the applicable standard for an indirect expropriation is set out in *Tecmed v. Mexico*, where the tribunal considered an investor's legitimate expectations as part of the proportionality test to determine if a State act constitutes a compensable, indirect taking (although the paramount criterion for indirect expropriation remains the effect of the measure at issue). The Respondent's citation of the *MTD* annulment committee is of no help because the cited passage relates to the obligation to accord FET. In any event, the Claimant submits, the annulment committee found that the *MTD* tribunal's reliance on *Tecmed* for its account of FET was not a ground for annulment.¹⁰⁶² The Claimant concludes that it cannot be questioned that it has property rights protected under the BIT and the Respondent's discussion of the *Tecmed* holding is simply an attempt to mischaracterize the Claimant's expropriation claim as being found solely on their legitimate expectations.

¹⁰⁶⁰ *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018 (CL-325), ¶ 305.

¹⁰⁶¹ *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017 (CL-326), ¶¶ 179-180.

¹⁰⁶² *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 [hereinafter: *MTD v. Chile*] (AL RA-185), ¶ 68.

888. On the issue of the State’s police powers, the Claimant disputes the Respondent’s assertions that the BIT carves out regulatory undertakings. The Claimant submits that the tribunal in *Vivendi v. Argentina*, which analyzed a treaty similar to the BIT, recognized that public purpose alone cannot automatically immunize a measure from being considered expropriatory.¹⁰⁶³ The *Siemens v. Argentina* tribunal similarly rejected Argentina’s argument that the tribunal should consider the State’s lack of intent to expropriate.¹⁰⁶⁴ The Claimant submits that in any event, as recognized by the *Santa Elena v. Costa Rica* tribunal, while an expropriation may be classified as a “*taking for a public purpose [...] the fact that [a property] was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking.*”¹⁰⁶⁵ The Claimant further states that the Respondent’s cited cases are to no avail because they provide that a State may not be obligated to compensate for its legislative or regulatory action provided that, as the tribunal in *Continental Casualty v. Argentina* put it, the “*restrictions do not impede the basic, typical use of a given asset and do not impose an unreasonable burden on the owner as compared with other similarly situated property owners.*”¹⁰⁶⁶

889. Citing *Burlington v. Ecuador*, the Claimant submits that international tribunals have generally applied the “*sole effects*” test when assessing the evidence on expropriation, and have focused on substantial deprivation:

*When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment.*¹⁰⁶⁷

890. To this end, relying on *Vivendi v. Argentina*, the Claimant submits that “*the effect of the measure on the investor, not the state’s intent, is the critical factor.*”¹⁰⁶⁸

¹⁰⁶³ *Vivendi v. Argentina* (CL-75), ¶ 7.5.21.

¹⁰⁶⁴ *Siemens v. Argentina* (CL-22), ¶ 271.

¹⁰⁶⁵ *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 [hereinafter: *Santa Elena v. Costa Rica*] (CL-72), ¶ 71.

¹⁰⁶⁶ *CCC v. Argentina* (CL-120), ¶ 276.

¹⁰⁶⁷ Claimant’s Memorial, ¶ 480; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 [hereinafter: *Burlington v. Ecuador*] (CL-104), ¶¶ 396-397.

¹⁰⁶⁸ Claimant’s Memorial, ¶ 484; *Vivendi v. Argentina* (CL-75), ¶ 7.5.20.

891. The Claimant further argues that any expropriation must be lawful, which entails four essential elements: (i) the measures concerned must serve a public purpose; (ii) the expropriation must be carried out in accordance with due process of law; (iii) the measures must be non-discriminatory; and (iv) the expropriation must be against the payment of prompt, adequate and effective compensation.¹⁰⁶⁹
892. As to the requirement of public purpose, the Claimant cites the tribunal in *BP v. Libya*, which held that an expropriation “*clearly violates public international law*” when it is not effected for a public purpose related to the internal needs of the State, but is “*made for purely extraneous political reasons and [is] arbitrary and discriminatory in character.*”¹⁰⁷⁰ The Claimant further submits that while the concept of “*public interest*” is broad, there must be some genuine interest of the public at issue.¹⁰⁷¹
893. As to the requirement of due process, the Claimant argues that a State must provide it in accordance with international law, and not merely comply with domestic law.¹⁰⁷² Referring to *ADC v. Hungary*, the Claimant submits that in the expropriation context, due process of law “*demand[s] an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it*” along with “*basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute.*”¹⁰⁷³
894. As to the arbitrary and discriminatory measures, the Claimant refers to its earlier submissions.¹⁰⁷⁴
895. As to the requirement to pay compensation, the Claimant submits that numerous tribunals have held this to be necessary for an expropriation to be considered lawful.¹⁰⁷⁵

b) Application to the facts

896. The Claimant submits that it made certain investments in the Argentine Republic that were protected by the BIT and were significantly and arbitrarily affected by the Respondent’s actions. These comprised:¹⁰⁷⁶

¹⁰⁶⁹ Claimant’s Memorial, ¶ 490.

¹⁰⁷⁰ Claimant’s Memorial, ¶ 49; *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, Award (Merits), 10 October 1973 (CL-77), ¶ 111.

¹⁰⁷¹ Claimant’s Memorial, ¶ 493.

¹⁰⁷² *Id.*, ¶ 494.

¹⁰⁷³ Claimant’s Memorial, ¶¶ 494, 504; *ADC v. Hungary* (CL-41), ¶ 435.

¹⁰⁷⁴ Claimant’s Memorial, ¶ 495.

¹⁰⁷⁵ *Id.*, ¶ 496.

¹⁰⁷⁶ *Id.*, ¶ 473; Claimant’s Reply on the Merits, ¶ 717.

- its direct shareholding participation in *Orazul Energy Generating S.A.*;
- its indirect shareholding participation, through *Orazul Energy Generating S.A.*, in Cerros Colorados and the FONINVEMEM;
- its indirect rights, through Cerros Colorados, arising under the Concession Contract and the Electricity Law, including its rights to revenues for power sales.

897. According to the Claimant, the Tribunal should consider the effect of the measures on Orazul, not the Government’s intent.¹⁰⁷⁷

898. The Claimant contends that the Government directly expropriated Orazul’s investment by refusing to pay for outstanding receivables, which the Government instead forced Orazul to invest in the FONINVEMEM.¹⁰⁷⁸ As the Claimant’s quantum expert BRG explains,

*generators were not only harmed by lack of timely payment by CAMMESA due to Respondent’s actions, but also forced to participate in these agreements in order to grasp some foreseeability of their owned revenues – even at non-market rates.*¹⁰⁷⁹

899. According to the Claimant, such receivables were confiscated and thus represent the property that was directly taken from Cerros Colorados by the Government.¹⁰⁸⁰ The Claimant adds that the tribunal in *Total v. Argentina* found that the FONINVEMEM program could be expropriatory.¹⁰⁸¹ With respect to the Respondent’s argument pertaining to the alleged absence of a transfer of title to the Argentine Republic, the Claimant notes that any discussion regarding the title to the FONINVEMEM plants is irrelevant. Rather, the property rights that were directly expropriated are the receivables that the Government never paid and was forced to reinvest in the FONINVEMEM.¹⁰⁸² As the sole offtaker of Cerros Colorados’ generation of electricity, the Government cannot claim that it was not in possession of the property that belongs to Orazul (*i.e.*, the withheld receivables).

900. The Claimant also submits that the Respondent indirectly expropriated the Claimant’s investment by adopting its subsequent arbitrary and discriminatory measures that progressively modified the compensation scheme applicable to the Claimant under the

¹⁰⁷⁷ Claimant’s Reply on the Merits, ¶ 717.

¹⁰⁷⁸ Claimant’s Memorial, ¶¶ 474, 497-498; Claimant’s Reply on the Merits, ¶ 717.

¹⁰⁷⁹ BRG II, ¶ 87.

¹⁰⁸⁰ Claimant’s Reply on the Merits, ¶ 718.

¹⁰⁸¹ *Total v. Argentina (CL-29)*, ¶ 342.

¹⁰⁸² Claimant’s Reply on the Merits, ¶ 720.

Electricity Law, and which ultimately entirely deprived the Claimant of its use or the reasonably expected economic benefit of its property.¹⁰⁸³

901. Specifically, Argentina’s measures have severely limited the ability to earn revenues by restricting or eliminating, in violation of the Electricity Law, Cerros Colorados’ ability to (i) receive a uniform spot price for all generators based on the economic cost of the system; (ii) earn adequate capacity payments with values guaranteed under the Electricity Law; (iii) enter into PPAs on the term market; (iv) timely receive revenues it has earned, that the Government has baselessly withheld, and therefore, devalued. As the Respondent did to the claimant in *Casinos Austria v. Argentina* when it granted and revoked the license, here the Government made and then revoked its systematic promises to revert the disputed measures and restore the original market rules, which continue to be enshrined in the Electricity Law.¹⁰⁸⁴ The Claimant submits that it did not assume this risk just because it invested in Argentina. Rather, relying on *ADC v. Hungary*, it argues that it had a “*legitimate and reasonable expectation that [it] would receive fair treatment and just compensation.*”¹⁰⁸⁵
902. If the Tribunal finds that none of the measures individually constitute an expropriation, the Claimant submits that, together, they constitute a creeping expropriation.¹⁰⁸⁶ Relying on its witness, Mr. Tierno, the Claimant states that the measures gradually and increasingly restricted Cerros Colorados’ ability to operate, and generate the return to which it would have been entitled under a system based on a uniform spot price and freely agreed PPAs.¹⁰⁸⁷ According to the Claimant, in addition to incurring severe economic harm, Orazul lost the ability to control its investments and make basic management decisions such as deciding on the financing of repairs and maintenance.¹⁰⁸⁸
903. The Claimant claims that the Respondent has not satisfied any of the conditions necessary for making the expropriation lawful.¹⁰⁸⁹
904. First, the Claimant argues that the expropriation did not serve a public purpose. Although the Respondent described the 2003 measures as temporarily necessary to address an abnormal situation, Argentina maintained these measures indefinitely. Further, in the context of the FONINVEMEM, the Respondent forced Cerros Colorados to reinvest its outstanding receivables for the construction of new power plants that

¹⁰⁸³ Claimant’s Memorial, ¶¶ 474, 497, 499.

¹⁰⁸⁴ Claimant’s Reply on the Merits, ¶ 721.

¹⁰⁸⁵ Claimant’s Memorial, ¶ 499; *ADC v. Hungary (CL-41)*, ¶ 424.

¹⁰⁸⁶ Claimant’s Memorial, ¶ 500; Claimant’s Reply on the Merits, ¶ 722.

¹⁰⁸⁷ Tierno I, ¶ 23.

¹⁰⁸⁸ Claimant’s Reply on the Merits, ¶ 723; Tierno II, ¶ 60.

¹⁰⁸⁹ Claimant’s Memorial, ¶¶ 491, 502 *et seq.*; Claimant’s Reply on the Merits, ¶ 725.

would increase generation capacity, and therefore, allow Argentina to reinstate the market rules as they functioned prior to the Government's intervention and which were consistent with the Electricity Law. However, the new power plants were constructed, but the electricity sector was never restored.¹⁰⁹⁰

905. Second, the Claimant claims that the expropriation was not carried out in accordance with due process as the measures themselves violate Argentine law and Orazul was not afforded the right to be heard.¹⁰⁹¹ Referring to comments by the tribunal in *Total v. Argentina*, the Respondent provided false assurances, made contradictory statements, and committed discriminatory acts that deprived the Claimant of due process.¹⁰⁹²
906. Third, the Claimant claims the expropriation was the result of discriminatory measures. Starting in 2004, through the *Energía Plus* and the *Energía Delivery Plan*, the Claimant submits that the Respondent adopted a discriminatory price regime that afforded preferential treatment to new power generators.
907. Finally, the Claimant alleges that the Respondent never compensated it for the expropriation; that is, for the lost revenues relating to spot prices and capacity payments. It has not compensated the Claimant for directly expropriating its assets through FONINVEMEM, which includes its unpaid receivables “reinvested” into the program, its receivables generated from the Timbúes, Belgrano, and Vuelta de Obligado plants and placed in the Trust Fund, and the interest the Claimant never received from the forced loans.¹⁰⁹³ The Claimant contends that it sought to mitigate its loss by participating in the FONINVEMEM Agreements.¹⁰⁹⁴ Thus, the value of these receivables, as updated to the net present value, minus Orazul's mitigation, is what Orazul is claiming under the “forced loans” head of damages.¹⁰⁹⁵

2. The Respondent's position

a) The applicable standard

908. The Respondent agrees with the Claimant that the BIT provides for protection against both direct and indirect expropriation. According to the Respondent, direct expropriation refers to the formal or obligatory transfer of title in favor of the host State, as well as other open, deliberate and acknowledged takings of property, while indirect

¹⁰⁹⁰ Claimant's Memorial, ¶ 503.

¹⁰⁹¹ Claimant's Reply on the Merits, ¶ 725.

¹⁰⁹² Claimant's Memorial, ¶ 504.

¹⁰⁹³ *Id.*, ¶ 506.

¹⁰⁹⁴ Claimant's Reply on the Merits, ¶ 718.

¹⁰⁹⁵ *Ibid.*

expropriation takes place where an action or series of actions has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.¹⁰⁹⁶

909. Contrary to the Claimant's contention, the Respondent submits that it is inappropriate to claim simultaneously a direct and an indirect expropriation, as decided by the tribunal in *Enron v. Argentina*.¹⁰⁹⁷ In reply to the Claimant's statement that only one measure was disputed in the *Enron* case, the Respondent submits that there is a double claim against a single measure, thus rendering the *Enron v. Argentina* precedent applicable.¹⁰⁹⁸
910. In order for a direct expropriation to exist, the Respondent agrees with the Claimant that the formal transfer of title to property over an asset in favor of the State is an essential element of this type of expropriation. In order to determine whether such expropriation has occurred, the Respondent submits that it is necessary to (i) identify the scope and terms of the right invoked pursuant to the domestic legislation, and (ii) verify whether property of such right was effectively transferred to the State.¹⁰⁹⁹
911. In order for an indirect expropriation to exist, the Respondent submits that several cumulative requirements must be met. First, any disputed measures must impair the investor's ownership rights; second, such impairment of the investor's ownership rights must be material; and third, the governmental measures that impair the investor's rights must not be regulatory measures within the police power of the State.¹¹⁰⁰
912. With respect to the first criterion, the Respondent submits, based on the finding of the *MTD v. Chile ad hoc* committee, that the Claimant is required to prove that there has been a material governmental impairment of its ownership rights, not just a mere impairment of its expectations.¹¹⁰¹
913. With respect to the second criterion, the Respondent contends, based on the *Pope & Talbot v. Canada* case, that the impairment of an investor's ownership rights is not material if the investor remains in control of its investment.¹¹⁰² The Respondent submits

¹⁰⁹⁶ Respondent's Counter-Memorial, ¶¶ 512-513, referring to *S.D. Myers, Inc. v. Canada*, UNCITRAL/NAFTA Arbitration, Partial Award, 13 November 2000 [hereinafter: *S.D. Myers v. Canada*] (CL-57), ¶ 280; *Generation v. Ukraine* (AL RA-135), ¶ 20.21; Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours de l'Académie de Droit International*, 1997, vol. 269 (AL RA-138), p. 382; *Starrett Housing Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. CL. Trib. Rep., 1983, vol. 4 (AL RA-176), p. 154.

¹⁰⁹⁷ Respondent's Counter-Memorial, ¶¶ 515-516; Respondent's Rejoinder on the Merits, ¶¶ 719 *et seq.*; *Enron v. Argentina* (CL-26), ¶ 250.

¹⁰⁹⁸ Respondent's Rejoinder on the Merits, ¶ 720.

¹⁰⁹⁹ *Id.*, ¶ 725; *Quiborax v. Bolivia* (CL-68), ¶ 135; *Generation v. Ukraine* (AL RA-135), ¶ 6.2.

¹¹⁰⁰ Respondent's Counter-Memorial, ¶¶ 518 *et seq.*

¹¹⁰¹ *MTD v. Chile* (AL RA-185), ¶ 67; *Waste Management v. Mexico*, (CL-55), ¶ 159; *Mobil v. Argentina* (CL-103), ¶ 828; James Crawford, *Treaty and Contract in Investment Arbitration*, 2008 (AL RA-175), p. 373.

¹¹⁰² *Pope & Talbot v. Canada* (CL-73), ¶ 100.

that in the instant case, the Claimant still has its company (Cerros Colorados), which continues to conduct business.¹¹⁰³ According to the Respondent, it is well-established that a mere loss of profitability does not amount to indirect expropriation.¹¹⁰⁴ The Respondent submits that a substantial and significant enough impact must exist for compensation to be claimed.¹¹⁰⁵ As underscored by the *El Paso v. Argentina* tribunal, “a mere loss in value of the investment, even if important, is not an indirect expropriation.”¹¹⁰⁶ The Respondent sustains that the fact that an investment does not have the expected return is part of the business risk that any investor assumes and treaty protection is not meant to compensate a business that has failed.¹¹⁰⁷ The Respondent also cites to *AES v. Hungary*, in which the tribunal assessed whether certain measures placing a cap on prices paid to electricity generators amounted to an expropriation and found that the State had not interfered with the ownership or use of the claimants’ property as claimants retained control of their investment at all times.¹¹⁰⁸ The Respondent recalls that the Claimant only cites one precedent in support of its position (*CME v. The Czech Republic*), thus showing that it is trying to make a minority position prevail.

914. Finally, with respect to the last requirement, the Respondent notes that as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable.¹¹⁰⁹ Article V of the BIT must be, according to the Respondent, construed in such a way that the protection standards of the BIT are consistent with the State’s right to regulate, which a host State enjoys under customary international law.¹¹¹⁰ The Respondent submits that to distinguish between “*compensable expropriation*” and “*non-compensable regulation*,” most tribunals take into account the purpose of the State’s measure, through a police power doctrine, which recognizes that a State has the power to restrict private property without compensation in order to achieve a legitimate purpose.¹¹¹¹ The OECD

¹¹⁰³ Respondent’s Counter-Memorial, ¶ 522.

¹¹⁰⁴ *Waste Management v. Mexico* (CL-55), ¶ 159; *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013 [hereinafter: *ECE v. Czech Republic*] (AL RA-313), ¶ 4.814; *Philip Morris v. Uruguay* (AL RA-141), ¶ 286; *Feldman v. Mexico* (AL RA-161), ¶ 112.

¹¹⁰⁵ *LG&E v. Argentina* (CL-24), ¶ 191; *Mamidoil v. Albania* (AL RA-20), ¶ 570.

¹¹⁰⁶ *El Paso v. Argentina* (CL-23), ¶ 249.

¹¹⁰⁷ Respondent’s Rejoinder on the Merits, ¶ 742.

¹¹⁰⁸ *Id.*, ¶ 745; *AES v. Hungary* (CL-71), ¶ 14.3.2.

¹¹⁰⁹ *Methanex v. USA* (AL RA-133), § IV.D, ¶ 7; *EDF v. Romania* (AL RA-128), ¶¶ 292, 299, 308; *CCC v. Argentina* (CL-120), ¶ 276.

¹¹¹⁰ Respondent’s Rejoinder on the Merits, ¶ 753, referring to *Saluka v. Czech Republic* (CL-11), ¶¶ 255, 260, 262; *Philip Morris v. Uruguay* (AL RA-141), ¶¶ 292-299.

¹¹¹¹ Respondent’s Counter-Memorial, ¶ 525.

has also recognized in a Working Paper on indirect expropriation and the right to regulate that it is “*an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police powers of the State, compensation is not required.*”¹¹¹² The Respondent further argues that the finding that a host State has acted within its police powers, which defeats any expropriation claim, is different from the analysis of lawfulness to be carried out once an expropriation has been deemed to exist.¹¹¹³

915. With respect to the Claimant’s argument that the disputed measures constitute a creeping expropriation, the Respondent considers that the Claimant has failed to prove so and only provides a loose theoretical analysis in this respect. The Respondent recalls the definition given by the *Siemens v. Argentina* tribunal of a creeping expropriation, which “*refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur.*”¹¹¹⁴ The Respondent thus posits that a creeping expropriation only exists where a particular act exists and definitively tilts the balance, giving rise to an expropriation in a definitive fashion.¹¹¹⁵

b) Application to the facts

916. The Respondent’s position is that it did not breach the protection against expropriation.
917. The Respondent submits that there was no direct or indirect expropriation of the Claimant’s investment, as there was no formal transfer of the Claimant’s interests or assets and no measures were taken which would amount to an indirect expropriation of the Claimant’s investment.¹¹¹⁶
918. With respect to the Claimant’s argument that Argentina directly expropriated its investment by allegedly refusing to pay any outstanding receivables and by forcing it to invest in the FONINVEMEM, the Respondent submits that there could have been no direct expropriation because there was no transfer of title to the Argentine Republic. The Respondent states that Cerros Colorados and other power generators invested their unpaid receivables in the construction of three power plants: Termoeléctrica San Martín S.A., Termoeléctrica Manuel Belgrano S.A. and Central Vuelta de Obligado S.A. but

¹¹¹² Catherine Yannaca-Small, “Indirect Expropriation” and the “Right to Regulate” in *International Investment Law*, OECD Directorate for Financial and Enterprise Affairs, Working Paper on International Investment No. 2004/4, 2004 (September 2004) (AL RA-140), p. 5, fn. 10.

¹¹¹³ Respondent’s Rejoinder on the Merits, ¶¶ 758-761.

¹¹¹⁴ *Siemens v. Argentina* (CL-22), ¶ 263.

¹¹¹⁵ Respondent’s Rejoinder on the Merits, ¶ 771.

¹¹¹⁶ Respondent’s Counter-Memorial, ¶ 517.

that this did not entail a transfer of title to the Argentine Republic.¹¹¹⁷ Furthermore, the State recognized those receivables at all times, and even converted them into dollars, also giving rise to interest accrued on them.¹¹¹⁸ In addition, as a consequence of the crisis and upon the depletion of the Seasonal Stabilization Fund, as Orazul was aware when acquiring Cerros Colorados in December 2003, there were no resources available to make the electricity payments either immediately or in full. Consequently, there was a prioritized need to secure the electricity supply, which gave rise to the claimed and recognized receivables in favor of generators. In short, the Respondent submits that there was no money that could have been withheld and thus no act of expropriation existed or could have existed.¹¹¹⁹

919. The Respondent contends that at the time of the Claimant's alleged investment in December 2003, Resolutions 406/03 and 943/03 were already in force since respectively September and November 2003. The Respondent submits that these resolutions established a mechanism whereby any receivables the payment of which was not possible once the available resources had been depleted, based on the order of their priority as established for payment, would be documented as receivables. Resolution 943/03 clearly established that the receivables did not constitute "*a liquid and enforceable debt according to Article 819 of the Civil Code*" and that they would "*be adjusted when their expiration date is defined.*"¹¹²⁰ According to the Respondent, this meant that the receivables had a settlement date to be defined at a later time, which meant that, as of Orazul's acquisition of Cerros Colorados in December 2003, the debt was not enforceable. The Respondent adds that the Claimant was aware of and accepted the documentation of the receivables in such form and did not object to it at the time of the acquisition, which could have even been done in court.¹¹²¹
920. The Respondent additionally argues that, contrary to the Claimant's view, there was no "*withholding*" of the receivables by the State, because Argentina had no possession of the sums owed to generators.¹¹²² What was created as a result of the outstanding payments was a debt, recognized by way of receivables. The Respondent states that numerous tribunals have held that the mere refusal to pay a debt does not amount to expropriation.¹¹²³ The Respondent says that in any event, this claim is unreasonable

¹¹¹⁷ *Id.*, ¶ 530.

¹¹¹⁸ Respondent's Rejoinder on the Merits, ¶ 777.

¹¹¹⁹ *Id.*, ¶ 778.

¹¹²⁰ Resolution 943/2003 dated 27 November 2003 (C-209), Article 1.

¹¹²¹ Respondent's Rejoinder on the Merits, ¶ 776; Cameron III, ¶¶ 13, 53.

¹¹²² Respondent's Rejoinder on the Merits, ¶ 779.

¹¹²³ Respondent's Rejoinder on the Merits, ¶ 780; *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 [hereinafter: *SGS v.*

because the sums due were paid off, in accordance with the terms agreed upon in the successive agreements voluntarily negotiated and consented to by Cerros Colorados (also waiving any claims in that respect).¹¹²⁴

921. Furthermore, the Respondent submits that the Claimant received a percentage of equity interests in the corporations owning the newly-built plants based on the choice made by Cerros Colorados to run the plants developed in the context of the FONINVEMEM.¹¹²⁵ The Respondent states that the equity interests were part of the mechanism for the payment of the outstanding receivables and the title to them held by Cerros Colorados is additional evidence against the Claimant's expropriation claims. The Respondent also submits that, contrary to the Claimant's view, these agreements were not forced. Rather, Cerros Colorados adhered to them after conducting long negotiations and freely chose to sign them and benefitted from them.¹¹²⁶
922. The Respondent also contends that the successive agreements entered into by the Claimant render any hypothesis of expropriation absurd given the Claimant's consent thereto. In this regard, the Respondent recalls that the *Tradex v. Albania* tribunal held that "[a]s expropriation by definition is a 'compulsory transfer of property rights' [...] an agreement reached in consent with the foreign investor and signed by it [...] can hardly be seen as an act of expropriation in itself."¹¹²⁷ Contrary to the Claimant's view, the Respondent asserts that the *Total* tribunal's findings are inapposite. The Respondent recalls that the alleged forced conversion of receivables into participation "*might be considered also an expropriation.*" However, the *Total* tribunal found it unnecessary to examine such measure under the expropriation standard. With respect to the uniform marginal price mechanism, the tribunal concluded that they did not amount to an expropriation notwithstanding their impact on the value of the assets, as there had been no deprivation of control of the investment.¹¹²⁸
923. With respect to the Claimant's argument that Argentina indirectly expropriated its investment through measures that deprived it of its financial benefit and effective control, the Respondent submits that the Claimant has maintained at all times title to and control of the management and administration of its investment in Cerros Colorados. According to the Respondent, the company could have chosen to adhere to

Philippines] (CL-82), ¶ 161; *Waste Management v. Mexico* (CL-55), ¶ 160; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009 [hereinafter: *BIVAC v. Paraguay*] (CL-448), ¶ 110.

¹¹²⁴ Respondent's Rejoinder on the Merits, ¶ 781.

¹¹²⁵ *Id.*, ¶ 782.

¹¹²⁶ *Id.*, ¶ 783; Cameron III, ¶¶ 43, 45, 51, 70; Gallo Mendoza I, ¶¶ 27, 37, 62.

¹¹²⁷ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999 (AL RA-67), ¶ 177.

¹¹²⁸ *Total v. Argentina* (CL-29), ¶ 341.

the FONINVEMEM or not and it carried out disposition acts with respect to the receivables by advancing, negotiating and signing the Adhesion Contract, the FONINVEMEM I Agreement, the FONINVEMEM II Agreement, the adherence to Resolution 95/13 and the 2019 Agreement for the Regularization and Payment of Receivables, as well as their respective waivers, including that of June 2021.¹¹²⁹ The Respondent submits that had the Claimant considered that any of its rights were impaired, it could have gone to court or triggered the termination clause of the Concession Contract, which it did not do.¹¹³⁰

924. The Respondent further disputes that as a result of the Claimant's partaking in the FONINVEMEM I Agreement and the FONINVEMEM II Agreement, it received a significantly diminished value of its receivables. On the contrary, the Respondent contends that any capital invested within the framework of those agreements was going to have an annual return that was the equivalent of annual interest at LIBOR +1% under the Final Agreement and interest at LIBOR +5% under the 2008-2001 Agreement, which was an exceptional return for the context at the time.¹¹³¹ In this connection, the Respondent submits that the Claimant received every agreed-on payment, pursuant to the payment schedules that had been agreed upon, plus the agreed-on interest and return rates, coupled with the equity interests it obtained as it chose to invest its receivables in the FONINVEMEM I Agreement and the FONINVEMEM II Agreement, based on the available alternatives offering the greatest return rates (and with the greatest risks).¹¹³²
925. The Respondent states that the Claimant's investment continued to be profitable and to operate successfully, even after the measures were implemented, and that the Claimant maintained the capacity to control its investments at all times, as evidenced by the fact that it advanced successive projects for new generation plants and even for repair and maintenance.¹¹³³ According to the Respondent, the fact that the Claimant's rights would now be worth less than expected would not give rise to an expropriation claim in itself, even if it could be shown that the reduction in value was solely attributable to the actions of the Respondent.¹¹³⁴
926. According to the Respondent, the Claimant's reference to *Casinos Austria v. Argentina* is inapposite because the facts of the case are very different from the instant case, since

¹¹²⁹ Respondent's Rejoinder on the Merits, ¶ 790; FONINVEMEM II Agreement (C-37), Article 3.2.iv; Agreement for the Regularization and Payment of Receivables with the Wholesale Electricity Market. CAMMESA-Orazul Energy Cerros Colorados S.A. of 9 August 2019 (C-290), Article 3; Letter SE No. 6110/2013, 7 October 2013, and Letter from Duke Energy Argentina, 26 August 2013 (A RA-129).

¹¹³⁰ Respondent's Rejoinder on the Merits, ¶ 789.

¹¹³¹ *Id.*, ¶ 791.

¹¹³² *Id.*, ¶ 792.

¹¹³³ *Id.*, ¶ 793.

¹¹³⁴ *ECE v. Czech Republic* (AL RA-313), ¶ 4.814.

the claim at issue here is based on promises allegedly made to revoke certain measures and the non-fulfilment of said promises. In addition, the Concession Contract awarded to Orazul (which would be the only potentially comparable aspect between the two cases) is still in force and being exploited by the company.¹¹³⁵

927. With respect to the claim of a creeping expropriation, the Respondent submits that the Claimant also fails to identify the particular decisive act that definitively tilted the balance and allegedly gave rise to the alleged expropriation. Since the measures allegedly in breach of the standard are not expropriatory, either individually or cumulatively, there can be no creeping expropriation as the Claimant has failed to prove a substantial deprivation or a significant impairment.¹¹³⁶ The Respondent states that the disputed measures are nothing more than regulatory measures which were necessary to secure the electricity supply, were neither discriminatory nor unjustified, and were adopted within the scope of the exercise of public regulatory powers and in compliance with due process, thus preventing them from being qualified as expropriatory acts.¹¹³⁷ According to the Respondent, such regulatory powers are recognized under customary international law, constitute an attribute inherent in a State's sovereignty and were part of the regulatory framework in place at the time Cerros Colorados made its investment.¹¹³⁸
928. The Respondent says that in the event that the Tribunal were to consider that expropriation has occurred, such alleged expropriation would be legitimate under the terms of the BIT. This is because the Respondent acted in a non-discriminatory fashion by treating all generators alike, in compliance with due process and by exercising valid and inherent regulatory powers towards achieving a certain public purpose at a time of crisis and emergency.¹¹³⁹ The Respondent concludes that taking into consideration that the Claimant itself consented to, did not object to and did not raise any claims against the measures it characterizes as expropriatory but from which it derived benefits, the claim is unreasonable and should be dismissed.

3. The Tribunal's analysis

a) The applicable standard

929. Article V of the BIT, titled "*Nationalization and Expropriation*," provides:

¹¹³⁵ Respondent's Rejoinder on the Merits, ¶ 787.

¹¹³⁶ *Id.*, ¶ 794.

¹¹³⁷ *Id.*, ¶ 795.

¹¹³⁸ *Id.*, ¶ 796.

¹¹³⁹ *Id.*, ¶ 798.

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

930. Article V of the BIT sets forth a three-prong test for an unlawful expropriation:

- First, the object of an expropriation must be an investment.
- Second, there must be an interference with such an investment in the form of an expropriation or any other measure having similar characteristics or effects to an expropriation or nationalization.
- Third, such an interference is only lawful to the extent that it was made in the public interest, in accordance with the law, in a non-discriminatory basis and accompanied by appropriate compensation to be paid without undue delay and in freely convertible currency.

931. As far as the first prong is concerned, the Parties agree that it is the Parties' investment – and more specifically, the underlying property rights as created under the applicable domestic law – which is the object of an expropriation. Legitimate expectations, in and of themselves, do not constitute property rights that may be subject to an expropriation.

932. The Tribunal's position is supported by the decision in *Waste Management v. United Mexican States* in which the tribunal expressly held that “*the loss of benefits or expectations is not a sufficient criterion for an expropriation.*”¹¹⁴⁰ In a similar vein, the *Mobil v. Argentina* tribunal concluded that a

*mere frustration of investor's expectations, even when legitimate, which is not a result of an interference with the control or use or the investment, is not an indirect expropriation.*¹¹⁴¹

933. The Tribunal's finding does not exclude that legitimate expectations may be considered when assessing the other prongs for an expropriation.

934. As far as the second prong is concerned, the Parties agree that an expropriation can occur in the form of a direct expropriation or in the form of an indirect expropriation.

¹¹⁴⁰ *Waste Management v. Mexico (CL-55)*, ¶ 159.

¹¹⁴¹ *Mobil v. Argentina (CL-103)*, ¶ 828.

935. The Tribunal agrees with the Respondent that a direct expropriation is characterized by the forcible transfer of title in favor of the host State and may also include situations of outright seizure. An indirect expropriation, in contrast, is characterized by an equivalent interference without the forcible transfer of title or an outright seizure.¹¹⁴² This explains why there cannot be at the same time a direct and an indirect expropriation with regard to the same investment.¹¹⁴³

936. Turning to the specific threshold for an indirect expropriation, the Tribunal finds that the interference must meet a certain threshold. Its effects must be equivalent to a direct expropriation, as the text of Article V of the BIT confirms. In this respect, the Tribunal has taken note of the decision in *Burlington v. Ecuador*, cited by the Claimant, in which the tribunal held:

*When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment.*¹¹⁴⁴

937. The Tribunal agrees with the Claimant that the effects upon an investment, and specifically the capacity to generate profits, are relevant criteria to assess whether an indirect expropriation has taken place.

938. At the same time, the Tribunal is mindful that there is ample case law to support the proposition that non-discriminatory general regulation for a public purpose limiting the use of property in a tolerable and proportionate manner may not give rise to an indirect expropriation. For example, the tribunal in *Saluka* held:

[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it

¹¹⁴² Respondent's Counter-Memorial, ¶¶ 512-513, referring to *S.D. Myers v. Canada* (CL-57), ¶ 280; *Generation v. Ukraine* (AL RA-135), ¶ 20.21; Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours de l'Académie de Droit International*, 1997, vol. 269 (AL RA-138), p. 382; *Starrett Housing Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. CL. Trib. Rep., 1983, vol. 4 (AL RA-176), p. 154.

¹¹⁴³ *Enron v. Argentina* (CL-26), ¶ 250.

¹¹⁴⁴ Claimant's Memorial, ¶ 480; *Burlington v. Ecuador* (CL-104), ¶¶ 396-397.

*adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today.*¹¹⁴⁵

939. In a similar vein, the tribunal in *Continental Casualty v. Argentina* held:

*[T]here are limitations to the use of property in the public interest that fall within typical governmental regulations of property entailing mostly inevitable limitations imposed in order to ensure the rights of others or of the general public (being ultimately beneficial also to the property affected). These restrictions do not impede the basic, typical use of a given asset and do not impose an unreasonable burden on the owner as compared with other similarly situated property owners. These restrictions are not therefore considered a form of expropriation and do not require indemnification, provided however they do not affect property in an intolerable, discriminatory or disproportionate manner.*¹¹⁴⁶

940. For the reasons set forth below, the Tribunal does not need to further address the implications of this case law for present purposes.

941. As far as the third prong of the analysis is concerned, Article V of the BIT sets forth four criteria for the lawfulness of an expropriation: namely that (i) the measures concerned must serve a public purpose; (ii) the expropriation must be lawful, meaning that the measures must be carried out in accordance with due process of law; (iii) the measures must be non-discriminatory; and (iv) the expropriation must be against the payment of prompt, adequate and effective compensation. Such elements “*must be fulfilled cumulatively.*”¹¹⁴⁷

b) Application to the facts

942. With this standard in mind, the Tribunal turns to the facts of the present case.

943. Turning to the first prong of the analysis, the Tribunal notes that the Claimant claims various forms of investment to have been expropriated. The Claimant refers to:

- its direct shareholding participation in *Orazul Energy Generating S.A.*,
- its indirect shareholding participation, through *Orazul Energy Generating S.A.*, in Cerros Colorados and the FONINVEMEM,

¹¹⁴⁵ *Saluka v. Czech Republic (CL-11)*, ¶ 262.

¹¹⁴⁶ *CCC v. Argentina (CL-120)*, ¶ 276.

¹¹⁴⁷ See Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed.) (CL-173), p. 99. See also *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (CL-76), ¶ 428 (noting that it is clear “*that all conditions must be met lest an expropriation be deemed unlawful.*”).

- its indirect rights, through Cerros Colorados, arising under the Concession Contract and the Electricity Law, including its rights to revenues for power sales,
 - and specifically, Cerros Colorados’ ability to (i) receive a uniform spot price for all generators based on the economic cost of the system; (ii) earn adequate capacity payments with values guaranteed under the Electricity Law; (iii) enter into PPAs on the term market; and (iv) timely receive revenues it has earned.
944. The Tribunal finds that the Claimant’s direct shareholding participation in *Orazul Energy Generating S.A.* as well as its indirect shareholding participation, through *Orazul Energy Generating S.A.*, in Cerros Colorados and the FONINVEMEM, fall under the BIT’s definition of an investment and constitute property rights that are capable of being expropriated. The same holds true for the Claimant’s rights under the Concession Contract, even though not every breach of a contract amounts to an expropriation.
945. Mere entitlements arising under the Electricity Law, including the purported rights to receive a uniform spot price, earn adequate capacity payments, enter into PPAs and timely receive revenues, in contrast, are not rights capable of being expropriated. The Claimant has not shown that these purported rights fall under the BIT’s definition of an investment or otherwise have the characteristic of a property right (e.g., in that it can be alienated or assigned).
946. The Tribunal turns to the second prong of the test for an unlawful expropriation, which concerns the interference with the investment.
947. The Tribunal finds that there has been no direct expropriation. The Claimant has failed to prove a forcible transfer of the title in any of the alleged investments or an outright seizure. To the extent that the Claimant transferred certain receivables under the FONINVEMEM Agreements or waived claims, this does not amount to a direct expropriation. The Tribunal recalls its findings that the Claimant’s participation in the FONINVEMEM Agreements was voluntary. The Tribunal further finds that any failure to settle outstanding claims by Argentina does not amount to a direct expropriation based on the criteria set out above. The Tribunal notes that previous tribunals have reached similar findings.¹¹⁴⁸
948. The Tribunal therefore turns to the question of whether there has been an indirect expropriation of the Claimant’s investments. The Tribunal finds that the Claimant has

¹¹⁴⁸ *SGS v. Philippines* (CL-82), ¶ 161; *Waste Management v. Mexico* (CL-55), ¶ 160; *BIVAC v. Paraguay* (CL-448), ¶ 110.

failed to show an interference that would amount to the level of an indirect expropriation.

949. In reaching this decision, the Tribunal has considered the Claimant's investments in their entirety. Specifically, it has taken note that Cerros Colorados continued to be profitable.
950. In this respect, the Tribunal has taken note of the Respondent's expert who explained that Cerros Colorados continued to generate a positive EBITDA:

From 2004 (the first full year after Claimant allegedly made its investment in December 2003) through 2020, Cerros Colorados has generated operating profits before depreciation, also known as earnings before interest, tax, depreciation and amortization ("EBITDA") averaging US\$ 14.4 million per year. The revenues generated by Cerros Colorado have been sufficient to cover its operating costs and to generate profits, which have been available to recover investment costs and to provide a return to investors. The average EBITDA for the period 2004 to 2020 (US\$ 14.4 million) exceeds the EBITDA of Cerros Colorados in 1996 (US\$ 12.7 million), 1998 (US\$ 12.6 million), 1999 (US\$ 12.1 million), 2002 (US\$ 10.4 million), and 2003 (US\$ 10.1 million).¹¹⁴⁹

951. The Claimant's expert does not dispute the existence of positive annual profitability at the net income or EBITDA level.¹¹⁵⁰ However, the Claimant's expert submits that an objective assessment of profitability requires one to calculate metrics such as the IRR. The Claimant's quantum expert defines the IRR as "*a measure of profitability that compares the cash flows that a business produces (or is expected to produce) with the stock of capital invested.*"¹¹⁵¹
952. The Tribunal does not exclude that metrics such as the IRR are relevant for the assessment of the damages suffered by the Claimant. For the mere assessment of the narrower question of whether the Claimant's investment has been expropriated, in contrast, the Tribunal finds that this metric lacks relevance.
953. In a situation in which an investment continues to operate and generates significant positive annual profitability at the net income or EBITDA level, no situation equivalent to the forcible transfer of title or an overt seizure is given.

¹¹⁴⁹ Quadrant II, ¶ 56.

¹¹⁵⁰ BRG II, ¶¶ 211 *et seq.*

¹¹⁵¹ *Id.*, ¶ 213.

954. Leaving that aside, the Claimant has failed to show that even if one were to apply the IRR, a situation equivalent to the forcible transfer of title or an overt seizure is given. The Tribunal considered in this context that the Claimant acquired its shareholding interest in December 2003 free of charge by way of a restructuring within the Duke Energy group.¹¹⁵² If one were to compare the cash flows generated by Cerros Colorados with the capital invested by the Claimant (which are nil), the outcome would still be positive, as the Respondent’s quantum expert has demonstrated.¹¹⁵³
955. The Tribunal’s finding that there has not been an indirect expropriation is corroborated by further evidence on record. For example, Duke Energy reported very favorable results for its generation assets in Argentina. The summary of Duke Energy’s Annual Report for 2005 included the following information as part of its 2005 “*highlights*”:
- DEI exceeded expectations with segment EBIT of \$314 million, compared to \$222 million in 2004. Those results were largely driven by improved Latin American operations (due primarily to favorable pricing and weather conditions in Peru and Argentina).*¹¹⁵⁴
956. Such “*favorable pricing*” conditions were also noted as a reason for the increase of Duke’s EBITDA and “*higher electricity generation, prices and increased gas marketing sales*” in Argentina were noted as the reason for the increase in Duke’s increase in operating revenues in Duke Energy’s Form 10-K filing with the SEC in 2006.¹¹⁵⁵
957. In 2015, during Duke Energy’s Year-End 2015 Earnings Conference Call, the President and CEO of Duke Energy noted that Argentina was a “*generally very good market[]*.”¹¹⁵⁶
958. For the reasons set forth above, the Tribunal thus finds that the threshold for an indirect expropriation has not been met. Even assuming that there had been a reduction in value of the Claimant’s investment, such reduction would not rise to the level of an indirect expropriation. This holds true irrespective of whether individual measures are examined in isolation or in aggregate (“*creeping expropriation*”).
959. The Tribunal therefore does not need to address whether the Respondent can invoke its power to regulate and whether the further requirements for the lawfulness of an expropriation are fulfilled. The Claimant’s claim based on a breach of Article V of the BIT must be rejected.

¹¹⁵² Hearing Transcript, Day 2, pp. 357, 464, 521.

¹¹⁵³ Hearing Transcript, Day 9, pp. 2365, 2595-2596.

¹¹⁵⁴ Duke Energy Corp., Summary Annual Report 2005 dated 2005 (A RA-236), p. 27.

¹¹⁵⁵ Duke Energy Corp., 10-K 2006 dated 2006 (A RA-237), pp. 60-61.

¹¹⁵⁶ Duke Energy Corporation, FQ4 2015 Earnings Call Transcripts (A RA-234), p. 18.

X. The Claimant’s claim that the Respondent failed to observe obligations it entered into with regard to the Claimant’s investments in breach of Article IV(2) of the BIT and Article II(2)(c) of the US-Argentina BIT

960. The tenth issue to be determined concerns the Claimant’s claim that the Respondent failed to observe obligations it entered into with regard to the Claimant’s investments in breach of Article IV(2) of the BIT and Article II(2)(c) of the US-Argentina BIT.

1. The Claimant’s position

a) The applicable standard

961. The Claimant relies on the MFN clause in Article IV(2) of the BIT to invoke the umbrella clause in Article II(2)(c) of the US-Argentina BIT, which provides:

*Each Party shall observe any obligation it may have entered with regard to investments.*¹¹⁵⁷

962. According to the Claimant, the tribunal in *EDF v. Argentina* found that a similarly-drafted MFN clause in the Argentina-France BIT “*permit[s] recourse to the ‘umbrella clauses’ of third-country treaties.*”¹¹⁵⁸ The tribunal rejected Argentina’s contention in that case that the principle of *ejusdem generis* barred the claimants from invoking the protection of umbrella clauses in third-country BITs.¹¹⁵⁹ According to the Claimant, the MFN clause at issue here is broad, as the more favorable treatment that it extends applies not only to investments or returns and other assets relating to such investments, but to “*all matters governed by this Agreement.*”¹¹⁶⁰ Since the term “*treatment*” applies to “*all matters*” in the MFN clause, the Claimant argues that it is entitled to benefit from substantive guarantees of other treaties entered into by Argentina.

963. The Claimant disagrees with the Respondent’s view that the *Teinver* tribunal’s approach should apply to the case. In *Teinver*, the tribunal decided against importing an umbrella clause from the US-Argentina BIT into the Argentina-Spain BIT based on the MFN clause’s terms “*[i]n all matters governed by the Agreement.*”¹¹⁶¹ However, the Claimant submits that by narrowing the BIT’s MFN clause’s effects to the rights already provided by the Treaty, the tribunal “*ignore[d] the indisputable fact that the parties [...] included*

¹¹⁵⁷ Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (CL-5), Article II(2)(c).

¹¹⁵⁸ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 [hereinafter: *EDF v. Argentina*] (CL-14), ¶ 929.

¹¹⁵⁹ Claimant’s Reply on the Merits, ¶ 728.

¹¹⁶⁰ *Id.*, ¶ 729.

¹¹⁶¹ *Id.*, ¶¶ 683-684; *Teinver v. Argentina – Award* (CL-99), ¶¶ 89-892.

in the treaty both the negotiated substantive matter and also the MFN rule.”¹¹⁶² The Claimant submits that a significant number of tribunals constituted under BITs containing similar MFN clauses to the Argentina-Spain BIT have in fact agreed to import substantive protections such as an umbrella clause.¹¹⁶³

964. Referencing other tribunals’ interpretations of the provision, the Claimant submits that Article II(2)(c) of the US-Argentina BIT “*cover[s] both contractual obligations such as payment, as well as obligations assumed through law or regulation*” and that “[o]bligations covered by the ‘umbrella clause’ are nevertheless limited by their object: ‘with regard to investments.’”¹¹⁶⁴ The Claimant further argues that the umbrella clause may render violations of obligations at the municipal law level as breaches of international law.¹¹⁶⁵
965. The Claimant specifically submits that the umbrella clause applies to contractual undertakings. In this respect, the Claimant argues that the Respondent’s assertion that not all contractual breaches trigger the applicability of umbrella clauses is misplaced in light of the Treaty’s broad language. The umbrella clause in the US-Argentina BIT refers to “*any obligation;*” it does not qualify specific types of obligations or specific circumstances that would be excluded from its scope. Thus, according to the Claimant, based on the terms and ordinary meaning of the umbrella clause alone, the Respondent’s argument fails.¹¹⁶⁶ Such view is also supported by accepted jurisprudence and commentators.¹¹⁶⁷ The Claimant states that even the most restrictive view of the umbrella clause would not exclude the applicability of the US-Argentina BIT. According to the Claimant, it is immaterial to engage in a discussion of whether a breach of the umbrella clause applies to ordinary commercial breaches or requires an element of exercise of public authority because none of Argentina’s breaches of contractual (and

¹¹⁶² Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed.) (CL-173), p. 209.

¹¹⁶³ Claimant’s Reply on the Merits, ¶ 685 referring to *EDF v. Argentina* (CL-14), ¶¶ 932-934; *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, 8 April 2013 [hereinafter: *Arif v. Moldova*] (CL-86), ¶ 396; *Bayindir v. Pakistan* (CL-323), ¶¶ 155, 157.

¹¹⁶⁴ *Enron v. Argentina* (CL-26), ¶ 274.

¹¹⁶⁵ Claimant’s Memorial, ¶ 510; Claimant’s Reply on the Merits, ¶ 730.

¹¹⁶⁶ Claimant’s Reply on the Merits, ¶ 732.

¹¹⁶⁷ *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005 (CL-44), ¶ 246; Prosper Weil, *Problèmes Relatifs aux Contrats Passés Entre un État et un Particulier*, HAGUE ACADEMY OF INTERNATIONAL LAW dated 1969 cited in Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, GEORGE MASON LAW REVIEW 14, 137 dated 2006 (CL-329), p. 147; Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 2 JOURNAL OF WORLD INVESTMENT & TRADE 5, 231 dated April 2004 (CL-330), p. 250; Hein-Jürgen Schramke, *The Interpretation of Umbrella Clauses in Bilateral Investment Treaties*, 4 TRANSNATIONAL DISPUTE MANAGEMENT 4, 1 dated September 2007 (CL-328), pp. 21-22.

legislative) obligations in this case can be characterized as mere commercial breaches.¹¹⁶⁸

966. The Claimant also submits that the umbrella clause applies to any obligations “*entered into with regard to investments.*” With respect to the Respondent’s argument that the umbrella clause in Article II(2)(c) of the US-Argentina BIT is not applicable because there is no privity between Argentina and Orazul, the Claimant submits that the clause explicitly refers to obligations entered into “*with regard to investments*” rather than “*with investors*” or “*with regard to investors.*”¹¹⁶⁹ The Claimant argues that the following tribunals have rejected the same or similar arguments by the Respondent: *LG&E v. Argentina*, *Enron v. Argentina*, *Enron v. Argentina Annulment Committee*, *Sempra v. Argentina*, *Continental Casualty v. Argentina*, and more recently, *EDF v. Argentina*.¹¹⁷⁰ In all of these cases, the tribunals found that the same or similarly worded umbrella clauses covered obligations entered into between the Government and a local subsidiary of claimants.¹¹⁷¹ The Claimant adds that when international tribunals have refused to apply umbrella clauses where privity was not present, they have generally done so in situations where obligations had not been assumed by the State itself, but rather by a state-owned entity or even private corporation, which is not the case here.¹¹⁷²
967. The Claimant additionally contends that the umbrella clause applies to legislative obligations, contrary to the Respondent’s view.¹¹⁷³ The Claimant insists that the specific language of the umbrella clause in the US-Argentina BIT refers to “*any obligations*” entered into “*with regard to investments,*” without distinguishing between contractual or legislative obligations.¹¹⁷⁴ Various tribunals have affirmed that legislative obligations may fall within the scope of an umbrella clause.¹¹⁷⁵
968. Citing *Duke Energy v. Ecuador* in particular, the Claimant submits that for a breach of an obligation to amount to a breach of the umbrella clause, it must show that “(i) *there*

¹¹⁶⁸ Claimant’s Reply on the Merits, ¶ 738.

¹¹⁶⁹ *Id.*, ¶ 739.

¹¹⁷⁰ *LG&E v. Argentina (CL-24)*, ¶ 175; *Enron v. Argentina (CL-26)*, ¶¶ 269-277; *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010 (CL-114), ¶¶ 325, 342; *CMS v. Argentina (CL-10)*, ¶¶ 296-303; *Sempra v. Argentina (CL-27)*, ¶¶ 305-314; *CCC v. Argentina (CL-120)*, ¶ 297; *EDF v. Argentina (CL-14)*, ¶¶ 938-942.

¹¹⁷¹ Claimant’s Reply on the Merits, ¶ 740.

¹¹⁷² *Id.*, ¶ 741.

¹¹⁷³ *Id.*, ¶ 742.

¹¹⁷⁴ *Ibid.*

¹¹⁷⁵ *Enron v. Argentina (CL-26)*, ¶ 274; *LG&E v. Argentina (CL-24)*, ¶ 175; *CCC v. Argentina (CL-120)*, ¶ 301; *EDF v. Argentina (CL-14)*, ¶¶ 921 *et seq.*, 970-993.

exists an “obligation” of the State which is (ii) “entered into with regard to investments” and which (iii) “has not been observed.””¹¹⁷⁶

b) Application to the facts

969. The Claimant claims that the Respondent entered into the following “obligations” with regard to its investment:¹¹⁷⁷

- in the Electricity Law, the Respondent committed to: (i) providing generators market-based, uniform spot prices set a by a marginal cost system, (ii) adequately compensating generators for the energy available for dispatch through capacity payments, and (iii) allowing generators to sell energy and capacity through freely negotiated PPAs;¹¹⁷⁸
- in the Selling Memorandum, which contained and expanded on the basic principles of the Electricity Law, the Respondent promised that power generators would be able to buy and sell electricity “at prices determined by supply and demand forces;”¹¹⁷⁹
- in the Concession Contract, the Respondent committed to comply with its obligations in accordance with the Electricity Law and related privatization documents (including Cerros Colorados’ bylaws);¹¹⁸⁰
- in the FONINVEMEM Agreements, the Respondent promised that if the Claimant reinvested Cerros Colorados’ unpaid receivables into the FONINVEMEM plants, along with the receivables actually generated through these plants, it would abrogate Resolution 240/03, restore capacity payments to values consistent with the Electricity Law, and return to a regulatory framework that complied with the Electricity Law;¹¹⁸¹

¹¹⁷⁶ Claimant’s Memorial, ¶ 512; *Duke v. Ecuador (CL-124)*, ¶ 318.

¹¹⁷⁷ Claimant’s Memorial, ¶ 514; Claimant’s Reply on the Merits, ¶ 747.

¹¹⁷⁸ Electricity Law (C-2), Articles 35, 36; McGee I, ¶ 15.

¹¹⁷⁹ Selling Memorandum (C-6), p. 77.

¹¹⁸⁰ Concession Contract (C-79), Articles 8, 70.

¹¹⁸¹ Resolution 826/2004 dated 6 August 2004 (C-13), fourth whereas clause; FONINVEMEM Adhesion Contract (C-211), Articles 1, 4.1; FONINVEMEM I Agreement (C-36), Article 1; FONINVEMEM II Agreement (C-37), Article 1. Specifically, under the FONINVEMEM Adhesion Contract, the Claimant says that the Respondent committed, in writing, to restoring the WEM as a competitive market, as guaranteed under the Electricity Law (C-211; C-106). It says the Government specifically promised: to abrogate Resolution 240/03 and, therefore, return to a non-intervened spot price (C-211, Article 4.1(iv)); establish Seasonal Prices that would allow generators to receive accrued credits (C-211, Article 4.1(iii)); transfer treasury funds in order to pay credits due to generators (C-211, Article 4.1(v)); promote regulatory changes to require Large Users to contract in the Term Market seventy five percent (75%) of their consumption (C-211, Article 4.1(vi)); allow additional natural gas purchases for power generation (C-211, Article 4.1(ix)); and adjust capacity payments to values consistent with the Electricity Law (C-211, Article 4.1).

- through its representations when adopting a myriad of regulations, the Respondent promised that the disputed measures were only “temporary”,¹¹⁸² and
- through its Minister of Energy at the time, the Respondent acknowledged that compensation was due to Cerros Colorados because of the measures that the Government had imposed.¹¹⁸³

970. With reference to the definition of “investment” in Article I(2) and (3) of the BIT, the Claimant argues that the above obligations the Respondent entered into relate to a qualifying investment for the purposes of Article II(2)(c) of the US-Argentina BIT, in particular, to certain “shares”, “rights”, and “immovable property”.¹¹⁸⁴ To this end, the Claimant refers to the fact that it directly owns 95% of the shares in Duke Energy Generating S.A., and through that, indirectly owns 86.33% of the shares in Cerros Colorados. It submits that it owns 86.33% of Cerros Colorados’ shareholding participation in the FONINVEMEM and 86.33% of Cerros Colorados’ rights arising under the Concession Contract and the Respondent’s legal framework. The Claimant refers to the fact that in 2004, the Respondent, through its Supreme Court and the measures, recognized that power generators had acquired rights.¹¹⁸⁵ In addition, through Cerros Colorados, the Claimant owns immovable property as it owns 86.33% of the Alto Valle Plant.
971. The Claimant submits that the Respondent breached each of the above-mentioned obligations in violation of the invoked umbrella clause by failing to act in accordance with the commitments it made to Cerros Colorados that the disputed measures would be temporary and that the Respondent would abide by the Electricity Law.¹¹⁸⁶
972. The Claimant submits that the Respondent breached its obligations towards the Claimant under the Electricity Law by implementing an inconsistent “temporary” regulatory regime, the breach of which the Respondent itself acknowledged.¹¹⁸⁷ The Claimant argues that the measures the Respondent implemented *inter alia* (i) restricted and then prohibited Cerros Colorados’ sales in the term market (see Resolutions 956/04, 1281/06 and 95/13); and (ii) substantially modified the applicable price determination mechanism that should have been based on a cost-based price determination system

¹¹⁸² Energy Secretariat, Technical Report in Administrative Docket No. EXP-S01:143056/2003 (Part 1) (C-103); Resolution 826/2004 dated 6 August 2004 (C-13), fourth whereas clause; McGee I, ¶¶ 20-21.

¹¹⁸³ Tierno I, ¶ 75.

¹¹⁸⁴ Claimant’s Memorial, ¶ 515.

¹¹⁸⁵ *Id.*, ¶ 516.

¹¹⁸⁶ Claimant’s Reply on the Merits, ¶ 758.

¹¹⁸⁷ Energy Secretariat, *Balance de Gestion en Energia 2016-2019* dated December 2019 (C-101).

with uniform spot prices and capacity payments (*see inter alia* Resolutions 240/03, 406/03, 1281/06, 95/13, 529/14, 482/15).

973. With respect to the Respondent’s argument that the Electricity Law is irrelevant because it was enacted 11 years before the Claimant invested, the Claimant submits that legislative commitments such as the ones that the Government made in the Electricity Law are actionable via the umbrella clause.¹¹⁸⁸
974. According to the Claimant, the Respondent also breached the Concession Contract by altering the legal framework applicable to it and thus violating Cerros Colorados’ right to generate and sell electricity under the Electricity Law.¹¹⁸⁹ The Claimant submits that it is not raising claims under the Concession Agreement nor is it requesting its termination; rather, it is demonstrating that yet again the Government undertook to and subsequently failed to respect the regime set forth in the Electricity Law.¹¹⁹⁰
975. The Claimant further contends that the Respondent also breached its obligations under the FONINVEMEM Agreements to restore the original market rules with respect to both spot prices and capacity payments.¹¹⁹¹ According to the Claimant, under the Adhesion Contract, the Respondent committed to *inter alia* (i) abrogating Resolution 240/03, (ii) restoring capacity payments to values consistent with the Electricity Law, and (iii) returning to a regulatory framework consistent with the Electricity Law if Orazul re-invested Cerros Colorados’ unpaid and future receivables into the FONINVEMEM plants.¹¹⁹² The Government also committed to establishing seasonal prices that allowed to pay generators accrued credits; transferring treasury funds in order to pay credits due to generators; promoting regulatory changes to require large users to contract in the term market 75% of their consumption; and allowing additional natural gas purchases for power generation.¹¹⁹³ Contrary to the Respondent’s argument, the Claimant states that the language in the FONINVEMEM Agreements is clear as to such commitments.¹¹⁹⁴
976. The Claimant also states that the Selling Memorandum builds on the Electricity Law and promises potential investors that power generators would be able to buy and sell electricity “*at prices determined by supply and demand forces.*”¹¹⁹⁵ With respect to the Respondent’s argument that Orazul’s reliance on the Selling Memorandum is not

¹¹⁸⁸ Claimant’s Reply on the Merits, ¶ 749.

¹¹⁸⁹ Concession Contract (C-79) Articles 8, 70.

¹¹⁹⁰ Claimant’s Reply on the Merits, ¶ 751.

¹¹⁹¹ Claimant’s Memorial, ¶ 522.

¹¹⁹² FONINVEMEM Adhesion Contract (C-211), Annex, Article 1.

¹¹⁹³ *Id.*, Annex, Article 4.1(iii)-(vi), (ix).

¹¹⁹⁴ Claimant’s Reply on the Merits, ¶ 754.

¹¹⁹⁵ Selling Memorandum (C-6), p. 77.

reasonable, the Claimant states that the representations made therein are in fact consistent with contemporaneous evidence, which reinforced the Government's undertakings with respect to Orazul's investment.¹¹⁹⁶

977. Finally, with respect to the Respondent's witness, who allegedly has "*no recollection of the Argentine State promising any compensation to Orazul at any moment*,"¹¹⁹⁷ the Claimant insists that its witness Mr. Tierno testifies that at a meeting with Argentine officials, Minister Aranguren "*noted that he understood that damages had been suffered which should be redressed [...]*" and discussed various options to compensate Cerros Colorados.¹¹⁹⁸

2. The Respondent's position

a) The applicable standard

978. The Respondent's position is that standards of treatment not included in the Argentina-Spain BIT cannot be invoked through the MFN clause.¹¹⁹⁹ According to the Respondent, the scope of the MFN clause, provided for in Article IV(2) of the BIT, is specifically limited to the fair and equitable treatment referred to in Article IV(1).

979. The Respondent submits that had the Parties to the BIT intended that the MFN clause contained in Article IV(2) apply to any treatment related to the matters governed by the BIT, they would have so agreed and written, as is common practice among States and as Spain and Argentina have done in other agreements.

980. Furthermore, even if the MFN clause applied to all matters governed by the BIT and not just to the FET standard, importing rights not provided for in the BIT would not be admissible as it would run counter to the *ejusdem generis* principle, which requires that the treaty include the MFN clause and the invoked treaty contain a provision on the same matter.¹²⁰⁰ Claims made under the umbrella clause are contrary to such principle as they are not standards referred to in the underlying treaty.

¹¹⁹⁶ *Id.*, pp. 77, 86; Decree No. 287/1993 dated 22 February 1993 (C-90), first and second whereas clauses; Bidding Terms and Conditions (C-251), Article 1.2, approved by Resolution 364/1993 dated April 1993 (C-233); Bidding Terms and Conditions Alto Valle S.A. dated March 1992 (C-50), Article II; Bylaws of Central Térmica Alto Valle S.A. dated 11 May 1992 (C-51), Article 3; Concession Contract (C-79), Article 70.1.

¹¹⁹⁷ Respondent's Counter-Memorial, ¶ 575; Sruoga I, ¶ 31.

¹¹⁹⁸ Claimant's Reply on the Merits, ¶ 757; Tierno I, ¶ 75; *see also* Tierno II, ¶ 65.

¹¹⁹⁹ Respondent's Counter-Memorial, ¶¶ 534-554; Respondent's Rejoinder on the Merits, ¶¶ 800-819.

¹²⁰⁰ Respondent's Counter-Memorial, ¶ 540, citing International Law Commission, *Report of the International Law Commission on its thirtieth session*, Yearbook of the International Law Commission, 1978, vol. II, Part Two, *Draft Articles on most-favoured-nation clauses with commentaries* (AL RA-181), Article 9 (10-11).

981. The Respondent submits that Spain agrees with this interpretation of the BIT as it has argued in the *Maffezini v. Spain* case that the “reference in the most favored nation clause of the Argentine-Spain BIT to ‘matters’ can only be understood to refer to substantive matters or material aspects of the treatment granted to investors.”¹²⁰¹
982. In any event, the Respondent submits that it has not violated the contents of the “umbrella clause.”¹²⁰² If the Tribunal were to consider that the MFN clause allows an application of the umbrella clause, the Respondent submits that the Claimant attempts to impose an overly broad interpretation of this provision. The Respondent argues that for the clause to be applicable, the host State must have first undertaken a “legal obligation,” meaning that the expectations arising out of a negotiation are not included under this notion. Second, the host State must also have “entered into” such obligation, which means that Article II(2)(c) of the US-Argentina BIT is limited to consensual obligations not undertaken *erga omnes* but only in relation to certain persons with respect to a given investment. Third, the obligations must have been undertaken directly between the host State and the investor, excluding obligations undertaken by subjects other than the State or the foreign investor. Finally, the umbrella clause does not transform any contract claim into a treaty claim. According to the Respondent, if the obligation is not breached under the law applicable to it, then there is no breach of the umbrella clause.

b) Application to the facts

983. In the event that the Tribunal were to find that Article II(2)(c) of the US-Argentina BIT should be imported, the Respondent argues, the Claimant’s conclusions must still be rejected because the Respondent’s actions have been consistent with that standard.¹²⁰³ In particular, the Respondent considers that the Claimant has not proven that the Respondent incurred any specific legal obligation with respect to Orazul or that it neglected its duties under the US-Argentina BIT.¹²⁰⁴
984. The Respondent submits that the Claimant fails to identify obligations protected under Article II(2)(c) of the US-Argentina BIT, demonstrate their alleged breach, and prove that the alleged obligations were undertaken *vis-à-vis* the Claimant. The Respondent considers that the Claimant’s claim relies on documents and statements that do not entail obligations within the meaning of Article II(2)(c) of the US-Argentina BIT.¹²⁰⁵

¹²⁰¹ *Maffezini v. Spain* (CL-6), ¶ 41.

¹²⁰² Respondent’s Counter-Memorial, ¶¶ 547-566; Respondent’s Rejoinder on the Merits, ¶¶ 820-826, 832-843.

¹²⁰³ Respondent’s Counter-Memorial, ¶¶ 567 *et seq.*

¹²⁰⁴ Respondent’s Rejoinder on the Merits, ¶ 844.

¹²⁰⁵ Respondent’s Counter-Memorial, ¶ 568.

985. The Respondent argues that the Electricity Law is a general rule that could never be interpreted as a specific obligation towards a particular investor, in particular if the investor entered the market 11 or 24 years after the law was enacted, depending on which year is considered to be the beginning of the Claimant's investment.¹²⁰⁶ According to the Respondent, the application of the Electricity Law, in particular with regard to the functions of the Secretariat of Energy, has been in accordance with its goals and purposes.¹²⁰⁷ One of the objectives of the Electricity Law is to guarantee access to energy services, which is a recognized human right in several treaties to which the Respondent is a party to.¹²⁰⁸
986. According to the Respondent, the Claimant's citation of the Selling Memorandum of Hidroeléctrica Norpatagónica S.A. ignores the fact that the information contained therein does not constitute obligations.¹²⁰⁹ The Respondent notes that Articles 77 and 86 of the Selling Memorandum should be read in conjunction with Article 84, which provides that “[t]he Secretariat of Energy is responsible for setting capacity payments.”¹²¹⁰
987. With respect to the Claimant's citation of the Concession Contract, the Respondent submits that the Contract sets forth that the modifications in the price regulation criteria do not give rise to any compensation, unless they are substantial and arbitrary modifications which render contract performance excessively onerous, which has not been proven by the Claimant. The Contract thus does not include a specific obligation to make regulations applicable at the time it was entered into remain over time.
988. With respect to the FONINVEMEM Agreements mentioned by the Claimant, under which the Respondent allegedly undertook to abrogate Resolution 240/03, establish a specific amount for the capacity payments and thus make the market competitive, the Respondent contends that the Claimant's interpretation of the alleged obligations is mistaken. The Respondent submits that the rights and obligations of the Parties were modified and adjusted in the subsequent agreements, whose ultimate purpose was to adapt the electricity market and not go back to the marginalist system that was in force in the 1990s. According to the Respondent, the Claimant's argument entails that the Claimant demands the performance of agreements which it allegedly entered into forcibly.¹²¹¹ According to the Respondent, the Claimant's claim is contrary to the

¹²⁰⁶ *Id.*, ¶ 569; Respondent's Rejoinder on the Merits, ¶ 846.

¹²⁰⁷ Respondent's Rejoinder on the Merits, ¶ 846.

¹²⁰⁸ *Ibid.*

¹²⁰⁹ Selling Memorandum (C-6), p. 2.

¹²¹⁰ *Id.*, Article 84.

¹²¹¹ Respondent's Counter-Memorial, ¶ 572.

principle of good faith, since it is manifestly contradictory to its own acts.¹²¹² The Respondent considers that the principles of acquiescence and estoppel prevent the Claimant from pursuing its claim.¹²¹³

989. With respect to the Claimant's reference of alleged statements made by the Argentine Republic regarding the temporary nature of certain regulations, the Respondent recalls that Article II(2)(c) of the US-Argentina BIT does not give investors *carte blanche* to demand compliance with any expectation they may have.¹²¹⁴ Rather, it is necessary for investors to identify a specific legal obligation owed by the State, which the Claimant has not done. The Claimant bases the alleged promise on general provisions and on preambles of laws.¹²¹⁵
990. Finally, with respect to the Claimant's reference to alleged statements of the former Minister of Energy, Mr. Aranguren, the Respondent submits that the Claimant tries to build its case on out-of-context fragments of measures adopted as from 2015, which did not imply a recognition of damage in favor of generators, and on statements allegedly made by a public official at a meeting that none of its witnesses attended.¹²¹⁶ The Respondent submits the testimonial evidence of Mr. Sruoga, who attended the meetings mentioned by the Claimant and who states that he has no recollection of the Argentine Republic promising any compensation to Orazul at any moment.¹²¹⁷
991. The Respondent thus concludes that even if the Tribunal were to find that the security treatment set forth in Article II(2)(c) of the US-Argentina BIT is applicable, with the broad scope sought by the Claimant, it is not established that the behavior of the Argentine Republic was contrary to the standard of treatment established under that article.

3. The Tribunal's analysis

992. In a first step, the Tribunal must determine whether the Claimant can invoke the umbrella clause contained in Article II(2)(c) of the US-Argentina BIT based on Article IV(2) of the Argentina-Spain BIT.
993. The Tribunal recalls that Article IV(2) of the BIT provides the following:

¹²¹² Respondent's Rejoinder on the Merits, ¶ 849.

¹²¹³ *Id.*

¹²¹⁴ Respondent's Counter-Memorial, ¶ 574; Respondent's Rejoinder on the Merits, ¶ 850.

¹²¹⁵ Respondent's Counter-Memorial, ¶ 573.

¹²¹⁶ *Id.*, ¶ 574; Respondent's Rejoinder on the Merits, ¶ 851; Tierno I, ¶ 75.

¹²¹⁷ Sruoga I, ¶ 31.

*In all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country.*¹²¹⁸

994. In addition, the parties to the BIT included a Protocol to the BIT, which provides as follows in its first paragraph:

With reference to articles IV and VII:

*The interpretation of articles IV and VII of the Agreement shall be that the Parties consider that the application of most-favoured-nation treatment shall not extend to the specific treatment reserved by either Party for foreign investors in respect of investments made in the context of concessionary funding provided for in a bilateral agreement concluded by that Party with the country to which the aforementioned investors belong, such as the Treaty for the establishment of a special associative relationship between Argentina and Italy of 10 December 1987 and the General Treaty of cooperation and friendship between Spain and Argentina of 3 June 1988.*¹²¹⁹

995. The Tribunal recalls its above finding that the language of Article IV(2) of the BIT is broad and refers to “*all matters governed by this Agreement.*” The Tribunal found in its assessment of jurisdiction and admissibility, that Article IV(2) is sufficiently broad to cover a dispute resolution provision contained in Article 13 of the Australia-Argentina BIT and in Article VII of the US-Argentina BIT. The Tribunal reached this finding in view of the fact that dispute resolution was “*a matter governed by this Agreement*” given that Article X of the BIT expressly addresses dispute resolution.
996. The Tribunal reaches a different conclusion regarding the umbrella clause. The BIT does not contain an umbrella clause, which is therefore not a matter governed by the BIT. In this regard, the Tribunal agrees with the tribunal in *Teinver v. Argentina*, which found with respect to the Argentina-Spain BIT that “*the plain and ordinary meaning of [matters] is to refer to the various rights or forms of protection contained in the individual provisions of the Treaty.*”¹²²⁰
997. The Tribunal has carefully examined whether the phrase “*in all matters governed by this Agreement*” could be interpreted even more broadly so as to cover the protection of foreign investors in general. The Tribunal finds that such an interpretation is not in line with the wording of Article IV(2) of the BIT, which uses the plural form “*matters*”

¹²¹⁸ Treaty (CL-246), Article IV(2).

¹²¹⁹ *Id.*, Protocol.

¹²²⁰ *Teinver v. Argentina – Award (CL-99)*, ¶ 884.

instead of referring to the sole and only matter of “*protection of foreign investors.*” The Tribunal finds that the matters referred to in Article IV(2) of the BIT are the substantive and procedural protections referred to in the BIT.

998. The Tribunal’s interpretation of Article IV(2) of the BIT does not render the MFN clause contained therein meaningless since it may still serve to “*enhance*” the standards of protection contained in the BIT, as illustrated by the Tribunal’s above finding with respect to Article X of the BIT.
999. The Tribunal finds support for its approach in the decision *Teinver v. Argentina*, in which the tribunal reached a similar conclusion with respect to the same BIT. The *Teinver* tribunal held:

*In the Tribunal’s view, in interpreting the scope of the MFN Clause contained in Article IV(2) of the Treaty, meaning must be given to the critical words “[i]n all matters governed by this Agreement. According to the Claimants, this language should be interpreted as referring generally to the protection of foreign investors. This interpretation is too broad and disregards the reference to all “matters” governed by the Treaty. In the Tribunal’s view, the plain and ordinary meaning of this language is to refer to the various rights or forms of protection contained in the individual provisions of the Treaty. The Tribunal accepts that the parties to the treaty were in all likelihood aware of the existence of umbrella clauses and if they had intended to include such a clause in the Treaty, they would have done so.*¹²²¹

1000. The Tribunal has noted that the Claimant criticizes this decision. Relying on Dolzer and Schreuer, the Claimant argues that the *Teinver* tribunal “*ignore[d] the indisputable fact that the parties [...] included in the treaty both the negotiated substantive matter and also the MFN rule.*”¹²²² The Tribunal disagrees. The *Teinver* tribunal did not ignore this fact but reached a different interpretation of the term “*matters*” contained in the BIT.
1001. The Claimant also relies on the decision in *EDF v. Argentina* to support the proposition that a “*similarly drafted MFN clause*” in the Argentina-France BIT was found to permit recourse to the umbrella clauses of third-country treaties.¹²²³ However, the Tribunal finds that the MFN clause in the Argentina-France BIT differed from the MFN clause contained in Article IV of the BIT: the MFN clause in the Argentina-France BIT applied

¹²²¹ *Ibid.*

¹²²² Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed.) (CL-173), p. 209.

¹²²³ *EDF v. Argentina* (CL-14), ¶ 929.

generally with respect to investments and activities associated with such investments, without being limited to “*all matters governed by [that] Agreement.*”¹²²⁴

1002. The Claimant has not shown that any of the other decisions invoked by the Claimant¹²²⁵ would require the Tribunal to reach a different finding with respect to Article IV of the BIT.
1003. The Tribunal therefore concludes that the Claimant does not benefit from the umbrella clause contained in Article II(2)(c) of the Argentina-United States BIT based on Article IV(2) of the BIT. The Tribunal therefore does not need to decide whether the further requirements for a breach of Article II(2)(c) of the Argentina-United States BIT are fulfilled in the present case. The Claimant’s claim based on a breach of Article IV(2) of the BIT in conjunction with Article II(2)(c) of the Argentina-United States BIT must be rejected.

XI. The Respondent’s defense of necessity

1004. The eleventh issue in dispute between the Parties concerns the Respondent’s defense of necessity. The Tribunal having reached the finding that the Respondent did not breach any obligations under international law, the Tribunal does not need to consider the merits of the Respondent’s defense of necessity. The Tribunal nevertheless sets out the Parties’ positions on necessity in summary fashion for completeness.

1. The Respondent’s position

a) The applicable standard

1005. The Respondent submits that the state of necessity has been established under customary international law as a circumstance precluding wrongfulness, which, in certain cases, may exempt a State from international responsibility.¹²²⁶ The Respondent argues that in the field of international responsibility, necessity refers to the situation of

¹²²⁴ *Ibid.*

¹²²⁵ Claimant’s Reply on the Merits, ¶ 685, referring to *EDF v. Argentina (CL-14)*, ¶¶ 932-934; *Arif v. Moldova (CL-86)*, ¶ 396; *Bayindir v. Pakistan (CL-323)*, ¶¶ 155, 157.

¹²²⁶ ILC’s Articles on Responsibility of States for Internationally Wrongful Acts, Article 25, annexed to UN General Assembly Resolution No. 56/83, 12 December 2001, UN Doc. A/RES/56/83 (**AL RA-266**); Ian Johnstone, “The Plea of ‘Necessity’ in International Legal Discourse”, *Columbia Journal of Transnational Law*, 2004, vol. 43 (**AL RA-189**), pp. 354-355; *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), ICJ, Judgment of 25 September 1997 (**AL RA-193**), ¶ 51; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004 (**AL RA-194**), ¶ 140; Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL 1 (2000) (**AL RA-191**); Jean J. A. Salmon, *Faut-il codifier l’état de nécessité en droit international?*, in *ESSAYS IN HONOUR OF JUDGE MANFRED LACHS* (1984) (**AL RA-192**), 270.

a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it under an international obligation to another State.¹²²⁷ The Respondent contends that the fact that there is no provision in the Argentina-Spain BIT such as the clause on the protection of essential interests in the US-Argentina BIT does not prevent it from invoking the protection of essential interests and state of necessity under customary international law under the BIT.

1006. The Respondent states that Article 25 of the ILC Articles provides the conditions under which necessity may be invoked under customary international law. According to the Respondent, the ILC has recognized that the plea of necessity may be raised to protect a wide range of essential interests, including the preservation of the very existence of the State and its population in a time of public emergency, as well as the guarantee of the security of a population.¹²²⁸
1007. The Respondent submits that, under international investment law, the admissibility of the necessity defense under customary international law has also been recognized.¹²²⁹

b) Application to the facts

1008. The Respondent's position is that the essential requirements of the state of necessity arising from the definition of the ILC Articles are met in the case at hand. The Respondent considers that the measures taken by the Energy Secretariat in the electricity sector, for which Orazul brings its claims, are a consequence of the severe economic, financial, institutional and social crisis.¹²³⁰ According to the Respondent, the Energy Secretariat had to adapt the regulation of the electricity sector to the new macroeconomic context and to the new circumstances of the electricity market in view of the need to guarantee the supply of energy for users under accessible conditions upon the severe situation lashing the country. Accordingly, the Respondent submits with respect to the Claimant's argument that the Respondent's defense fails because the Claimant is not asserting its claims as a result of the pesification, that the Claimant's alleged expectations are similar to a pre-crisis situation.¹²³¹

¹²²⁷ *Report of the International Law Commission on the work of its thirty-second session*, 5 May - 25 July 1980, Chap. III, ¶ 34, commentary to Article 33, ¶ 1, U.N. Doc. A/35/10 (AL RA-190).

¹²²⁸ Respondent's Rejoinder on the Merits, ¶ 865; Commentaries from the ILC on the Responsibility of States for Internationally Wrongful Acts, commentary on Article 25, ¶ 14, in *the Report of the International Law Commission on the Work of its Fifty-third Session*, 2001, chapter IV, U.N. Doc A/56/10 (AL RA-198).

¹²²⁹ Respondent's Counter-Memorial, ¶ 581.

¹²³⁰ Respondent's Rejoinder on the Merits, ¶ 896.

¹²³¹ *Id.*, ¶ 895.

1009. The Respondent argues that after the crisis broke out, the Energy Secretariat had to implement reasonable changes to the regulations governing the electricity sector in order to adjust them to the macroeconomic context and the new circumstances of the electricity market because it was necessary to guarantee the supply of affordable electric power.¹²³² In the words of the Respondent’s witness, Mr. Cameron, the measures were necessary “*given the lack of resources and the depletion of the Stabilization Fund in June 2003, to preserve the supply of electricity to users.*”¹²³³
1010. With respect to the Claimant’s argument that the Respondent could have turned to subsidies, the Respondent contends that it would have been necessary to subsidize more than half of the Argentine population, which is materially impossible.¹²³⁴ In any event, the Respondent considers that the Claimant has failed to prove that other alternatives would have been viable.¹²³⁵
1011. In addition, the Respondent submits, as was held in *LG&E v. Argentina*,¹²³⁶ that the measures it adopted do not impair in any manner the essential interests of the other State party to the BIT (*i.e.*, Spain), a third State or the international community.
1012. Finally, the Respondent submits that there is no obligation to compensate under the application of the state of necessity defense.¹²³⁷

2. The Claimant’s position

a) The applicable standard

1013. The Claimant’s position is that the Respondent may not rely on the necessity defense.¹²³⁸ The Claimant argues that the Respondent relies upon customary international law because the BIT does not contain a “*non-precluded measures clause*” (*i.e.*, a clause that would allegedly allow either BIT party, Argentina or Spain, to take actions otherwise prohibited by the BIT under certain circumstances).¹²³⁹ The Respondent failed to show that the necessity defense is available and applicable in this case.¹²⁴⁰

¹²³² Respondent’s Counter-Memorial, ¶ 594.

¹²³³ Cameron III, ¶ 9.

¹²³⁴ Respondent’s Rejoinder on the Merits, ¶ 915.

¹²³⁵ *Id.*, ¶ 919.

¹²³⁶ *LG&E v. Argentina (CL-24)*, ¶ 257.

¹²³⁷ Respondent’s Rejoinder on the Merits, ¶¶ 929 *et seq.*

¹²³⁸ Claimant’s Reply on the Merits, ¶¶ 774 *et seq.*; Claimant’s Annex A to its Reply on the Merits, ¶¶ 1 *et seq.*

¹²³⁹ Claimant’s Annex A to its Reply on the Merits, ¶¶ 1, 5.

¹²⁴⁰ *Id.*, ¶ 5.

1014. The Claimant also notes on the basis of the *Gabčíkovo-Nagymaros Project* case that the doctrine of necessity is subject to the satisfaction of cumulative requirements, which are not met in the present case.¹²⁴¹
1015. The Claimant adds that any protection offered by necessity is temporarily-limited, lasting only as long as the conditions of the doctrine are met.¹²⁴²
1016. Furthermore, the Claimant submits that a State may not rely on necessity if it contributed to the crisis situation in a sufficiently substantial way. The Claimant adds that the doctrine does not require that a State be the sole contributor of the purported situation of necessity. In addition, as held by *Impregilo v. Argentina*, the Claimant submits that intent is irrelevant in the inquiry of a State's contribution.¹²⁴³

b) Application to the facts

1017. The Claimant's position is that the Respondent does not meet the requirements for a plea of necessity.¹²⁴⁴ The Claimant states that the Respondent's necessity defense necessarily fails because Orazul is not asserting claims as a result of the Government's pesification of the economy in the early 2000s. The Claimant adds that the Respondent does not even mention the electricity sector, the disputed measures, or a single event that occurred immediately before and after Orazul's acquisition of its participation in Cerros Colorados.¹²⁴⁵
1018. The Claimant asserts that the Respondent bears the burden of proving that it has satisfied the requirements of a state of necessity defense, which is subject to judicial inquiry, *i.e.*, the Respondent is not the sole judge of whether such requirements are met.¹²⁴⁶ According to the Claimant, the Respondent has failed to discharge such burden in many other cases before.¹²⁴⁷

¹²⁴¹ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, 1997 ICJ REP. (AL RA-193), ¶¶ 51 *et seq.*

¹²⁴² Claimant's Annex A to its Reply on the Merits, ¶ 11.

¹²⁴³ *Impregilo v. Argentina (CL-18)*, ¶ 356.

¹²⁴⁴ Claimant's Annex A to its Reply on the Merits, ¶¶ 14 *et seq.*

¹²⁴⁵ *Id.*, ¶ 3.

¹²⁴⁶ Claimant's Annex A to its Reply on the Merits, ¶ 14; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 Sept. 1997, 1997 ICJ REP. (AL RA-193), ¶ 51.

¹²⁴⁷ Claimant's Annex A to its Reply on the Merits, ¶ 15; referring to: *AWG v. Argentina (CL-30)*, ¶ 265; *BG Group v. Argentina (CL-54)*, ¶ 412; *CMS v. Argentina (CL-10)*, ¶ 331; *EDF v. Argentina (CL-14)*, ¶ 1169; *El Paso v. Argentina (CL-23)*, ¶ 665; *Enron v. Argentina (CL-26)*, ¶ 321; *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014 [hereinafter: *Hochtief v. Argentina*] (CL-177), ¶ 301; *Impregilo v. Argentina (CL-18)*, ¶ 359; *Mobil v. Argentina (CL-103)*, ¶ 1124; *National Grid v. Argentina (CL-64)*, ¶ 262; *Sempra v. Argentina (CL-27)*, ¶ 388; *Suez v. Argentina (CL-100)*, ¶ 243; *Total v. Argentina (CL-29)*, ¶ 345.

1019. With respect to the requirements of necessity, the Claimant first contends that an essential interest of the Respondent was not threatened by a grave and imminent peril.¹²⁴⁸ The Claimant argues that since the economy's normalization was followed by strong economic growth, the Respondent cannot show that any grave and imminent peril threatened an essential interest as late as mid-2004 and mid-2006, which is the starting point for the quantification of Orazul's losses. The Claimant refers to a message from the Executive to the National Congress to affirm that the Respondent, by its own admission, has not been under a state of emergency for at least 17 years and it did not face any crisis nor was it threatened by a grave and imminent peril when it enacted the measures.¹²⁴⁹ According to the Claimant, the Respondent recovered from the crisis by the end of 2003 and the beginning of 2004, as was for example recognized by the tribunal in *Total v. Argentina*¹²⁵⁰ and even by the three tribunals that found that a state of necessity existed in Argentina.¹²⁵¹
1020. The Claimant also alleges that the disputed measures were not the only means to safeguard the Respondent's interest as the Government could have adopted different viable courses of action, such as subsidies. According to the Claimant, the Respondent did not need to unlawfully repudiate its obligations under the Electricity Law, and force Orazul to invest its unpaid receivables in power plants, in addition to other egregious conduct, to safeguard any essential interest.¹²⁵²
1021. With respect to the requirement of contribution, the Claimant contends that the Respondent generated and significantly contributed to any imbalances in the power generation sector. The Claimant submits that the Respondent's decision to perpetuate the 2003 disputed measures, in addition to subsequent arbitrary conduct, including the restriction on Cerros Colorados' ability to enter into PPAs on the term market, and the forced investments in the FONINVEMEM program, among other actions, created an unsustainable system.¹²⁵³ The Claimant recalls *inter alia* that the *Total* tribunal found that "*the inability of CAMMESA to pay the electricity supplied by generators was due to CAMMESA's insufficient revenues which has been caused, in turn, by the pricing*

¹²⁴⁸ Claimant's Annex A to its Reply on the Merits, ¶¶ 17 *et seq.*

¹²⁴⁹ Message from the Executive to the National Congress Regarding 2004 Budget dated 15 September 2004 (C-250), p. 22.

¹²⁵⁰ *Total v. Argentina* (CL-29), ¶¶ 172, 345.

¹²⁵¹ *LG&E v. Argentina* (CL-24), ¶ 228; *CCC v. Argentina* (CL-120), ¶ 157; *Urbaser v. Argentina - Award* (CL-113), ¶¶ 729, 813.

¹²⁵² Claimant's Annex A to its Reply on the Merits, ¶ 22.

¹²⁵³ *Id.*, ¶ 24.

mechanism established by the SoE after 2002.”¹²⁵⁴ Moreover, the Argentine economy had recovered by 2003 and continued to improve between 2004-2006.¹²⁵⁵

1022. The Claimant adds that even if a state of necessity existed, the Respondent would still be under a duty to compensate Orazul.¹²⁵⁶ Article 27(2) of the ILC Articles make clear that the operation of necessity does not serve as a bar to “*compensation for any material loss caused by the act in question.*”¹²⁵⁷ According to the Claimant, the Respondent’s measures caused severe damage to Orazul, for which it must be compensated and the Respondent failed to meet its burden to prove the necessity defense.¹²⁵⁸

3. The Tribunal’s analysis

1023. Having rejected all of the Claimant’s claims, the question of whether there are circumstances precluding wrongfulness is not relevant for the Tribunal’s decision. The Tribunal therefore finds that it does not need to address the issue of the Respondent’s defense on necessity.

G. QUANTUM

1024. The Tribunal having reached the finding that the Respondent did not breach any obligations under international law, the Tribunal equally rejects the Claimant’s claim for compensation and interest. The Tribunal nevertheless sets out the Parties’ positions on quantum in summary fashion for completeness.

I. The Claimant’s position

1025. The Claimant submits that it is entitled to compensation corresponding to lost profits it did not receive due to Argentina’s breaches of the BIT.¹²⁵⁹
1026. According to the Claimant, its claim is made up of three separate (but cumulative) heads of damages, namely (i) damages related to lost spot prices (or lost ‘Gross Energy Margin’), (ii) damages related to lost capacity payments, and (iii) damages related to

¹²⁵⁴ *Total v. Argentina (CL-29)*, ¶ 345.

¹²⁵⁵ BRG II, ¶ 81, Figure 8, p. 37.

¹²⁵⁶ Claimant’s Annex A to its Reply on the Merits, ¶¶ 35 *et seq.*

¹²⁵⁷ *ILC’s Articles on State Responsibility: Responsibility of States for Internationally Wrongful Acts*, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (CL-131), Article 27(b).

¹²⁵⁸ Claimant’s Annex A to its Reply on the Merits, ¶ 38.

¹²⁵⁹ Claimant’s Memorial, ¶¶ 523 *et seq.*; Claimant’s Reply on the Merits, ¶¶ 779 *et seq.*

the allegedly forced contribution of receivables to FONINVEMEM or the Trust Fund at non-market terms.

1027. The Claimant submitted alternative valuations with its Post-Hearing Brief, “*assuming breaches concerning Spot Prices and Capacity Payments on mid-2006, February 2010, and March 2013,*”¹²⁶⁰ quantifying its damages in the amount of either USD 667.3 million, 504.8 million, or 364.4 million plus interest.

1028. The Claimant’s alternative valuations are as follows:¹²⁶¹

		Head of Damages	Nominal Damages	Interest	Total
Mid-2006	Reduced Revenues	Spot Prices	172.2	115.4	287.6
		Capacity Payments	138.0	191.2	329.2
	Withheld Remuneration	Non-Market Loans	36.6	13.9	50.5
	Total Damages		346.8	320.5	667.3
Alternative Valuation: Breach as of February 2010*	Reduced Revenues	Spot Prices	163.7	86.6	250.4
		Capacity Payments	106.4	97.6	204.0
	Withheld Remuneration	Non-Market Loans	36.6	13.9	50.5
	Total Damages		306.8	198.2	504.8
Alternative Valuation: Breach as of March 2013	Reduced Revenues	Spot Prices	148.0	62.1	210.1
		Capacity Payments	72.7	37.8	110.5
	Withheld Remuneration	Non-Market Loans	36.6	13.9	50.5
	Total Damages		257.4	113.8	364.4

II. The Respondent’s position

1029. The Respondent’s view is that because it observed its international obligations under the BIT, there is no obligation to compensate the Claimant.¹²⁶² However, in the event that the Tribunal were to hold the Respondent to be internationally liable, the Respondent’s position is that the Claimant has not proven the requirements for reparation and its claim exceeds all damages principles under international law.

1030. Specifically, the Respondent argues that (i) the Claimant has failed to prove as a matter of fact any damage or loss; (ii) the Claimant has failed to prove that the losses it claims to have suffered were directly and exclusively caused by any measure implemented by the State; (iii) the compensation sought by the Claimant is excessive both as regards the facts and the law; (iv) the Claimant’s claim for damages exceeds the primary obligations of the Parties, disregards the conduct of the Parties, and results in a grossly inequitable outcome; (v) the Claimant breached its duty to mitigate damages as it had an unreasonable delay in bringing its claim; and (vi) the compensation sought by the

¹²⁶⁰ Claimant’s Post-Hearing Brief, ¶ 134.

¹²⁶¹ *Ibid.*

¹²⁶² Respondent’s Counter-Memorial, ¶¶ 609 *et seq.*; Respondent’s Rejoinder on the Merits, ¶¶ 941 *et seq.*

Claimant implies double recovery inasmuch as Cerros Colorados has already collected its receivables under the agreements entered into with the Argentine Republic.¹²⁶³

III. The Tribunal's analysis

1031. The Tribunal having rejected the Claimant's claims in their entirety, the Tribunal equally rejects the Claimant's claim for compensation and interest.

H. COSTS

I. The Claimant's position

1032. The Claimant requests an order that the Respondent bear all of the Claimant's costs incurred in connection with the proceedings, including attorney's fees, expert and witness fees, the Tribunal member's fees and expenses, and the costs of the Centre.¹²⁶⁴ The Claimant considers that legal and factual considerations demand that it be the Respondent who exclusively pays for all costs related to this proceeding. The Claimant's total fees, expenses, and costs total USD 17,437,692.09.
1033. The Claimant submits that while the Treaty is silent with regard to the allocation of costs, Article 61(2) of the ICSID Convention and Rule 28(1) of the ICSID Arbitration Rules grant tribunals discretion to decide on the allocation of costs of the arbitration.¹²⁶⁵ The Claimant recalls that tribunals usually adopt one of two main approaches. The first approach is that each party should bear its own costs while the other is the "*costs follow the event*" rule, by which the losing party bears all or part of the costs of the proceedings, including those of the prevailing party. Regardless of which approach tribunals use, according to the Claimant, tribunals determine the final allocation of costs based on several factors, which include, among others, a party's relative success in the arbitration, the seriousness of the treaty breach, the use of procedural tactics that unreasonably increase time and costs, and the reasonableness of the costs incurred.
1034. The Claimant is of the view that the Respondent engaged in conduct which has significantly and needlessly increased the costs of the arbitration and warrant awarding cost recovery to the Claimant.¹²⁶⁶ Specifically, the Claimant submits that the costs of the arbitration were increased due to the Respondent's objections to the Tribunal's

¹²⁶³ Respondent's Rejoinder on the Merits, ¶ 942.

¹²⁶⁴ Claimant's Memorial, ¶ 600.

¹²⁶⁵ Claimant's Submission on Costs, ¶ 3.

¹²⁶⁶ *Id.*, ¶¶ 8 et seq.

jurisdiction and request for the bifurcation of the proceedings when it knew that such objections lacked merit. The Claimant also argues that the Respondent devoted inordinate time in its written and oral submissions to its necessity defense, despite knowing full well that the Claimant was not challenging Argentina's emergency measures of 2002-2003, and that investment tribunals had repeatedly rejected Argentina's necessity defense for measures postdating those years. The Claimant further argues that the Respondent also caused the Parties and the Tribunal to unnecessarily devote additional resources when it alleged, including at the Hearing, that "*it was not until the 2016 transaction took place that Cerros Colorados began to question the measures, [which] represented a complete reversal of its behavior until then.*"¹²⁶⁷ According to the Claimant, that allegation prompted the Tribunal, during the Hearing, to request a submission specifying the complaints on the record.

1035. The Claimant also alleges that the Respondent's procedural misconduct warrants awarding cost recovery to the Claimant.¹²⁶⁸ In particular, the Claimant submits that the Respondent pursued a belated request for the production of a wide-range of documents concerning, *inter alia*, Cerros Colorados' acquisition by Duke Energy International LLC and I Squared Capital in 1999 and 2016, respectively, as well as the value of the Claimant's investments. The Claimant argues that such request was overly broad. Moreover, according to the Claimant, the Respondent ultimately raised virtually no arguments with respect to the documents because they ratified the Claimant's position. The Claimant also submits that the Respondent raised unsupported allegations about the authenticity of several exhibits at the Hearing and in an unsolicited letter after the Hearing, increasing the Claimant's costs. The Claimant further argues that the Respondent raised a number of objections to the Claimant's translations and required that the language of the proceedings be in Spanish, while litigating in English, further increasing the Claimant's costs. In addition, despite being informed of the identity of the Claimant's party representatives a month prior to the commencement of the Hearing, the Claimant submits that the Respondent waited until the evening before the closing arguments at the Hearing to raise an inquiry in connection with one of the Claimant's representatives, Mr. Kay, and the potential existence of third-party financing in this case.

1036. The Claimant further states that the Respondent's allegations on the Claimant's costs are baseless.¹²⁶⁹

¹²⁶⁷ *Id.*, ¶ 11, referring to Hearing Transcript, Day 1, p. 161.

¹²⁶⁸ *Id.*, ¶¶ 13 et seq.

¹²⁶⁹ Claimant's Reply to Respondent's Submission on Costs, ¶¶ 8 et seq.

1037. Finally, the Claimant considers that its costs were reasonable in view of the length of the proceedings, the issues in dispute, and the extent of the Claimant's damages allegedly caused by the Respondent's alleged breaches.

II. The Respondent's position

1038. The Respondent requests that the Tribunal order the Claimant to pay all expenses and costs arising out of the proceedings, including the fees and expenses of the members of the Tribunal, the charges for the use of the facilities of the Centre, the fees and expenses incurred by the Respondent and any other expense that might arise from these proceedings.¹²⁷⁰ The Respondent's total fees, expenses, and costs total USD 1,709,080.

1039. The Respondent argues that tribunals have discretion to allocate costs based on Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules.¹²⁷¹ The Respondent submits that when exercising their discretion in the apportionment of costs, tribunals have considered the particular circumstances of the case, including, *inter alia*, (i) the reasonableness of the costs incurred, (ii) the relative success of the parties on all the issues presented, including the ratio in which the amount awarded differed from the amount claimed, and (iii) the parties' overall conduct during the proceedings. The Respondent adds that when a respondent State is successful on an objection on the tribunal's jurisdiction or the admissibility of claimant's claim, tribunals have awarded costs to the State.

1040. The Respondent submits that the lack of any jurisdictional basis or merit in the Claimant's claim should lead the Tribunal to order the Claimant to pay all the reasonable costs incurred by the Respondent in its defense. Even if the Tribunal were to accept part of the Claimant's case, the Respondent submits that it should still be awarded its costs due to the Claimant's conduct during the proceedings.

1041. The Respondent submits that the Claimant's lack of transparency and procedural misconduct throughout the proceedings is a basis to award costs to the Respondent.

1042. First, the Respondent argues that the Claimant unduly and deliberately delayed the initiation of the proceedings by deciding to bring its claim in late August 2019, more than 15 years after the Energy Secretariat adopted the core measures that are the real cause of the dispute, and failed to prove a compelling reason for such delay. According to the Respondent, this increased the Respondent's costs unnecessarily by making the evidence seeking process much more burdensome. Furthermore, the Respondent

¹²⁷⁰ Respondent's Counter-Memorial, ¶ 763; Respondent's Rejoinder on the Merits, ¶ 1198; Respondent's Submission on Costs, ¶¶ 6 *et seq.*

¹²⁷¹ Respondent's Submission on Costs, ¶ 3.

submits that it had to allocate resources to respond to peripheral or hearsay witness testimony presented by the Claimant.

1043. Second, the Claimant opposed the bifurcation of the proceedings, which would have contributed to the efficiency of the proceedings, despite the fact that the Respondent's preliminary objections were not frivolous or vexatious and had a significant chance of being upheld.
1044. Third, the Respondent submits that throughout the proceedings, the Claimant repeatedly and deliberately withheld relevant documents, even in violation of the Tribunal's order regarding the production of evidence. The Respondent submits that the exchanges between the Parties and the Tribunal not only caused delays in the proceedings, but also forced the Respondent's legal team to devote significantly more time and resources than would have otherwise been used in preparing for the Hearing. All these exchanges could have been avoided if the Claimant had produced the documents on time and in full, instead of making the issuance of two procedural orders necessary for that purpose.
1045. Fourth, the Respondent submits that the Claimant resorted to dilatory and bad faith tactics during the Hearing. The Respondent argues that the Claimant's attempt to frustrate the proceedings by challenging the President in the midst of the Hearing not only caused unnecessary delays, but also resulted in further costs that should be allocated exclusively to the Claimant. Furthermore, the Respondent submits that the timing of the Claimant's communication of Prof. Schreuer's non-appearance at the Hearing must also be taken into account. The Respondent states that it was not until the day before the commencement of the Hearing that the Claimant advised that it would not be possible to cross-examine him via videoconference despite the fact that his health condition dated back to July 2022. By the time of the Hearing, the Respondent's legal team had already devoted many hours and resources to preparing Prof. Schreuer's cross-examination, which could have been avoided had the Claimant timely notified the Respondent and the Tribunal of this situation.
1046. Fifth, the Respondent submits that the Claimant repeatedly and intentionally misrepresented the record in an effort to mislead the Tribunal. The Respondent points to the alleged production by the Claimant of inaccurate translations of key documents from which the Claimant attempted to draw alleged commitments by the Respondent. Furthermore, according to the Respondent, the Claimant produced as evidence documents that appear to have been redacted or altered, and even went so far as to submit a Quantum America report appearing to have been drafted by an employee of Inkia Energy, one of the companies of the I Squared Capital group to which the Claimant belongs.

1047. Sixth, the Respondent submits that the Claimant's speculative and abusive model on damages should lead the Claimant to be held liable for the Respondent's costs.
1048. Finally, the Respondent notes that the costs it incurred are reasonable in view of the length of the proceedings and the issues in dispute on jurisdiction and admissibility, merits, and quantum.
1049. With respect to the Claimant's costs, the Respondent submits that in the unlikely event that the Claimant prevailed on any of its claims, it should not be awarded the amount of compensation claimed nor its unreasonable costs. The Respondent *inter alia* submits that there is a striking disproportion between the Parties' costs and that the Claimant improperly seeks to recover categories of costs that should never have been included and must thus be denied *in limine*.¹²⁷²

III. The Tribunal's analysis

1050. The Parties agree that the Tribunal enjoys broad discretion to allocate costs pursuant to Article 61(2) of the ICSID Convention:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

1051. The Tribunal notes that each Party seeks to recover the entirety of its costs related to this arbitration, including the legal fees and expenses incurred in connection with these proceedings. Both Parties argue that such a cost award is warranted because they should prevail in the arbitration and because the other Party has engaged in procedural misconduct leading to delay and increasing costs.
1052. Having considered all circumstances of the case, the Tribunal decides that each Party shall bear its own costs. The Tribunal considers that both Parties have advanced meritorious arguments in the proceedings and have been partly successful and partly unsuccessful in their arguments before the Tribunal. The Claimant was successful on jurisdiction and admissibility, while the Respondent prevailed on the merits.
1053. The Tribunal has also duly taken note of the Parties' mutual allegations concerning their respective conduct of the proceedings. However, the Tribunal sees no reason to depart from its above finding that each Party shall bear its own costs and half of the arbitration

¹²⁷² Respondent's Reply to Claimant's Submission on Costs, ¶¶ 3 *et seq.*

costs. In particular, the Tribunal does not find it appropriate to sanction the Parties. Rather, the Tribunal has come to the conclusion that both Parties have efficiently assisted the Tribunal in the task of resolving this dispute.¹²⁷³

1054. Accordingly, the Tribunal is of the view that each Party shall bear its own costs and half of the arbitration costs.¹²⁷⁴
1055. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant and ICSID's administrative fees and direct expenses amount to a total of USD 1,486,422.00 broken down as follows:

Arbitrators' fees and expenses	
Inka Hanefeld	373,383.57
David R. Haigh	266,483.08
Alain Pellet	169,592.50
Assistant's fees and expenses	
Charlotte Matthews	129,136.30
Aaron de Jong	12,140.00
ICSID's administrative fees	220,000.00
Direct expenses	315,686.55
Total	1,486,422.00

1056. These costs have been paid out of the advances made by the Parties.¹²⁷⁵

I. DISPOSITIF

1057. For all of the foregoing reasons, the Tribunal decides as follows:
- a. The Tribunal has jurisdiction over the Claimant's claims, which are admissible.**
1058. By majority view, the Tribunal decides:
- b. The Claimant's claims are rejected in their entirety;**

¹²⁷³ Prof. Pellet nevertheless regrets an excessive tendency on the part of both Parties to multiply procedural incidents and conduct unnecessary procedural discussions.

¹²⁷⁴ Prof. Pellet feels it nonetheless necessary to point out that the amount of expenses claimed by the Claimant is a further example of a worrying trend towards undue inflation of the costs in investment arbitral proceedings.

¹²⁷⁵ The ICSID Secretariat will provide the Parties with a detailed Financial Statement. The balance in the case account will be refunded to the Parties proportionally to their contributions.

- c. Each Party shall bear its own costs and half of the arbitration costs;**
- d. All other claims and pleas for relief are rejected.**

[signed]

Mr. David R. Haigh, KC
Arbitrator

Subject to the attached dissenting opinion

Date: 12 December 2023

Prof. Alain Pellet
Arbitrator

Date:

Dr. Inka Hanefeld
President of the Tribunal

Date:

[signed]

Mr. David R. Haigh, KC
Arbitrator

Subject to the attached dissenting opinion

Date:

Prof. Alain Pellet
Arbitrator

Date: 13 December 2023

Dr. Inka Hanefeld
President of the Tribunal

Date:

Mr. David R. Haigh, KC
Arbitrator

Subject to the attached dissenting opinion

Date:

Prof. Alain Pellet
Arbitrator

Date:

[signed]

Dr. Inka Hanefeld
President of the Tribunal

Date: 11 December 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Orazul International España Holdings S.L.

v.

Argentine Republic

(ICSID Case No. ARB/19/25)

DISSENTING OPINION – DAVID R. HAIGH, KC

Members of the Tribunal

Dr. Inka Hanefeld, President of the Tribunal
David R. Haigh, KC, Arbitrator
Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal

Ms. Anna Toubiana, ICSID

Assistant to the Tribunal

Ms. Charlotte Matthews

A. INTRODUCTION

1. I have had the opportunity to meet with my colleagues on our Tribunal and to consider their draft Award in this matter. I have no difficulty concurring with their finding that our Tribunal has jurisdiction and that the Respondent's objections to jurisdiction and admissibility must be rejected.¹
2. I do not, however, agree with my colleagues (the **Majority**) on their proposed findings on liability. I have accordingly prepared this Dissenting Opinion to describe to some extent my reasons for this disagreement. In particular, I would find that the Respondent has breached its duty to extend fair and equitable treatment (**FET**) to the Claimant and should be liable for damages accordingly.

B. FAIR AND EQUITABLE TREATMENT

3. I have a number of points of disagreement with my colleagues' analysis and reasoning and will endeavour to identify some of the more significant of those differences. As I go through my own analysis, I will not attempt to replicate all of the submissions we have received. It is not, therefore, my objective to review all points considered, but rather to give a brief explanation for my disagreement with the Majority.
4. At the outset, I do not accept that the Majority has correctly framed the issue before us based on the Claimant's pleadings. The Majority has stated:²

634. ...the Claimant argues that the Respondent should have changed the regulatory framework as applicable in 2003. Specifically, the Claimant claims to have had the expectation that the market would be 'restored' by mid-2006, which is the basis for the Claimant's damages calculation. In the alternative, the Claimant submits that it expected the market to be restored at the latest in 2010 when the two FONINVEMEM I Plants went into operation. Such expectation forms the basis for the Claimant's alternative damages calculation.³

¹ I should note that I also do not disagree with my colleagues on certain other findings, such as their determination on the Claimant's case for expropriation or their determination on the inapplicability of the umbrella clause.

² Award, paras. 634 and 635.

³ Internal footnotes omitted.

635. ...The relevant question to be determined in this case is rather whether the Claimant had a legitimate expectation that the regulatory framework as existing in 2003 would be modified and, specifically, that it would be modified in the way alleged by the Claimant by mid-2006 or 2010.

5. With respect, in my opinion, this description of the Claimant's case turns the matter on its head. In fact, the real question before us is whether after 2003 the Energy Secretary's express representations that the 2003 regulations were transitory and temporary would be honoured so that certain mandatory parts of the Electricity Law would be restored by 2006 or, at the latest, by 2010.
6. With this framing of the issue, I would find that Argentina failed to act as the Energy Secretary said he would act. Thus, it is not, as the Majority states, a matter of the Claimant expecting that the regulatory framework would be modified, but rather that the 2003 regulatory departures from the requirements of the Electricity Law would be merely transitory, as promised and, accordingly, the Energy Secretary's compliance with the Electricity Law would be restored.
7. The basic resolutions in place in 2003 unambiguously demonstrate the promise that they were transitory or temporary. In fact, the context was set with Resolution 2/2002 which referenced adoption of "transitory measures."⁴ The Energy Secretary's Resolution 240/2003, dated 14 August 2003, stated in the fifth whereas clause:⁵

The provisions in this resolution contain partial and transitory rules which are both necessary and urgent to address the state of emergency affecting the country's economy, in as much as it has a detrimental effect on the WHOLESale ELECTRIC MARKET (WEM).

8. Article 1 of Resolution 406/2003 then stated:⁶

Article 1 – Given the depletion of the resources available in the WHOLESale ELECTRICITY MARKET Stabilization Fund and the differences between the Seasonal Price fixed and the Hourly Spot Market Prices recorded, the methodology described in this resolution is hereby temporarily established in order

⁴ Resolution 2/2002, dated 14 March 2002, fifth whereas clause (C-186).

⁵ Resolution 240/2003, dated 14 August 2003, fifth whereas clause (C-8).

⁶ Resolution 406/2003, dated 8 September 2003, third whereas clause (C-9).

to preserve the supply required to meet demands not backed by Electric Power Agreements in the Term Market.

9. Resolution 406/2003 recited, in part:

Therefore, given the country's current state of public and economic emergency, this Office deems it convenient to establish a transitory mechanism for the assignment of scarce and insufficient resources to settle the receivables of the Agents of the Wholesale Electricity Market (WEM), in a manner that prioritizes the payment of accepted costs, with the purpose of ensuring the availability of supply to meet demands not backed by Electric power Agreements in the Term Market.⁷

10. The reference in this resolution to "a transitory mechanism" mirrored this same exact wording in a 2003 technical report recommending the enactment of this resolution.⁸

11. Resolution 240/2003 was itself suspended by the Energy Secretary in October 2003, based on revised forecasts for the availability of natural gas.⁹ As a result, it was not clear at the end of 2003, whether or to what extent this Resolution would be reinstated.

12. On 27 November 2003, the Energy Secretariat issued Resolution 943/2003 modifying Resolution 406/2003. Article 1 provided for modification of the amounts that would be paid to generators and stipulated that the modification would be "transitory."¹⁰

13. The terms "transitory" and "temporary" are easily understood. Their meaning must have been equally clear to the Energy Secretary and the generators operating in Argentina in 2003. Black's Law Dictionary defines "temporary" as an adjective meaning, "Lasting for a time only; existing or continuing for a limited (usu. short) time; transitory."¹¹ The term, "transitory", is defined by the Cambridge Business Dictionary as, "only lasting for a short period of time."¹²

14. Other, subsequent actions of the Energy Secretariat continued to express the transitory quality of these measures. For example, in the 2004-2008 National Energy Plan, the

⁷ Resolution 406/2003, dated 8 September 2003, third whereas clause (**C-9**).

⁸ Energy Secretariat, *Technical Report in Administrative Docket No. EXP-S01:143056/2003 (part 1)*, 2003, para. 2 (**C-103**).

⁹ Deputy Secretary of Energy, Note No. 526, dated 10 October 2003, para. 1 (**C-159**).

¹⁰ Resolution No. 943/2003, dated 27 November 2003, article 1 (**C-209**).

¹¹ *Black's Law Dictionary*, Seventh Edition, 1999.

¹² *Cambridge Business English Dictionary*, Cambridge University Press, 2022.

Government included a plan entitled, “Electrical Agreement for the Re-adaptation of the WEM until December 2006” with the objective of achieving the sustainability of the Wholesale Electricity Market in the medium term and identified a “Transition Period: May 2004 – December 2006.”¹³

15. The Majority finds that words such as “transitory” or “temporary” are “neither a specific promise nor an assurance to the Claimant that the Argentine electricity regulatory framework would be restored to the framework prevailing during the 1990s, even less so under the specific timeframe foreseen by Claimant.”¹⁴ I do not accept this conclusion. A generator such as the Claimant was perfectly entitled to take these words at their face value. The promise of the Energy Secretary was that his departure from the Electricity Law was temporary and the measures in 2003 were transitory. This is not about the “regulatory framework” prevailing in the 1990s, but rather about the Electricity Law which, in pertinent respects, remained unchanged and unamended at all relevant times up to the time of the hearing in this case. As for the timing expectations, one need merely refer to the National Energy Plan, as I have done in the immediately preceding paragraph, above, from which it is obvious that the 2003 measures were projected to lead to “readaptation” of the WEM by the end of 2006. The “Transition Period” is expressly acknowledged to cover the period “May 2004 – December 2006.” Generators would naturally anticipate that that projection could be relied upon.

C. REVIEW OF THE REASONING OF THE MAJORITY

16. The Majority have addressed their findings in “six analytical steps.”¹⁵ I will briefly address these analyses and provide my own views of those findings in a summary way.
17. The Majority says “the Claimant’s subjective expectations do not suffice as a basis for legitimate expectations.”¹⁶ As I have already indicated, I disagree that the Claimant’s expectations were merely subjective. Instead, I find that the Claimant’s expectations were based solidly on what the Energy Secretary expressly stated in Resolution 240/2003 and Resolution 406/2003, reinforced by subsequent communications, all under the overarching requirements of the Electricity Law. The information shown in the Claimant’s

¹³ Minister of Federal Planning, Investment and Services and Energy Secretary, National Energy Plan 2004-2008, p. 21 (C-154).

¹⁴ Award, para. 668.

¹⁵ *Id.*, para. 637.

¹⁶ *Id.*, para. 637.

2004 Budget Review simply corroborates the expectation held by the Claimant. In other words, it was a real, contemporaneous, as opposed to an after-the-fact, expectation.¹⁷ It was also an expectation shared by other generators, such as *Petrobras Energía Participaciones S.A.*¹⁸

18. The Majority explains that, in their view, conditions in place at the time of the investment, that is around December 2003, "... were marked by the ongoing crisis and ongoing changes."¹⁹ The Majority further comments that, "[i]t was a time of regulatory change and a time of constant economic changes and there was no clarity which further changes would happen and within which timeframe."²⁰ The Majority says there was, therefore, "...no basis for the legitimate expectation that the Respondent would restore the regulatory framework as applicable in the 1990s."²¹
19. I disagree with these determinations. I would point, for example, to the message sent to Congress by the National Executive Branch on 16 September 2003, which stated, "[t]he Bill of the National Administration's General Budget reflects the macroeconomic context with a significant recovery of the economic activity from mid-2002, emphasized in 2003".²² A year later, the same body confirmed, "[i]n 2003, activity recovered steadily, reaching a GDP growth level of 8.8% (a magnitude that had not been observed since 1997), in a context of low inflation (only 3.7% in the case of the CPI)."²³ The Respondent's Rejoinder on the Merits sets out a graph which shows Argentina's GDP per capita steadily increasing from 2003 onwards to 2010, rising from slightly more than US\$2,000 to over US\$10,000 in that period.²⁴ In the case of *Total v Argentina*, the tribunal found that by the time President Kirchner took office in May 2003, "Argentina had emerged from the crisis as commentators, international organizations and other arbitral tribunals in investment disputes against Argentina have recognized."²⁵ And, further, "[i]t is generally recognized

¹⁷ DEI Group, Budget Assumptions 2005, dated 15 November dated 2004 (**C-67**).

¹⁸ *Petrobras Energía Participaciones S.A.*, Form 6-K, 1 April 2004 (**C-10**).

¹⁹ Award, para. 637.

²⁰ *Id.*, para. 652.

²¹ *Id.*, para. 637.

²² Message Sent to Congress by Argentine National Executive Branch Regarding the 2004 Budget, dated 16 September 2003, p. 1 (**C-244**).

²³ Message Sent to Congress by Argentine National Executive Branch Regarding 2005 Budget, dated 15 September 2004, p. 22 (**C-250**).

²⁴ Respondent's Rejoinder, para 130, graph prepared by Respondent based on data from the World Bank, Evolution of Argentina's GDP per capita 1997-2010 (**A RA-362**).

²⁵ *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, dated 27 December 2010 (**Total v Argentina Decision on Liability**), para. 171 (**CL-29**).

that Argentina's economy quickly recovered from the crisis—by the end of 2003 and the beginning of 2004.”²⁶

20. The Majority states that, even if there had been a legitimate expectation that the Respondent would take regulatory measures on the basis of the Electricity Law, the Claimant's claim would not be founded because, "... the Electricity Law did not contain a guarantee of stability with respect to the regulatory conditions as applicable during the 1990s.”²⁷ I disagree with this characterization of the claim. The Claimant's claim is not that there should be "a guarantee of stability" for regulatory conditions in the 1990s, but rather that the Energy Secretary would follow the mandatory requirements of the Electricity Law from which he had temporarily diverged. Articles 35 and 36 of the Electricity Law state:²⁸

Article 35. The Energy Secretariat shall lay down the rules to govern the operation of the DNDC [CMMESA]. Such rules shall ensure transparency and fairness in decisions, and the following principles shall be considered:

- a. To allow the execution of freely agreed contracts between the parties, such parties being generation companies ..., large users and distribution companies (term market);
- b. To dispatch the required demand on the basis of recognition of energy and capacity prices as set in the following article, which market participants shall expressly undertake to accept, in order to be entitled to supply or receive electricity not freely agreed upon by the parties.

Article 36. The Energy Secretariat shall issue a resolution with the economic dispatch rules to be applied by the DNDC [CMMESA] to the energy and capacity transactions provided in Article 35(b) above. This rule shall provide that all generation companies shall receive a uniform price for the electricity they sell at each point of delivery to be defined by the DNDC, based on the economic cost of the system. In calculating such price, the cost that the unsupplied electricity represents for the community shall be taken into account.

²⁶ *Id.*, para. 172.

²⁷ Award, paras. 637 and 670.

²⁸ Law No. 24,065, dated 16 January 1992 (C-2).

21. The Majority finds that, "... the language of Articles 35 and 36 of the Electricity Law leaves considerable discretion to the Energy Secretariat in the setting of capacity payments. It does not prescribe any specific currency, method of calculation or price that the Energy Secretariat should reflect in its resolutions."²⁹ I disagree with this conclusion. The mandatory verb, "shall", appears several times in these two articles. It is perfectly clear that Article 35a contemplates the execution of "freely agreed contracts between the parties". It is equally clear that energy was to be dispatched on the basis of prices as set under Article 36. That Article, in turn, required that all generation companies "shall receive a uniform price for the electricity they sell at each point of delivery" and that such uniform price was to be defined by CAMMESA, "based on the economic cost of the system". These requirements in Articles 35 and 36 did not leave the Energy Secretariat with considerable discretion in relation to "freely agreed contracts" nor in relation to the requirement for a "uniform price" based on the economic cost of the system. Unless Articles 35 and 36 of the Electricity Law were amended, the Energy Secretary was compelled to follow their strictures at all relevant times.
22. These requirements in the Electricity Law describe exactly what a generator such as the Claimant was entitled to expect from the Government of Argentina. These phrases in Articles 35 and 36 set forth the principles that the Claimant and, no doubt, other generators, expected would be followed. Resolutions are, under Argentina's legal regime, subordinate to a law, such as the Electricity Law and, it follows, that a resolution of the Energy Secretary could not over-rule or displace the Electricity Law.
23. The Electricity Law at all relevant times remained unamended and unchanged in this respect. The language used in Articles 35 and 36 does not raise a question of some idyllic return to market conditions in the 1990s, as the Award repeatedly appears to infer, although the Argentine electricity markets had functioned well at that time. I disagree with how the Majority construes the Claimant's case as though it expected regulatory conditions applicable in the 1990s, for example through Resolution 61/92, to be restored. Nor does the language in Articles 35 and 36 require a guarantee of regulatory stability. But, the Claimant expected, quite legitimately in my opinion, that the mandatory provisions of these two articles in the Electricity Law, as quoted above, would be restored and observed. If this restoration was not the Government's intention, then it should not have

²⁹ Award, para. 676.

continually referred to the measures interfering with the requirements of that law as transitory or temporary. In any event, if the Government's intention was to vary the Electricity Law on a long-term basis, then the Electricity Law in these articles should have been amended by the legislature. In fact, it was never changed or amended in this respect and so should have been followed by the state's regulators.³⁰

24. In their fourth point, the Majority finds that the 2003 resolutions, "... even if they confirmed the transitory and temporary nature of the measures, cannot serve as a basis for the Claimant's legitimate expectations at the time of the investment."³¹ The Majority holds that, "... with respect to the alleged restriction of the Claimant's ability to sell on the term market through Resolution 956/2004, Resolution 1,281/06, and Resolution 95/13, the [Majority] notes that all these resolutions were adopted after the Claimant's investment."³² According to the Majority, it is obvious, therefore, that these resolutions could not have been a basis for the Claimant's expectations.³³ The Majority further develops its conclusion in relation to the impacts that these three resolutions had on the term market for PPAs, namely: a surcharge to existing PPAs pursuant to Resolution 956/2004;³⁴ a differential treatment for large users benefitting only PPAs entered into with new plants pursuant to Resolution 1,281/2006;³⁵ and temporary suspension of the execution of new PPAs in the term market and the introduction of *Energía Plus*, pursuant to Resolution 95/2013.³⁶
25. If the Claimant was relying on these particular resolutions, standing alone, to demonstrate what its reasonable or legitimate expectations were at the time of its investment, then the Majority's conclusion could be arguable. However, it is my understanding that the Claimant's contention is not that these later, specific Resolutions were the basis for its expectations, by themselves, but rather that these later resolutions perpetuated the breach

³⁰ In focussing my analysis on the Electricity Law, I am not overlooking or disregarding the significance of the Claimant's submissions based on the promises made in the Selling Memorandum (*Selling Memorandum for the Privatization of Hidroeléctrica Norpatagónica S.A.* dated December 1992, **C-6**), or the Concession Contract (Concession Contract, **C-79**, especially articles 8 and 70), or the terms in the FONINVEMEM I Agreement (**C-36**, Article 1 and specifically the *Adhesion Contract*, **C-211** and **C-106**) and other, similar contentions. As I explain in my Dissenting Opinion, the Electricity Law simply expresses the fundamental principles on which the Claimant's legitimate expectations were based. These other submissions only go to reinforce those principles.

³¹ Award, para. 690.

³² *Id.*, para. 691.

³³ *Id.*, para. 695.

³⁴ Resolution No. 956/2004, dated 28 September 2004 (**C-210**).

³⁵ Resolution No. 1,281/2006, dated 4 September 2006 (**C-176**).

³⁶ Resolution No. 95/2013, dated 22 March 2013 (**C-21**).

of the Claimant's expectations based on the Electricity Law, expectations that were formed at the time of its investment at the end of 2003.³⁷

26. The Claimant pleads that, "... Resolution 240/03 did not change the criteria for dispatching energy. However, it did change the criteria for calculating the Spot Price by excluding higher liquid fuels and water value (if it was more expensive than natural gas) from the VCP calculation."³⁸ In support of this assertion, the Claimant quotes CAMMESA:

[D]ispatch continues to be carried out based on the actual fuels used [by generators] but for the calculation of the spot price, it is considered that all dispatched generation has an unrestricted supply of natural gas and the value of the water is not considered [for the calculation] to fix prices if it is higher than ... natural gas.³⁹

27. The Claimant says that, "[p]rior to Resolution 240/03, the maximum Spot Price varied in order to reflect the risk of failure or outages. Following the enactment of Resolution 240/03 however, the Spot Price was capped at AR\$ 120/MWh."⁴⁰

28. The Claimant has submitted that:⁴¹

...instead of fulfilling its promises and reversing the Measures that led to the unsustainability of the system in the first place, Argentina extended the temporary regime. Even worst, [*sic*] Argentina imposed additional Measures that further interfered with Orazul's investments, while at the same time offering new power plants more favourable, ...market-based terms through specific pro-investment programs, like *Energia Plus*...

29. In addition, the Claimant has further submitted that:⁴²

Following Orazul's investment in Cerros Colorados, the Government adopted additional Measures that were inconsistent with the Electricity Law and increasingly interfered with Cerros Colorado. Throughout its adoption of these

³⁷ Claimant's Memorial on the Merits, paras. 202-203 *ff.*

³⁸ *Id.*, para. 198.

³⁹ CAMMESA, 2004 Annual Report, p. 3 (C-72).

⁴⁰ Claimant's Memorial on the Merits, para. 199.

⁴¹ *Id.*, para. 202.

⁴² *Id.*, para. 203.

Measures, however, the Government continued reassuring power generators that the original market-based rules would be restored.

30. These excerpts from the Claimant's pleading show that the expectation on which the Claimant is relying is that Argentina would obey its own Electricity Law, especially in relation to the mandatory requirements for a "uniform price" and "freely" negotiated contracts for the sale of electricity.⁴³
31. Accordingly, I find that I cannot agree with the Majority's conclusion that the Claimant is relying on these later Resolutions of the Energy Secretary as a basis for its legitimate expectations at the time of its investment in December 2003. That conclusion, in my opinion, is knocking down a straw man argument that the Claimant has not made.
32. The Majority's fifth point concerns the FONINVEMEM Agreements. As with their fourth point, the Majority point to the fact that these "legal acts" date from a point in time after the Claimant's investment. The Majority says that, "... the Claimant has not shown that they breached its legitimate expectations."⁴⁴
33. In response to this conclusion, I am obliged to observe that the Claimant did not, as I understand it, rely on the FONINVEMEM Agreements as the basis for its expectations at the time of the investment. On the contrary, the Claimant has continually relied on the provisions of the Electricity Law, as I have earlier noted. Those provisions were obviously in place in December 2003.
34. I find it convenient to refer to the determination of the tribunal in the case of *Total v Argentina* which found that the FONINVEMEM scheme was an abuse of authority and a breach of the FET protection under the BIT.⁴⁵

336. The Tribunal agrees with [the claimant] that [the forced conversion of receivables into a stake in FONINVEMEM] resulted in a *de facto* refusal by Argentina to pay power generators their receivables, even at the reduced values resulting from the measures.

⁴³ *Id.*, paras. 204 *et seq.*

⁴⁴ Award, para. 696.

⁴⁵ *Total v. Argentina* Decision on Liability, paras. 336-338 (CL-29).

337. The Tribunal is not convinced by Argentina's argument that generators who decided to participate in FONINVEMEM ... did so on a voluntary basis. On the contrary, based on the evidence submitted, the Tribunal agrees with [the claimant] that the conversion offered by Argentina as of August 11, 2004 cannot be defined as "voluntary." If not "forced," it was certainly strongly induced by putting generators in a situation where they had no choice other than to accept the scheme or otherwise risk suffering higher losses. First, generators were faced with a situation in which the institution (CAMMESA), which was appointed by the public regulator to manage the market efficiently, was unable to pay for the electricity produced and distributed to consumers because consumers were charged an insufficient tariff. Second, the generators were put in the position of choosing either to contribute 65% of their past and future receivables to FININVEMEM and become shareholders of the generators that were to be built with the corresponding funds, or to hold unpaid receivables, payment of which was legally and factually uncertain in regards to when, how, and how much would be paid.

338. This scheme must be considered as a kind of forced, inequitable, debt-for-equity swap, not due to unfavourable market conditions or a company's crisis (as is usually the premise of such swaps in the private market), but due to governmental policy and conduct by Argentina. As such, in the view of the Tribunal it represents a clear breach of the [FET] obligation of the BIT for which Argentina is liable to pay damages. The liability of Argentina is not excluded by the fact that the shares resulting from the conversion have a market value as adduced by Argentina, since the generators have been or are being installed. The determination of the value of those shares is relevant to the valuation of damages and will have to be taken into account in the quantum phase.

35. I concur fully with these determinations and would make virtually the same finding in this case. The coercion of generators into accepting FONINVEMEM and entering into the Adhesion Contract was not consistent with the Electricity Law in any sense whatsoever.
36. My colleagues have set out some of the provisions of the Adhesion Contract, including Article a1 which indicated that, "[t]he aim of this document is to establish the basis on which the WHOLESALE ELECTRIC MARKET (MEM) would be restored, meaning that it would be readjusted to normalize the regular operation of the MEM as a competitive market, with sufficient supply, in which Generators, Distributors, Traders, Participants and Large energy Users can buy and sell electricity at prices determined by the offer and the

demand, without regulatory distortions and within the framework established by law 24,065.”⁴⁶ In my opinion, this language, drafted by the Energy Secretariat, is referring directly to the requirements of Article 35a of the Electricity Law, that is, “freely agreed contracts between the parties, such parties being generation companies ... large users and distribution companies (term market).”⁴⁷

37. Any possible doubt in this regard is resolved later in Article a1 of the Adhesion Contract itself. It provided, *inter alia*, that, “The Energy Secretary shall:

(iv) When the Market is restored once the new equipment built with FONINVEMEM resources commences commercial operations, abrogate Resolution 240 of the ENERGY SECRETARIAT dated 14 August 2003, and remunerate generators with the System’s Marginal Price as set under “THE PROCEDURES”, in a free spot market, considering the cost of unsupplied energy, with a water value that represents the thermal replacement value.”⁴⁸

38. This language made it perfectly clear that the Energy Secretary was promising to withdraw Resolution 240/2003 upon commencement of commercial operations by the generators built with other generators’ money and then to restore a free spot market. To have done so would have complied with the requirements of the Electricity Law, as I have already noted them. As it happened, however, that is not what occurred. When the new generating facilities came on stream, the Energy Secretary did not act in accord with the obligatory language, above.

39. I therefore disagree with my colleagues forming the Majority and would instead find that the Claimant’s reasonable and legitimate expectations, based on the Electricity Law, and further evidenced by the FONINVEMEM Agreement, were breached by the Energy Secretary.

40. The Majority’s sixth reason for their decision to deny the Claimant’s claim in this case is that prior investment arbitration cases on the Argentine electricity framework do not change the Majority’s conclusion. I am surprised by this determination. The Majority’s

⁴⁶ FONINVEMEM Adhesion Contract, dated 6 December 2004, article a1 (C-211).

⁴⁷ Law No. 24,065, dated 16 January 1992 (C-2).

⁴⁸ FONINVEMEM Adhesion Contract, dated 6 December 2004, article a1 (C-211).

view is that “it has strong reasons to distinguish the circumstances of this case from those of both the *Total* and *El Paso* cases.”⁴⁹

41. The Majority note that, “[b]oth Total and El Paso made their investments in a favorable legal environment where the Electricity Law and the regime prevailing in the 1990s was the relevant benchmark against which to assess any rights or expectations.”⁵⁰ They then hold that:⁵¹

709. The Claimant’s investment, in contrast, took place as late as December 2003, i.e., in a crisis environment where the Emergency Law and a different regulatory regime under the Electricity Law were in place, generators had not been able to collect their past and future receivables in full since June 2003 [internal footnotes omitted], and where, pursuant to Resolution 943/2003, past and future receivables would be paid only when the Unified Fund was able to do so, at a date to be determined by the Energy Secretariat in the future. Accordingly, Total’s or El Paso’s situations are not comparable to that of the Claimant and, thus, those tribunal’s findings do not change the Tribunal’s conclusion.

42. I have already shown earlier in this Dissenting Opinion that by the time the Claimant made its investment at the end of December 2003, the Argentine economy had made a strong recovery from the 2002 crisis. In any event, what is more critical to my disagreement with the Majority’s opinion in this regard is that the Electricity Law in its essential features, particularly those I have highlighted from Articles 35 and 36, remained intact and unamended for the duration of not only Total’s and El Paso’s investments but the Claimant’s as well. What the tribunals in the cases of *Total v Argentina* and *El Paso v Argentina*⁵² found to be contrary to the Electricity Law and breaches of the relevant BITs are the very same actions under consideration in this arbitration.

43. Thus, the tribunal in *Total v Argentina* held:⁵³

328. It cannot be disputed however, that the pricing system the SoE progressively put in place after 2002 is at odds with those principles as spelled out in the Electricity

⁴⁹ Award, para. 705.

⁵⁰ *Id.*, para. 708.

⁵¹ *Id.*, para. 709.

⁵² *El Paso International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, dated 31 October 2011 (*El Paso v Argentina*) (CL-23).

⁵³ *Total v Argentina* Decision on Liability paras. 328-330 (CL-29).

Law, even leaving pesification out of consideration. After 2002, the market has been characterized by unreasonably low tariffs [internal footnote omitted]. These, in turn, have massively reduced the returns of generators, barely permitting them to cover their variable costs, contrary to sound economic management principles for power generators operating within a regulated system of public utilities [internal footnote omitted]. The low prices encouraged a substantial increase in consumption that could not be matched by a parallel increase in supply, since the producers could not finance new investments under the rigid administrative pricing system in place [internal footnote omitted]. The unsoundness of such a policy in light of practices generally followed in modern societies to ensure electricity supply, when this is left to private companies, is demonstrated by the subsequent lack of investment, power failures and the need to import electricity to Argentina (while the country was previously self-sufficient or even an exporter to neighbouring countries) [internal footnote omitted].

329. The *Energia Plus* program and the FONINVEMEM scheme (to finance new generators through the use of unpaid receivables of existing generators) show that the pricing mechanisms put in place after 2002 were not economically sustainable. The Tribunal recalls that new electricity producers are to be remunerated at higher prices under the *Energia Plus* program so as to encourage new investments since existing generators lacked resources to expand due to default of CAMMESA and the Stabilization Fund. This mechanism is in contrast with the principle of uniform price, which should reflect the economic cost of the system and ensure that new investments are made according to the demand [internal footnote omitted].

330. The Tribunal considers that this situation, brought about by the SoE with full awareness of its negative impact on affected generators operating under sound economic principles, cannot be reconciled with the fair and equitable treatment standard of Article 3 of the BIT. As a consequence, the Tribunal finds that Argentina has violated the BIT in this respect.

44. I fully agree with that tribunal's reasoning and see no reason whatsoever to dismiss it on the basis that Total had invested at a different time or in a different economic climate than the Claimant in this case. Their reasoning and condemnation of the Energy Secretary's measures obviously do not turn on when Total invested. As I stated earlier, what remains consistent are the relevant provisions of the Electricity Law and Argentina's duty to extend FET pursuant to the BIT applicable here. I do not accept the Majority's distinguishing of this case from that of *Total v Argentina*. Accordingly, while my colleagues say that they

recognize that “achieving a coherent body of law is an important objective,”⁵⁴ it is one that in my opinion they have failed to uphold. I would make similar observations about the *El Paso v Argentina* case and the determination by that tribunal that Argentina’s actions breached the FET standard of protection.

45. My colleagues have concluded that, “having reached the finding that the Respondent did not breach any obligations under international law, the Tribunal equally rejects the Claimant’s claim for compensation and interest.”⁵⁵ While it is evident that I do not share their finding on liability in this case, I agree that it is pointless to consider the quantum to be awarded. Accordingly, I will not review the requests for damages made by the Claimant. Suffice it to say that I would have awarded the Claimant substantial damages for Argentina’s breach of the FET protection under the BIT.
46. I would likewise have awarded the Claimant its full costs of this arbitration as it was successful not only on the jurisdiction of this Tribunal, but should have been successful in its claim on liability.

⁵⁴ Award, para. 705.

⁵⁵ *Id.*, para. 1024.

[signed]

Mr. David R. Haigh, KC
Arbitrator

Date: 12 December 2023