

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

El Paso Energy International Company
Claimant,

- against -

The Republic of Argentina,
Respondent.

)
) **Case No. ARB/03/15**
)
)
)
)
)
)
)
)
)
)
)
)

)
) **Legal Opinion of**
) **M. Sornarajah**
)
)
)
)
)
)
)
)
)
)
)
)

I, M. SORNARAJAH, declare as follows:

1. I have been asked for my opinion as to the issues raised in the arbitration brought before ICSID arising out of a claim by El Paso against the Republic of Argentina. El Paso alleges that Argentina through measures taken in the course of an economic crisis in the country had violated rights of El Paso arising from the Bilateral Investment Treaty between the United States and Argentina.
2. I begin by stating my competence to provide this opinion. I am currently CJ Koh Professor of Law at the National University of Singapore. I have taught Public International Law at various law schools and institutions in Australia, the United Kingdom, the United States, the People's Republic of China, Switzerland, Sri Lanka and Singapore. Within that subject, I have specialized on issues relating to foreign investment and arbitration of foreign investment disputes. I have

researched these fields while holding fellowships at several institutions. I was Research Fellow at the Centre for International Law, University of Cambridge and at the Max Planck Institute for Foreign and International Law at Heidelberg, Germany. I am a Professorial Fellow at the Centre for Petroleum and Natural Resources Law at the University of Dundee, Scotland. I was Visiting Professor at the World Trade Institute of the Universities of Berne and Neuchatel in Switzerland. I hold the degree of Doctor of Laws of the University of London awarded on the basis of my published works on Public International Law. I have written several books and articles on the subject of foreign investment and foreign investment arbitration, including The International Law on Foreign Investment (Second Edition, Cambridge University Press, Cambridge, 2004), The Settlement of Foreign Investment Disputes (Kluwer, The Hague, 2001) International Commercial Arbitration : The Problem of State Contracts (Longman, 1992) The Law of International Joint Ventures (Longman, 1990) and The Pursuit of Nationalized Property (Martinus Nijhoff, 1986). Two UNCTAD publications, Taking of Property and State Contracts, were based on manuscripts written by me. I have been arbitrator, sole arbitrator, counsel and expert in several arbitrations involving foreign investments. I was Director of the Programme on Investment Treaties of the UNCTAD and the WTO at New Delhi and Pretoria. I am a Fellow of the Australian Centre of International Commercial Arbitration and a Member of the Regional Panel of the Singapore International Arbitration Centre. I am a Solicitor of the High Court of England and Wales. I am an Advocate and Solicitor

of the High Court of Singapore. A detailed curriculum vitae is attached to this opinion.

THE FACTS

3. El Paso is a company registered in Delaware, USA. It entered Argentina in 1989 through purchase of 45% of the shareholdings in CAPSA which in turn held shares of CAPEX. El Paso also purchased 12% of the shareholding of Costanera and incorporated a company Servicios through which it operated in the petroleum sector. El Paso claims that its entry into Argentina was influenced by the liberalization programmes which Argentina took to deal with the inflationary pressures in its economy in the 1980s. These measures largely involved privatization, introduction of free market mechanisms particularly into the energy sectors and the monetary reform that pegged the Argentine peso to the American Dollar. In addition, Argentina signed investment treaties with many states, including the United States.

4. In 2001, a severe economic crisis came about in Argentina. The undesirable effects of the currency peg were showing forcefully. Social unrest, engendered as a result of recession and unemployment, resulted in widespread violence in the cities. Complementary currencies had emerged in the provinces adding to the problem of currency flows from the Argentine economy. A lack of confidence in the currency system resulted. People began withdrawing money from the banks and converting them into dollars. Debt payments that Argentina had to make were

heavy. Faced with these problems, the government removed the currency peg and began a programme designated as the “pesification” of the economy. The Claimant argues that these measures affected its rights under the US-Argentine Bilateral Investment Treaty. The Claimant bases its claims on the violation of these rights. The issues that arise from the dispute are considered in the following paragraphs. The issues dealt with in this opinion arise from the papers filed in this arbitration by the two parties as well as from the opinions submitted by two experts of the Claimant: Professors Reisman and Schreuer. They are discussed in this opinion from the point of view of whether the requirements for maintaining this claim are satisfied and whether the Argentinian measures did in fact violate any of the rights of the Claimant under the Treaty.

The Nature of the Investment Rights Claimed.

5. In investment arbitrations, the identification of the nature of the investment that is the subject matter of the claim is crucial as the application of the rules, the alleged violation of the rights and the potential relief that can be afforded will depend on the nature of the investment. In this case, the identification of the nature of the investment is difficult because the Claimant largely made indirect investments in the Argentine economy through several existing companies which operated within the regulatory context of laws existing in Argentina. The protection claimed is as a shareholder in companies that have existed in Argentina for several years before the Claimant entered Argentina. Only Servicios was incorporated after Claimant’s

entry. The effects of the measures were caused on the Argentinian Companies. The Claimant is a minority shareholder in these companies. While interference with the right to hold shares is definitely covered by investment treaties, the issue still remains contested whether a foreign shareholder of a company may claim violations of treaty rights when the company itself does not protest at the measures or does not have the rights to claim through international arbitration because it is a national of the host state. (This proposition is made despite the decision to the contrary in some awards which will be discussed later). If the foreign shareholder can, indeed protest, then, there comes about a situation where the governance of the company itself becomes difficult as the foreign minority shareholder could threaten arbitration under the treaty each time the company and the majority shareholders decide to comply with the regulatory measures of the state. This clearly, is not a situation contemplated by the makers of the treaty. It puts shareholders within the corporate structure, quite unwittingly, at positions of inequality. This was not what was intended to be done when shareholder protection was devised through investment treaties. The protection is confined to the shares in that forced divestment is prevented and if the company is dissolved through state measures, the foreign holder of shares has a right of standing to recover their value. That is the extent of protection that foreign shareholders are given by investment treaties.

The Nature of the Claimant's Rights.

6. The rights that the Claimant argues have been affected are the rights of Argentinian Companies, principally CAPSA and CAPEX in which the Claimant was, directly or indirectly, a minority shareholder. Being Argentine companies, they cannot hold rights under the bilateral investment treaty against Argentina, their home state. One issue is whether shareholders in these companies can have rights, beyond their rights as shareholders, arising from the investment treaty on the ground that they are foreign investors protected by the treaty. The argument is that these rights arise because the Claimant had invested in the company as a result of series of promises held out by the Argentinian government to potential foreign investors in the course of its liberalization and privatization programmes. While it is undoubted that there is a right in a foreign shareholder to protect his shares in a local company through the protection given to those shares directly, there is no authority to support the view that the rights of a functioning local company can be protected through the use of the investment treaty or that foreign minority shareholders in the company can seek investment treaty protection when the company itself decides to conform to the state measures. Having regard to the history of the inclusion of the protection of shareholdings in investment treaties, it is unlikely that such a course was contemplated by the states which made the treaty. Though there may be dicta in recent arbitrations supporting a contrary proposition, these dicta have been arrived at without a consideration of the intention of the parties making investment treaties and the mischief sought to be cured by including protection of shareholders in the treaty. It is not conceivable that diplomatic protection could be extended to a local company by a foreign state

on the basis that its nationals had shares in that company. Investment treaties are but devices to supplant the notion of diplomatic protection. That being the case, it is most unlikely that they sought to fashion anything more than a device to cure a particular problem of shareholder protection which arose from the Barcelona Traction Case.

7. Shareholder protection through treaties came about as a result of the decision of the International Court in the Barcelona Traction Case¹ which refused standing to the country of the shareholders and held that only the state of incorporation could intervene on behalf of the company. This left shareholders in foreign companies without protection. The investment treaties rectify this defect by ensuring that shareholders are protected. Such protection is only to prevent the shares being directly affected by the measures taken by the host state. It was also to ensure that if the local company was dissolved or taken over by the state, the foreign shareholders or their home states were entitled to ensure that their share in the compensation for such taking would be paid. Standing to do so was held to be lacking in Barcelona Traction and it was that particular defect that was being cured by the provisions of the investment treaties. There was no intention to protect the rights of the functioning local company through the fact that some of the shareholders were foreign and their home states had investment treaties with the state of incorporation of the companies. Such a course would be too intrusive. The defect that was sought to be cured was the rule in Barcelona Traction that

¹. [1970] ICJ Rpts 1.

only the state of incorporation of the company operating in another state had the right of diplomatic protection and *ius standi* to bring an action in respect of claims of the company and its shareholders and not the state of nationality of the shareholders. The situation was confined to the case where the corporation had been expropriated, as in the Barcelona Traction Case. The Rapporteur on Diplomatic Protection and the International Law Commission have affirmed the continuing relevance of the major rules in the Barcelona Traction Case for diplomatic protection.² Where change is to be made to those rules, the extent of the change made must be scrutinized with care. It is most unlikely that states transferred to multinational corporations a power they never claimed for themselves.

8. Investment treaties cure that particular defect by enabling the protection of shareholders. This became increasingly relevant since many developing states required entry of foreign investment only through incorporation of a local company, usually a joint venture company in which the foreigner held minority shares. If Barcelona Traction continued to be the law, the diplomatic protection of shareholders in such companies would be non-existent. BITs addressed the

² . The report of the Rapporteur concluded that "the wisest course seems to be to formulate articles that gives effect to the principles expounded in Barcelona Traction," endorsing both the primary rule (nationality derived from the state of incorporation) and the exceptions announced by the ICJ. The primary rule was formulated thus: "For the purposes of diplomatic protection, the State of nationality of a corporation is the State in which the corporation is incorporated [and in whose territory it has its registered office]." The International Law Commission added the requirement that the seat of management should also be in that state. U.N. Int'l L. Comm'n, Report of the International Law Commission, 56th Sess., U.N. Doc. A/59/10 at 13 (May 3--June 4 and July 5--Aug. 6, 2004). In Barcelona Traction, Sidro, the Belgian holding company was a majority shareholder in Barcelona Traction.

deficiency by ensuring the protection of shareholders. It created a unilateral right in the foreign shareholders to protect their shareholdings in those circumstances where there was interference with the shares by state measures such as forcible divestment or where the company in which the shares were held was expropriated. If the company continued to function and the shares were intact, the need for such protection would not arise. The measures affecting the company were matters for the company to take up in accordance with the legal system in which the company was incorporated. The mere fact that the shares had depleted in value does not give a cause of action to a minority shareholder under an investment treaty.³ Had the company been expropriated, the situation would be different as the minority shareholder has a right to compensation for the extent of his share in the value of the company.

9. In AAPL v Sri Lanka, an ICSID tribunal had held that the physical or intangible assets of a local company could not be protected by a foreign minority shareholder.⁴ This was a logical conclusion, consistent with the purposes of the investment treaty. The understanding in international law always was that “the

³ . As a matter of policy, such a consequence will be harmful. There would be a multiplicity of causes of action resulting from every economic fluctuation caused by changes in policy in a country in a multiplicity of claimants. It is not a result that could conceivably have been desired by the parties to an investment treaty.

⁴ . At para.90, the tribunal stated: “ ..the Treaty protection provides no direct coverage with regard to Serendib’s physical assets (“farm structures and equipment, shrimp stock in ponds, cost of training the technical staff, etc”) as such or to the intangible assets of Serendib if any (“good will , future profitability, etc”). The scope of the international law protection granted to the foreign investor in the present case is limited to the single item: the value of his share-holding in the joint venture entity (Serendib Company)”. In APPL v Sri Lanka, the joint venture company’s assets had been destroyed by army action. In Vacuum Salts v Ghana, the minority shareholder was held not to have standing to bring an ICSID claim on behalf of the company. The issue has to be looked at from the point of view of the ICSID Convention as well.

shares in a company incorporated in a host country are not usually affected by any measures taken there. It is the company itself that is the victim”.⁵ In these circumstances, the company, being a local company, had to defend its interests under local laws. The company, being a local company, had no personality to seek protection under an investment treaty. This situation cannot be subverted merely by ensuring that protected foreigners have minority shareholdings. The situation is different where the company itself is extinguished, as in the Barcelona Traction Case. Here, whether the shares in the company are directly or indirectly held, in terms of the investment treaty, protected shareholders can claim the value of their shares in the affected company. That was the extent of the change that investment treaties brought about. The change is grounded in the rules on diplomatic protection. The change is made on the basis of the rules on diplomatic protection⁶. The customary law does not protect shareholders for the reasons stated in Barcelona Traction. The investment treaties changed the law so that shareholders and their states are given status to protect shares, whether “directly or indirectly” held. The latter phrase refers to degrees of holding of the shares and no more. The clear intention was to protect the shares and the value of the shares when the company is expropriated. There could have been no intention to protect the shares of a functioning company, which had to be dealt with by the company laws of the host state.

⁵ . Francis Mann, “Foreign Investment in the International Court of Justice: The ELSI Case” (1992) 86 AJIL 86 at p.92.

⁶ . As indicated in footnote 2, the International Law Commission’s Rapporteur preferred the continuance of the rule while the International Law Commission suggested that the incorporation test be continued with the inclusion of additional requirements regarding actual management.

10. An initial question which the Tribunal will have to decide is whether the rights of the local company fall within the protection of the Treaty merely because protected foreigners hold shares in them, for the Claimant's case largely depends on the assertion that its own rights have been affected. Nothing stated by the Tribunal at the jurisdictional phase is conclusive on this basic issue as the Tribunal in that phase was only making a decision as to whether, *prima facie*, there was ground to believe that the Tribunal had jurisdiction.⁷ Neither is the fact that there are awards in which this issue has been cursorily considered binding on this Tribunal. This issue must be decided as a preliminary issue. Further discussion of the issues raised takes place on the assumption that the investment treaty protects shareholder rights beyond the protection of their rights as shareholders and includes the protection of the rights of the companies in which such shares are held.⁸

The Nature of the Rights Alleged to Be Affected

11. The rights of the Claimant are alleged to have been affected by the regulatory changes effected to deal with the economic crisis. These rights constitute the investments of the Claimant which are alleged to have been subjected to wrongful

⁷ . See the Tribunal 's decision on jurisdiction, at paras. 43-45.

⁸ . The International Court in the ELSI Case [1989] ICJ Rpts 15, para. 106 also made such an assumption: "While there may be doubt whether the word property in Article V, paragraph 1, extends, in the case of shareholders, beyond the shares themselves, to the company or its assets, the Chamber will nevertheless examine the matter on the basis argued by the United States that the property to be protected under this provision of the FCN Treaty was not the plant and equipment the subject of the requisition, but the entity of ELSI itself". ELSI was a wholly owned company.

treatment or expropriated. The investments are in the form of shareholdings the Claimant had in the affected Companies. These rights, if they exist, are intangible property. The nature of these rights must be clearly identified to determine whether they are of the type that fall within the definition of the investments protected by the treaty.⁹ Rights to property of individuals and corporations, whether tangible or intangible, do not arise in international law. International law does not have rules on personal property. Such rules on property can arise only in the domestic law of a state. It is the constitutional and regulatory regime of a state which recognizes the extent and the limits of the right to property. That right, so recognized, may come to be protected by international law, particularly through treaties on human rights or investment. The extent and limits of the right to property are not defined in international law. What exists in domestic law can be lifted out of the domestic sphere and subjected to international law.¹⁰ But, the domestic law content of these rights cannot be enhanced by such a process. Argentine law is therefore always relevant as it determines the nature of the rights that the Claimant argues are his investment protected by the Treaty.

12. The same propositions apply to contractual rights. Such rights too arise in the context of domestic law. International law does not have a law on the formation of contracts of foreign investment. The argument that, once made, they are akin to

⁹ . Joy Manufacturing Company v Egypt; Mihaly v Sri Lanka are two awards in which the claimants failed because the investments they claimed did not fall within the treaty definition of investments. The issue whether there was in fact an investment protected by the investment treaty was also considered in Patrick Mitchell v Republic of Congo.

¹⁰ . Nationality Decrees in Morocco Case (1923) PCIJ Series B, No.4

treaties, lacked credibility. The argument has been given up. Being domestic contracts, contracts of foreign investment create obligations only in domestic law. It is without doubt that, through the use of appropriate language,¹¹ the rights so created can be lifted up and subjected to an international regime of protection. But, the extent of those rights must depend on domestic law. They cannot be expanded by an international mechanism. They can be protected only to the extent they exist in domestic law. The only relevant instance in which the breach of a foreign investment contract can give rise to a remedy is where the foreign investor seeks a remedy for the breach from a local court and is denied remedy. But, in such a situation, the remedy arises not for the breach of the contract but for the denial of justice.¹² In this case too, the law of Argentina is always relevant in determining the extent of any contractual right that the Claimant alleges it had.

13. Having established these obvious propositions, it is necessary to look at the precise extent of the rights which the Claimant alleges are his investments and whether these rights are such investments as are protected by the relevant Treaty.

14. The rights claimed to be affected consist of shareholding interests in the Argentine Companies, capital contributions made under the Energy Regulatory Framework and alleged rights such as the right to export arising from general laws. The latter rights are those of the companies in which the Claimant had

¹¹ . The casually drafted umbrella clause in an investment treaty does not have this effect, as will be argued later.

¹² . The breach of the contract is not per se a violation of international law. CF Amerasinghe, Local Remedies Rule in International Law (2nd Ed., CUP, 2004)p. 137.

shares. There are also rights which are said to arise from general representations made by officials and agencies of the Government of Argentina on the ground that reliance was placed on them prior to entry. These representations were not made specifically to the Claimant but were made in order to attract investments into Argentina. To a large extent, these rights are either rights of the Argentine companies or rights allegedly arising from the existence of regulatory laws made by state agencies and representations made by officials. The rights are not personal to the Claimant. There do not appear to be any commitments given directly to the Claimant or even to the companies. The rights are said to arise from regulations and promotional statements to attract foreign investment associated with the liberalization programme prior to the entry of the Claimant. They are also said to be transformed into contractual rights. The process of this transformation has not been explained. The whole regulatory structure and the representations allegedly made are imported into the contracts with the companies. Jurisprudence shows that only in circumstances in which the foreign investor had obtained rights directly in his own capacity such as a license or a permit to export is violation of that right regarded as a violation of the investment. There are many grounds on which the alleged rights in this case do not fall within the category of covered investments protected by the Treaty.

15. Firstly, the rights, except possibly in the case of Servicios, are rights of Argentinian companies which cannot claim treaty protection against their own state. Secondly, jurisprudence supports that commitments specifically made and

contained in contracts, such as stabilization clauses or rights specifically created in the foreign investor through permits and licenses are protected by the investment treaties, all of which have similar definitions of investment. However, general statements seeking to attract investments are not such commitments as are protected by the treaty. Rather, existing jurisprudence generally suggests that only specifically created rights in the foreign investor, which are directly given to him, qualify as investments for the purpose of treaty protection.¹³ Promotional statements do not, despite the astounding reliance on the French Nuclear Test Case for the contrary view,¹⁴ create rights in domestic law or international law. Otherwise, every government tourist agency will implicate the state in liability under the treaty for the representations it makes about tourism in the state and every disgruntled tourist will have a cause of action under an investment treaty. Such expansionism would subvert the purposes of the investment treaty system. Thirdly, the rights are created in domestic law and are subject to domestic regulatory prescriptions as to the content of the rights. If they are extinguished in accordance with pre-existing law, there can be no investment to protect because of the fact that the nature and extent of those rights were prescribed by that regulatory framework.

Shareholder Protection.

¹³ . There are dicta in *CMS v Argentina* which goes against this proposition.

¹⁴ . In the French Nuclear Test Case, the Court seized upon a statement made on French television to hold that future testing was not contemplated and therefore orders ask for requiring France to desist from such testing had become moot. Here, the Court found a convenient way of avoiding pronouncement on a difficult legal issue. It must not be read as creating law.

16. Each of these grounds requires explanation. Shareholder protection of the rights of companies is a facet of company law. Companies assert their rights as companies. As indicated, in international law, shareholder protection became necessary because of the Barcelona Traction Case which denied standing to the home state of the majority shareholders of companies. Thereafter, there was a specific need to provide for the protection of shares in companies being affected by such measures as forced sales, particularly in states which mandated entry of foreign investment only through participation in locally incorporated joint venture companies. Such shareholding would be without protection as the company in which the shares were held had personality only in domestic law. Hence, the technique was used to protect shareholdings from direct measures such as forced sales through their inclusion in the definition of investments. There was no intention on the part of the makers of investment treaties to alter notions of corporate personality by enabling shareholders to protect the rights of the local companies in which they held shares. In APPL v Sri Lanka, it was held that foreign shareholders will not have the capacity under investment treaties to protect the assets of the local company in which they held shares. Whether as a matter of domestic law in which alone companies can have existence, minority shareholders can assert the rights of the companies is another issue to be raised.
17. While in Azurix, it was held that there could be indirect holding of shares, it is to be doubted whether the minority shareholder can satisfy the requirements of the definition of a protected investment in terms of Article 1 (1) a of the Argentina-

US Treaty. The Article defines investment as “owned or controlled” by nationals or companies of the other party. A minority shareholder owns its shares. It controls its shares. But, it does not own or control the company in which it holds shares or the assets and rights of the company. The Claimant’s case must fail simply because the rights it claims are not “owned or controlled” by the Claimant but by the company in which it has shares. They do not fall within the textual context of the definition of the investment that is protected by the Treaty. When the Treaty refers to “directly or indirectly” it refers to shares which are owned or controlled either by a claimant company or by another foreign company higher up in a holding chain. It does not extend to the company which as a result of the shareholdings becomes the vehicle of the foreign investment. The property, tangible or intangible of this company is not protected. It is only the shares in the company which are protected. To interpret the provision otherwise would be to extend the scope of the provision which does violence to the language and is contrary to the intention of the parties to the treaty. It has been already explained that the references to shares in the investment treaties are in response to the decision of the International Court in Barcelona Traction. Their precise context must be understood and given effect to. Overmuch extension of the provisions of the Treaty besides going beyond the intention of the parties which an arbitration tribunal does not have jurisdiction to do will result in injury to the system of investment arbitration. As the Tribunal in Tokio Tokelés put it, “an international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition” The local company’s assets never fell within

the diplomatic protection of the foreign investor's home state. It cannot be that greater rights were created by the home state in the foreign investor than the rights enjoyed by the home state. The essence of BITs is to transfer the contents of the right of diplomatic protection to the foreign investor, not to enlarge those rights.¹⁵

18. Secondly, the rights that are claimed successfully in other awards are specific rights arising from commitments made to the foreign investor either through the grant of a permit or license or through a contractual stipulation.¹⁶ They do not arise from the general laws or regulations of the state which must necessarily be understood as being subject to change. In all cases where such rights were involved there were permits directly granted to the foreign investor which had been revoked or contractual stipulations directly given which had been breached. A point of distinction between CMS and the present case is that CMS had a license provided it by a decree and argued that this license gave rise to certain rights which were affected. In other cases, where commitments were involved, they were specifically given to the claimants by contract or by license.¹⁷ The Claimant does not allege any such specific commitments. The Claim rests on the ground that the general statements made by officials of Argentina about

In *PSEG v Turkey* (2006, para. 192), the standing of a participating company was at issue. The tribunal refused standing, distinguishing CMS and Enron on the ground that "any interest, which the investor may eventually have, may accrue, in part, to NACC, if the latter still has an ongoing equity participation in the investor company". In the present case, the Claimant would also had an equity interest if not for the voluntary termination through the voluntary sale of its shares.

¹⁶ . Eg. *Middle Eastern Cement Shipping Ltd. V Egypt*; *Lauder v Czech Republic*; *Goetz v Burundi*. In these awards, the issue was lack of due process prior to the cancellation of the permits as much as the cancellation of the permits. The two notions go hand in hand. Due process is possible only in those measures which are aimed at the claimant.

¹⁷ . Likewise, in *Revere Copper v OPIC* on which much reliance is placed, there was a stabilization clause in the contract which involved a specific contractual commitment.

investment prospects gave rise to the alleged rights. The Claimant seeks to read the rights created in the regulatory framework into existing contracts some of which were made well prior to the coming into effect of the regulatory framework under the liberalization programme. The views in some recent arbitral awards that such general statements can give rise to expectations and that the violation of such expectations create liability are extensions of the law for which there is no basis. These awards, though containing expansionist dicta, nevertheless dealt with specific commitments. In *CMS v Argentina*, there were stipulations contained in the license, on the basis of which a case could be built. *Tecmed v Mexico* which contained broad dicta, also involved a license which had been directly given to the claimant in the case. In this situation, there was no direct contact between the Claimant and the State.¹⁸

19. Thirdly, the nature, extent and the limits of the rights that the Claimant alleges were violated depend on the Argentinian laws in the context of which they were created. It is necessary to keep in mind the interaction between the domestic sphere in which the rights are initially created and their extent determined and the international sphere in which they are protected. The two orders should not be blurred.¹⁹ The rights created in the domestic order are not magnified at the

¹⁸ . Withdrawals of licenses featured in *Lauder v Czech Republic* (2003); *CME v Czech Republic*; *Goetz v Burundi* (2001) and the older case, *Amco v Indonesia*.

¹⁹ . Thus, in another context, the Tribunal in *Noble Ventures v Romania* (para. 54), rejected the expansive view on umbrella clauses as the consequence was “that the division between the national legal order and the international legal order is completely blurred”. The present Tribunal itself in the similar context has stated that the expansive definition of the umbrella clause is “destructive of the distinction between national legal orders and the international legal order”. *El Paso Energy Company v the Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, ¶ 82. The distinction is important in other contexts as well.

international level. They can, at the international level, only be coterminous with the rights created at the domestic level. To take an example, the patent rights of the foreign investor arise only through grant in accordance with domestic law. But, such rights, once granted, can be and are protected by investment treaties. But, the patent rights are subject to domestic laws and remain subject to the law in which they were created. If they were created in a system in which there could be compulsory licensing of patents, it cannot be argued that the compulsory licensing amounts to expropriation, simply because compulsory licensing was an inherent limitation in the right that was originally granted.²⁰ Many investment treaties recognize this fact. They provide that the investment must be made in accordance with the laws and regulations of the host state. But, such express recognition is not necessary as it must be understood that the rights of the foreign investor protected by the investment treaty must be created subject to the conditions that exist in the laws under which it was created. Foreign investment rights under the investment treaty can exist only to the extent permitted by the host state's law at the time of the entry.²¹

²⁰ . Many treaties deal with the situation by expressly excluding compulsory licensing from the provision of expropriation, but this is not necessary if the right was created in domestic law subject to compulsory licensing.

²¹ . See the final award rendered on 2 August 2006 in the *Inceysa Vallisoletana S.L. v. Republic of El Salvador* case. The tribunal accepted that El Salvador's consent to ICSID jurisdiction embodied in the Spain-El Salvador BIT did not extend to investments that were made fraudulently, and therefore not in accordance with the law. The tribunal relied both on the express language of the Spain-El Salvador BIT and on references in the travaux préparatoires to investments complying with local law as a precondition to benefiting from that treaty's protection. Although prior ICSID decisions (*Tokios Tokeles v. Ukraine* and *Salini Costruttori S.p.A. v. Kingdom of Morocco*) had briefly addressed the function of 'accordance with law' clauses in investment treaties, the decision in this case is believed to be the first to apply such clauses for purposes of determining the tribunal's jurisdiction. It is clear that where the investment is tainted as a result of bribery or by fraud under the local law, the investment cannot obtain protection under the treaty. These cases

20. It is for this reason that the precise extent of the rights alleged by the Claimant as violated must be identified as they constitute the investment that is alleged to be protected. The rights that the Claimant alleges existed can arise only from the laws of Argentina under which the companies were created and the sectors in which they operate. It is relevant to consider the principal legislation relating to the energy and power sectors to determine the extent of the rights of CAPSA, CAPEX and Servicios and the subsidiary legislation made by the regulatory agencies under such principal legislation. The contractual rights that accrue are also subject to such legislation as contracts can only be made in the legislative context that applies to the sector in which the contracts are to operate.

The Rights in the Electricity Sector.

21. Electricity is regulated by Electricity Law (1992) which set out the fundamental provisions applicable to the sector. The Law charges the Energy Department Secretary with the regulation of the wholesale electricity market. The regulations are adjusted continuously so that private interests in the sector are reconciled with those of the community. It could, in that context, not be expected even in times of normalcy, that the regulations will remain constant or that the rights of those who

demonstrate the continuing relevance of the domestic law as the determinant on whether there is a protected investment. See further The World Duty Free Co Ltd v The Republic of Kenya (ICSID Award, 4th October, 2006) and Feldman v Mexico . In Yaung Chi Oo Ltd v Myanmar (2004) the tribunal examined the issue whether the domestic law requirements of the investment had been satisfied.

enter the electricity sector would remain unaffected by the changes. The Energy Department also fixes prices depending on fluctuations. The oversight of the price mechanism is done by CAMMESA which coordinates the activity of the power generators in accordance with regulations established by the Energy Secretary. Price will depend on seasonal fluctuations and other factors such as excess capacity. No entrant into the sector can expect constancy in such areas. It was established even prior to the entry of the Claimant through its shareholdings that “the agents and participants of the wholesale electric market shall operate pursuant to the regulations issued for such purpose by the Energy Department”.²² It is estimated that the prior to 2001, when the crisis began, the regulations had been modified 131 times. In that context, it is futile for entrant to expect that the regulations will remain constant. The onus is always on the entrant to be aware of the context of the laws in which he operates. It is accepted that a foreign investor who enters a sector in a host state is familiar with the regulations which operate in that sector. The Claimant can hardly refute that proposition as the Claimant relies on these regulations for its arguments. The nature of the rights that arose, not in the shareholders but in the companies, was dependent on the context of the laws that apply to the sector which indicate that these rights were amenable to changes due to fluctuations in factors. If these rights are to be regarded as investment for the purposes of the BIT, then, they must be rights the exact content of which are to be ascertained in the context of the regulatory framework in which they were created. This regulatory framework provided for change. Changes that are

²² . Presidential Decree No.186/95, section 6.

consistent with the regulatory framework cannot be regarded as an erosion of the rights. It was an inherent feature of the rights created under the regulatory framework that their extent would depend on the regulations that are made from time to time, depending on the circumstances within the sector. It is relevant to note that the Argentine companies affected voluntarily acceded to the measures. It is the Claimant, as a minority shareholder, who complains. It is not likely that he will have a basis to exert any claims under the company law of the host state. It would require considerable creativity to argue that the position is different at the international sphere. The rights, if he had acquired any, were not set in stone. The regulatory structure in the context of which they existed showed that their extent varied with circumstances affecting the sector. When later measures are taken in the context of severe economic problems affecting the country in accordance with the rules of the regulatory structure, an argument that the rights are infringed is not tenable.

The Rights in the Oil Sector.

22. A similar analysis must be made as to the rights in the oil sector to determine whether the nature of the rights asserted by the Claimant as a minority shareholder in Argentine companies in that sector. It also has relevance to the interests of the Claimant in Sevicios. The rights are those of the companies. But, overlooking this point, the nature of the rights may be ascertained. The oil sector was regulated under the Mining Code (1887) and the Oil and Gas Law (1967). Oil

fields are in the public domain. This is consistent with the doctrine of permanent sovereignty over natural resources in international law. The Argentine Constitution requires that measures be taken for the rational use of natural resources and the preservation of natural wealth. In this, the Constitution confirms the doctrine of permanent sovereignty over natural resources, which authorities regard as amounting to a *ius cogens* principle of international law.²³ A *ius cogens* principle stands higher than treaty commitments made by a state. The doctrine requires that natural resources be utilised for the betterment of the people of the state. Under the Mining Code and the 1967 Law, concessions for exploitation of oil may be granted. The concessions of CAPSA were granted before 1967 and are ruled by the old Mining Code. The concessions of CAPEX were granted under the 1967 Oil and Gas Law. The later Presidential Decrees which sought to liberalise the sector, were made in the context of that law and stand in a subsidiary relationship to this law, which is the supreme applicable law governing the oil sector. Its primary objective is to satisfy the country's need for oil. Export is permitted only to the extent that "domestic supply is not affected".²⁴ The Executive is tasked with setting policy for the sector.

23.

The regulations that the Executive issues bind the concessionaires in the sector. The Law requires that exports of oil are authorized. The old Mining Code which applies to CAPSA also restricts exports in cases of urgency. In the context of this regulatory structure, the rights in the oil sector that are directly or indirectly held are

²³ See below for authorities.

²⁴ Gas Law, section 3; Oil and Gas Law, section 3.

continuously subject to the changing public interest. Where new regulations are made in accordance with such changing public interest, the rights cannot be regarded as unlawfully affected. All rights when originally created were subject to the condition that they could be varied in accordance with industry and public need. All the infringements alleged by the Claimant have to be looked at in the context of the fact that the extent of the rights under this regulatory regime fluctuate in accordance with the regulatory authority's determination of the public interest at any given time. This would be so even in times of normalcy. The rights are bound to be encroached upon, quite lawfully, in times of economic crises. It is in the nature of the rights in this sector that they be responsive to the economic pressures at any given time. The entrant to the field must be quite aware of this. This pattern has existed in the oil sector not only in Argentina but in virtually every oil-producing country. A major player in the sector cannot claim to be unaware of this fact. No contract in the field of oil is entirely insulated from the circumstances in which it operates.²⁵ To the extent that the measures taken during the economic crisis are reasonable within the regulatory structure, they cannot create any impact on any external system of investment protection for a wrongful infringement of treaty rights. The nature of the investment in this case is the entrant's rights to the extent recognized and circumscribed by the regulatory system. Allegations of violation of such rights must be looked at in the context of the regulatory system. It is questionable whether the

²⁵ . In *Aminoil v Kuwait* (1982) 21 ILM 976, the tribunal observed: "This concession-in its origin a mining concession granted by a State ... became one of the essential instruments in the economic and social progress of a national community in full process of development. ... The contract of Concession thus changed its character and became one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages..." (para. 98).

constriction of the rights in a manner consistent with the regulatory structure in times of economic strife can be a violation when the extent of the rights itself depends on the determination of it in the context of each specific circumstance at a given time.

24. In the context of the above discussion, the Claimant will be hard-pressed to show that the rights that are claimed are such rights as would be capable of being protected by the BIT. The rights are not fixed rights but are rights with a content that varies according to circumstances identified in the domestic law. Leaving aside the fact that the large majority of the asserted rights are the rights of Argentine companies which have voluntarily acceded in the measures taken by the Government, the rights themselves are created on the understanding that they would expand or constrict depending on economic and other circumstances within the relevant sectors. But, the further suggestions of the Claimant that the treaty standards have been violated through the encroachment are looked at despite this initial hurdle that the Claimant has not overcome the requirement of showing that there is a relevant investment that is protected by the treaty. These relate to expropriation and the violation of the treaty standards.

25. It is also relevant to look at the context of these rights in the light of the doctrine of permanent sovereignty over natural resources which is regarded as a *ius cogens* principle.²⁶ If so, investment treaty rights, must, in view of Article 61 of the

²⁶ The following authorities support permanent sovereignty as a *ius cogens* principle. Ian Brownlie, "Legal Status of Natural Resources in International Law (1979) 162 Hague Recueil 245 at p. 255; Justice Weeramantry in the East Timor Case [1995] ICJ Rpts 202 said it was part of the principle of self determination which was *ius cogens*. Alexander Orakshelashvili, *Peremptory Norms in International Law* (OUP, 2006), p.489. It is also discussed as part of the right to development and a part of basic human rights which are considered *ius cogens* by some authorities. H Steiner and P Alston, *International Human Rights in Context* (OUP, 1996) pp.1110-1146. In the Guinea-Bissau Case (1986) 25 ILM 302, a strong tribunal

Vienna Convention on the Law of Treaties be subordinate to the principle. The doctrine mandates that sovereignty over natural resources resides in the people. It can be transferred by contract as the Mining Code and the Oil and Gas Law do accept but, as these laws do, there is always a subjection of such transfer to the public interest. As explained in the case law which has considered the doctrine, this is perfectly consistent with the acceptance of the doctrine as a *ius cogens* principle. But, when public interests require that the concession or contractual rights be changed because of urgencies in the situation, a recovery of sovereignty is permissible. This defeasibility of rights in extreme circumstances has been acknowledged in several arbitral awards. As indicated, all investment treaty rights are subject to the doctrine. In times of extreme urgencies that characterised the Argentine economic crisis, treaty rights also become defeasible due to the subjection of such rights to the *ius cogens* principle.

26. There are two ways at looking at the rights which the Claimant relies on. The extent of the rights have to be determined by Argentine law. The constant denial of the Claimant that Argentine law is not relevant is therefore not appropriate. The rights, even if they exist, are defeasible in the public interest due to the existence of the doctrine of permanent sovereignty over natural resources, which requires a government to use natural resources in the public interest. Such a proposition exists in Argentine law as well.

consisting of Manfred Lachs, Keba Mbaye and Mohammed Bedjaoui, wrote (para. 123) that it could not “contest the right of the peoples concerned to a level of economic and social development which fully preserves their dignity”. For the views of another past President of the International Court in support, see Jimenez de Arechega, “International Law in the Past Third of a Century” pp. 297-298.

27. The Tribunal should also take two further factors into account in considering whether the investment falls within the definition of the Argentina-US Treaty. The first is whether the type of rights alleged to be investment were consistent with the preambular statement of the Treaty that investments would “promote the economic development of the Parties”. Where such investments cease to promote economic development of the parties but because of circumstances become an economic liability, the purpose of the Treaty is not furthered. Thus, for example, the peg of the dollar and the peso, which is argued by the Claimant to be a right attached to the investment, can hardly have helped the economic development of Argentina at the time of the crisis when there was an urgent need to stem the flow of funds outside the state. Such alleged rights move out of protection of the Treaty when circumstances arise where they are counterproductive to the development of the host state. To this extent, the rights allegedly associated with the investment on the basis of which the Claimant bases its case, are rights not protected by the Treaty as a result of the new circumstances of the economic crisis. Rights which are not consistent with the aim of development lose their basis for treaty protection.

28. A second factor which the Tribunal should take account of is a fact already mentioned that the sectors of activity involve the permanent sovereignty over natural resources. It is to be noted that the United States has already excluded the use of land and natural resources from national treatment, signalling the special

role of these sectors. In the case of the natural resources sectors, the doctrine of permanent sovereignty, being a *ius cogens* principle, should have priority over treaty obligations. These resources must constantly be used in the public interest as sovereignty over them resides in the public. This is provided for in the regulatory structures of Argentina itself. That may explain why Argentina did not include an exception of the sectors from the Treaty. The laws of Argentina contain clear directions that the public's need of the oil and energy resources should be given priority. In defining the nature of the investments that are protected under the Treaty, account must be taken of this fact that the *ius cogens* principle, while permitting contracts regarding resources being made, also justifies variations of these contractual rights when the public interest requires such a change.

THE EXPROPRIATION CLAIMS

The Direct Expropriation Claim.

29. The Claimant makes several claims on the basis of the expropriation provision of the US-Argentina Bilateral Investment Treaty. The Claimant argues that the facts disclose both direct and indirect expropriation. The focus is on building up the notion of indirect takings or measures tantamount to a taking and embracing within the fold of these constructs the measures taken by Argentina in the oil and energy sectors to overcome its crippling economic crisis. The general issue is whether these measures can be regarded as expropriation under the provisions of

the Treaty. It is best to discuss this general question before looking at the specific acts which the Claimant alleges amount to expropriations.

30. The measures that were taken were general measures which were intended to stem the flow of money out of Argentina and otherwise deal with the political and economic situation caused by the crisis. They were similar to the measures taken by Malaysia at the time of the Asian economic crisis when flow of money outside the country was regulated and the currency pegged at a fixed level.²⁷ The measures were also similar to the ones that developed states had taken during times of financial crises. The measures that Argentina took were not unusual given the extent of the crisis that afflicted its political and economic life. The issue that arises as a preliminary issue regarding the expropriation claims is whether these general measures not specifically aimed at the Claimant can amount to expropriation.

31. The classic situation of expropriation involved the direct taking of physical property of a foreign investor. It was progressively extended to include other interference with tangible and intangible property rights of the foreign investor but the extensions were made in response to specific situations. They were not made haphazardly but were controlled by having regard to the original situation of direct deprivation of the property of the investor. A category of takings was

²⁷. On the Malaysian capital controls, see Joseph E. Stiglitz, *Globalization and Its Discontents* 122-25 (2002); and Ethan Kaplan & Dani Rodrik, "Did the Malaysian Capital Controls Work?", in *Preventing Currency Crises in Emerging Markets* 393 (Sebastian Edwards & Jeffrey A. Frankel eds., 2002)

developed where the eventual effect of property deprivation was arrived at through the slow, incremental whittling away of the rights of the foreign investor so that he upped and left the host state without his property. This category was described as indirect expropriation. A third amorphous category of measures tantamount to an expropriation was recognized in the language of the investment treaties without its precise extent being defined. But, it was not intended that it did not have the original idea of specific property deprivation as the controlling mechanism identifying its parameters. States, like Canada, have interpreted this category as not having added anything to the category of indirect takings. Such positions were necessary given the expansive interpretations that were being attempted on the basis of the treaty definition of expropriation. There was a need to limit this tendency.

32. The controlling mechanism required an act that was aimed at the particular foreign investor. General acts of a state which causes sporadic harm to different people while the state sought to achieve a specific objective do not entail state responsibility. There was no intention or negligence by the state in causing these acts which were quite incidental to the achievement of its main objective, in the present case, the easing of the economic crisis. The cases illustrate that in all cases where expropriation has been successfully pleaded, the state measures were specifically and directly targeted at the particular foreign investor making the

claim. His rights were directly affected even in situations of the category of indirect expropriations.²⁸

33. A fundamental defect in the Claimant's case on expropriation is that the measures taken by the Government of Argentina were not intended to harm the interests of the Claimant. They were intended to deal with the economic crisis but incidentally caused effects to the Claimant. Responsibility in a state cannot arise in these circumstances. Though dolus may not be necessary in the general law on state responsibility, it is always relevant in expropriation law and state responsibility under it. Three of the requirements of a lawful expropriation stated in investment treaties are public purpose, due process and absence of discrimination, which are all dependent on the intent and purpose behind the expropriation. The cases in which public policy was considered not satisfied involved measures, such as reprisals, taken very intentionally.²⁹ Due process cannot be given unless the state consciously affected an investment. Discrimination is always intentional. A fourth rule is the exclusion of regulatory expropriation. Regulatory expropriation again depends on the intent and purpose of the law. A tribunal always has to determine the intent and purpose of the expropriation before ascribing responsibility. A fifth accepted requirement of expropriation is that it must cause permanent deprivation of property. An

²⁸ Much of the category of indirect expropriations was developed through decisions of the Iran-US Claims Tribunal. The authority of the decisions of this Tribunal is doubted by some writers.

²⁹ Eg BP v Libya 53ILR 329 ; In Liamco v Libya (1981) the arbitrator spoke in terms of finding the dominant motive, suggesting that the predominant motive for the taking was the preservation of national control over oil and not the political motive of reprisal.

ephemeral taking is not expropriation. The distinction between permanent and ephemeral taking also rests on intention. As in the law of theft in domestic systems, there must be an intention permanently to deprive the owner of property. Intention is central to the law of expropriation, whatever the position in the rest of the law on state responsibility is. As in all circumstances relating to the law where intention is relevant, the intention is to be presumed from the conduct of the state. The notion that intention is not relevant originated from some decisions of the Iran-US Claims Tribunal.³⁰ As will be shown, these decisions have little relevance outside the context of the law that was applied by that Tribunal. They are used in some more recent awards to whittle down the requirement of intention. But, there are also awards which have asserted the traditional view that expropriation is dependent on the intention of the state.³¹ The classic position that expropriation required intention to take property has not been changed by investment treaties. Treaties must be read in the context of pre-existing law. The expropriation provision codified existing law. In this case, the measures taken by the Respondent State was not accompanied by any intention to take the assets of the Claimant. If, if there was any such effect, which is denied, the effect was an incidental and non-intended consequence for which there could be no liability.

³⁰ The case which initiated the trend is Tippets. But in other cases, the purpose of the measures taken by the state has been looked at. Eg. Amoco International Finance v Iran (1987) 15 Iran-US CTR 189 where public purpose and discrimination are discussed at pars 142-146.

³¹ This has been asserted in recent awards. See eg. SD Myers v Canada (Partial Award, 13 November 2000) “The tribunal must look at the real interests involved and the purpose and effect of the government measure”.

34. In any event, an important element of destruction or alienation of property has not taken place in this case. Another requirement for expropriation that has to be satisfied is that the property rights of the foreign investor should have been destroyed. In this case, even if the rights of the Argentine companies can be regarded as the rights of the Claimant, there is nothing to show that they were destroyed by the measures. The companies continued to function. The Claimant voluntarily sold its shares for reasons best known to it. The Government of Argentina cannot be held answerable for business decisions that the Claimant took on its own.³²

35. Alternatively, the sale was too remote a consequence of the measures that it could not be attributed to the Respondent. There must be a sufficient proximity for the sale to be regarded as a consequence of the measures of the Respondent. As the Respondent has explained, it could well be that the sale of the shares was a result of the Respondent's own internal problems. The law on state responsibility

³² Compare the findings in *Lauder v The Czech Republic*, where the tribunal held: "201. The Arbitral Tribunal holds that the Respondent did not take any measure of, or tantamount to, expropriation of the Claimant's property rights within any of the time periods, since there was no direct or indirect interference by the Czech Republic in the use of Mr. Lauder's property or with the enjoyment of its benefits. 202. The Claimant has indeed not brought sufficient evidence that any measure or action taken by the Czech Republic would have had the effect of transferring his property or of depriving him of his rights to use his property or even of interfering with his property rights". The next paragraph suggests that the taking should have benefited the Czech government. This requirement is also not satisfied in the present case, as the measures did not benefit the Argentine government.

requires a proximate cause for attribution of responsibility.³³ There is a lack of such a proximate cause in this case.

36. Besides, the measures taken were regulatory measures for which there can be no compensation. The large amount of regulatory measures are aimed specifically at the investor concerned because of violations committed by the foreign investor as where he pollutes or breaches planning laws. Certainly, such measures are not compensable as compensation would destroy the punitive value of the interferences. The other category of regulatory measures is general measures taken without discrimination purely in the public interest. The measures of the Government of Argentina complained against by the Claimant fall within this category. These measures are clearly regulatory measures which are excluded from the scope of the treaty provision on expropriation in the US-Argentina Treaty. This point will be expanded on in a later section. But, at this stage, it is sufficient to point out that these general factors militate against the measures taken by the Government of Argentina amounting to an expropriation in terms of the Treaty. Having indicated the difficulties in making a case for expropriation on the facts of this case, the specific allegations of expropriation may be examined.

³³

Administrative Decision No. II, 7 R.I.A.A. at 30 (“[T]he law cannot consider . . . the ‘causes of causes and their impulses one on another.’ Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains . . .”).

(1) The “forced sale” as expropriation.

The Claimant has argued that it was forced to sell the shares as it was unable to service its extensive loans. This assertion is doubted by the Government of Argentina which has argued that the sale was necessitated not by the measures taken by the Government, but by the internal, global problems that the Claimant, as a multinational company, faced. The sale by the Claimant of its shares in the Argentine companies was preceded by allegations of extensive corporate malpractices and other problems associated with the parent company and its associated companies both in the United States and elsewhere. If these were the reasons for the sales, then, the sales could not even be indirectly connected to the measures taken by the Government of Argentina. They are too remote from the measures. They are not sufficiently proximate to the measures so as to create responsibility in Argentina. Consequently, no responsibility could possibly arise in the Government of Argentina. This is both a factual and a legal argument that the Tribunal has to consider. If these factual allegations are correct, there cannot be a claim under the BIT. The BIT does not insure the foreign investor against ordinary business risks or the effects of their own conduct. It does not provide a means by which the loss resulting from the imprudent decisions of the foreign investor can be recovered from the host state. Assuming the sales are connected with the measures taken by the Government of Argentina, the question as to the liability of the Government needs to be examined. But, even in such circumstances, it is relevant to keep in mind the admonition of the Permanent Court of International Justice that “no enterprise can escape from the chances

and hazards resulting from general economic conditions”³⁴ let alone in this case a deeply entrenched economic crisis. There must also be a satisfaction of a sufficient standard of causation. The Claimant must satisfy the Tribunal that the measures of Argentina were the direct cause of the sales, and not its internal problems.

37. Forced sales have seldom featured in expropriation law. In most situations, the investors concerned sold their property in anticipation of events which did or did not occur. Christie has explained:

“The factual situations in this kind of problem can be very intricate and, unfortunately, there does not seem to be much authority. Future cases will have to decide how far a panicky alien property holder can question the good faith of the state in which he is in operation, and how far he will be compelled to rely either on promises of future compensation or even on a presumption that adequate compensation will be paid by the State. The difficulty and inconvenience of claims based on forced sales would seem to require that the alien must in most cases take his chance of ultimately obtaining compensation from the State involved. If he prefers the bird in hand and sells out for what he can get, then he should normally be prepared to sacrifice any future claims based on the inadequacy of his receipts from the sale.”

38. The cases discussed in this context are sales made by owners of property. Even in such cases, expropriation has been difficult to find. In this case, there is a sale of shares in a company. The companies themselves had not sold out but continue to operate to this day. There is little authority which governs the situation. In the so-called indigenization measures that took place in some states of Africa, there was a legislative direction to foreign owned companies operating in the states to divest

³⁴ Oscar Chinn Case (1934) PCIJ (Series A/B) No.63, 416,436.

themselves of determined percentages of shares into the hands of local people.³⁵ These directions were followed. There were no proceedings resulting from these forced divestments, presumably because they were made in pursuance of a national policy to transfer a portion of economic control into the hands of the local populace. Despite the widespread nature of this practice, no proceedings resulted neither is there any record of diplomatic intervention on behalf of the shareholders.

39. In the present case, there was no compulsion to sell. The absence of compulsion also sets the present case apart from the cases that have been discussed in the writings. The Claimant sold voluntarily. The companies in which the Claimant had shares continue to function. The Respondent's view is that choice of the moment of sale was entirely influenced by factors personal to the Claimant and could not be attributed to the measures taken by the Government of Argentina. The reasoning therefore had to become rather convoluted to trace a link between the state and the voluntary sale. The argument is that, if the original conditions of entry as indicated by the state, such as the operation of perfect market mechanisms to fix spot prices in the electricity sector, had continued to exist, there would have been no reason to sell the shares. These original conditions had to be dismantled in view of the emergency situation resulting from the economic crisis. It was a changed circumstance that the Government had to cope with. The argument that the Government was responsible for bringing about the situation is

³⁵ These measures are described in M Sornarajah, International Law on Foreign Investment (2nd Ed, 2004, CUP).

without merit, given that not too long ago the Government was considered among the most successful operators of a policy of liberalization on the basis of which the Claimant itself had admittedly made entry. An economic policy had gone wrong. Changes had to be effected to cope with the crisis that resulted. The Claimant's sale was purely voluntary and the attempted link of it to the change in the policies of Argentina is unconvincing. Even if a link did exist, the changes were made because the state believed it was the best way of dealing with the economic crisis and had no intention at all of affecting the Claimant's interests in doing so.

40. It has already been pointed out that a defect in the Claimant's argument was that there was no intention on the part of the Government of Argentina to affect the Claimant's interests in the shares. Intention is central to expropriation law. Absence of an intention to expropriate creates a major flaw in the Claimant's case.³⁶ A further defect is that there is an absence of the requirement that the measures must be aimed at the foreign investor. In no situation where expropriation whether direct or indirect has been found have the measures of expropriation not been intentionally aimed at the foreign investor. Even in cases where there have been casual statements that such intention was not a necessary requirement, the tribunals went on to find that the measures of expropriation were intentionally directed at the foreign investors concerned. It cannot be established

³⁶ The Ethyl Case provides a close parallel. A long-shot argument was used that the ministerial statement to ban the production of ethyl, a chemical substance, harmed the share values in Ethyl Corporation. Ethyl was the sole producer of the substance. Here intention could have been satisfied and the element of direct effect was also there. Ethyl must be distinguished from the present case on these grounds. The case was settled.

that in this situation the measures that Argentina took were directed at the interests of the Claimant. The Claimant was probably far removed from the thoughts of the Government of Argentina which was in the throes of a severe crisis and was taking measures to stem that crisis. The absence of an intention and the absence of conduct directed at the Claimant severely undermine the case of the Claimant that the sale was involuntary and that it therefore amounted to an expropriation.

41. If not for the voluntary sale, the Claimant would still be in possession of its shares. To this extent, there has been no act of expropriation by the Respondent State. For expropriation, there must be an act which makes the right of property “precarious and defeasible”.³⁷ The Claimant’s shares were never in such a position, never under any threat by the Respondent State. The companies involved still continue to function in Argentina. There is an insufficient basis for any tribunal to find expropriation on such facts.

Absence of Direct Expropriation.

42. The Claimant alleges that there was direct expropriation. This is difficult to make out on the facts of this case. There are the following hurdles to be faced: (1) there is no single act of expropriation specifically directed at the ownership or control of an investment of the Claimant; (2) to overcome this, the Claimant identifies as property a series of expectations it had and claims that these expectations are

³⁷ Soporong and Lonroth v Sweden 5 ECHR 35 (1983).

property interests the violation of which results in direct expropriation. (3) the latter view lacks any authority in law and is too expansive to be accepted.

Requirement of a Single Act directed at the Property of the Foreign Investor.

43. The paradigm case of direct expropriation is a single act of taking of the property, tangible or intangible, of the foreign investor. It is specifically aimed at the ownership interest of the foreign investor so that he is divested of his property rights (including possession). There must be an elimination of these property rights. The departures made from this paradigm situation are largely to be found in the awards of the Iran-US Claims Tribunal. Prior to these awards, the authorities that existed largely dealt with the paradigmatic situation of physical dispossession or the extinguishing of a definite intangible property right.
44. The idea that ownership rights can be unbundled is an innovation that comes about largely in the cases decided by the Iran-US Claims Tribunal. The cases there held that in the context of revolutionary Iran, the deprivation of ownership is not significant as many of the American investors would have deserted the place in fear due to the intensely hostile atmosphere that prevailed. Also, the methods of interference included replacement of management in factories and similar interferences. The unbundling of ownership rights was effected in the context of the peculiar circumstances that existed in Iran and the attendant animosity directed in particular at American investors. The theories constructed on the basis of these awards are suspect. They have to be confined to the type of situation that

existed in Iran where hostility was principally directed against a group of investors. The Tribunal itself was constituted in a manner that involved a certain degree of compulsion. It was given a specific mandate in the Algiers Accord which created it. The law it was to apply also was a *lex specialis* that was stated in the Accord. The Iran-US Tribunal was given jurisdiction by Treaty over “over expropriation and other measures affecting property rights”. This formulation, according to George Aldrich, who as arbitrator, decided many of the cases which decided that intent was not relevant to expropriation, suggested that “neither the terminology nor the intent of the actions attributable to either government would affect the Tribunal’s jurisdiction to award compensation if the actions had adversely affected a claimant’s property rights”.³⁸ The Tribunal also had wide powers of determining the applicable law under the Treaty, extending beyond international law.³⁹ These may indicate that the Tribunal was vested with wider powers than would be a tribunal under some other institutional system, such as ICSID and that its precedents should not be used by other tribunals without some hesitation and scrutiny as to applicability.

45. The emphasis on effects caused by the acts of the Iranian government and the discarding of the intention of the state appears in the awards of the Iran-US

³⁸ George Aldrich, Jurisprudence of the Iran-US Claims Tribunal (New York, OUP, 1996) p.173. In some cases, the Tribunal awarded compensation for measures affecting property rights without finding expropriation. *Eastman Kodak v Iran* 17 Iran-US CTR 153; *United Painting Inc. v NIOC* 23 Iran-US CTR 351 (1989).

³⁹ Article V of the Algiers Accord : “The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.”

Claims Tribunal. In Sea-Land Service Inc. v Iran⁴⁰, the Tribunal stated the conventional rule that an expropriation would require “at the very least ... deliberate governmental interference”. The Tribunal required a “deliberate” act, thereby stressing both intention and the requirement that the act be aimed at the foreign investor. There was a dissent by the American arbitrator, Judge Holtzmann, who suggested that what was relevant was not the subjective intention of the government but the effects of the conduct of the government on the investment. Judge Holtzman relied as authority for this obvious extension on his own award in Starret Housing Corp v Iran and two cases in which Arbitrator Aldrich featured; Tippets and ITT Industries. There is an incestuous process in the making of precedents in this area. The law was essentially restated by two arbitrators, Holtzman and Aldrich, in the context of a particular definition of expropriation contained in the Treaty creating the Iran-US Tribunal. The relevance of this restatement of the law in the context of a particular treaty formulation to the law of expropriation is contentious. The precedents of the Iran-US Tribunal on this point cannot change the existing expropriation law.

46. The Claimant and its experts in suggesting that the effects of the measures of a state are what matter are relying to a large extent on the extensions to expropriation made by these awards of the Iran-US Claims Tribunal.⁴¹ The Santa Elena v Costa Rica also featured an arbitrator closely associated with the Iran-US

⁴⁰ 6 Iran-US CTR 149 (1984).

⁴¹ Schreuer, Opinion, paras. 163-166.

Claims Tribunal. Later, relying on these awards, which were based on a treaty direction to consider not only expropriation but measures affecting property rights, some ICSID tribunals, without a similar mandate, placed emphasis on the effects of the government conduct rather than the intention with which it was done.

47. In all the cases that have been decided, even where dicta exist that emphasize the effects of the state conduct, there was evidence that the primary purpose of the conduct was to interfere with the property of the foreign investors. In the cases relied on, Biloume v Ghana, Metalclad v Mexico, Norwegian Ship Owners' Claims and German Interests in Upper Silesia, the acts were so directed at the foreign investors that an intention to affect the investors was clear. They were not general acts as in the present case but were specific acts directed at the interests of the foreign investors. The broad dicta these cases may contain must be read as being confined to the facts which involved measures directly and intentionally aimed at the foreign investments. The cases cited by the Claimant do not affect but confirm the proposition that for there to be expropriation, the primary purpose of the state conduct must be to affect the investment of the foreign investor. That is not the case in the present situation. Here, the purpose of the measures taken was to solve the economic crisis not to affect the interests of the Claimant.

48. The effects on the Claimant in this case were incidental. They do not satisfy the standard of proximate causation that has always existed in expropriation law. The

cases cited by the Claimant uniformly involved acts specifically aimed at the foreign investor. The dicta in them must be looked at in the light of the facts of the cases. The measures that the Claimant complains of in this case were not directly and intentionally aimed at the Claimant. The cases cited are clearly distinguishable on that ground.

Claimant had no relevant investment that was targeted.

49. The second point is that there is no demonstration of the presence of an investment that is affected. The law in the Treaty requires that the expropriatory measure must be specifically aimed at an investment under the ownership or control of the foreign investor. Claimant is at a loss to find an investment that is affected for a claim of direct expropriation to be maintained. There is a problem as to whether the interests affected are only those of the Companies in which the Claimant holds shares and whether the Claimant can protect the interests of the Companies or claim on their behalf. The rights affected are not “owned and controlled” by the Claimant in any sense. They are owned and controlled by the Companies. The Claim does not fall within the meaning of the Treaty provisions. The issue has been ducked in the other arbitrations that have taken place involving the Argentine economic crisis. There has been no discussion of the question based on the authorities. It is squarely taken up by the Respondent state in this arbitration. It is a matter this Tribunal must pronounce upon. For the Argentina-US BIT to apply, there must be an investment that the Claimant “owns

and controls”. The Claimant does not own or control the Companies whose interests have been affected or the rights of these Companies. Faced with this problem, the Claimant has to scurry around to find such an investment. The Claimant finds it in contract rights which are constructed on the basis not of any express provisions in any contract but from the circumstances that the regulatory framework supplies these rights. But, even so, the initial problem will be whether these rights, if they exist, belong to the Companies and whether they could be asserted by the Claimant, who is a minority shareholder.⁴²

50. In AMT v Zaire⁴³, the matter was discussed but the controlling shares in the affected company were in the hands of Americans. In AAPL v Sri Lanka⁴⁴, the tribunal doubted whether the assets of a locally incorporated company which was the vehicle of the foreign investment is protected by the investment treaty. In both cases, the assets of the company, had been destroyed. In the recent cases like Lanco v Argentina, it was held that a minority shareholder could claim for adverse effects on the company which continued to function and did not claim for itself in domestic law. These are awards made without consideration of the implications of either domestic law or international law in arriving at such a

⁴² In Starrett Housing v Iran 91984) 4 Iran-US CTR 122, the contractual rights of a controlled subsidiary was protected. Starrett Housing held the controlling shares in the company, the management of which had been taken over. The tribunal found that Shah Goli, the Iranian company was controlled by Starrett. It then said that “...measures of expropriation or taking, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property.” The claim was not to contractual rights by themselves but to such rights as are associated with physical property that had been taken by the state.

⁴³ 5 ICSID Rpts 10 (1997).

⁴⁴ (1992) 17 YCA 106 para. 60.

result. They clearly create a right in minority shareholders which may not exist in domestic law. As pointed out earlier, the treaties cannot expand rights which do not arise in and exist in domestic law. There are awards, particularly after the Iran-US Claims Tribunal, which have expanded the notion of investment. These expansive notions have been supported in writings. A schism has come about as a result between lawyers with a mercantilist inclination seeking expansionary views on policy grounds of investment promotion and those who, relying on equally cogent policy grounds that preserve the regulatory control of the host state, require a more cautious analysis. Mihaly v Sri Lanka and Joy Manufacturing v Egypt are instances where the expansive view of what amounts to an investment was rejected.

51. In two awards. CMS v Argentina and LG&E v Argentina, the tribunals did not countenance claims of direct expropriation. Claiming contract rights is of little use as the contracts in this case were not made with the Claimant but with the Argentine Companies. Breaches of contract by themselves are not actionable under the Treaty. The Claimant's fallback position is that what were expropriated were rights implied in the contract that were granted under the Oil and Gas Law. There is no contract at all between power generators (such as CAPEX and COSTANERA) and the Argentine government. There are only concession contracts to explore and exploit oil and gas. The argument seems to be that certain rights arise from general representations made by state officials and these must be implied in the contract. The legal basis on which this should be done has not been

explained. These rights, if they exist, were not directly created in the Claimant but the argument is that the pesification of the sale prices in the sectors of operation, the export withholdings and the resultant transfer of wealth to other sectors constitute direct expropriation.

52. The difficulty with the argument is that none of the cases involved such general rights that the Electricity Framework may have created. In all the cases in which direct expropriation was successful, there were rights that were specifically created in the claimants. In Middle East Cement v Egypt, there was an import license granted to the investor which had been interfered with. This was a specific right in the investor. In Eureko v Poland, a direct right to acquire more shares in a privatized company was granted to the claimant and later withdrawn. In such instances, specific rights were created in the investor by the host state. There was direct contact between the foreign investors and state organs in the course of which definite and specific legal rights were transferred to the foreign investor. There is nothing comparable in the present case. There is no evidence of any direct contact between the Claimant and the Argentine state authorities in the context of which any rights were created. All that the Claimant has to show are alleged rights created by general laws which are claimed to be transferred through some process of osmosis into contractual rights. General laws that apply to the investment are not in the nature of the rights that are protected by the investment treaties. The claim of a direct expropriation is not maintainable due to the absence

of any tangible or intangible assets of the Claimant that were affected by the measures of Argentina.

53. The Claimant's rights as a shareholder were not affected. In Occidental v Ecuador, the fact that the foreign investor could have continued to function as shareholder precluded a finding of expropriation. In this case too, despite the fact that there had been a depreciation in earnings, there was no impediment to the Claimant functioning as a minority shareholder in the Companies.

54. For the several reasons discussed, the argument that there was direct expropriation cannot be sustained. There were no direct acts specifically aimed at the Claimant's property rights. The existence of these rights is suspect as they could be extinguished, suspended or varied under domestic law. The content of the rights are entirely based on domestic regulatory law and their content has to be established for protection to be effected at the international level. Here, there can be no protection because the rights, if they existed, were encroached upon in accordance with the domestic law. Therefore, the encroachments cannot create international liability as they are an existing condition for operation in the two sectors. For these reasons, it must be concluded that there was no direct expropriation.

WAS THERE AN INDIRECT EXPROPRIATION?

55. The Claimant relies to a large extent on the broad definitions of indirect expropriations in cases such as Santa Elena v Costa Rica and Metalclad v Mexico⁴⁵. Under this broad definition, any interference with the “reasonably to be expected economic benefit of the property” would amount to an indirect expropriation. From this, the Claimant launches off into the proposition that the frustration of “legitimate expectations” will amount to an indirect expropriation.

56. The argument that “legitimate expectations” are property interests is a novel one. It lacks authority in terms of the law and has no grounding in the definition provided for investments in the Treaty. Article IV (1) of the Argentina-US BIT states that “investments shall not be expropriated”. Investments are defined by the Treaty. Investments include several intangible rights but these are spelt out in Article I(1) as including “any right conferred by law or contract and any licenses and permits pursuant to law”. The acts of the Government of Argentina indirectly affect the interests of the Companies in which the Claimant has shares. They do not affect the Claimant’s interests. In seeking to discover property that is directly affected, the Claimant comes up with the argument that his “legitimate expectations” are affected by the measures and much effort is spent in establishing that “legitimate expectations” are investments. It requires sophistry to

⁴⁵ The British Columbia Court said of the definition of expropriation in Metalclad: “The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority.” See review decision on the Metal Clad Award, 2001 BCSC 664.

establish that legitimate expectations are investments and further that they are investments of the type that fall within the definition of investments in the Treaty to ground a claim. The Treaty is intended to encourage flows of economic assets to benefit economic development. Legitimate expectations are mental states which are no value to the host state or its development. They are not protected investment under the Treaty.

57. The need to constantly raise “legitimate expectations” as the interest affected is indicative of the weakness of the Claimant’s case. This category exists in the expansionary writings of some scholars but is not based on firm grounds in law. In domestic legal systems, “legitimate expectations” are grounds raised to secure procedural protection for promises made by administrative officials. They are not substantive rights simply because the question of whether a state can be estopped from going back on representations it made when public interests so requires arises. The two ideas collide and have been resolved in domestic legal systems in different ways.⁴⁶ In the Claimant’s vision however, “legitimate expectations” are elevated to substantive rights without question and receive the protection of investment treaties. It is a startling and novel proposition for which there is an effort to create authority by pooling disparate dicta in awards and the writings of like-minded arbitrators and academics with mercantilist inclinations. There are,

⁴⁶ After long development, English law has recognized in one case that there could be substantive rights created through representations made by public officers in a limited category of cases. The situation arises in cases where one citizen or a limited number of citizens could have their expectations satisfied without too much cost to the state. Generally, English law does not accept that policies cannot be changed because of the existence of past representations that they would not be changed.

no doubt, expansive dicta in arbitrations but these dicta are not supported by the actual decisions that were made in them.

58. The “legitimate expectations” of the Claimant are said to arise from such factors as the promises of stability held out by the President at the time of the investment and the regulatory changes that were effected prior to the investment. They did not contain any specific inducements or create any specific rights in the Claimant. In the cases cited to support the proposition relating to “legitimate expectations”, there were specific commitments given to the claimants in the form of licenses and permits that had been granted to them. Expectations were created through grant of administrative property to the investor which receives direct protection under the Treaty as they fall within the definition of investments in Article I of the Treaty. Statements issued by the President do not create such rights. If the Claimant lacked prudence and relied on these statements, this deficiency cannot be rectified by an investment treaty. Promotional activities seeking to attract foreign investment into a state are in the nature of what common lawyers describe as an “invitation to treat”. They cannot create legal obligations unless and until more formal rights are secured in the context of negotiations. However expansive the language in some arbitral awards cited are, the cases in which they were made involved legal rights obtained through negotiations.

59. Cases such as Middle East Cement v Egypt and Tecmed v Mexico involved licenses directly given to the foreign investors which fall within the definition of

investments in the treaties. It is from these direct dealings that protected legitimate expectations were created in these cases, though it was hardly necessary to do so in the circumstances as there were rights that could have been protected without recourse to such an amorphous concept. Though these awards may contain expansive dicta, their facts are based on the existence of administrative rights specifically created in the foreign investors which were subsequently withdrawn. Most investment treaties capture these administrative rights in the definition of investments. Here, on the Claimant's own admission the expectations are not even based on contract rights.⁴⁷ In CME v The Czech Republic, there were direct commitments that had been given in the license. Likewise, in Revere Copper and Brass Inc. v OPIC⁴⁸, there were contractual commitments with an express stabilization clause. In all these cases, there were specifically negotiated rights and assurances in existence. In the present case, the Claimant relies on the general structure of the Energy Regulatory Framework which is not directly addressed to it but are general regulations that apply uniformly within the industry. They are in the form of subsidiary regulations which any entrant into the industry should know change in the context of

⁴⁷. Para. 454 of Claimant's Reply Memorial.

⁴⁸ 17 ILM 1321 (1978); there was an interesting dissent in Revere Copper that stated: "by any standard what Revere treats as expropriatory is within the proper taxing power of the Jamaican nation".

circumstances. The Claimant is aware of the defect in analogizing the cases it relies on with its own.⁴⁹

60. To use the policy arguments which are replete in the Claimant's Memorials, it is difficult to demonstrate how the "legitimate expectations" of the Claimant are investments which benefit Argentina. What is contemplated in the definition of investments are assets that can be put to productive use in economic development. The Claimant's "legitimate expectations" simply do not qualify as protected investments under the treaty definition. They are not investments which can be "owned or controlled" as required by Article I. They are not productive assets generating income for the Claimant or promoting the economic development of the host state. It would be far-fetched to argue that there can be expropriation of legitimate expectations which reside in the mind of a foreign investor. What would the state gain in return for taking the mental states of the foreign investor?!

61. The Claimant's argument seeking to use the most favoured nation clause to latch onto the definition in the Argentina-Panama Treaty that includes "amendment or repeal of laws" within expropriatory measures, smacks of desperation. The extent to which the most favoured nation clause can be used to latch onto more favourable provisions in other treaties has become a matter of controversy and again demonstrates the expansive techniques that are in operation in this area. Such expansive views, on which the Claimant's case is based, destroy the original

⁴⁹ Claimant argues that "most of these elements are present in this case" (para. 463 of Claimant's Reply Memorial) conceding that not all are and the ones that are not present, the specifically negotiated assurances and rights, are the most important elements in the cases.

intention of the parties which made the investment treaties and substitute them with the intention of a few arbitrators and academic writers. This trend will prove to be destructive of investment arbitration.

62. In this case, there is a subsequent interpretation agreement between Argentina and Panama which establishes that “the act or series of non-discriminatory legislative or regulatory acts adopted by one of the Contracting Parties to protect general welfare objectives such as public order, public health, public security, social, economic, monetary, foreign exchange or tax policy are not direct or indirect expropriations, nationalizations or similar measures and, therefore, are not subject to any compensation”.⁵⁰ Interpretive notes are intended to indicate what the original intention of the parties is. The Claimant seeks to wriggle out of the predicament created by the agreement by saying that it is not an interpretive agreement despite its title and the clear intention of the parties. Such agreements come about as a result of the expansionary trends in the field that have already been adverted to. Clearly, the interpretive agreement prevents the possibility of the argument of the Claimant based on the most favoured nation clause.⁵¹ In any event, the interpretive statement merely confirms existing customary law on regulatory takings.

⁵⁰ Interpretation Agreement, Panama-Argentina BIT, September 15, 2004.

⁵¹ Maffezini v Spain where the mfn clause was first successfully used to assert jurisdiction dealt with procedural rights and not substantive rights. This distinction is made in Occidental Petroleum v Ecuador at para. 178. In this case, a substantive right is asserted on the basis of the mfn clause.

63. The reinterpretation is not peculiar to Argentina and Panama. It is interesting to note that the United States has also reinterpreted in a similar fashion what it means by an indirect expropriation in the side letter to the Singapore-United States FTA (2003) as well as in its Model Bilateral Investment Treaty (2004). The side letter to the Singapore-US FTA states:

“Except in rare circumstances, non-discriminatory regulatory actions designed and applied to protect public welfare objectives, such as public health, safety and the environment do not constitute indirect expropriation”

64. Similarly, there is a redefinition of indirect expropriation and provision made for regulatory expropriations in the new Model BIT of the United States. It is to be noted that the exact formulation of the side letter in the US-Singapore FTA is used in the Model Treaty. The relevant part in Annexure B reads as follows:

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
 - (b) **Except in rare circumstances**, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

65. What these trends describe as regulatory action has always been non-compensable. It is what occurred in this case. There were regulatory measures “designed and applied to protect legitimate public welfare objectives” which included public safety. The description of regulatory takings that is to be found in the Harvard Draft Convention on State Responsibility fits the circumstances of this case like a glove. Article 10 (5) reads as follows:

“An uncompensated taking of alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights; or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful”

The American Restatement on Foreign Relations defines regulatory expropriation as follows:

A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, . . . and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.”

66. The award in Methanex illustrates the use of regulatory takings in modern expropriation law. Professor Reisman was a member of the tribunal which decided Methanex. Methanex resembles the facts of Ethyl, which the Canadian government settled rather than argue that there was no liability for a variety of reasons. Methanex concerned the ban of a substance which was considered harmful to health. The sole producer of the substance, a Canadian investor, brought an action under NAFTA provisions on expropriation. The tribunal held that the taking was a regulatory taking which was not compensable. The Claimant

avoids overmuch reference to Methanex. The Claimant's complaint that if regulatory expropriation is admitted then "the virtual entirety of expropriation law is obliterated"⁵² echoes the statement in the US Model Treaty that "except in rare circumstances", regulatory takings are not expropriations. Such a broad exception was intentionally carved out, given the opposite tendency in arbitration awards to take the view that any conduct that affects the foreign investor is an expropriation. It is stances like the ones which the Claimant makes and the exorbitant theories that some tribunals have adopted which provoke reactions, like the one which the United States has adopted, in states which continue to enjoy sovereign power and are resentful of the erosion of regulatory space in times of crises.

67. Methanex also is troublesome for some of the other arguments addressed by the Claimant in this case. Dealing with the allegation that the ban on methanol was intended to benefit the American producers of ethanol (alleged to be interchangeable with methanol), the tribunal required that there should be a "legal relationship" established through proof of intent so that the measures could be said to relate to Methanex. The tribunal, at the jurisdictional phase, articulated the requirements as follows:

"The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable"

⁵² Para. 487 of Claimant's Reply Memorial. In Palma Consortium v Bulgaria, the technique used in Maffezini was doubted. Also, see Salini v Jordan where Maffezini was not approved.

The passage neatly encapsulates the many difficulties with the Claimant's case. There is an inability to show a precise legal relationship in the context of which the measures made affected the Claimant. There was direct intent to harm the Claimant through the measures. There was no satisfaction of the rule on causation, providing a strong link between the Argentine measures and the damage the Claimant alleges was caused. But, more importantly, there is the point that the aim of the measures was purely regulatory in that they were made primarily to overcome the economic crisis.

68. The Methanex case as well as the carving out of the exception of regulatory takings from the provision on expropriation in recent investment treaties of the United States and other states are not new developments in expropriation law. They revive the old rule on regulatory takings. The rule had always existed. But, there has been a reassertion of the rule in modern treaties. These developments are in direct response to the type of expansionary arguments that are made by the Claimant and writers who argue that any depreciation in value caused by government measures will amount to an expropriation. In the days of the Ethyl Case, this argument had much currency. There, a statement made by the environment minister in Parliament that she was considering banning a substance produced by the Claimant, Ethyl Corporation, on environmental and health grounds was the basis of the claim for expropriation. The case was settled. But, such an exorbitant claim was bound to provoke a reaction. The reaction was the

type of interpretive statements that one finds in the case of the Argentina-Panama BIT and the formulation in the US Model BIT. The Claimant builds its case on expansionary ideas that have been beaten back by states and also in awards like Methanex.

69. In the light of these developments, the range of arbitral awards on which the Claimant builds its case – Santa Elena v Costa Rica, Techmed v Mexico, etc. – must be doubted. The re-introduction of the concept of regulatory takings has emasculated the type of arguments that the Claimant has made. The facts of the present case, for a variety of reasons discussed here, do not support a finding of direct or indirect expropriation.

70. In dealing with expropriation, it is necessary to keep in mind the wide formulation of Article XI of the Treaty. It reads:

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

The situation in response to which the measures complained of were taken involved public security and the maintenance of order. The measures taken were justified in the light of the political and economic conditions in Argentina which preceded the measures. The measures were continued due to the fear that this instability would return. The existence of the safeguards of the type contained in Article XI of the Treaty are a common feature of investment treaties as it is

realized that the treaty obligations should not prevent a state from acting in times of economic crisis in the manner it thinks is best to deal with the situation. Again, whereas in the past, investment treaties were geared entirely to the protection of foreign investments, the expansive trends that have been initiated in some modern awards have resulted in the statement of wide exceptions in the recent investment treaties which include provisions on the environment and labour, the health, morals and welfare exception, and the exclusion of regulatory takings. The great danger in accepting the litigation strategy of the Claimant is that investment treaty arbitration would become so unattractive to states that they would either increase the scope of the defences or pull out of treaties altogether. Since policy perspectives are regarded as important by the Claimant, the stress that the system is being subjected to by the arguments presented should be considered.

Taxation and Expropriation.

71. The Claimant argues that the imposition of export withholdings amount to an expropriation. Though the right to impose taxes is admitted, the Claimant argues that the abrogation of the exemption from export withholdings was a violation of its legal and contractual rights. Both arguments are difficult to maintain. The tax regime of a state is a part of its regulatory structure and there can never be a valid commitment not to change it, for taxation is a tool of economic policy that has to be varied in accordance with circumstances. It is doubtful whether a fetter on this right can be created by law or by contract. No prudent business entity assumes a

constant tax system in a state and plans on the belief that there will not be changes.

72. Leaving confiscatory taxation which is in effect a taking dressed up as a tax measure aside as it is not alleged here, taxation is normally dealt with as lawful in investment arbitration, particularly in situations where it is in response to changed economic circumstances. Thus, the tribunal in Feldman v Mexico⁵³ stated that “a government must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting and withdrawal of government subsidies, reduction or increases in tariff levels, imposition of zoning restrictions and the like”. In Aminoil v Kuwait, the taxing of windfall profits that result from the hikes in global oil prices was regarded as legitimate. In abrogating export withholdings, Argentina was taking a measure in response to a crisis. The legitimacy of such a measure depends on the exigencies of the situation. Each state has to respond to a crisis as it sees it fit at the time of the crisis. It is not for a tribunal to challenge the correctness of this measure. Provided there is an objective legitimacy for the measures taken in the context of the situation, an international tribunal will not scrutinize whether this was the best possible way to deal with the crisis. Its task is not to second-guess the state which has the immediate right to deal with the situation. The argument that the right to be exempt from export withholdings is a contractual right because it existed at the

⁵³ (2003) 42 ILM 625, para. 103.

time of the entry of the minority shareholder is one difficult to accept. It does not merit discussion.

73. The statement of the tribunal in EnCana v Ecuador that places taxation in a special category for the claim of expropriation is relevant. The tribunal stated that “only if the tax law is extraordinary, punitive in amount and arbitrary in its incidence would issues of indirect expropriation be raised”. Modern treaties, including American treaties, regard taxation separately and devise special procedures for dealing with taxation. Under Article XII of the Argentina-US Treaty, taxation measures that amount to expropriation may be subject to the dispute settlement provisions. Under the new US Model BIT, taxation measures are subject to a new provision which requires the triggering of consultation mechanism before there could be recourse to arbitration. The new Model BIT, which has been the basis of several US treaties, reads:

Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.
2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:
 - (a) the claimant has first referred to the competent tax authorities¹⁷ of both Parties in writing the issue of whether that taxation measure involves an expropriation; and
 - (b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

There are similar provisions in the new Canadian Model Treaty as well, indicating that tax measures are not lightly to be treated as expropriation. There have been

several changes made to tax regimes in the context of rethinking of privatization policies of the past that were bringing windfall profits to private companies, including foreign investment companies. A notable instance was the British taxes introduced on companies which had massed profits as a result of privatization. It is unlikely that the regulatory nature of taxation will permit it being regarded as expropriation unless it reaches such a degree as to permit an inference of it being used as a confiscatory measure rather than as taxation.

Taxation and Investment Agreements

74. The Tribunal has already indicated that “the only claims the Tribunal can consider at the merits stage are tax claims based on the existence of an expropriation and on the violation of an investment agreement or authorisation”.⁵⁴ There is no expropriation on the facts of this case for the reasons already indicated. There is no investment agreement that has been made with the Claimant. Whatever agreements there were, were between the Argentinian companies and the relevant state authorities. As such, the Claimant has no standing under the formulation of the Tribunal to pursue any tax claims. There has been no authorisation provided for the investment. For these reasons, there can be no tax claims that can be pursued before the Tribunal.

Conclusions on Expropriation

⁵⁴Para. 116 of Decision on Jurisdiction in *El Paso v Argentina*.

75. Generally, the Tribunals that have considered similar arguments have fought shy of finding either direct or indirect expropriation as the company in which shares were held continued to function. The scenario involved does not satisfy the basis requirements for a finding of an expropriation, direct or indirect. Even expansionary tribunals are not inclined to extend the law thus far. In CMS v Argentina, the Tribunal ruled against a finding of expropriation, observing:⁵⁵

“Substantial deprivation was addressed in detail by the tribunal in the Pope & Talbot case. The Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in that case, is not present in the instant dispute. In fact, as the Respondent has explained, the investor is in control of the investment, the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment”.

Expropriation requires total elimination of the rights to property. This was never accomplished by the Argentine measures. There was no intention to affect the Claimant. The measures were not aimed at the Claimant. The Claimant did not have a relevant investment to protect. Even if the shares in the companies held by the Claimant can be held as investments falling within the Treaty-which for reasons stated is doubtful- the measures were not aimed at those shares. The sale of the shares was voluntary; they were not forced. The dominant aim of Argentina was to overcome its economic crisis. There was no link that would satisfied the need for proximate causation between the measures and the sale of the shares. For the reasons explained, there can be no finding of expropriation, direct or indirect, on the facts of this case.

⁵⁵ CMS v Argentina, para. 263.

TREATMENT STANDARDS

The Fair and Equitable Standard

76. After alleging expropriation, the Claimant moves to the making of a case for violation of treatment standards. The focus of attention in investment arbitration is shifting from expropriation to claims based on treatment standards. Direct expropriations are rare. Fanciful claims as to what amounts to indirect expropriations have lacked credibility and have been rejected.⁵⁶ Hence, focus has been shifted to treatment standards and once more, neo-liberal tendencies to impose preferred standards of governance animate the expansionary tendencies in the consideration of these standards. The Claimant's case for the violation of the treatment standards is based on these expansionary arguments which do not reflect the intention of the states which made the treaties. The so-called Tecmed standard animates the case of the Claimant. It is a standard that the most neo-liberal state will find difficult to fulfil.⁵⁷ It is hardly a standard but the wish-list of

⁵⁶. The third category-anything tantamount to an expropriation- has been effectively emasculated.

⁵⁷ The Tecmed standard is stated in the following passage in *Tecmed v Mexico*: "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the

the foreign investor which the Tecmed tribunal willingly restated. Some other tribunals have followed this zeal. No state would want to live with such absolutism. Consequently, state parties have reinterpreted provisions on treaty standards to prevent these tendencies. These reinterpretations cannot be read out of the consideration of treatment standards as they constitute state practice which has greater relevance than the view stated by a handful of arbitrators and academics. The practice of the United States is particularly relevant as it is a party to the Treaty that is the basis of the present claim.

77. The fair and equitable standard has lent itself for the most expansive of interpretations. It was regarded as a higher standard than the international minimum standard, itself an amorphous standard which has struggled to find content in over hundred years of its articulation.⁵⁸ In 1999, UNCTAD published a survey on BITs in which it stated, referring to the fair and equitable standard, that “there is little authority on its application”.⁵⁹ But, it has been claimed that the fair

function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor’s ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized “...by any reasonable and impartial man,” or, although not in violation of specific regulations, as being contrary to the law because: (it) shocks, or at least surprises, a sense of juridical propriety.

⁵⁸ That it was a higher standard is stated in FA Mann, “British Treaties for the Promotion and Protection of Investments”, 52 BYIL 241 (1981).

⁵⁹ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (1998) p.54.

and equitable standard has found concrete meaning in just the last five years of frenetic arbitral activity. Professor Schreuer has suggested in his writings that in five years of activity, the fair and equitable standard has been given firm content through arbitral awards.⁶⁰ The most important claim that is made on which the thrust of the argument of the Claimant is made relates to the view that the fair and equitable standard protects the legitimate expectations of the foreign investor. The standard also draws its impetus from the policy reason that if the stability of expectations is not realized the flow of investments which the treaties expect will not take place and economic development will not be enhanced. Many recent studies doubt this policy justification based on the assumption that investment treaties promote foreign investment flows and thereby, economic development. The Claimant rehearses these policy justifications stated in arbitral awards as a prelude to its arguments.⁶¹ It is evident that these awards also display a predisposition towards certain economic theories and their conclusions are arrived at in the context of the preference for definite economic models. This explains the expansionary tendencies in the awards.

78. When attempted in the context of NAFTA's reference to fair and equitable standards, the effort at expansion met with a swift reaction from the parties who promptly redefined the fair and equitable standard as indistinct from the international minimum standard, which has been in existence for over a century

⁶⁰ Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice" 6 *The Journal of World Investment & Trade* (2005), p. 357.

⁶¹ Paras. 517-520 of Claimant's Reply Memorial.

without a definite content. That reinterpretation is to be found in the US Model Treaty as well as in the newer American treaties such as the US-Singapore FTA. In that context, the Argentine-US Treaty must be understood in the light of the American view as to what the fair and equitable standard is. The American practice simply does not accommodate the new, expansionary trends to be found in some arbitral awards on which the Claimant builds its case. As pointed out, the American interpretation is more relevant than that of arbitrators as the United States was a party to the Treaty on which this claim is based.

79. A slight digression may be permitted so that the origin of legitimate expectations could be explained. Its origins are probably in English administrative law. At least one leading arbitrator who has subscribed to the creation of the concept in investment arbitration in its rise in the last few years has acknowledged as much.⁶² Except in the most exceptional situations which have yet to be defined with precision, legitimate expectations in English administrative law only create a procedural right to a hearing prior to interference with the expectations if the state is to act contrary to assurances. English lawyers have had to reconcile the concept of legitimate expectations with the rule that estoppel does not run against the

62

Francisco Orego Vicuna, "Foreign Investment Law : How Customary is Custom?" in 2005) 99 American Society of International Law, Proceedings of Annual Conference 97; he observed: "So, too, I may submit that in the light of a number of recent decisions, "fair and equitable treatment" is not really different from the legitimate expectations doctrine as developed, for example, by the English courts and also recently by the World Bank Administrative Tribunal. International law is not unaware of major domestic legal developments, particularly when the rights of citizens are entangled in promises made by their governments and the citizens have in good faith relied upon them. Whether this standard may be developed beyond foreign investments or international administrative law is just a question of time. The common standard thus continues to evolve".

Crown (the state). The notion of legitimate expectations was developed in the English administrative law to protect the small man against the state, not a multinational corporation against bad business decisions. What was transferred into the international sphere was a wrong understanding of English administrative law. The error has been compounded by fellow travellers in the arbitration industry in the cases that the Claimant relies on. The episode illustrates how “law” in the area has come to be made.

80. It is important for a tribunal to demonstrate how the concept of legitimate expectation is arrived at in investment arbitration. So far, there has been the magic incantation of the formula without an explanation of the origin of its sources. The terminology of legitimate expectation is used in English law and in European law but neither system has used it in the inflexible manner that some of the recent awards in investment arbitration have done. In both systems, legitimate expectation provides procedural protection, requiring a hearing to be given before administrative interference with expectations created by representations made to individuals regarding their entitlements. Damages may result where specific commitments giving rise to expectations are violated. But, this seldom applies in the case of policy changes. Both systems admit that the liberty to make policy changes is inherent in the form of constitutional government. They seldom, if ever, treat expectations arising from general policies as giving rise to substantive rights.⁶³ In English law, which is considered to be in advance of the other

⁶³ The English position is discussed in P Craig, *Administrative Law* (5th Edition, 2005) pp.639-656.

European legal systems, a departure was made in a recent decision.⁶⁴ It is explained by supporters as an exceptional instance where the acceptance of a substantive right in an individual will not result in an impediment in implementing an administrative policy as the cost of such recognition would not be great. As Craig explains, in legal systems which recognise legitimate expectations, proof of expectations is but the first step. There is a second step “in which the courts inquire whether the public body had sufficient reasons to depart from the expectation”.⁶⁵

81. If international tribunals must use the concept, they must indicate how they arrive at the conclusion that they are part of treaty law. It can become part of international law if there is practice on the subject among states or if it is a general principle of law. Neither exercise has been performed by the tribunals which have merely incanted the formula of legitimate expectations. Even in times of normalcy, domestic legal systems do not impose the restraint that some investment tribunals have sought to impose. In the present case, there is no situation of normalcy. Policy was changed to meet circumstances of intense political and economic stress in the life of the state. It requires an idiosyncratic

⁶⁴. R v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 203. The extension in Coughlan was explained in later cases as follows: “Here lies the importance of the fact in the Coughlan case that few individuals were affected by the promise in question. The case’s facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy or none with multi-layered effects, upon whose merits the court is asked to embark.” *Sultana Begum v Returning Officer for the London Borough of the Tower Hamlets* [2006] EWCA 733 (para.68, citing and approving earlier dicta). It is evident that courts will not don the garb of the policy maker and determine the correctness of the policies.

⁶⁵. Craig, *ibid.* at p. 646. Craig also wrote a work on European Union Administrative Law (OUP, 2006) in which he considered the position in European Law. He pointed out that the European Court would balance overriding public interests with the expectations of individuals. (p. 649).

and unique approach that stretches credibility to construct a notion of legitimate expectation as the basis of a claim in such a situation when no domestic legal system would have felt it necessary to restrain the discretion of the state in dealing with a situation of acute emergency.

82. The Claimant rehearses the awards that support the view on legitimate expectations. But, even these awards containing the expansionary view that stable conditions must be maintained and legitimate expectations of the foreign investor should be protected are made in the context of specific assurances that had been directly given by the state or its agencies to the foreign investor and manifested in legal instruments such as licenses, permits and written contractual stipulations given to the foreign investors. Thus, in MTD v Chile, the representations as to zoning were directly made to the foreign investor, a Malaysian property developer. In Tecmed v Mexico, a license directly given to the foreign investor was involved. .These cases are clearly distinguishable on the ground that there were direct contacts between the foreign investors and state officials. Assurances and representations giving rise to the legitimate expectations had been made in the context of direct contacts between the foreign investors and state officials. The assurances made were specific to the foreign investors. In the present case, there were no direct contacts and the representations were not specific to the investment that the Claimant sought to make. The expectations arose from Presidential statements, and regulatory laws.

83. In the case of BITs involving the United States, the United States has indicated that fair and equitable standard does not mean anything more than the international minimum standard. Consequently, it is to be doubted that in interpreting a treaty to which the United States is a party, it is permissible to look at the constructions that have been placed by arbitration tribunals which interpreted treaties involving other states. Both as regards the formulation in NAFTA, the US Model Treaty and the later treaties of the United States,. The formulation reads:

Article 5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” 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 principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international.

When a state has indicated what the meaning of a phrase is in its view, it is incumbent on the arbitration tribunal to confine itself to the meaning that the state ascribes to the phrase.

84. There are also textual difficulties in interpreting the fair and equitable standard as applying to legitimate expectations. The treatment is to be accorded to

investments, and investments are precisely defined in Article I. One has to stretch the interpretation of the phrase of Article I(a)(i) on "investment" ("tangible and intangible property, including rights, such as mortgages, liens, and pledges") to include legitimate expectations as a protected investment. The phrase is intended to apply to rights directly arising from the investment itself and not from external circumstances. Besides, as the Claimant constantly reminds, the investment treaty is intended to attract foreign investments which encourage developments. Legitimate expectations are not such assets. They cannot be put to productive use. What has been played out in the case of the recognition of legitimate expectations is a charade that falls well outside the treaty formulation of the standard. The elevation of legitimate expectations to rights of property could not possibly have been within the contemplation of the parties to investment treaties. Neither is there firm authority that the standard is a substantive right in domestic legal systems to justify such elevation. This should be sufficient to dismiss the arguments of the Claimant but they may be considered further.

85. When the Claimant states that "the GOA has not identified any ICSID ruling limiting the BIT right to fair and equitable treatment to a non-evolving and pre-existing level of customary international law", it expects the performance of an impossible exercise.⁶⁶ The existence of a customary international law on the older international minimum standard itself is a contested proposition. As regards the fair and equitable standard, which is a recent standard that traces its origins from

⁶⁶ Para. 554 of Claimant's Reply Memorial.

the Abs-Shawcross Draft Convention, a private draft, adopted by the OECD in 1968, the formation of customary international law would certainly be a most difficult proposition. An authoritative paper on the subject in the *British Yearbook* (1999) candidly admitted that the standard was one with no fixed meaning.⁶⁷ An ardent advocate of the standard, Professor Schreuer, has suggested that the content of the standard has been spelt out in the last six years.⁶⁸ According to him, the standard includes legitimate expectations. The idea that customary international law could be formed by the dictates of a few arbitrators and writers would be extremely doubtful. They are bodies without authority to create law. They would be exceeding their jurisdiction if they were to breathe new meaning into formulations used in the treaties which were quite unintended by the states.

86. There are awards and academic writings which go the other way. In SD Myers v Canada, the tribunal ruled that export prohibitions on hazardous waste violated, among other standards, the fair and equitable standards. In Pope and Talbot v Canada, where allocation of permits under regulatory laws was involved, the tribunal considered the issue of the violation of the fair and equitable standard. It regarded the standard as having “an additive character” and stood above the international minimum standard. It held that the verification processes involved violated the fair and equitable standard. But, prior to the final award, the parties

⁶⁷. Stephen Vasciannie, “The Fair and Equitable Standard in International Investment Law”, 70 *BYIL* 99 (1999). The author also wrote the manuscript on which the UNCTAD study on the subject is based.

⁶⁸ Christoph Schreuer, “Fair and Equitable Treatment in Arbitral Practice” 6 *The Journal of World Investment & Trade* (2005), p. 357.

ensured the issuance of an interpretive statement by the NAFTA Commission which defined the fair and equitable standard as not involving “treatment in addition to or beyond” what is required by the customary international law minimum standard of treatment. That put paid to adventurism through the fair and equitable standard within NAFTA. As indicated, subsequent US treaties uniformly contain the formula that the standard does not vary from the old international minimum standard. The state parties resented the idea that regulatory structures within their states should be subject to review by an external tribunal. Indeed, the constitutionality of such a process is a hotly debated topic within these states. These are developments relating to a treaty in which the US is a party containing similar provisions as the Argentina-US Treaty which is the basis of the present claim. In the preliminary award in the ongoing UPS v Canada Post⁶⁹, the tribunal has held that the fair and equitable standard is not an additive to the existing standards of law. The Claimant fights shy of these developments. They are hardly mentioned in the memorials.

87. There are also awards which take a more sensitive approach to the fair and equitable standard. Fairness and equity must be considered in the totality of the situation and not in the context of the interests of the foreign investor alone. Genin v Estonia (2002)⁷⁰ is an award which the Claimant is uncomfortable with. It concerned revocation of a banking license. The tribunal took into consideration

⁶⁹ Para. 97.

⁷⁰ 17 ICSID Rev. 395 (2002).

that the regulation took place in a nascent economy unused to these controls in a vital sector. To quote:⁷¹

“The Tribunal considers it imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state.”

88. Genin illustrates that as much as some tribunals are adventurist, others are reticent in the area and would look at the issues regarding fairness in the context of the situation in which they arose. It is interesting to note that the Genin tribunal considered subjective bad faith as a requirement for the finding of the violation of the standard, a criterion difficult to find in the present case. Olguin v Paraguay contained views that the regulatory system should not be blamed for the failure of an investor to secure profits. Generation Ukraine v Ukraine has dicta to the like effect. The tribunal there suggested that the vicissitudes of the host state economy were relevant in determining the investor's legitimate expectations. The fair and equitable standard should not be the basis on which rules favourable to the foreign investor can be made and his expectations protected without looking at competing factors of relevance to the state and its economy at the time of the regulation. Thunderbird strikes a position that requires a return to orthodoxy by asserting the old Neer standard that requires substantial denial of justice. In a case decided after the NAFTA interpretive statement, the tribunal said, (in marked contrast to the dissenting award in the case, which provides a useful contrast in attitudes):

“Notwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a

⁷¹ Para. 31.

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

This dictum shows that the recrudescence of the notion of legitimate expectation through the international minimum standard would also have opponents.⁷² The insistence on the notion of legitimate expectations and the fair and equitable standard is based on the aim of imposing global standards of governance in foreign investment matters. But, this object should not be achieved without the consent of states.

89. Some writers also take the view that if the fair and equitable standard is to be applied, it must be looked at in the context of the overall situation in which the events took place, taking into consideration the interests of the state as well. Fairness and equity are common to both parties to the dispute.

90. Professor Muchlinski states this position in a recent article.⁷³ Commenting on CMS v Argentina, Muchlinski pointed out:

The crisis had in itself a severe impact upon the Claimant's business, but this aspect must to some extent be attributed to the business risk the Claimant took on when investing in Argentina, this being particularly the case as it related to decrease in demand. Such effects cannot be ignored as

⁷². There is a line of cases, *Asurix* being one, which seek to read the standards of stability into the international minimum standard and downplay the significance of the Neer Claim which requires high standards before state responsibility could be imposed. They take their cue from *Mondev* and *ADF* where the demolition of Neer was attempted on the ground that it is an old authority, unsuitable for present times.

⁷³ Peter Muchlinski, "Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Standard", 55 *ICLQ* 527 (2006).

if business had continued as usual. Otherwise both parties would not be sharing some of the costs of the crisis in a reasonable manner and the decision could eventually amount to an insurance policy against business risk, and outcome that, as the Respondent has rightly argued, would not be justified.

91. It has already been pointed out that even if an independent fair and equitable standard exists, there are difficulties in applying it in the present case as no direct promise or assurance was made to the foreign investor as were involved in the cases in which successful violations of the standard have been made. The Claimant requires an inference that the commitment to the spot price, the free market mechanisms and other liberalization measures should constantly be maintained. No prudent investor can have such an expectation. Literature in business studies alerts investors to the obvious fact that there is an aversion-attraction cycle in foreign investment. Neo-liberal policies are always followed by policies that reject this economic philosophy. The economic life of every state has undergone such fluctuations in policies. Policies of states on foreign investment are never constant. It is not the function of arbitral tribunals to keep neo-liberal policies favoured at one time constant for all times and ensure that states do not deviate from them even in times of economic crises. Such policy changes, when made, are not hindered by a rule that regards its effects as expropriation and requires the payment of compensation unless property rights are conclusively extinguished.⁷⁴ Such changes must be factored in as ordinary business risks. It cannot be argued that the needs of the foreign investor to stability trumps the need

⁷⁴ Such policy changes have often been discussed in the context of human rights cases where the view is that a balance must be effected between the social need to change the policy and the individual's right to property.

of the state to change its policies. Where the change leads to an outright nationalization, it is clear that compensation needs to be paid. But, when the foreign investor is permitted to continue to function, the fact that the new policies result in an inability to make profits of the same type as made before is of no consequence. This is particular so, where the change of policy is due to an economic crisis where the ability of all in the state to make profits would be severely curtailed. It is not the function of an arbitral tribunal to indicate policy preferences in favour of certain economic theories on foreign investment and devise a law that favours the interests of the foreign investor on the basis of nebulous notions such as legitimate expectations and the fair and equitable standard. Even such standards, when applied fairly and equitably, would require that the circumstances of the change in policy be taken into account.

92. The vagueness in the fair and equitable standard enables arbitrators to develop its contents. But, the issue has to be raised whether the parties gave such law-making capacity to arbitrators. It also has to be considered whether the standard is void because of its vagueness. An indeterminate rule cannot become a customary principle of international law. Legitimacy requires that rules have a fixed content so that states may guide themselves by such rules. It is not for arbitrators to rule ex post facto whether the rule was violated by fixing an unknown standard. The fair and equitable standard is an unsafe standard on which to base liability in the circumstances of this case. There must be a lodestar that guides its interpretation. It is for that reason that changes to the formulation occurred in the context of

NAFTA which sought to confine its interpretation to existing standards of customary international law. The tribunal in UPS v Canada Post has ruled that the fair and equitable standard has no function outside customary international law.⁷⁵

Pesification and the Fair and Equitable Standard.

93. The Claimant argues that the currency peg was vital to the decision made by it to enter Argentina. There were promises that the peg would be maintained and that the pesification measures amounted to a violation of the expectations these promises created. Unlike in CMS, the assurance was not contained in the contract as an express provision. In the case of the Claimant, the argument is made on the basis of the fact that it was announced policy at the time the Claimant made entry. Measures relating to currencies and controls on currency have been frequent in times of economic crisis. In Grueslin v Malaysia, Malaysia instituted currency controls to deal with its economic crisis. The investor took the matter under an investment treaty to arbitration. The case failed on jurisdiction as the Malaysian treaties protected only approved investments. The Malaysian currency controls have been widely studied as a measure of response to financial crises. As is well known, the International Monetary Fund backtracked from its original position that the Malaysian measures were not appropriate, to say that the Malaysian measures were a viable way of overcoming the crisis. It would be difficult to

⁷⁵ The redefinition of customary international law on the basis that formulation of standards in cases like the Neer Claim (1926) are outdated is subject to the same criticism. The standards of customary law are based on the idea that responsibility should not be lightly imputed to a state, a view stressed more recently in the ELSI Case by the International Court.

argue that a state should not take measures it chooses merely because there is an investment treaty. That would be to require a state to sacrifice its interests and those of its people so that the foreign investor could continue to profit. No standard of fairness or equity mandates such a result.

94. The issue of fairness and equity in this case has to be looked at in the context of the economic crisis that afflicted Argentina. The context is relevant to decide on fairness. It must now be accepted that, at least as far as American investment treaties are concerned, the fair and equitable standard has no meaning outside customary international law. That being so, it is impermissible to introduce rules relating to legitimate expectation in applying the standard.

Umbrella Clause.

95. The Claimant also relies on the umbrella clause in the Treaty. This is not tenable as the Tribunal has already ruled on the issue as to whether the contract claims of the Claimant can be converted into treaty claims. It is well-known that there is a conflict in the case law as to the role of the umbrella clause. Since there is no system of precedent in investment arbitration, the fact that the tribunals in CMS and LG&E may have taken a different view of umbrella clauses is of no concern. The view that an umbrella clause will render an investment treaty otiose taken in SGS v Pakistan is the view that is logical and should be accepted. In any event,

the regulatory framework which was changed is not a part of the contract as were the stipulations considered by the tribunal in CMS. The Claimant's arguments relating to the umbrella clause require reading the provisions in the regulatory framework into the contract the Companies made in times past. The umbrella clause, even assuming its validity, is intended only to protect the express contractual stipulations made to the foreign investor and not those which are argued to be implied in contracts made by the Companies in which the Claimant is a minority shareholder. Besides, there is no contract whatsoever regarding the Electricity Regulating Framework. Within the oil and gas sector, CAPSA's concession contracts were executed several decades before the decrees invoked by the Claimant, and CAPEX's concession contracts expressly provide that "the concessionaire will be subject to the applicable general fiscal legislation".

96. The LG&E tribunal was in error in reading the general provisions of the regulatory law into the contract. It would be a startling proposition in any system of contract law that the regulatory system is a part of the contract, unless of course, they were mandatory provisions that required their incorporation into contracts. The provisions in the regulatory framework are not specific commitments as are protected by the Treaty. In the cases which have dealt with the umbrella clause, what was sought to be protected were contractual stipulations which were contained in the foreign investor's contract and had been specifically negotiated. If the reading contented for is accepted, the function of a state, whether it be the United States or Argentina, will become impossible. No state

could have assumed treaty obligations that are so extensively destructive of sovereignty.

97. In paragraph 604, the Claimant speaks of stabilization clauses. Clearly if there had been a stabilization clause, a contractual violation could have occurred. But, it would appear that there are no stabilization clauses in the contract between the Companies in which the Claimant had minority shares and Argentina. Indeed, they are local contracts subject to local law and the idea of stabilization clauses in such contracts between a local company and its state would be a novelty. The notion of inferences of clauses into the contract on the basis of the tax and regulatory laws would also be considered a novelty. The rights that are supposed to arise from the regulatory laws are defeasible in any case as the major legislation in the sector always asserted that priority will be given to the public interest. CAPEX and CAPSA being local entities in whom whatever the rights asserted would vest, would understand these rights as defeasible rights. Besides, for the purposes of contractual rights, the rights must arise from a written document. There is nothing to show that the rights that the Claimant asserts were contained in a written agreement.

Full Protection and Security.

98. The rules on full protection and security were intended to protect the foreign investor in times of violence and strife or in situations where the violence was

directly aimed at the foreign investor. In such circumstances, awards of tribunals indicate that there was a duty to afford protection to the foreign investor. The failure to provide such protection would result in state liability. It is this rule for which authority exists in customary law that is stated in investment treaties. The investment awards have recognized this duty in a series of awards concerning damage caused through violence to the property of the foreign investor. The practice in ICSID cases has been no different.⁷⁶

99. The Claimant, consistent with the expansionary patterns on which it relies in making its case, extends the law by equating security with stability by using the dictionary meaning of the word security which unusually includes stability. The expansionist dicta in *Azurix* and other awards seeking to extend security beyond physical security is used in support.⁷⁷ There is no authority for such an extension except as has happened on the authorities that like-minded arbitrators have themselves manufactured. If the law is to be extended, the practice of states or state consent has to be evidenced. That would be a novel method of making international law.

100. It is evident that such extensions are resisted by another set of arbitral awards. In the large majority of cases prior to the emergence of this trend, the law was used in a manner that did not extend beyond direct military action used by the state against foreign investment. The cases include *AAPL v Sri Lanka*, *Amco v Indonesia*, *AMT v Zaire* and *Wena Hotels v Egypt*. Investment arbitration will

⁷⁶. *AAPL v Sri Lanka*; *AMT v Zaire*; *Wena Hotels v Egypt*; *Amco v Indonesia*.

⁷⁷ Para. 636 of Claimant's Reply Memorial.

attract contempt if the expansionary trends contrary to the accepted principles are continued. The acceptance of the Claimant's argument takes the law well beyond what it was intended for. It calls for the acceptance of definite inclinations towards viewpoints that are not universal. These trends call into question the legitimacy of the law. If the law were to be so extended, the extent to which the courts of the state could have protected the Claimant should be taken into account. As the International Court in the ELSI Case pointed out, the imposition of responsibility on a state is no easy matter. It is an admonition that the expansionists have not taken to heart.

101. It is also relevant to note that the new US Model BIT speaks of full protection and security in terms of its traditional meaning of police protection in times of violence directed at the foreign investment. It states: "full protection and security requires each Party to provide the level of police protection required under customary international". There is no meaning outside the context of violence and protection from violence to the requirement that full protection and security be granted to foreign investment.

Arbitrary Treatment.

102. The story is relentlessly continued with the charge that the measures were arbitrary. The uniform and consistent imposition of a law in an open manner cannot be arbitrary. The continued use of the standard in the treaties is to prevent

capricious confiscation of the property to satisfy an official whim or similar purpose. There was nothing capricious about the measures that Argentina took. They were not measures designed to affect the Claimant. Rather they were measures intended to deal with a pressing economic crisis. The measures were not unreasonable as similar measures had been taken successfully by other states which had dealt with such economic crises. Besides, the political exigencies that existed in Argentina and the security situation caused by violent strife required it to take action. It requires imagination to characterize the measures as arbitrary. It is best to leave this claim without further comment.

Discriminatory Treatment.

103. Again, this is an exorbitant claim on the facts of this case. Discrimination must be between likes. There is nothing to show that the other operators in the sector were treated any differently. The Companies in which the Claimant had shares were local companies. They could complain of discrimination if other companies had been treated differently or preferentially. Forgetting that the claim should be one for the Companies and not for the minority shareholder to make, there is no substance in law for a claim of discrimination. The comparison is always with like persons. This is so in human rights law as well as in trade law.

104. The claim here is that the energy sector was made to bear the brunt of the burden and that other sectors benefited from the measures. It is difficult to

maintain that this is discrimination. It is also difficult to show that the measures were aimed at foreign investors as the Claimant was only a minority shareholder in the Argentinian companies that were affected. The Claimant makes two factual arguments to overcome the difficulties. The first is that the benefits were intended to be directed at the banking sector but really ended up benefiting the electricity consumers. The second is that as a result of privatization, the majority of the ownership in the sector was in the hands of foreign investors. Both have not been established through evidence. It also has to be demonstrated that the main object of the changes to the regulation was discriminatory. This too, cannot be established on the facts.

105. The law on discrimination contemplates treatment of likes differently. It is not clear how the effects on the banking sector can be regarded as favourable treatment of a sector that is quite unrelated to the sectors in which the Claimant operated. Investment treaties do not create a general rule of non-discrimination. They, like trade rules and other international law rules on non-discrimination, only prohibit likes being treated differently. National treatment provisions require that there be non-discrimination between foreign investors and nationals operating in the same sector. The conclusion that the Claimant seeks is not consistent with the law on non-discrimination in investment treaties. If there is a general rule on discrimination, the parties, particularly the United States, which has exempted several sectors from national treatment, would have also made a separate list of

exempted sectors to such a general rule. There is no general rule of discrimination in investment treaties.

THE DEFENCES AVAILABLE TO ARGENTINA

106. The facts of the case disclose that several defences are available to Argentina. These would include: (1) the fact that the measures necessary for the maintenance of public order and national security as would fall under Article XI of the US-Argentina Treaty; (2) the situation represents a force majeure situation so that if there were any contractual arguments that could be made on the basis of contractual obligations, those obligations were suspended or terminated as a result of the intervention of unforeseeable circumstances that required the State to take the measures it did; (3) The doctrine of necessity justifies the taking of the measures given the extent of the political and economic crisis that existed at the time of the measures complained of.

Article XI of the Treaty: Measures Necessary for the Maintenance of Public Order

107. It was evident that the events in Argentina preceding the taking of the measures that the Claimant complains of were fraught with circumstances that threatened the maintenance of public order in the country. A volatile economic situation resulting in violence and political turmoil existed in Argentina. The

measures complained of were taken in order to deal with the situation. The validity of the measures taken is not for an international tribunal to decide after the events. It must do so in the context of the situation that immediately faced the government. The wisdom of the measures is not to be looked at in the light of later circumstances. Considerable leeway must be given to the government in deciding the measures to be taken.

108. Given the public order situation that existed in Argentina prior to the measures complained of and the evident threat to national security that the violence on the streets indicated, the need to take economic measures to stem the crisis was acute. The measures were a response to this need and therefore must be held to be covered by the exception in the treaty regarding public order and national security. These are not matters for subjective determination, though in the case of the United States some treaties, such as the USSR-US treaty did contain formulations that permitted subjective assessments of national security justifying the state from conforming to treaty obligations. The assessments have to be made objectively but in the context of what was reasonable under the circumstances of the situation as perceived during the pendency of the crisis. On this test, the measures taken were sustainable as measures necessary to deal with situations of public order and national security. National security was implicated as the situation, which resulted in successive and rapid changes of government and violence on the streets demonstrated that internal strife was about to break out

unless there could be satisfactory demonstration of the fact that effective measures were being taken to deal with the situation.

109. In *LG&E v Argentina*, the tribunal held as follows:

229 Thus, Argentina is excused under Article XI from liability for any breaches of the Treaty between 1 December 2001 and 26 April 2003. The reasons are the following:

230. These dates coincide, on the one hand, with the Government's announcement of the measure freezing funds, which prohibited bank account owners from withdrawing more than one thousand pesos monthly and, on the other hand, with the election of President Kirchner. The Tribunal marks these dates as the beginning and end of the period of extreme crisis in view of the notorious events that occurred during this period.

The tribunal's award contains a survey of the situation that existed in Argentina during the crisis. The measures that are complained of in this case took place during the period of the public emergency which the tribunal in *LGE* identified. Specifically, the tribunal ruled that "it is recognized that Argentina's suspension of the calculation of tariffs in U.S. dollars and the PPI adjustment of tariffs was a legitimate way of protecting its social and economic system".

The tribunal explained in a later paragraph:

"The Tribunal accepts that the provisions of the Emergency Law that abrogated calculation of the tariffs in U.S. dollars and PPI adjustments, as well as freezing tariffs were necessary measures to deal with the extremely serious economic crisis. Indeed, it would be unreasonable to conclude that during this period the Government should have implemented a tariff increase pursuant to an index pegged to an economy experiencing a high inflationary period (the United States). The severe devaluation of the peso against the dollar renders the Government's decision to abandon the calculation of tariffs in dollars reasonable.

There was a Force Majeure Situation

110. Assuming that there are contractual rights or rights in the nature of contractual rights involved in this situation, the extent to which they are affected by force majeure presented by the economic crisis will have to be explored. Force majeure will not apply in circumstances where there are alternative methods of dealing with the supervening circumstance that causes impediments in the granting of contractual rights or in the performance of the obligation. This is the law that applies between private parties to a transaction but in the case of states, greater leeway is to be granted in deciding on the measures to be taken to deal with a supervening circumstance, which in the present case, had reached proportions that threatened the economic and political life of the state.
111. In civil law systems, force majeure is recognised as suspending contractual obligations. In public or state contracts, the right of a state to suspend or rearrange the contract in circumstances of force majeure has been recognised. In Aminoil v Kuwait, the Tribunal held that the external price fluctuations in the oil sector justified changes being made to the price stipulations in the concession agreement. The immutability of contractual rights cannot exist when the contractual balance undergoes dramatic changes. In the case of the Argentinian crisis, assuming contractual rights did exist, the reality of their continued existence when the crisis had to be dealt with through measures such as pesification militates against their continued existence. A change had to occur and the obligations must cease at least during the crisis. Assuming that the Claimant's arguments based on contract have any substance, the effect of force majeure in

avoiding liability must be considered. It must also be considered whether there is greater latitude to be given to such a doctrine in state contracts than in normal commercial contracts. In state contracts, every changed circumstance permits consideration of the contract in terms of the public interest. In that context, the Argentine economic crisis and the changed public interest could be said to have the effect of wiping out any contractual obligations, if any existed, asserted in this case by the Claimant.

Force Majeure and State Responsibility

112. Apart from its relevance to the contractual arguments, force majeure is also a defence to state responsibility. It is referred to in the International Law Commission's Articles on State Responsibility in Article 23 as follows:

1. The wrongfulness of an act of a State not in conformity with its international obligations of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or an unforeseen event, beyond the control of the State, making it materially impossible for it to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The state has assumed the risk if the situation occurring.

113. It is evident that the Argentine economic crisis is an unforeseen event beyond the control of the state which made it impossible for the state to perform the obligations involved in the Argentine-US Treaty as it had to take measures that were necessary to deal with the Treaty. To the extent that these measures

were inconsistent with any obligation under the Treaty, force majeure would provide an excuse for their non-performance. The economic crisis was not brought about by Argentina. Argentina would have dearly wished that the crisis had not taken place. There means that Argentina took were similar to those that other countries had taken to deal with similar crisis. In any event, it is not the means taken that are crucial but the events of the crisis. In the context of the crisis, it would not have been possible for Argentina to have met the obligations that arose under the Treaty as a situation of economic and political chaos existed in which neither the foreign investors nor the citizens of Argentina could have prospered. In the circumstances of the chaos, it would have been “materially impossible” for the obligations under the Treaty, if any were owed to the Claimant, to be satisfied. It is that chaos that is the force majeure that terminated the obligations. The measures were merely designed to overcome the situation of chaos. They did do that as later events demonstrated.

114. The investment treaty is an economic treaty. It is designed to cater to situations of economic and political normalcy. Economic normalcy was the condition necessary for the proper functioning of an investment treaty. When economic and political chaos came about in Argentina, “the permanent disappearance or destruction of an object indispensable for the operation of the treaty”.⁷⁸ While it is conceded that the mere fact that the performance of an obligation had become more onerous will not discharge a party from performance

⁷⁸ The words of the International Court of Justice in Gabcikovo Nagymaros Project Case, (1997) para. 102.

due to force majeure,⁷⁹ in this case, the performance of the obligation was impossible in light of the continuing chaos which would not have ended if sufficient measures to remedy it had not been taken. The chaos was the force majeure situation. If it had continued, as it would have if not for the corrective measures taken, the investments of foreigners and citizens alike would not have borne fruit. It was that situation which terminated or suspended the obligations under the Treaty. Before that situation could be brought to an end, the Claimant had voluntary liquidated its assets in Argentina.

115. The object of the treaty which was stated to be economic development in the preamble could not have taken place in the conditions of chaos. The situation of force majeure was such as to have destroyed the objects of the Argentine-US Treaty. In such circumstances, claims cannot arise under the provisions of the Treaty.

The Role of Necessity

116. International law recognises, as do municipal legal systems, that in circumstances of extreme necessity, there can be no legal impediments standing in the way of a state acting in such a way as to protect its security and interests. In the Advisory Opinion on Nuclear Weapons⁸⁰, the International Court did not answer the issue as to whether nuclear weapons can be used when a state is faced

⁷⁹ ILC Commentary to Article 23, para. 7, citing the *Rainbow Warrior* (1990) XX RIAA 217.
⁸⁰ [1999] ICJ Rpts 226.

with extinction but individual judges of the Court stated the view that necessity would justify the use of such weapons when the state was pushed into a situation of necessity. The *Gabcikovo-Nagymaros Case*⁸¹ also involved an examination of the situation of necessity by the International Court. The Court accepted the existence of the plea in customary international law though it cautioned that “such a ground for precluding wrongfulness can only be accepted on an exceptional basis”. There is no doubt that such a defence exists in international law and is available to Argentina in the circumstances of this exceptional case, where the state was facing an economic and political crisis that threatened stability and order. One must judge the circumstances involved not in the comfort of an office but in the light of circumstances that prevailed at the time. As the aphorism of Justice Holmes puts it, “detached reflection is not possible at the point of an uplifted knife”. It is not for a later assessor of the circumstances to think of alternative means of solving the issue. Latitude must be given to the measures that the entity at peril chose to overcome the situation of necessity.

117. Even sacrosanct treaties embodying rights which are regarded as immutable or non-derogable become subject to encroachment in times of political crisis or public emergencies that threaten the life of a nation. This is recognised both in domestic law as well as in international law. In international law, the most evident instance would be the human rights conventions which recognise certain rights as non-derogable. But, even these treaties recognise that there could be circumstances of public emergencies when the life a nation is being threatened

⁸¹ [1997] ICJ Rpts 7

where individual rights, which are considered non-derogable in times of normalcy could be suspended or do not exist so that the emergency could be overcome. These circumstances are to be carefully supervised but, the state's appreciation of the nature of the emergency and the measures that are necessary to overcome them are not second-guessed by a supervisory tribunal unless there is a gross and evident departure not proportionate to the nature of the emergency.

118. Article 15(1) of the European Convention on Human Rights permits the suspension of obligations under the Convention when "a public necessity threatening the life of a nation existed". In determining whether such a public necessity exists, the European Court of Human Rights has stated that the executive of the state is entitled to considerable deference. It is "a pre-eminently political judgment" which courts or supervisory bodies will not second-guess. The European Court has taken an "unintrusive approach" to such issues. The threshold of severity of the necessity, according to the cases, is not set high.⁸² It is for each contracting state to determine how far it is necessary to go in attempting to overcome the emergency. This is so too in circumstances of terrorism when states seek to suspend the application of human rights conventions. Courts grant "a wide margin of appreciation" to the executive in these circumstances.

⁸² Commentators agree on this on the basis of *Ireland v UK* 2EHRR 25 (1980); *Aksoy v Turkey* 23 EHRR 553 (1997). *Brannigan and McBride v UK* 17 EHRR 539 (539); *Marshall v UK* (10 July, 2001).

119. In situations, of public emergency, by reason of their direct contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. The same situation prevails in the situation of an economic and political crisis such as the Argentine crisis which led to economic chaos and resulted in violence on the streets. The treaty obligations that existed must be regarded as subservient to the need to bring about a solution to the crisis which was the sole factor that should have received the attention of the Government. If the investment treaty obligations need to be violated, then, the law, as in the case of derogation of human rights standards, would permit their violations. The Respondent's case is that there were no treaty violations resulting in liability to the Claimant. But, assuming there were, the situation of necessity would permit such violations.

120. The CMS Award was clearly partial in seeking to ignore the State's own assessment of the crisis. It adopted a stance entirely at variance from that of other tribunals such as the European Court of Human Rights which approach the task with sensitivity, giving much leeway to the appreciation of the situation by the State facing the emergency or crisis.

121. The requirements for pleading necessity are satisfied in this case. Essential interests of Argentina had to be secured from a grave and imminent peril. It did not affect the obligations owed to other states. In the case of the Treaty in

question, there is no violation of any obligation, as Article XI permits the suspension or termination of the obligations in times of public emergencies of the type that affected Argentina. Clearly, Argentina did not cause the crisis. For these reasons, the plea of necessity enables Argentina to avoid responsibility, in the unlikely event of any responsibility arising from the facts of this case.

The Compelling Obligations of Argentina

122. In the situation of the economic crisis, there were compelling international law obligations that arose in the State of Argentina. Thus, for example, if a war breaks out, the priorities to be accorded to the different obligations will change. In modern international law, where a plethora of obligations have been created, it is obvious that there could come about conflicts between the obligations of a state.

123. In this case, the state must be able to relinquish obligations which are inconsistent with more demanding obligations that are thrust into the forefront by the force of circumstances. Clearly, *ius cogens* norms must have priority as would other obligations of greater urgency and import. In a state of economic and political crisis, several international obligations arose in Argentina. It had the duty to restore order so that human life could go on in peace. This is an obligation that the State in Argentina owed to its people but also to the international community through human rights obligations arising from the Convention on Civil and

Political Rights and the Convention on Economic and Social Rights. There are core obligations which arise in terms of the obligations owed under these conventions. These core obligations are both to the people of the state and to the international community as a whole which has an interest in the preservation of the core rights of all human persons. These rights include the right to protection of life in times of civil disorder, the right to food and shelter and the right to other basic amenities.⁸³ As regards WTO dispute settlement, it has been pointed out that there must be a balancing of human rights obligations of a state with the rights relating to trade under the various WTO instruments. The reasoning of Pauwelyn and others is that the WTO is a part of the international law system and that in settling disputes, it cannot ignore other international obligations.⁸⁴ This is so in the case of international investment treaties as well. They are part of the international law system and other international law obligations are relevant to their interpretation. Here, in times of the crisis, the international law obligations the State of Argentina owed to its own people have primacy. The protection of the international law rights of the citizens are paramount and trump the rights of investors who are only owed the same standard of treatment as is given to nationals in these circumstances.

⁸³ Audrey Chapman and Sage Russell (Eds.) Core Obligations : Building a Framework for Economic, Social and Cultural Rights (Intersentia, 2002).

⁸⁴ Joost Pauwelyn, "Human Rights in the WTO Dispute Settlement" in Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi Bonanomi (Ed.), Human Rights and International Trade (OUP, 2005) p. 205.

124. Some of these obligations are *ius cogens* obligations. The argument can be made that the non-derogable rights of the human rights conventions like the right to life are *ius cogens* rights.⁸⁵ It has been argued that some social and economic rights are also *ius cogens* rights. As these rights were being subjected to strain by the violent crisis, they had to be attended to as a matter of priority by the State. In the course of ensuring that these *ius cogens* rights received protection, the lesser international law obligations could be cast aside.

125. Another *ius cogens* principle that is relevant is the doctrine of permanent sovereignty over natural resources. Authorities agree on listing permanent sovereignty over natural resources as an *ius cogens* right. The right of usage and exploitation of natural resources may be transferred by contract but it is recovered in circumstances where the transfer affects the public interests, for it is the public interest that has primacy under the doctrine. In the present situation, if contractual or treaty rights had in fact been created in the Claimant which are broken -and this is denied-, the fact that the doctrine of permanent sovereignty enables the measures in consonance with the public interest to be taken in respect of natural resources like oil, validates any illegality.

126. The investment treaties obligations become suspended in the area of natural resources when the public interest changes. International law mandates conduct in accordance with *ius cogens*. *Ius cogens* principles prevail over Treaty obligations in conflict with them.. The International Law Commission's Draft Articles on State Responsibility requires observance of obligations arising from

⁸⁵ Alexander Orakhelashvili, Peremptory Norms in International Law (OUP, 2006).

peremptory norms.⁸⁶ The investment treaty obligations which conflict with the peremptory norm on sovereignty over natural resources become redundant. Such a conflict comes about in times of economic crisis when the state is under a duty as a result of this peremptory norm to ensure that the natural resources are used to lead the country out of the economic crisis so that the public interest could be protected. The state is perfectly entitled under such circumstances to take measures which conflict with the obligations under the investment treaty. The measures that Argentina took, the withholding of tax on oil exports, the pesification measures affecting contracts in the industry as well as in the whole economy and other measures are not only consistent with the existing regulatory structure at the time the Claimant made its investment but are entirely consistent with the doctrine of permanent sovereignty over natural resources. Therefore, responsibility cannot attach to any violation of the investment treaty obligations. Such treaties as investment treaties during economic crisis affecting natural resources become, in terms of Article 53 and 64 of the Vienna Convention of the Law of the Treaties, void and terminate. The process is somewhat akin to the emergence of a new *ius cogens* principle. Such a new *ius cogens* principle invalidates an incompatible treaty. So too, though undoubtedly, contracts can be made in respect of natural resources and foreign investors in such sectors can be protected under investment treaties, this is so because the making of such contracts as well as the protection of foreign investments is in the public interest. But, when an economic crisis comes about, the public interest changes and with it,

⁸⁶ Article 26 of the Articles on State Responsibility: “Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law”.

the obligations towards the foreign investor also change. On this basis, if there had been violations under the Treaty in this case, they are of no consequence in law as the obligations under the Treaty stand void the moment there was recovery of the permanent sovereignty through the measures taken by the State.

CONCLUSION.

The several arguments on which the case for the Claimant rests are without adequate foundation. There is no relevant investment in the Claimant which could be protected under the Treaty. The Claimant is a minority shareholder in Argentine companies which continue to function. For the reasons stated, such shareholdings do not come within the definition of covered investments.

The arguments relating to expropriation, whether direct or indirect, also fail. The measures of the Respondent were not directed at the Claimant. Rather, they were intended to ensure that Argentina emerged out of the economic crisis. Several requirements that had to be satisfied for expropriation to be considered by the Tribunal do not exist in this case. The reasons for such a conclusion have been canvassed in this opinion.

The treatment standards have not been violated. The interpretation of the fair and equitable standard as involving legitimate expectations is challenged on the ground that it does not accord with custom and cannot be considered a general principle of law. As such, it cannot be applied by an investment tribunal. The Claimant's case on discrimination is based on a misapplication of the law.

Finally, even in the unlikely circumstance of there being a finding of responsibility, there are adequate defences to such liability disclosed by the Treaty exception contained in Article XI of the Treaty as well as customary international law.

A handwritten signature in cursive script, reading "M Sornarajah", with a horizontal line underneath the name.

M Sornarajah.

5th March, 2007.